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BRICS LAW JOURNAL (BRICS LJ)

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

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IMPLEMENTING THE RIGHT TO INFORMATION AS A KEY ELEMENT OF FREEDOM OF EXPRESSION IN THE BRICS COUNTRIES

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The category of rights and freedoms, including the right to access information and the right to self-expression, is not immutable. Rights and freedoms are a byproduct of the historical development of society and represent a socio-cultural phenomenon that reflects the historical identity of peoples and countries throughout the world. As a result, each legal system has its own legal concept of rights and freedoms, without which the crisis-free development of a particular state is impossible. This is because the degree to which citizens' rights to self-expression and information are realized has a direct impact on the overall quality of a democratic system. This article analyzes the sectoral normative legal acts of the BRICS countries that regulate the right to information. Based on the data obtained, a comparison was made between restrictions and prohibitions regarding the exercise of the right to information. Furthermore, the article describes and analyzes the main approaches to assessing and determining the index of democracy in the world. Based on the comparison of the democracy index, the global ranking of the right to information and the global ranking of the civilian population, a formula for calculating democracy was derived. The degree of democracy in the BRICS countries was then calculated using the formula obtained, and a regional ranking of democracy within the BRICS countries was compiled. The authors believe that providing citizens with the opportunity to fully exercise their right to information, which would be impossible without the balanced participation of the state, results in the creation of an objective information environment, which in turn provides citizens with the opportunity to justly

exercise their right to self-expression. In this regard, it is self-evident that democracy is closely connected with the full realization of the right to information. Today it plays a key role in citizens' exercise of their right to self-expression.

Keywords: right to information; index of democracy; right to self-expression; civil and political rights; human rights.

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Introduction

Human rights and freedoms are part of a complex and multifaceted system, a structure that has the human being at its center, as its integral core element. In truth, we're dealing with a phenomenon that has emerged as a result of a complex process that we will refer to as biosocial cultural evolution, a universe resting on three steadfast pillars: the material, the social and the spiritual elements of human nature manifested in the individual human being and in human society as a whole. Human rights and freedoms serve as a criterion for determining the standards of a modern democratic regime from both political and legal standpoints, with their observance serving as an absolute prerequisite for ensuring stability and successful development at the level of each sovereign state as well as the global community at large.

In the second half of the twentieth century, when the events of world history that had revolutionized the human mind were analyzed and processed by scientists, diplomats and government officials, the understanding of the great value of human rights was brought forth to the international level, making human rights and

freedoms the foundation of today's democracy.[1] It was at that period in history that the hierarchy of human rights was determined.

At the same time, as the twenty-first century saw the dawning of the age of global computer networks that became a game changer for all areas of human life, we witnessed the birth of a new dimension, to be more precise, a cyberspace that obliterated the principles, laws and rules that had been at work in the customary offline world. Consequently, the structure of supreme human rights experienced changes while the legal regulations pertaining to international and domestic protection of rights remained unchanged.

Originally proclaimed in Article 19 of the 1948 Universal Declaration of Human Rights, the human right to "seek, receive and impart information and ideas through any media and regardless of frontiers" was supplemented by the restrictions of the 1966 International Covenant on Civil and Political Rights in order to safeguard the rights of others, as well as morality, public order and general welfare by means of national law. With the advent of the era of the global Internet, the right to information finally took shape. While the right to information used to be merely a declarative right with a secondary role in the body of human rights, in the digital world, the right to information has evolved into the core of fundamental human rights, becoming the foundation in the realization of fundamental human rights and freedoms. As a consequence, the degree to which the human right to information is exercised has come to be an indicator of the development rate of civil society and the level of democracy in it.

In the context of global digital communication, the issue of freedom of speech and access to information is undoubtedly one of the main issues. Thus, according to the degree of exercising, by a person and a citizen, of the rights to freedom of speech and access to information, it is possible to judge the political processes unfolding in a country, to assess the pace of building a civil society and the rule of law. These rights represent the foundation of modern democracy.[2]

It will not be an exaggeration to claim that the degree to which the right to freedom of expression is exercised by citizens of a particular state varies depending on the development of democratic institutions in that state. In this regard, the right to information, in addition to being a key element in exercising freedom of expression, also becomes a high-precision indicator that determines the level of a country's democratic development.

"Human rights are universal, interdependent, indivisible, inalienable,"[3] and, at the same time, the body of rights and freedoms has a socio-cultural and civilizational

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1 Ellen F. Paul et al., *Democracy* 1 (2000).

2 Ksenia Ivanova & Madi Myltykbaev, *The Freedom of Speech and Right of Access to Information in the Emerging System of International Information Security*, 4(4) Law Enforcement Rev. 80 (2020).

3 David Brunsma et al., *Expanding the Human in Human Rights: Toward a Sociology of Human Rights* 1 (2015).

aspect, in which regard, the state, in order to safeguard the rights of others, of morality, public order and the general welfare, independently determines the boundaries within which the right to information may be exercised. These boundaries must not be excessive and, according to international standards, are to be clearly defined and aimed at the realization of the intended purpose.

The ratio between the restriction of the right to information and the degree to which the citizens of a state are allowed to exercise this right is determined by the country's political regime. The theory of state and law as well as referential democracy balances this ratio almost perfectly.[4] And yet, Goethe's "All theory... is gray, but the golden tree of life springs ever green" in the conditions of confrontation present in the system of international information security currently taking shape, with the right to information being called to serve as the core of ideological pluralism, becomes the apple of discord, a propaganda tool that cultivates an atmosphere of hostility and hatred between countries and peoples, making the degree to which the right to information is exercised a key element in determining the level of democracy in the state.

Thus, the right to information as a defining component in exercising freedom of expression is closely related to the level of democracy in the state. As a result, in order to fully cover the subject, the following objectives have been outlined:

• to analyze the existing methods for assessing the level of democracy and offer an alternative option for assessing the democracy index;

• describe the key importance of the right to information in exercising freedom of expression;

• analyze the normative legal acts that regulate exercising the right to information in the BRICS countries;

• to compare the democracy index with the level on which the right to information is exercised by the citizens of the BRICS countries and, based on the results of the obtained ratio, to assess the feasibility of restrictions that the BRICS countries impose on the right to information and the exercise of it by their citizens.

This analysis of the right to information as exercised by the citizens of the BRICS countries includes a description of the current legal situation as well as the prevailing opportunities for people to exercise their freedom of expression through the use of the Internet. Furthermore, the article assesses the level of democracy in terms of exercising freedom of expression and the right to information, justifying the principle of lawful restriction of the right to information on the basis of the civilian armament index and the index of political participation of the citizens of the BRICS countries in exercising their right to direct control. The formula proposed in this study may be applied to calculate the level of democracy in any country, as its nature is universal.

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[4] Bruce E. Cain et al., *Democracy Transformed?: Expanding Political Opportunities in Advanced Industrial Democracies* 28 (2008).

1. Calculating the Index of World Democracy

Humanitarian disciplines, including the political, legislative and social sciences, have all made the assessment of the democratic regime the cornerstone of empirical analysis that has been attracting increased attention of late.[5] According to one scholar,

> The issue of democracy is so acute on the agenda today as it has probably never been before; some demand even more democracy, while others insist on surmounting a deficit thereof.[6]

Thus, the standing questions first and foremost and very rightfully are as follows: "What is the right kind of democracy? What is the quality of democracy?"[7]

No public figure or politician would ever publicly speak out against political and civil rights or democracy; no one would ever argue that authoritarianism has any advantage over democracy.[8] Moreover,

> a tyrant, having come to power by the will of the people, does not abolish the formal attributes of democracy. Even worse, he introduces them! Hitler, having come to power in a completely democratic way, did not at all abolish the German parliament – the Reichstag. He simply cleared it of the representatives of the opposition, turning it into "the highest paid male choir in the world" with its functions reduced to singing the national anthem at the opening and closing of the parliamentary sessions.[9]

Democracy has become the measure of all things political, the basis for the legitimization of power,

> the sphere of collective decisions. It embodies the ideal system in which decisions concerning the entire community are made by all of its members, and all of them have equal rights to participate in taking this or that decision.[10]

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5 *Democracy at Large: NGOs, Political Foundations, Think Tanks and International Organizations* 5 (Boris Petric ed., 2012).

6 *Бешлер Ж.* Демократия. Аналитический очерк [Zhan Beshler, *Democracy. Analytical Essay*] 7 (1994).

7 *Морлино Л., Карли Л.-Г.* Как оценивать демократию. Какие существуют варианты? [Leonardo Morlino & Luis-Gvido Karli, *How to Evaluate Democracy. What Are the Options?*] 4 (2014).

8 Marina Ottaway, *Democracy Challenged: The Rise of Semi-Authoritarianism* 7 (2003).

9 *Сироткин С.В.* Демократия [Sergey V. Sirotkin, *Democracy*] 66 (2001).

10 *Битэм Д., Бойл К.* Демократия: вопросы и ответы [David Beetham & Kevin Boyle, *Democracy: Questions and Answers*] 11 (1996).

In recent years, the assessment and definition of the index of the democratic regime has received a great deal of attention, owing to its

> largely profound nature. The possibility of assessing the decree of democracy allows us to attest the relationship between democracy and the quality of life of the population, to determine a certain limit of that quality beyond which there is a reduced probability of deviation from democracy.[11]

Let us consider the main quantitative measures of the degree of democracy in different countries.

The Polity projects are one of the most well-known and widely used approaches for measuring the degree of democracy. The first Polity project was led by Ted Robert Gurr. The task was completed between the 1970s and 1990s within the frameworks of Polity II, Polity III and Polity IV.[12] Polity V,[13] covering the period 1800–2018, is being implemented at present. A distinct advantage of the Polity projects is their ability to analyze various political regimes of independent states in the development that they present. This is made possible by a large number of variables that describe the features of the institutions of power that are used, which in turn allows for the production of unambiguous and consistent results. Another advantage of this study is its long duration. The regimes are analyzed over the course of two centuries' worth of dynamics and the information obtained is then used to forecast long-standing political tendencies. It is worth noting that this information is available to a wide audience. At the same time, the universality of the study has a downside: the conclusions are generalized, and only the broadest trends are outlined. Thus, its model does not take into account the extent to which human rights are protected or equality of access to political participation.

Freedom House[14] works to protect human rights and promote democratic change, with a focus on political rights and civil liberties. Freedom House was founded on the initiative of the government of the United States in 1941 after the Ring of Freedom, Fight for Freedom and Committee to Defend America by Aiding the Allies were merged. During the war years, the main goal of the organization was to counter the propaganda of fascism and Nazism; in the post-war years, it pursued the goal of preventing the ideas of communism from spreading and worked against the

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[11] *Мельвиль А.Ю.* Как измерять и сравнивать уровни демократического развития в разных странах? По материалам исследовательского проекта «Политический атлас современности» [Andrey Melvil, *How to Measure and Compare Levels of Democratic Development Across Countries? Based on the Materials of the Research Project "Political Atlas of the Present"*] 4, 39–40 (2008).

[12] Polity IV Project, Systemic Peace (Dec. 12, 2021), available at https://www.systemicpeace.org/polity/polity4.htm.

[13] Polity V Project, Systemic Peace (Dec. 12, 2021), available at www.systemicpeace.org/polityproject.html.

[14] Freedom House (Dec. 12, 2021), available at https://freedomhouse.org/.

restrictions imposed on civil and political rights and freedoms. Some sources, particularly media statements, testify to the activities of Freedom House being financed by U.S. government funds during that period of time.

Today, Freedom House positions itself as an independent, non-governmental, non-profit organization that is not affiliated or backed by any of the political parties in the United States, with a broad interpretation of freedom and activities promoting its extrapolation across the world as stipulated in its founding documents.

The main assessment criteria used by Freedom House to determine the global freedom rating are political rights (with a maximum score of 40 points) and civil liberties (with a maximum score of 60 points). The sum of these points, which indicates the degree of freedom in the assessed country, cannot exceed 100.

In addition to the Global Freedom Index, Freedom House also maintains the Global Internet Freedom Index and the Global Democracy Index.

The Global Internet Freedom Index is made up of three criteria: the degree to which a country's citizens possess technical capability to access the Internet (maximum score of 25 points), content restriction (maximum score of 35 points) and violation of user rights (maximum score 40 points). Thus, the total score on all these criteria may constitute a maximum of 100 points.

The global democracy rating takes into account two criteria, "Percentage of Democracy" and "Rating of Democracy."

Despite the claims of Freedom House as being independent and unaffiliated with the ruling political circles of the United States, it is directly funded by the U.S. governmental.

A superficial assessment of political tendencies in today's world in terms of their impact on the degree of freedom is not very optimistic; it prompts a profound critique of the political prejudice inherent in an assessment performed by an organization in the interest of the U.S. government.

Projects under the supervision of Tatu Vanhanen. The University of Helsinki sponsored a number of studies, the results of which were subsequently published in Vanhanen's books *The Emergence of Democracy: A Comparative Study of 119 States, 1850–1979*;[15] *The Process of Democratization. A Comparative Study of 147 States, 1980–1988*;[16] *Prospects of Democracy: A Study of 172 Countries*[17] *and Democratization: A Comparative Analysis of 170 Countries*.[18]

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[15] Tatu Vanhanen, *The Emergence of Democracy, A Comparative Study of 119 States, 1850–1979* (1984).

[16] Tatu Vanhanen, *The Process of Democratization: A Comparative Study of 147 States, 1980–88* (1990).

[17] Tatu Vanhanen, *Prospects of Democracy: A Study of 172 Countries* (1997).

[18] Tatu Vanhanen, *Democratization: A Comparative Analysis of 170 Countries* (2003) (this research was tested in the framework of the project "Democracy and Peace: The Northern Model." Its results were presented at the Association for International Studies Convention in New Orleans (USA) in 2002 and at the International Political Science Association World Congress in Durban (South Africa) in 2003).

The chief objective of the projects was to research and explain the variables affecting the degree of democracy in the countries concerned. The research team challenges the popular thesis that the factors that contribute to the genesis of specific democratic systems may not be consistent with each other, and instead begins with the axiom of the fundamental possibility of explaining the degree of democracy (or democratization) by a single factor that does not exclude the other independent variables, but rather presents a common denominator for all of them. This factor, according to Vanhanen and his colleagues, is the distribution of resources in society. The central idea of the projects is based on the hypothesis that the degree of democracy is directly related to the distribution of material wealth in the state.

Initially, all independent states were the objects of this research. However, several restrictions were imposed in the years that followed. To begin with, countries with a population of under 100,000 were excluded from the analysis, which was dictated by the difficulties in carrying out data collection, as well as such countries' actual dependence on other countries. Secondly, only countries that had gained independence by 1991 were used as the subjects of the study. These restrictions were introduced in the second half of the 1990s and were discussed in the books, *Prospects of Democracy: A Study of 172 Countries* and *Democratization: A Comparative Analysis of 170 Countries*. Additionally, Taiwan and newly independent countries in Africa and Oceania were brought into the researchers' scope of attention.

The central theoretical idea of the Vanhanen projects stems from an evolutionary paradigm for the study of politics, which includes the following assumptions. To begin with, there are patterns of human behavior that manifest themselves similarly in the field of politics in different national contexts, that is, they cannot be neutralized by frontiers. Secondly, the political struggle for power is a form of the general struggle for survival (due to limited resources), as conceptualized in Charles Darwin's theory of evolution and natural selection. In the studies conducted by Vanhanen and his colleagues, these assumptions are summarized as follows: the struggle for power (a kind of common yardstick in political struggle) is carried out with the aim of gaining and maintaining access to resources; the more power, the wider the access to limited resources. Conversely, the more resources there are the more power those in charge of those resources have. Accordingly, if the resources are concentrated in the hands of one group of people, it is likely that this group will enjoy the largest degree of political influence. If resources are extrapolated among several groups, then power will be distributed accordingly. As a result, a unique interpretation of the dichotomy "autocracy vs. democracy" emerges: in this context, autocracy is interpreted as a situation in which resources are concentrated in the hands of a single group, whereas democracy is interpreted as a situation in which resources are dispersed among different groups. We can speak of democracy when resources are so widely distributed that no one group has the possibility of having an advantage over its competitors and thus establishing a hegemony by controlling

a greater share of the resources. This statement is accompanied by a thesis in *Democratization: A Comparative Analysis of 170 Countries* that claims that the greater the degree of resource distribution and intellectual potential of the population, the more developed the democracy. The specified dependence is considered universal, that is, inherent in all countries, regardless of their economic, cultural, civilizational and other features, and is either subordinated to the general logic of the evolutionary paradigm of the study of politics or ignored entirely.

In the most recent published study, it is proposed to assess the degree of a country's democracy by using the criteria of political participation and electoral competition.

Vanhanen's lowest democracy index is 5.0; for semi-democracies, it ranges from 2.0 to 5.0 and for authoritarian regimes, it is less than 2.0. The main shortcoming of this research project is a simplified understanding of democracy that does not take into account the population's participation in the political process.

Varieties of democracy (V-Dem).[19] The V-Dem Institute is an independent research institute with its headquarters at the Department of Political Science of the University of Gothenburg in Sweden. The Institute was founded by Professor Staffan I. Lindberg in 2014.

A new approach to conceptualizing and measuring the degree of democracy is proposed by researchers at this institute.

According to a statement made by the V-Dem Project, an international team of researchers consisting of more than 50 sociologists from six continents, in collaboration with more than 3,500 experts from different countries, collects data to assess the degree of democracy using five criteria (the electoral criterion, the liberal criterion, the joint criterion, the deliberative criterion and the egalitarian criterion).

By 2020, the V-Dem index consisted of over 470 indicators and indices in its dataset covering 202 countries, ranging from the years 1789 to 2019. The political scientist Daniel Hegedus describes V-Dem as an essential provider of quantitative democracy data for scientific research.

Bertelsmann transformation index. The Bertelsmann Foundation was established in 1977 by Reinhard Mohn. It is the largest private foundation in Germany that develops and oversees projects aimed at finding solutions to the pressing problems of our time. The Foundation's main project in the field of research of political and economic systems of the world is the Bertelsmann Transformation Index (ITB).[20]

The ITB measures the degree of democracy and market economy, as well as the quality of public administration in each of the countries considered in the research and its dynamics over the past five years. The results obtained are intended to contribute to the improvement of strategies for political management of transformational processes. That is, the results of scientific research serve as the basis for practical

[19] Varieties of Democracy (V-Dem) (Dec. 12, 2021), available at https://www.v-dem.net.

[20] Melvil 2008, at 54.

recommendations to improve management techniques and methods as well as models of external support of transformational processes. ITB analyzes and evaluates the quality and dynamics of democracy, market economy and political governance in 129 developing countries and countries whose economies are in transition, over the past five years, and estimates their successes and failures on their path to democracy based on the rule of law and socially responsible market economy.[21]

The ITB is the first cross-national benchmarking index to use self-collected data to comprehensively assess the quality of governance during transitions.

The Democracy Index, presented in the annual report of The Economist Intelligence Unit (EIU), the analytical arm of the British magazine *The Economist* (ISSN 0013-0613), is one of the most well-known and popularly used indices for measuring the level of democracy around the world. Its main criterion for assessing the level of democracy is the degree of participation of the civilian population in the political life of the country. Structurally, the democracy index consists of five categories: (a) electoral process and pluralism, (b) government activity, (c) political participation, (d) political culture and (e) civil liberties. The assessment is carried out by means of a survey of sixty key indices from anonymous experts from the relevant countries. Registration on the EIU's official website is required to view the reports for the years 2019[22] and 2020;[23] earlier versions are available in open access.

The Economist Intelligence Unit's policy is frequently criticized, and quite reasonably so, in light of the issue of drawing up the final report, due to the lack of transparency and accountability for the results it provides. Thus, the final report is drawn up on the basis of expert assessments by country, despite the fact that it does not contain expert data per se, nor does it specify the scope of their work or the number of experts that were involved. For example, it remains unknown whether they are employed by the EIU or are independent scientists. All information, even with anonymized personal data, is absent, and the countries of origin of the experts are not specified either. The policy exercised by the EIU in relation to the authors of the report is also ambiguous, classifying the authors and not providing any information about the experts is generally unreasonable, and raises doubts about the impartiality of the rating. With the authors information being classified, the EIU's policy regarding the readers of the reports appears contradictory: since 2008, access to the research has required the following information in the form of a questionnaire, with the completion of all fields being mandatory: family name, place of employment, occupation, position, part-time position (this field is also

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21 Bertelsmann Transformation Index, United Nations Economic and Social Commission for Western Asia (Dec. 12, 2021), available at https://archive.unescwa.org/bertelsmann-transformation-index.

22 Democracy Index 2019, Economist Intelligence Unit (Dec. 12, 2021), available at https://www.eiu.com/public/topical_report.aspx?campaignid=democracyindex2019.

23 Democracy Index 2020: In sickness and in health?, Economist Intelligence Unit (Dec. 12, 2021), available at https://www.eiu.com/n/campaigns/democracy-index-2020/.

required, even if one does not hold such a position), country of residence, work email, work phone number, as well as accepting the terms of use and the privacy policy which are primarily designed to protect the EIU from legal claims, and not in the least aimed at protecting the interests of those registering in its system.

To summarize, each of the aforementioned research projects on assessing the degree of democracy has its own distinct set of strengths and weaknesses. They are based on long-term research involving a diverse group of experts, the assessment and monitoring of the dynamics of the political process in a wide range of countries and the collection and systematization of valuable databases. On the one hand, expert assessments make it possible to accurately describe the political situation in a country; on the other hand, no expert can ever be completely objective. This is frequently the result of opportunistic political motives, which in turn has a negative impact on the objectivity of research.

Power is meaningless without ideals, and ideals without power are merely an illusion. What exactly is democracy? In its most general and simplest form, it is the absence of fear of exercising one's freedom of expression.

> The values of self-expression are more closely related to democracy than any other factor, such as the level of trust between people, the level of participation of the population in various social associations.[24]

What is it, then, that drives away the fear of exercising freedom of expression and replaces it with assurance that people's pride, honor and dignity will not be compromised by the state and that their human rights and property will not be infringed? What is the factor that sustains the silent agreement between the population and the state? Without a doubt, it is human strength, the power that each citizen possesses, that can provide a commensurable rebuff to legalized violence. The understanding by the country's political leadership of the presence of such a force in society generates a balance of interests between civic society and the private interests of the statesperson, and democracy without any adjectives emerges.

In view of the above, we may put forward a hypothesis that freedom depends on the level of the population's armament.

By comparing the index of democracy with the indices of the armed forces of the civilian population of the state, we obtain a new formula for calculating the degree of democracy, which will allow us to assess the appropriateness of restrictions on the right to information imposed by governments on citizens exercising their freedom of expression.

The formula will be calculated as the sum of the positions a given country occupies in the global ranking of the democracy index and the index of the population's armament.

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[24] Ronald Inglehart & Christian Welzel, *Modernization, Cultural Change, and Democracy: The Human Development Sequence* 4 (2005).

It appears that, the lower the resulting number is, the higher the degree of demoracy is that the state seems to have. It should be noted that compliance with the requirement of the national law to restrict the right to information in order to protect the rights of others, morality, public order and the general welfare in such democracies must be firm, and the penalty for violating this requirement must be proportionately high.

However, the higher the number based on the sum of the two indices is, the lower the degree of democracy is that the state has. Therefore, the number of requirements for restricting the right to information should be minimal, with liability for their violation absent or limited to a warning.

This formula, in addition to statistical indicators of democracy, will allow governments of countries seeking to establish democracy to introduce acceptable limits restricting the right to information, thus paving the way for a realistic democratic future.

2. The Significance of the Right to Information Pertaining to Freedom of Expression

The degree to which people exercise their right to freedom of expression defines the degree of democracy in a state. In this regard, we will consider the concepts of freedom of expression and the right to information and define the role that the right to information plays in exercising freedom of expression.

Freedom of expression is an essential component of democratic rights and freedoms.

At the first meeting of the United Nations General Assembly in 1946, before the key international agreements on human rights were signed, Resolution No. 59 was adopted, stating that, "Freedom of information is a fundamental human right and a criterion for all freedoms that fall under the jurisdiction of the UN."

Freedom of opinion and of its expression is one of the fundamental human rights, as stated in Article 19 of the United Nations Universal Declaration of Human Rights.

Freedom of opinion and the right to freedom of expression, including the freedom to seek, receive and impart information and ideas across frontiers, are essential pillars of today's information society.

Free, independent and pluralistic media play a key role in ensuring good governance in a democratic society, regardless of its "age." Open and pluralistic media are most valuable when they simply serve as a "mirror" in which society can see its true reflection. Seeing this reflection helps society in setting community goals and in determining the course of action for change when society (or its leaders) senses it has lost its bearings as to its own common good but wishes to set matters right.

However, freedom of speech is still no more than a pipedream for many countries around the world. The Information and Communications Technology (ICT) revolution, the development of virtual communication and the Internet make it easy to reach

even more people in all of the world's countries, introducing them to a wide range of information resources and giving them plenty of opportunities to exercise their freedom of expression. Cyberspace presents real opportunities for fast and massive distribution of information, as well as for increasing the level of transparency and good governance.[25]

In its broadest form, freedom of expression can be defined as the right to free expression of beliefs from the moment a person is born. One's belief system is formed in the process of socialization under the influence of the information environment they live in.

In this way, a person's self-expression is largely determined by the information environment that surrounds that person, which in turn is shaped and controlled by the state. It should be noted that the information environment is every state's weak spot in building democracy, and the process of its (this environment's) formation is the Achilles heel of each country that has overcome the bar of democratic standards. The problem is essentially quite obscure. The countries of the world have formally proclaimed their commitment to establishing democracy, which means that there must be a single global information environment that is free of controversy throughout the world. However, because technologies that shape this information environment are not solely dedicated to sustaining ideological pluralism but are also largely focused on fulfilling the political ambitions of countries, the information environment becomes a place of propaganda, "ideological confrontation that poses a threat to international security and cultivates an atmosphere of enmity and hatred between countries and peoples."[26]

In this regard, the right to information is the cornerstone in the formation of a democratic information environment, which implies freely searching for and obtaining reliable information that can be freely spread by any means and regardless of frontiers, subject to reasonable and proportionate restrictions established by national law in order to ensure public order, morality, security as well as safeguard the rights of others.

As a result, we have the following sequence: exercising the right to information in full, which may only be possible on condition of the state's balanced involvement, will create an objective information environment, which in turn will provide the population with an opportunity to exercise a justifiable freedom of expression.

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[25] International law and human rights, catalog of electronic resources (Dec. 12, 2021), available at https://hr-libguide.bsu.by/freedom-of-expression/.

[26] Ivanova & Myltykbaev 2020.

3. The Global Rating of the Right to Information

The global rating of the right to information (hereinafter the Rating) is a joint project by

> Access Info Europe (a human rights organization dedicated to promoting and protecting the right to information in Europe as a means of protecting civil liberties and human rights and promoting the population's participation in decision making and government accountability) and the Center for Law and Democracy (a Canada-based non-profit organization that works to promote, protect and develop the human rights that democracy resides on, including the right to information and freedom of expression, the right of participation and freedom of association and assembly).[27]

The Rating's chief objective is to assess the depth of the legal framework regulating the right to access government information resources on the basis of sixty-one discrete indices, each of which looks at a specific feature of the legislative regime and is divided "into seven main categories: the right of access, the scope of that right, the request procedure, exemptions and renunciations, appeals, sanctions, and measures of protection and enforcement."[28]

The highest achievable score in the Rating is 150 points. All of the world's regions today have a significant number of countries with legislation in place regulating the right to information, which is a major change since the Rating was first introduced in 2011. Notably, no Western country is ranked in the top 25, although eight are ranked in the bottom 25 in the Rating. Moreover, between 2000 and the present, all but one of the top 25 countries adopted a specialized right to information law for the first time. Thus, the statistical analysis of the Rating shows that the quality of the legislation is steadily improving, with the average score of laws introduced every five years becoming qualitatively higher than in the previous five-year period, although there are still areas that require further improvement.

The methodology of the Rating is based on a comparison of the legal framework of the right to information for each country in the world. It is important to note that the Rating is limited to assessing the law regulating the right to information, and not the quality of compliance with it. In some cases, countries with a relatively weak legal framework may still achieve significant success in practice due to the thoroughness with which established legal norms are implemented, whereas even relatively well-developed laws regulating the right to information cannot guarantee accessibility of information to the population if they are not executed properly. Despite this flaw,

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[27] Global Right to Information Rating (Dec. 12, 2021), available at https://www.rti-rating.org.

[28] *Id.*

practical experience clearly demonstrates that a well-developed law regulating the right to information is the key to increasing the accessibility of information and helping its users protect and promote this right. It is also important to note that while accessibility covers factors that lie beyond the legal framework of the right to information, a solid legal framework is an essential prerequisite for exercising the right to freedom of expression in full.

4. Sectoral Legal Acts Regulating the Exercise of the Right to Information in the BRICS Countries

As we have already seen, the extent to which the right to information is exercised is fundamental to the freedom of expression that serves as the foundation for democratic institutions.[29] Along with this, taking into account the objective data of the World Bank, which shows that the total area of the BRICS countries (Brazil, Russia, India, China and South Africa) constitutes approximately 30 percent of the world's land mass and 42 percent of the world's population, it would be appropriate to consider laws regulating the implementation of the right to information in the BRICS countries.

Brazil. The rules establishing the right to information in Brazil are set out in the following legal documents:

- Constitution of the Federative Republic of Brazil of 5 October 1988;[30]
- Law No. 12.527 of 18 November 2011 "On Access to Information";[31]
- Resolution No. 7.724 of 16 May 2012.[32]

The right to access information. This right is established by paragraph 33 of Article 5 of the Brazilian Constitution. Everyone residing in the country, Brazilians and foreigners alike, has the right to obtain information relating to collective or common interests from the country's public authorities; such information is provided within the time limits established by law under threat of liability, with the exception of information that is kept secret in order to ensure the state's and population's security.

According to paragraph 2 of Article 216 of the Brazilian Constitution, the government is obligated by law to manage the storage of government documents and make them available for consultation to anyone who requires them.

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[29] Adam Przeworski et al., *Democracy and Development Political Institutions and Well-Being in the World, 1950–1990* 1 (2000).

[30] Constituição da República Federativa do Brasil de 1988 (Mar. 30, 2022), available at http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm.

[31] Lei nº 12.527 de 18 de novembro de 2011 (Dec. 12, 2021), available at https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12527.htm.

[32] Decreto nº 7.724 de 16 de maio de 2012 (Dec. 12, 2021), available at https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2012/decreto/d7724.htm.

Article 3 of Law No. 12.527 of 18 November 2011 "On Access to Information" establishes the following principles in order to ensure the fundamental right to access information: (a) observance of the general rule of publicity, with the exception of secrecy; (b) distribution of information representing the public interest, irrespective of requests; (c) the use of communication means powered by information technology; (d) promotion of the development of a culture of transparency in public administration and (e) development of social control of public administration.

Exemptions. Resolution No. 7.724 of 16 May 2012, regulates the scope of activities of the Federal executive authorities, the procedure for ensuring access to information and the classification of information subject to restricted access in accordance with the levels and terms of secrecy stipulated in the provisions of Law No. 12.527 of 18 November 2011, providing access to the information specified in paragraph 33 of Article 5 and paragraph 2 of Article 216 of the Brazilian Constitution.

Russia. In Russia, the rules establishing the right to information are contained in the following legal documents:

• The Constitution of the Russian Federation adopted by popular vote on 12 December 1993, with amendments approved during a nationwide vote on 1 July 2020;[33]

• Federal Law of 27 July 2006 No. 149-FZ "On Information, Information Technologies and Information Protection" (hereinafter Federal Law No. 149-FZ);[34]

• Federal Law of 9 February 2009 No. 8-FZ "On Ensuring Access to Information regarding the Activities of Government Bodies and Local Self-Government Bodies" (hereinafter Federal Law No. 8-FZ).[35]

The right to access information. According to part 4 of Article 29 of the Constitution of the Russian Federation, everyone has the right to freely seek, receive, transmit, produce and distribute information in any legal manner. The legal definition of the concept of "information" is found in paragraph 1 of Article 2 of Federal Law No. 149-FZ.

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[33] Конституция Российской Федерации (принята всенародным голосованием 12 декабря 1993 г.) (с учетом поправок, внесенных Законами РФ о поправках к Конституции РФ от 30 декабря 2008 г. № 6-ФКЗ, от 30 декабря 2008 г. № 7-ФКЗ, от 5 февраля 2014 г. № 2-ФКЗ, от 21 июля 2014 г. № 11-ФКЗ) // Собрание законодательства РФ. 2014. № 31. Ст. 4398 [Constitution of the Russian Federation (adopted by a nationwide vote on 12 December 1993) (considering amendments, introduced by the RF Laws on amendments to the RF Constitution of 30 December 2008 No. 6-FKZ, of 30 December 2008 No. 7-FKZ, of 5 February 2014 No. 2-FKZ, of 21 July 2014 No. 11-FKZ), Legislation Bulletin of the Russian Federation, 2014, No. 31, Art. 4398].

[34] Федеральный закон от 27 июля 2006 г. № 149-ФЗ «Об информации, информационных технологиях и о защите информации» // СПС «КонсультантПлюс» [Federal Law No. 149-FZ of 27 July 2006. On Information, Informational Technologies and Protection of Information, SPS "ConsultantPlus"] (Dec. 12, 2021), available at http://pravo.gov.ru/proxy/ips/?docbody&nd=102108264.

[35] Федеральный закон от 9 февраля 2009 г. № 8-ФЗ «Об обеспечении доступа к информации о деятельности государственных органов и органов местного самоуправления» // СПС «КонсультантПлюс» [Federal Law No. 8-FZ of 9 February 2009. On Providing Access to Information on the Activities of Government Bodies and Bodies of Local Self-Government, SPS "ConsultantPlus"] (Dec. 12, 2021), available at http://pravo.gov.ru/proxy/ips/?docbody=&nd=102127629.

Messages and data, regardless of the form of their presentation, are considered information.

Article 8 of Federal Law No. 149-FZ guarantees the right of access to information.

Article 8 of Federal Law No. 8-FZ defines information user rights, including the rights to: (a) receive reliable information about the activities of state bodies and local self-government bodies; (b) refuse to receive information about the activities of state bodies and local self-government bodies; (c) not substantiate the need to obtain the requested information on the activities of state bodies and local self-government bodies, the access to which is not limited; (d) file a complaint in the prescribed manner about acts and (or) actions (inaction) of state bodies and local self-government bodies and their officials violating the right to access information about the activities of state bodies and local self-government bodies, as well as the established procedure for exercising this right; (e) demand, in the manner prescribed by law, compensation for harm caused by violation of the right to access information concerning the activities of state bodies and local self-government bodies.

Exemptions. Distribution of classified information is prohibited. The list of information constituting a state secret is determined by federal law, specifically part 4 of Article 29 of the Constitution of the Russian Federation.

Article 9 of Federal Law No. 149-FZ outlines the restrictions imposed on access to information in order to protect the foundations of the constitutional order, morality, health, rights and legitimate interests of others and to ensure the defense and security of the state. The provisions of this Law in restricting access to information are broadly defined.

Article 19 of Federal Law No. 8-FZ describes the procedure for providing information on the activities of state bodies and local self-government bodies upon request. These provisions provide a detailed description of the consequences of refusing to provide information.

India. In India, the rules establishing the right to information are contained in the following legal documents:

• The Constitution of India of 26 January 1950;[36]

• Law No. 22, 2005 on the Right to Information of 21 June 2005.[37]

The Indian Constitution does not openly protect the right to information. However, in 1982 the Supreme Court ruled that access to information of public authorities is a general guarantee of freedom of speech and expression and is protected by Article 19 of the Indian Constitution. Secrecy has been defined as "an exception justified only in cases where it is necessary under the strictest requirements of the public interest." After the ruling was approved, it took some time for the law on access to information to be passed.

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[36] Constitution of India, 1950 (Dec. 12, 2021), available at https://legislative.gov.in/constitution-of-india.

[37] Right to Information Act, 2005 (No. 22 of 2005) (Dec. 12, 2021), available at https://www.indiacode.nic.in/bitstream/123456789/2065/1/A2005-22.pdf.

India's Freedom of Information Act was passed into law in December 2002 after years of public debate. The law was widely criticized and never came into force because the government did not officially publish it. An intense public campaign, as well as the arrival of a new government in 2004, led to the fact that the Law on the Right to Information of 2005 (hereinafter the Right to Information law) was signed by the President in June of the same year. However, all of its provisions came into force only in October 2005.

The right to access information. This right has been repeatedly recognized by the Supreme Court of India, including in its 1982 ruling, despite the fact that the Indian Constitution does not contain a special provision for this right, stating that this right is a general guarantee of freedom of speech and freedom of opinion, and is protected by Article 19 of the Indian Constitution.

The preamble of Law No. 22, 2005 declares that democracy requires citizen awareness and transparency, both of which are vital to its functioning as well as to restraining corruption and holding governments and their bodies accountable.

Law No. 22, 2005 is a legally binding document at both the national and regional levels, which is reflected in a number of its provisions. The law recognizes the need to appoint a government public relations officer and public relations specialists in each of the states and establishes the positions of the Commissioner General and State Commissioner with relevant specialists appointed for the latter in each of the states.

According to section 3 of Law No. 22, 2005, every citizen has the right to information under its provisions. The "the right to information" is defined in section 2(j) as "the right to information ensured by law." Despite some ambiguity in the definition, it is a guarantee that citizens have the right to access information held by public authorities.

Exemptions. The exemptions are outlined in section 8 of Law No. 22, 2005 which provides a comprehensive regime for the protection of secrets, public and private. Section 24 completely excludes from the scope of the Act a number of intelligence and security agencies, namely the eighteen organizations listed in the second annex, including the Bureau of Intelligence and the Bureau of Drug Control. It is up to the government to change the second annex through an official notification, which must be submitted for consideration in Parliament. State governments may also exclude intelligence and security agencies from the annex by means of a special notice in the Gazette, which is submitted to the appropriate state legislative body. The exclusion of these bodies from the scope of the Right to Information Act is neither appropriate nor necessary. At the same time, there is at least one exception: it applies to information relating to allegations of corruption and the violation of human rights. When information that may prove a violation of human rights is requested from the relevant authorities, the information must be provided but only after the consent of the relevant Commission (the Government or the State Commission) and within

forty-five days, regardless of the time frame specified in section 7. No additional procedures are required when requesting information that may prove corruption.

"While in force," the law regulating the right to Information, according to section 22, overtly prevails over conflicting provisions of other laws, in particular, the Official Secrets Act of 1923. The majority of exceptions, but not all are subjected to damage testing. The Right to Information Act also establishes a significant priority of public interests over other interests. If the public interest in disclosing information outweighs the degree of harm that the disclosure could cause to legal interests, the information must be subjected to disclosure, contrary not only to the exceptions foreseen in the Right to Information Act, but also to any provisions of the Official Secrets Act (section 8(2)). Section 10(1) provides for the severability of disclosures if any portion of the record cannot be disclosed due to the lack of an exemption.

China. In China, the right to access information is governed by the Regulation of the People's Republic of China on Disclosure of Government Information, which was adopted at the 165th meeting of the State Council on 17 January 2007 and became effective as of 1 May 2008 (hereinafter the PRC Information Protection Law).[38]

On 17 January 2007, China adopted a model law on freedom of information with a special focus on clarifying statements concerning freedom of information. The law, as an administrative regulation approved by the National Council, may not repeal any of the laws or provisions of the Constitution. The freedom of information in China is of a declarative nature that must not contradict the official party politics of China. The emergence of such a law was conditioned by the expansion of information flow in the world and China's desire to demonstrate an increased transparency in the Chinese information environment. This improved information flow would contribute to creating a favorable reputation for China.

The right of access to information. Article 1 of the Chinese Regulation of Information makes it clear that this regulation has been drafted in such a way that the population, the legal bodies, and other organizations have the right to receive government information in accordance with the law in order to enhance the level of transparency in the work of the government as well as to ascertain the superiority of the law in the government in order to play to the full the role of government information in total production management and sustaining the population, as well as their economic and social activities.

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[38] 中(zhong1) 华(hua2) 人(ren2) 民(min2) 共(gong4) 和(he2) 国(guo2) 国(guo2) 务(wu4) 院(yuan4) 令(ling2) 第(di4) 492 号(hao4) 《中(zhong1) 华(hua2) 人(ren2) 民(min2) 共(gong4) 和(he2) 国(guo2) 政(zheng4) 府(fu3) 信(xin4) 息(xi1) 公(gong1) 开(kai1) 条(tiao2) 例(li4) 》 已(yi3) 经(jing1) 2007 年(nian2) 1(1) 月(yue4) 17(17) 日(ri4) 国(guo2) 务(wu4) 院(yuan4) 第(di4) 165 次(ci4) 常(chang2) 务(wu4) 会(hui4) 议(yi4) 通(tong1) 过(guo4)，现(xian4) 予(yu2) 公(gong1) 布(bu4)， 自(zi4) 2008 年(nian2) 5 月(yue4) 1 日(ri4) 起(qi3) 施(shi1) 行(xing2)。 [Regulations of the People's Republic of China on Open Government Information, adopted by the State Council on 17 January 2007, Effective 1 May 2008] (Dec. 12, 2021), available at http://www.gov.cn/zhengce/content/2008-03/28/content_1734.htm.

Article 5 of the Regulation declares that disclosure of government information by administrative bodies must make disclosure a norm, and non-disclosure an exception, while respecting the principles of justice, honesty, legitimacy and the comfort of the population.

Article 19 of the Regulation states that administrative bodies must be actively involved in disclosing government information, for a correction of the public interest requires a broad public understanding or the participation of society in decision making.

And article 27 of the Regulation states that, apart from government information actively disclosed by administrative bodies, the population, legal and other entities may apply to bodies of self-governance for obtaining relevant government information on all levels or to the departments of people's governments on the provincial level or higher, exercising, on their own behalf, the functions of administrative management (including remote and internal bodies stipulated in paragraph 2 of Article 10 of this Regulation).

Exemptions. Article 14 of the Regulation of Information in the People's Republic of China declares that government information legally defined as a state secret, government information that is not subject to disclosure according to laws and regulations, as well as government information that may jeopardize national security, social security, economic security, or social stability as a result of its publication, may not be disclosed under any circumstances.

Article 15 of the Regulation states administrative bodies must not disclose government information containing commercial or private secrets that, if disclosed, may negatively affect the legitimate rights and interests of third parties.

Article 14 of the Regulation states that information concerning internal matters of administrative bodies, including personnel and logistics management, internal operational processes, as well as information in other similar areas, may not be disclosed. Discussion protocols, procedure drafts, letters of consultation, and other similar information regarding types of procedures, as well as files of administrative legislative cases, may not be disclosed.

And, Article 17 of the Regulation states that administrative bodies create and complement open government information review mechanisms, clarifying procedures and responsibilities.

Administrative bodies disclosing government information carry out a checkup of government information liable to disclosure in compliance with the Regulations of the People's Republic of China on State Secrets as well as other laws, normative acts and relevant government regulations.

In cases when administrative bodies cannot determine whether certain government information may be disclosed, they must abide by laws, regulations and relevant government provisions to inform a relevant competent authority or an administrative Department of Privacy Management for confirmation.

The Information Regulations of the People's Republic of China also contain other restrictions contained in Articles 18, 32, 33, 34, 35, 36 and 37.

The existence of an excessive number of detailed restrictions with the possibility of broad interpretation as to what information can be disclosed, creates an impression that the Regulation of Information in the People's Republic of China is not intended for citizens to be able to exercise their right to information, but rather to guide civil servants in disclosing information.

The absence of a single document regulating the operation of the "social credit" system implemented through the means of facial recognition, which clearly outlines in simple terms what is allowed, what is forbidden, and what consequences non-compliance will incur, is by all means alarming, as is China's refusal to disclose information on "correction camps" in the Xinjiang Uygur Autonomous Region or collaborate with the United Nations on this issue.

> In 2018, Human Rights Watch published a report on the persecution of Muslims in Xinjiang. According to the report, large numbers of Uyghurs have been groundlessly detained and placed into prisons and correction camps, the social status and fate of millions of people depending on the points awarded in the "social credit" system.[39]

South Africa. In South Africa, the rules establishing the right to information are contained in the following legal documents:

• The Constitution of the South African Republic of 1996;[40]

• The Law on the Development of Access to Information, adopted in 2000 and effective as of 2001.[41]

The 1996 Constitution of the South African Republic guarantees not only the right of access to government information but also the right of access to information from private organizations that is necessary to enforce or protect any right. The Constitution also requires the acceptance of a law by the government to begin enacting this right within three years of its entry into legal force. This is an extremely practical provision that forces the government to pass legislation on time and within a specified time frame.

The Law of Developing Access to Information, which regulates enforcement, went into effect in March 2001. South Africa has one of the most progressive laws on

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[39] Human Rights Watch, 'Eradicating Ideological Viruses': China's Campaign of Repression Against Xinjiang's Muslims, HRW Publ. (2018) (Dec. 12, 2021), available at www.hrw.org/sites/default/files/report_pdf/china0918_web2.pdf.

[40] Constitution of the Republic of South Africa (No. 108 of 1996) (Mar. 30, 2022), available at http://housingfinanceafrica.org/app/uploads/Constitution-of-the-Republic-of-South-Africa-Act-108-of-1996.pdf.

[41] Promotion of Access to Information Act, 2000 (No. 2 of 2000) (Dec. 12, 2021), available at https://www.gov.za/sites/default/files/gcis_document/201409/a2-000.pdf.

freedom of information in the world. The main disadvantage is the lack of a guarantee of an administrative appeal. As a result, if a request is rejected by a government agency, only a court can review it. Furthermore, the Law does not have an obligation to actively distribute information that serves the public interest, despite the fact that this issue has received significant attention in a number of modern legislative systems; and it represents an important aspect of access to information on request.

The right to access information. Article 32 of the South African Constitution of 1996, "Access to Information" declares:

> (1) Everyone has a right to access:
> (a) any information held by the government;
> (b) any information held by any other person that may be deemed necessary for exercising, or ensuring protection of, any rights.
> (2) National legislation must regulate the implementation of this right, providing measures to mitigate the administrative and financial oppression exercised by the state.

The Preamble to the Access to Information Development Act in South Africa lists the following aims:

• foster a culture of transparency and accountability in public and private bodies by implementing the right of access to information;

• actively contribute to the creation of a society in which the people of South Africa have effective access to information enabling them to more fully exercise and protect all of their rights.

Article 2 of the Law of Information Access Development in South Africa states:

> 2. (1) In interpreting the provisions of this Law, each court shall prefer any reasonable interpretation of that provision consistent with the purposes of this Law over any alternative interpretation inconsistent with these purposes.

Article 9 of the Law states:

> 9. The objectives of this Law are as follows:
> a) exercising constitutional right of access to:
> any information owned by the state; and
> all information owned by any other person and necessary for the exercise or protection of rights;
> b) to exercise this right:
> considering justified limitations, including, but not limited to, those aimed at a reasonable protection of privacy, business secrecy and efficient, effective and benevolent governance; and

(II) in such a way that this right is balanced with any other rights enumerated in the Bill of Rights in Chapter 2 of the Constitution;

c) ensure that the state's constitutional obligations to promote a culture of human rights and social justice are met by including state bodies in the definition of "requester," allowing them, inter alia, to access information from private bodies while complying with this Law's four requirements, including an additional obligation for certain public authorities to act in the public interest in certain cases;

d) establish voluntary and mandatory mechanisms or procedures to exercise this right in such a way that individuals will be able to access documents from public and private bodies as quickly, cheaply and effortlessly as possible;

e) generally promote transparency, accountability and effective governance of all public and private bodies, including but not limited to empowerment and education for all;

(i) to understand their rights in terms of this Law in order to exercise their rights in relation to public and private bodies;

(ii) to understand the functions and activities of government bodies; and

(iii) to effectively analyze and participate in, decision-making endeavors by state bodies affecting their rights.

Article 11 of the Law states:

(1) The requesting party should be given access to the government record in the event when:

(a) the requesting party complies with all procedural requirements of this Law as concerns requesting access to the record; and

(b) access to this record has not been denied based on any reasons for denial stipulated in Chapter 4 of Part 2.

It should be noted that the implementation of the Law of Developing Access to Information has always been weak, with the level of "silent failures" being high and requests often left without any response.[42]

Exemptions. Article 5 of the Law of Information Access Development in South Africa applies to the exclusion of any provision of any other legislation that (a) prohibits or restricts the disclosure of records owned by a public or private body; and (b) materially contradicts the object or any of specific provision of this Law.

Articles 33–44 of the Law stipulate exemptions from the right of access in accordance with international standards. These exemptions relate to national

[42] Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, United Nations Educational, Scientific and Cultural Organization (2008), at 99 (Dec. 12, 2021), available at https://law.yale.edu/sites/default/files/documents/pdf/Intellectual_Life/CL-OGI_Toby_Mendel_book_%28Eng%29.pdf.

security, international relations, public health and security, prevention, investigation and prosecution of infringements of rights; confidentiality; lawful commercial and other economic interests; economic management; fair administration of justice and the privilege of legal advice; preservation of the environment and other operations of government agencies.

With all of this in mind, Article 46 of the Law of Information Access Development in South Africa contains a mandatory priority of the public interest; in this regard, information must be disclosed if this serves public interest, even if it has the potential to harm interests that are under its protection.

Conclusion: the Democracy Index of the BRICS Countries and the Feasibility of Restrictions Imposed on the Right to Information

The population's embrace of the opportunity to fully exercise its right to information, which is impossible without a balanced involvement of the state, leads to the formation of an objective information environment, which in turn provides the population with the opportunity to exercise freedom of expression in a reasonable manner. In this regard, a close relationship between the democracy index and fully exercising the right to information, which plays a key role in the population exercising freedom of expression, becomes apparent.

We believe it is advisable to take into account the civilian armament index in the definition of democracy calculated by using the formula for adding up the places that the state occupies in the global rating of the democracy index (based on data from The Economist Intelligence Unit's annual report, Democracy Index 2020: In sickness and in health?[43]) and the Civilian Armament Index (based on 2018 report data: "Estimating Global Civilian-held Firearms Numbers"[44] drawn up by The Small Arms Survey's Aaron Karp).

The BRICS association is the largest of the world's unions in terms of territory and population. It is particularly interesting in terms of calculating the degree of democracy of its member states using the formula proposed in the second paragraph above to determine the extent to which the population has the opportunity to exercise its right to freedom of expression, as well as determining the advisability of limiting the right to information by the BRICS countries by comparing the data on democracy and rights as well as exemptions enumerated in the countries' normative legal acts.

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43 Democracy Index 2020, *supra* note 23.

44 Aaron Karp, *Estimating Global Civilian-held Firearms Numbers*, Briefing Paper, Small Arms Survey (June 2018) (Dec. 12, 2021), available at https://www.smallarmssurvey.org/sites/default/files/resources/SAS-BP-Civilian-Firearms-Numbers.pdf.

According to the global rating of the democracy index for 2020, the BRICS countries are ranked in the following order: (a) South Africa is ranked 45th; (b) Brazil is ranked 49th; (c) India is ranked 53rd; (d) Russia is ranked 124th and (e) South Africa is ranked 151st.

According to the global civilian armament rating in 2017, the BRICS countries hold the following positions in the rating globally:

• Russia is ranked 68th, with 12.3 weapons per 100 people, with a population of 143,375,000, and the total number of firearms in civilian possession amounting to 17,620,000 units;

• South Africa is ranked 89th, with 9.7 weapons per 100 people, with a population of 55,436,000, and the total number of firearms in civilian possession amounting to 5,351,000;

• Brazil holds the 97th place with 8.3 weapons per 100 people, a population of 211,243,000, with the total number of firearms in civilian possession amounting to 17,510,000;

• India holds the 120th place with 5.3 weapons per 100 people, a population of 1,342,513,000, and the total number of firearms in civilian possession amounting to 71,101,000;

• China holds the 139th place with 3.6 weapons per 100 people, a population of 1,388,233,000, with the total number of firearms in civilian possession amounting to 49,735,000.

Adding up the data with the use of the formula, we get the following:

1. Democracy in South Africa = 1+2= 3
2. Democracy in Russia = 4+1 = 5
3. Democracy in Brazil = 2+3 = 5
4. Democracy in India = 3+4 = 7
5. Democracy in China = 5+5 = 1

Thus, South Africa leads in the degree of democracy and, therefore, also in terms of allowing its population to exercise its right to information and freedom of expression. An analysis of laws regulating access to information in South Africa showed a high level of elaboration with a very small number of exemptions. Russia and Brazil share second place. The legal norms regulating the right to information and freedom of expression in these countries are enumerated in their constitutions; laws regulating these rights and freedoms are balanced between rights and restrictions, with a tendency for exemptions to prevail over rights. India is ranked third in this rating of democracy and the implementation of the right to information in legal terms, significantly inferior to Russia and Brazil. In India's case, in particular, there is no direct indication of access to information in the constitution, which is compensated for by the rulings of the Supreme Court of India. The fourth place in terms of democracy among the BRICS countries is held by the People's Republic of China, which may be characterized by the lack of opportunities to fully exercise their right to information and freedom of expression. There are no constitutional guarantees for these rights,

and the Chinese Regulation of Information, which serves as a de facto guide for civil servants in determining what information can be disclosed, contains an excessively unreasonable number of detailed restrictions that could be interpreted broadly.

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GENDER DISCRIMINATION IN EMPLOYMENT: BRICS COUNTRIES OVERVIEW

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This article investigates the phenomenon of gender equality in employment in the BRICS countries where it is one of the factors hampering the economic development and basic

human rights. The authors examine the international obligations of these states under the human rights treaties of the United Nations Organization (UNO) and the International Labour Organization (ILO), compare the national anti-discriminatory norms with the international standards (ILO Conventions and the Convention on the Elimination of all Forms of Discrimination Against Women) and evaluate the observations of the relevant international bodies recently adopted in respect of the BRICS states. In particular, the activities of the Committee on the Elimination of Discrimination Against Women and the ILO Committee of Experts on the Application of Conventions and Recommendations are reviewed. In the paragraphs that follow, the national legislation and case-laws are examined. Furthermore, the reasons for the persistent gender stereotypes in the labor market, as well as the general attitude toward women's roles in society in each country are reviewed. The authors identify the obstacles to achieving true gender equality in the workplace and formulate recommendations for improving protections against discrimination of women in employment as well as ensuring equal access to employment and promotion.

Keywords: gender discrimination; CEDAW; BRICS; employment; wage gap; ILO; gender stereotypes.

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Introduction

The lack of gender equality in employment is a problem shared by all of the BRICS countries, as indicated by the fact that all five states have consistently ranked

low on the Gender Inequality Index.[1] Gender discrimination in employment has a significant impact on the economic efficiency and productivity of the states. It has been proven, for example, that an increase in the gender wage gap leads to a decrease in income per capita in the steady state and that measures aimed at supporting women's participation in the labor market have a strong positive impact on economic growth.[2] The authors are of the opinion that measures aimed at ensuring gender equality in the workplace are part of the path to achieving equitable, inclusive and sustainable development to eradicate poverty, which has been declared as one of the key objectives of the union.[3] However, none of the BRICS Declarations contain a clear commitment to tackle the issue of gender discrimination in employment.[4]

The importance of ensuring gender equality in employment for the development of the BRICS countries is well recognised by both non-governmental organisations (NGOs)[5] and scholars.[6] In addition, the ILO noted that gender gaps in labor market participation remain significant in the BRICS countries.[7] A number of research studies have focused their attention on analysing the different aspects of this problem It has been noted that gender segregation in employment is characteristic of BRICS and in the majority of these countries, only around 40% of women are employed in the

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1 According to data published in 2020, Russia is the most successful of all BRICS countries in the struggle against gender discrimination and is ranked 52nd, then comes Brazil (84th), China (85th), South Africa (114th) and India (131st) out of 189 evaluated countries. Gender Inequality Index (GII), Human Development Reports (2020) (Mar. 30, 2022), available at https://hdr.undp.org/en/content/gender-inequality-index-gii.

2 Tiago Cavalcanti & José Tavares, *The Output Cost of Gender Discrimination: A Model-Based Macroeconomics Estimate*, 126(590) Econ. J. 109 (2016); Åsa Löfström, *Gender Equality, Economic Growth and Employment*, Swedish Ministry of Integration and Gender Equality (2009) (Mar. 30, 2022), available at http://data.epws.org.s3.amazonaws.com/DOCUMENTS/WEBSITE2016/EUstudie_sidvis.pdf.

3 10th BRICS Summit Johannesburg Declaration, 26 July 2018 (Mar. 30, 2022), available at https://www.mea.gov.in/bilateral-documents.htm?dtl/30190/10th_BRICS_Summit_Johannesburg_Declaration. *See also* Declaration of the 11th BRICS Summit, 14 November 2019 (Mar. 30, 2022), available at http://en.kremlin.ru/supplement/5458.

4 In the most recent New Delhi Declaration the words "inclusive labor markets" and "the principles of equality" are mentioned. *See* XIII BRICS Summit: New Delhi Declaration, 9 September 2021 (Mar. 30, 2022), available at http://www.brics.utoronto.ca/docs/210909-New-Delhi-Declaration.html.

5 Instituto EQUIT, Women in the BRICS: Inequalities, Contradictions and Challenges (Mar. 30, 2022), available at https://www.bricsfeministwatch.org/pdf/Women_In_The_BRICS_web.pdf.

6 Marina Chudinovskikh & Natalia Tonkikh, *Telework in BRICS: Legal, Gender and Cultural Aspects*, 7(4) BRICS L.J. 45 (2020); Cobus van Staden & Luanda Mpungose, *BRICS Should Adopt Inclusive Approach to Women*, Africa Portal, 28 September 2018 (Mar. 30, 2022), available at https://www.africaportal.org/publications/brics-should-adopt-inclusive-approach-women/; Christian Guillermet Fernández & David Fernández Puyana, *The BRICS Commitment in the Promotion of Equality Between Women and Men: Analysis from the Human Rights and Peace Perspective*, 1(1) BRICS L.J. 5 (2014).

7 ILO, Decent Work and Economic Growth: Women's Participation – Equal Pay for Work of Equal Value, paper prepared for the BRICS Labour and Employment Ministerial Meeting (LEMM), 2–3 August 2018, Zimbali Holiday Resort, Durban, South Africa (Mar. 30, 2022), available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_636205.pdf.

non-agricultural sector.[8] According to the sociological research findings, women are still challenged with the choice between family and employment.[9] Another research demonstrated that Russia, China, India and Brazil all suffer from serious problems regarding the effectiveness of their gender equality efforts, and each country faces specific challenges in this sphere.[10] Scholars have substantiated the need to improve the process of globalization in order to empower women to be involved in economic activities.[11] At one of the recent BRICS events, the participants discussed the policies adopted in the BRICS countries to enhance women's participation in the labor force[12] and presented the toolkit "Women's Economic Empowerment in BRICS: Policies, Achievements, Challenges and Solutions."[13]

The documents cited above considered the problem of gender inequality in BRICS from different points of view. However, none of them analyzed the legal framework for ensuring protection against discrimination and the relevant national jurisprudence. Neither the origins of gender stereotypes in the workplace nor the effects of those stereotypes were taken into consideration. The purpose of this paper is to fill this gap in the following manner: Firstly, the international obligations of the BRICS states in the field of protection from gender discrimination will be considered. Secondly, in the sections that follow, gender stereotypes in the labor market, legal frameworks and relevant national case-laws of each of the BRICS states will be reviewed.

1. International Obligations of the BRICS States

All of the BRICS countries have ratified the following main international instruments aimed at ensuring gender equality: the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Equal Remuneration Convention

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8 Pinky Lalthapersad-Pillay, *Gender Influences in the Labour Market: The Case of BRICS*, 5(10) Mediterranean J. Soc. Sci. 155 (2014).

9 Ksenia Kizilova & Elizaveta Mosakova, *The Birth Rate in BRICS Countries Under the Gender Inequality in the Labor Market*, 19(4) RUDN J. Soc. 630 (2019).

10 Diva J.S.S. Coelho et al., *The Situation of Women in BRIC Countries: A Comparative Analysis of the (in) Effectiveness of Public Policies for the Protection of Women and Reduction of Gender Inequality in the Four Largest Emerging Economies in the World*, 5(1) UNIO – EU L.J. 121 (2019).

11 Tolulope Osinubi & Simplice Asongu, *Globalization and Female Economic Participation in MINT and BRICS Countries*, 48(6) J. Econ. Stud. 1177 (2020).

12 BRICS Dialogue on the Future of Work: Towards a Women-Led Growth Framework, Russian National Committee on BRICS Research, 17 June 2021 (Mar. 30, 2022), available at https://nkibrics.ru/posts/show/60cb45a46272697eb4990000.

13 Russian National Committee on BRICS Research, Toolkit "Women Economic Empowerment in BRICS: Policies, Achievements, Challenges and Solutions" (2020) (Mar. 30, 2022), available at https://www.nkibrics.ru/ckeditor_assets/attachments/600a8a8e6272697eb4070000/toolkit_women_in_brics.pdf.

(No. 100, ILO) and the Elimination of Discrimination in Respect of Employment and Occupation (No. 111, ILO).[14]

The definition of discrimination is fixed in Article 1 of the ILO Convention No. 111, adopted in 1958. It was the second international instrument to tackle the problem of discrimination in employment after the prohibition of discrimination in the Universal Declaration of Human Rights (Art. 7 (general prohibition of discrimination) and Art. 23 (equal pay)). Under Article 1 of the ILO Convention No. 111, *discrimination* includes any distinction, exclusion or preference made on the basis of race, color, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. Discrimination against women was defined in the CEDAW in 1975 as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. As a result of the interpretation of these instruments, sexual harassment has been recognized as a form of gender discrimination by both the ILO and the Committee established under CEDAW.[15]

The compliance of the BRICS states with the international obligations to ensure the prohibition of gender discrimination in employment is mainly monitored by the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) as far as the two ILO Conventions are concerned, and by the Committee on the Elimination of Discrimination against Women, established under CEDAW.[16] The monitoring takes the form of the consideration of the states' reports and the formulation of the recommendations unless the state has ratified the Optional Protocol to CEDAW. In this case, filing individual complaints on violations of CEDAW

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[14] The list of ratifications of the ILO Conventions is available here: https://www.ilo.org/dyn/normlex/en/f?p=1000:11001:::NO:::.

[15] *See* CEDAW, General Recommendation No. 19: Violence against Women, A/47/38 (1992) (Mar. 30, 2022), available at https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_3731_E.pdf; Direct Request (CEACR) – adopted 2017, published 107th ILC session (2018), Discrimination (Employment and Occupation) Convention, 1958 (No. 111) – Italy (Mar. 30, 2022), available at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3337422,102709,Italy,2017; Direct Request (CEACR) – adopted 2006, published 96th ILC session (2007), Discrimination (Employment and Occupation) Convention, 1958 (No. 111) – Malawi (Mar. 30, 2022), available at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2267240,103101,Malawi,2006.

[16] However, cases on this issue might be found in the jurisprudence of the Human Rights Committee (HRC) and the Committee on Economic, Social and Cultural Rights. *See, e.g.*, the most recent case considered by the HRC, *Elena Genero v. Italy*, CCPR/C/128/D/2979/2017, No. 2979/2017, 13 March 2020 (Mar. 30, 2022), available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/122/92/PDF/G2012292.pdf?OpenElement.

is allowed. Of the BRICS states, this Protocol has been ratified only by Brazil, Russia and South Africa.[17] By 2021, the Committee on the Elimination of Discrimination against Women had only considered a single individual complaint against Russia, which concerned the prohibition on women being employed in certain jobs.[18] The consideration of this case led to a number of positive changes in Russian legislation, which will be discussed in the paragraph dedicated to Russian law and jurisprudence.

In recent years, the Committee for the Elimination of Discrimination against Women has reviewed the reports of all the BRICS states and formulated its recommendations on the various issues, which include gender equality in employment. It expressed concerns about the occupational segregation and the persistent gender pay gap with respect to all the BRICS states. All of the countries were urged to counter this segregation by taking measures to improve women's access to employment opportunities and to effectively enforce the principle of equal pay for work of equal value. In terms of country-specific recommendations, Brazil was asked to report on the measures in place to protect women from sexual harassment in the workplace, as this information had not previously been provided.[19] India was criticized for the provisions of the enacted Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, which require conciliation as a preliminary step in the complaint procedure, as well as the absence of an effective complaints mechanism for domestic workers.[20] In respect of Russia, it also noted the absence of legislation prohibiting sexual harassment in the workplace and recommended that such norms be adopted, so as to ensure that victims have access to effective remedies.[21] The last report from China was reviewed in 2014, and in its concluding observations, the CEDAW stressed the need to adopt legal provisions that require employers to assume

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17 *See* the map of ratifications at the official United Nations (U.N.) site: https://indicators.ohchr.org/.

18 Committee on the Elimination of Discrimination against Women, Communication No. 60/2013, Views adopted by the Committee at its 63rd session (15 February – 4 March 2016), CEDAW/C/63/D/60/2013, 21 March 2016 (Mar. 30, 2022), available at https://digitallibrary.un.org/record/827494. *See also* Women's Rights Body Rules on Russian Banned Jobs List Complaint, U.N. Human Rights Office, 22 April 2016 (Mar. 30, 2022), available at https://www.ohchr.org/EN/NewsEvents/Pages/MedvedevaVRussia.aspx.

19 Committee on the Elimination of Discrimination against Women, Concluding Observations of the Committee on the Elimination of Discrimination against Women, CEDAW/C/BRA/CO/7, 23 March 2012 (Mar. 30, 2022), available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/414/40/PDF/G1241440.pdf?OpenElement.

20 Committee on the Elimination of Discrimination against Women, Concluding Observations on the Combined Fourth and Fifth Periodic Reports of India, CEDAW/C/IND/CO/4-5, 24 July 2014 (Mar. 30, 2022), available at https://digitallibrary.un.org/record/778815.

21 Committee on the Elimination of Discrimination against Women, Concluding Observations on the Ninth Periodic Report of the Russian Federation, CEDAW/C/RUS/CO/9, 30 November 2021 (Mar. 30, 2022), available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/351/83/PDF/N2135183.pdf?OpenElement.

liability for sexual harassment in workplaces.[22] In terms of South Africa, the CEDAW in the recently issued concluding observations emphasized the need to ensure the equal treatment of women care workers and domestic workers, including women migrant workers, who under current norms do not benefit from the same level of protection and benefits as other workers, particularly with regard to minimum wages, paid holidays, maximum weekly hours and regular days of rest, as well as a mechanism for monitoring workplace conditions.[23] This brief review of the CEDAW's concluding observations of the BRICS reports demonstrates that the issue of sexual harassment in the workplace is also a prevalent problem for the majority of the states.

Concerning the ILO's evaluation of the compliance of the BRICS states with non-discrimination conventions, it is necessary to analyze the actions of the CEACR. This Committee was founded in 1926 to examine government reports on ratified conventions.[24] When examining the application of international labor standards, the Committee of Experts makes two kinds of comments: observations and direct requests. Observations include comments on fundamental questions raised by the application of a particular convention ratified by a state, whereas direct requests relate to more technical questions or requests for further information.[25] The information about the number of direct requests and observations sent to the states under the two ILO Conventions on discrimination is presented by authors in Table 1 below.

Table 1

	Brazil CEACR direct requests/ observations	Russia CEACR direct requests/ observations	India CEACR direct requests/ observations	China CEACR direct requests/ observations	South Africa CEACR direct requests/ observations
C 111	17/20 (since 1991)	15/13 (since 1990)	15/13 (since 1991)	4/1 (since 2004)	7/3 (since 2002)
C 100	14/0 (since 1990)	10/5 (since 1990)	13/17 (since 1991)	10/3 (since 1995)	6/5 (since 2004)

[22] Committee on the Elimination of Discrimination against Women, Concluding observations on the combined seventh and eighth periodic reports of China, CEDAW/C/CHN/CO/7-8, 14 November 2014 (Mar. 30, 2022), available at https://www.women.gov.hk/download/whats_news/cedaw_report4_en.pdf.

[23] Committee on the Elimination of Discrimination against Women, Concluding Observations on the Fifth Periodic Report of South Africa, CEDAW/C/ZAF/CO/5, 23 November 2021 (Mar. 30, 2022), available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/352/34/PDF/N2135234.pdf?OpenElement.

[24] Committee of Experts on the Application of Conventions and Recommendations, ILO (Mar. 30, 2022), available at https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.htm.

[25] Managing International Labour Standards Reporting, Glossary (Mar. 30, 2022), available at https://managing-ils-reporting.itcilo.org/en/resources/glossary/direct-requests-and-observations.

Brazil is the leader in the number of observations received under Convention No. 111. In particular, the Direct Request published during the 107th ILC session in 2018[26] referred to the amended wording of Article 461 of the Consolidation of Labor Laws (*Consolidação das Leis do Trabalho* (*CLT*)).[27] The CEACR indicated that applying the principle of equal pay should not be limited to the same establishment or employer, as provided for in Article 461 of the *CLT*, and suggested that changes be made to the regulation to make it more comprehensive.

Russia has also received a number of comments from the CEACR. The most recent concern, in particular, is the need to take active steps to prevent and address sexual harassment unemployment,[28] as well as revise the list of jobs where the employment of women is prohibited.[29] The CEACR also demanded the Russian Government take concrete steps to tackle the issue of the gender pay gap, as well as take appropriate measures to raise public awareness of the relevant legislation and of the procedures and remedies available in relation to equal remuneration.[30]

The issue of equal pay has been raised by the CEACR in respect of India since 2002. In its most recent observation, it urges the government to take the necessary steps to ensure that the Code on Wages is amended to fully express the principle of equal remuneration for men and women for work of equal value as enshrined in the Convention, and that it is not limited to workers within the same workplace but applies across different enterprises and sectors.[31] China was urged to include a clear

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[26] Direct Request (CEACR) – adopted 2017, published 107th ILC session (2018), Discrimination (Employment and Occupation) Convention, 1958 (No. 111) – Brazil (Mar. 30, 2022), available at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3417489.

[27] Altera a Consolidação das Leis do Trabalho (CLT), aprovada pelo Decreto-Lei nº 5.452, de 1º de maio de 1943, e as Leis nº 6.019, de 3 de janeiro de 1974, 8.036, de 11 de maio de 1990, e 8.212, de 24 de julho de 1991, a fim de adequar a legislação às nova 13.467 (2017).

[28] Observation (CEACR) – adopted 2018, published 108th ILC session (2019), Discrimination (Employment and Occupation) Convention, 1958 (No. 111) – Russian Federation (Mar. 30, 2022), available at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3960923.

[29] Observation (CEACR) – adopted 2014, published 104th ILC session (2015), Discrimination (Employment and Occupation) Convention, 1958 (No. 111) – Russian Federation (Mar. 30, 2022), available at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3192118.

[30] Observation (CEACR) – adopted 2017, published 107th ILC session (2018), Equal Remuneration Convention, 1951 (No. 100) – Russian Federation (Mar. 30, 2022), available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO:13100:P13100_COMMENT_ID:3343611:NO; Observation (CEACR) – adopted 2014, published 104th ILC session (2015), Equal Remuneration Convention, 1951 (No. 100) – Russian Federation (Mar. 30, 2022), available at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3187524.

[31] Observation (CEACR) – adopted 2020, published 109th ILC session (2021), Equal Remuneration Convention, 1951 (No. 100) – India (Mar. 30, 2022), available at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:4055314; Observation (CEACR) – adopted 2017, published 107th ILC session (2018), Equal Remuneration Convention, 1951 (No. 100) – India (Mar. 30, 2022), available at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:3340468,102691:NO.

and comprehensive definition of discrimination (both direct and indirect) in its labor legislation[32] as well as to take specific steps to give full legislative expression to the principle of equal pay for equal work for both men and women.[33] In its most recent observation addressed to South Africa, the CEACR mentioned the adoption of the Code of good practice on equal pay and remuneration for work of equal value on 1 June 2015 as a positive aspect.[34] However, none of the observations issued under Convention No. 111 specifically address the problem of gender discrimination in South Africa.

The review of the CEACR comments addressed to the BRICS countries in the last five years demonstrates that the gender pay gap and the segregation of employment, the prohibition of sexual harassment in the workplace and the implementation of the prohibition of gender discrimination in practice are the most crucial issues relevant for almost all of the BRICS states. In the following section, we will examine the national legislation prohibiting gender discrimination in employment, the case law, and the persisting gender stereotypes in the BRICS states.

2. National Approaches to Gender Discrimination in Employment

2.1. Brazilian Law and Case-Law on Discrimination

In Brazil, the reflection of the ratification of CEDAW can be seen in Law No. 7,353 of 29 August 1985[35] which created the National Council for Women's Rights (CNDM). This Council aims to eliminate "discrimination against women, ensuring their conditions of freedom and equal rights, as well as their full participation in the political, economic and cultural activities of the country."

Later, in 1988, with the promulgation of the Federal Constitution of the Federative Republic of Brazil,[36] non-discrimination again gained constitutional status, both through Article 7's item XX, which guarantees the "protection of the women's labor market, through specific incentives," and through item XXX, which aims to

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[32] Observation (CEACR) – adopted 2021, published 110th ILC session (2022), Discrimination (Employment and Occupation) Convention, 1958 (No. 111) – China (Mar. 30, 2022), available at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:4118279.

[33] Observation (CEACR) – adopted 2016, published 106th ILC session (2017), Equal Remuneration Convention, 1951 (No. 100) – China (Mar. 30, 2022), available at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3298706:NO.

[34] Observation (CEACR) – adopted 2015, published 105th ILC session (2016), Equal Remuneration Convention, 1951 (No. 100) – South Africa (Mar. 30, 2022), available at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO::P13100_COMMENT_ID,P13100_LANG_CODE:3254914,es:NO.

[35] Lei nº 7.353 de 29 de agosto de 1985, cria o Conselho Nacional dos Direitos da Mulher – CNDM e dá outras providências (Mar. 30, 2022), available at http://www.planalto.gov.br/ccivil_03/leis/1980-1988/L7353.htm.

[36] Constituição da República Federativa do Brasil de 1988 (Mar. 30, 2022), available at http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm.

provide comprehensive protection against the "wage gap, the exercise of duties and admission criteria for reasons of sex, age, color or marital status."

The norm conveyed by Article 7's item XX has a general character. It aims to promote specific normative means among employers and/or service providers, such as granting equal working conditions to all people, regardless of gender, in order to reduce the discrimination suffered in the labor market by female workers. Article 7, item XXX, prohibits the practice of exclusionary criteria for admission due to gender, such as the common practice of requiring negative pregnancy tests or sterilization declarations for hiring. It is essential to note that this practice was expressly prohibited in 1995 by Law No. 9,029 of 13 April 1995.[37] In the Federal Constitution, Article 5, item I stipulates that "men and women are equal in rights and obligations, under this Constitution," which also guarantees equal access and respect for normatively guaranteed rights, regardless of gender.

In terms of specific ordinary legislation, on 1 May 1943, Brazil adopted the Consolidation of Labor Law under Decree No. 5,452, which is still in force. The *CLT* is the main body of labor legislation in the private sector in Brazil, and in conjunction with the Brazilian Federal Constitution of 1988, it regulates several labor provisions. Under Article 372 of the *CLT*,

> the precepts governing male work apply to women's work, in which they do not conflict with the special protection established by this Chapter.

Article 377, which also dates back to 1943, states that:

> [the] adoption of measures to protect women's work is considered to be a part of public policy, not justifying, under any circumstances, the reduction of wages.

Thereafter, Law No. 9,799 of 26 May 1999,[38] introduced new provisions in the *CLT* to provide more specific protection to women in the labor market against discrimination, through Article 373a, which prohibits: (a) publishing or causing to be published an advertisement for employment in which reference is made to sex, age, color or family situation, except when the nature of the activity to be exercised, publicly and notoriously, so requires; (b) refusing employment, promotion or dismissal from work

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[37] Lei nº 9.029 de 13 de abril de 1995, proíbe a exigência de atestados de gravidez e esterilização, e outras práticas discriminatórias, para efeitos admissionais ou de permanência da relação jurídica de trabalho, e dá outras providências (Mar. 30, 2022), available at http://www.planalto.gov.br/ccivil_03/leis/l9029.htm.

[38] Lei nº 9.799 de 26 de maio de 1999, insere na Consolidação das Leis do Trabalho regras sobre o acesso da mulher ao mercado de trabalho e dá outras providências (Mar. 30, 2022), available at http://www.planalto.gov.br/ccivil_03/leis/l9799.htm.

on the basis of sex, age, color, family situation or pregnancy, unless the nature of the activity is notoriously and publicly incompatible; (c) considering gender, age, color or family situation as a determinant variable for the purposes of remuneration, professional training and opportunities for professional advancement; (d) requiring a certificate or examination, of any nature, to prove sterility or pregnancy when hiring or keeping a job; (e) preventing access to or adopting subjective criteria for the acceptance of enrollment or approval in competitions in private companies on the basis of sex, age, color, family situation or pregnancy; (f) the employer or agent performing intimate searches on female employees or female workers.

Article 373-A ensures protection against both horizontal and vertical discrimination. Article 390-E, also included in the *CLT* by Law No. 9,799/1999, made it possible for the employer to associate or enter into agreements with "professional training entities, civil societies, cooperative societies, public bodies and entities or trade unions" to develop joint actions "aimed at the execution of projects related to the incentive to women's work." According to Article 391, marriage or pregnancy do not constitute just cause for termination of the employment contract.

Finally, Article 461 introduced the rule of equal pay for equal work without distinction of gender, ethnicity, nationality or age. This norm prohibited gender-based wage differentiation, reinforcing the paradigm of the anti-discriminative constitutional principle.

According to Loureiro (2005), discrimination in the labor market can be classified into four different types. These are wage discrimination and employment discrimination, in which women have fewer work opportunities and are, hence, more susceptible to unemployment. Occupation-related discrimination, which restricts women to certain types of employment, frequently with lower wages and worse working conditions, even though they have the productive capacity to perform more complex functions, while the fourth type of discrimination stems from unequal opportunities to access formal education or employment training.

For this study, we will focus on the gender pay gap. A study by the Brazilian Institute of Geography and Statistics (IBGE) based on the 2018 National Continuous Household Sample Survey shows that women earned, on average, 20.5% less than men in all of the occupations that were selected for the study, with the smallest differences among elementary school teachers (9.5% less than male pay) and the largest in the agriculture, retail and wholesale sectors (35.8% and 34% less than men).

Despite the significant wage gap that still exists, there is evidence of a tendency in the country to reduce wage inequalities since, in 2012; the difference in wages was 23.4% on average between salaries. The IBGE study also points out that the difference in the daily workload of men and women has been decreasing. In 2012, the difference was six hours, but by 2018, it had decreased to approximately four hours and forty-eight minutes.

It should be noted, however, that the responsibility for household chores remains a limiting factor for the female sex, as it tends to reduce the employment opportunities feasible for women or steer them toward lower-paying services. Currently, women's workload is nearly twice as high as the workload of men for housework, since 21.4 hours per week are spent by women doing housework, while men devote only 11 hours to housework.

This double day of working and caring for the house makes it difficult to introduce and retain women in the labor market, according to a 2018 IBGE study, because although women over the age of fourteen represent 52.4% of the population, only 43.8% of the 93 million Brazilians who were employed in 2018 were women.

The numbers get even worse when women have children because only 54.6% of women aged 25 to 49 with children up to three years of age were employed in 2019, while the percentage of men in the same condition was 89.2%. In households with children, the percentage of employed women was 67.2%, while the percentage of employed men was 83.4%.

Among the occupations selected for the study, the participation of women was highest among domestic service workers in general, accounting for 95% of the total. This was followed by elementary school teachers (84.0%); interior cleaning workers of buildings, offices, hotels and other establishments (74.9%); and workers of call centers (72.2%).

Professional advancement, in addition to career growth, is also another area where discrimination occurs since women occupy 42.4% of management positions, 13.9% of board positions and 27.3% of superintendence positions, earning on average 61.9% of men's income, according to data from the Ministry of Economy.

What is perceived from all of these data is that there persists in Brazil, both a view that the female gender cannot dedicate themselves both to their professional career and their private lives due to their dual responsibilities, which can be exacerbated with the presence at home of elderly family members and young children, as well as invisible barriers, also known as glass ceilings.

Despite the historical achievements of the feminist movement and the entire existing legal framework, the glass ceiling creates a race with obstacles for women to attain posts with power and responsibility.

The entire protective and encouraging normative framework for equity of access and remuneration between genders has not yet been able to reduce existing inequalities, particularly in regard to access to labor opportunities, including those made available by the State.

The Brazilian state government hires its employees, as a rule, through public tenders, the objective of which is to evaluate personal skills and select the best candidates for the provision of public positions through the verification of the intellectual, physical and psychic capacity of those interested in occupying public positions, with the most qualified candidates always being selected to become part of the Brazilian state body.

However, even after the Federal Constitution of 1988, several public tenders, particularly those in public security, held in the 1990s and 2000s to select officers for the military police, precluded the possibility of registering women, admitting only male candidates. The first post-constitution case of 1988 that reached the Supreme Court on this subject was Extraordinary Appeal No. 120,305,[39] which analyzed the case of the State of Rio de Janeiro that prohibited the admission of women to the position of dentists in the corporative body of officers of the Rio de Janeiro Military Police. A candidate approved in this contest was not selected solely due to her gender. She appealed to the Brazilian Supreme Court to have her right to gender equality respected by a sub national entity.

The *ratio decidendi* of the above judgment is as follows.

Public contest – adoption criteria – sex. The rule cites the unconstitutionality of the sex-specific admission criteria considered sex-specific in Article 5, item I, and para. 2, as well as in Article 39 of the Federal Charter. The only exception is the account of acceptable hypotheses given by the socio-constitutional order. Thus, the public tender for filling vacancies existing for Military Police Officers, in the Health Board (first lieutenant, doctor and dentist) falls under the constitutional rule, which prohibits the sex discrimination.

A second, more recent case occurred in the 2000s when the public tender for the Training Course of Officers of the Military Police of the State of Mato Grosso do Sul indicated that only male candidates would be considered for job vacancies. Again, it was up to a candidate approved in the contest to file a lawsuit before the Supreme Court in order to guarantee that they had the right to be legally accepted and appointed to the Brazilian state staff. The Brazilian courts debated the extent to which discrimination harmed or did not harm the principle of isonomy and gender equality and the Superior Court of Justice (*Superior Tribunal de Justiça* (*STJ*)) concluded in its ruling for this case that:

> Undoubtedly, there can be no distinction, in the face of the principle of isonomy, of human rights, although, by nature itself, certain activities are proper for men or more recommended for women. Thus, for example, access is provided to military careers. Today, in that contest, the deliberation of the State needs people in activities recommended for men and not for women. In so, I do not see that the simple distinction can confront the principle of isonomy.[40]

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[39] Extraordinary Appeal No. 120,305 – Rio de Janeiro, tried on 8 September 1994, of rapporteurs of Minister Marco Aurélio de Mello.

[40] Luis Vicente Cernicchiaro, *State of Mato Grosso do Sul, of the Rapporteurs* (1999) (Mar. 30, 2022), available at https://processo.stj.jus.br/processo/ita/documento/mediado/?num_registro=199800315560&dt_publicacao=22-03-1999&cod_tipo_documento=&formato=PDF.

The Supreme Federal Court, the highest court of the Brazilian Judiciary, in turn, disagreed with the judgment of the Superior Court of Justice and reaffirmed that:

> it is an illegitimate requirement when it establishes a prescription for the positions to be filled by public tender without legal basis and reasonableness in the criterion of fixing the activities to be performed.[41]

It is still important to note that, according to the judgment of the Federal Supreme Court, "the imposition of gender requirements" in public tender notices is compatible with the Federal Constitution only in exceptional cases, such as when the proportional reasoning and legality of the imposition are due to specific characteristics of the work to be performed, such as the physical lifting of heavy loads. As a result, the restriction must be both justified and proportionate.

In this sense, the sheer restriction, without motive and regardless of any criterion, to restrict women from serving in the military police violated the principle of equality.

During the trial of Extraordinary Appeal No. 528,684, Mato Grosso do Sul, Minister Carmen Lucia, a former president of the 2nd Panel of the Supreme Court, made a point of declaring in her vote:

> Here, what seems to have been discrimination is why women did not come in, and there is a somewhat strong phrase for us, especially: "that some activities are proper for men, some for women." They have already said this, here, in this Supreme Court: that you could not let a woman in. One of the reasons – and the speech is from 1998, was that Supreme Court was not fit for women because there was not even a female toilet, which was something impressive to be said, and said seriously. I also accompany Minister Gilmar, just saying this: for me, when you have in the Constitution that everyone is equal in the law – despite the expression before the law it is in the law – does not mean that sex, color, age cannot be legitimate, constitutional discriminatory factors. They can! If a career is a career for female police officers, there would be no unconstitutionality for certain activities that are legally provided for this. Only here, you forbade yourself for forbidding. The case is prejudiced, constitutionally fenced.

This statement is significant because it demonstrates the difficulty of admittance and professional advancement of women, even in public office, given that the Brazilian Supreme Court, which consists of eleven ministers, included a woman in this case, Minister Ellen Gracie Northfleet, appointed on 23 November 2000.

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41 Gilmar Mendes, *State of Mato Grosso do Sul, of the Rapporteurs* (2013), at 13 (Mar. 30, 2022), available at https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=4927133.

It is important to note that both of the judgments that were analyzed were delivered by the highest instance of the Brazilian Judiciary, after having been processed by all of the different judicial bodies. Many more cases do not reach the Supreme Court and are not even judicialized, making it difficult to verify the true extent of discrimination in Brazilian public tenders. However, it is believed that public tenders that formerly excluded applicants based on gender from accessing job vacancies have been phased out in recent years. On the other hand, new means of making it difficult to access job vacancies have arisen, such as the requirement of specific health examinations for women or offering a smaller number of vacancies compared to the number of vacancies available to men.

An example of the above can be found in the public tender that was held by the Military Police of the state of Rio Grande do Norte in 2018. After going thirteen years without holding a public tender, it made available a public selection with 1,000 vacancies, 938 for men and 62 for women, which is equivalent to only 6% of the total, in a state of the Brazilian federation, which according to the last IBGE study (2010) on the subject, had 51.11% of its population made up of women. Another example is complementary law no. 194/2012 of the state of Roraima, which establishes the Statute of the Military of the State of Roraima, reserving to women the maximum percentage of 15% of the vacancies offered in the public tender for admission to the Military Police and the Roraima Fire Department, despite the fact that 49.8% of its population is composed of women (IBGE, 2010).

Regarding specific women's health examinations, several public tenders (Federal District in 2016, São Paulo in 2015, among others) required the examination of the invasive pap smear, which is performed by the removal of material from the cervix for later analysis. Without this examination, candidates who had intact hymens were required to present a certificate of virginity that included the signature, stamp and registration of the gynecologist who issued it. It has been proven that such public tenders did not require equivalent examinations for male candidates, and it has also been proven that finding changes in the first pap smear examination is not sufficient to diagnose the existence or severity of a disease.

In this context, considering that the examination does not provide a definitive result, either positive or negative, the question that needs to be asked, and that the Brazilian courts are currently addressing, is whether the existence of any minor injury or illness, even if treatable, would be sufficient to bar a candidate from entering public service, using the justification that the candidate would not be able to perform the tasks and responsibilities of the desired position.

Thus, the core of the current legal question is to determine the limits of the reasonableness of specific requirements. such as the imposing of the performance of certain medical examinations on one sex while not requiring them from members of the other sex; and measuring the extent to which these medical examinations are capable of hindering the exercise of public functions; applying the same reasoning

for the limitation of female vacancies in police forces and questioning whether it is reasonable and non-discriminatory to limit access to people, solely on their gender and not on their competence or aptitude for the work.

The advances observed in Brazil regarding the reduction of gender inequalities in the Brazilian labor market are due to the public and legislative policies that reinforced both the inclusion and retention of the female gender in work, as well as their protection. We believe that this strategy, along with educational and incentive initiatives developed by the third sector, should be continued in order to dispel myths and increase social and legal awareness.

The authors of this paper believe that actions based on voluntarism by companies aimed at reducing gender discrimination are very fragile, as has already been pointed out (Tilly, 1999; Kalev and Dobbin, 2006; Greene, Kirton, and Wrench, 2005). This requires the State to take the lead in imposing or encouraging cultural changes in companies, which, once changed, will reduce inequality.

In this regard, the development of national legislation requiring both the elimination of gender-based vacancy distribution or, if necessary, the setting of a minimum percentage of vacancies for the female gender, as well as the prohibition of invasive medical examinations that can not only cause embarrassment but also do not necessarily prevent the exercise of official duties, is a crucial step toward reducing the obstacle of access to jobs in the public sector. The establishment of fines to combat the wage-disparity between men and women in Brazil, such as those established by Bill No. 130/2011, combined with female-only labor training programs aimed at specific sectors with open jobs, such as the technology sector, and the improved performance of unions, can strengthen existing initiatives to reduce inequalities.

In order to reduce the effects of the glass ceiling, the creation of tools and monitoring by third-party entities, with gender cutouts and position indicators added to the stimulation of stakeholders so that equality and equity in professional development and career advancement within the company are observed, are essential steps that can be adopted gradually with another affirmative action that is already in place or being created.

We believe that the entire society is responsible for addressing inequalities, and that this is a collective project, which will only achieve its ultimate goal, that of establishing equality, when there is a clear understanding of our roles in deconstructing the historically constituted social disparities, This is the only way to achieve the expected of the 2030 Sustainable Development Goal No. 5.

2.2. Regulation of the Prohibition of Discrimination in Russia

Overcoming discrimination is a priority of the state policy of the Russian Federation. The Russian Constitution guarantees the equality of rights and freedoms of everyone regardless of their social status, employment position, or gender, in particular. Men and women have equal rights and freedoms and equal opportunities

(secs. 2 and 3 of Art. 19). The Constitution also guarantees protection of motherhood and the family by the State. The care and upbringing of children is an equal right and obligation of both parents (secs. 1 and 2 of Art. 38).[42]

In the sphere of employment, the state pursues the policy of ensuring equal opportunity for all citizens of the Russian Federation, regardless of gender.[43] The Labor Code of the Russian Federation prohibits discrimination in labor relations. No one may be deprived of their labor rights and freedoms or receive any benefits based on their race, color of skin, nationality, language, origins, property, social or positional status, age, domicile, religious beliefs, political convictions, affiliation or non-affiliation with public associations, as well as other factors not relevant to the professional qualities of the employee. Pregnant women and persons with family responsibilities are provided with guarantees when an employment contract is executed or terminated at the initiative of the employer (Arts. 3, 64, 261 of the Labor Code of the Russian Federation).[44] Both the Administrative and Criminal Codes provide for liability for discrimination. However, administrative and criminal liabilities for gender discrimination are seldom pursued.[45]

The government has taken measures to increase the competitiveness of women in the labor market. Job advertisements containing requirements about gender, age or marital status are prohibited. An employer does not have the right to request information about an employee's age, marital status and parental status when hiring an employee. The number of jobs prohibiting the use of women's labor has been reduced. The level of remuneration is gradually increasing in the budget sectors of the economy, which employ mainly women. These sectors include education, science, culture and healthcare. Women on parental leave can receive vocational training provided by employment agencies.

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[42] Конституция Российской Федерации (принята всенародным голосованием 12 декабря 1993 г.) (с учетом поправок, внесенных Законами РФ о поправках к Конституции РФ от 30 декабря 2008 г. № 6-ФКЗ, от 30 декабря 2008 г. № 7-ФКЗ, от 5 февраля 2014 г. № 2-ФКЗ, от 21 июля 2014 г. № 11-ФКЗ) // Собрание законодательства РФ. 2014. № 31. Ст. 4398 [Constitution of the Russian Federation (adopted by a nationwide vote on 12 December 1993) (considering amendments, introduced by the RF Laws on amendments to the RF Constitution of 30 December 2008 No. 6-FKZ, of 30 December 2008 No. 7-FKZ, of 5 February 2014 No. 2-FKZ, of 21 July 2014 No. 11-FKZ), Legislation Bulletin of the Russian Federation, 2014, No. 31, Art. 4398], Art. 19.

[43] Закон Российской Федерации от 19 апреля 1991 г. № 1032-I «О занятости населения в Российской Федерации» // Бюллетень нормативных актов РСФСР. 1992. № 1. С. 4–18 [Law of the Russian Federation No. 1032-I of 19 April 1991. On Employment of the Population in the Russian Federation, Bulletin of Normative Acts of the RSFSR, 1992, No. 1, p. 4].

[44] Трудовой кодекс Российской Федерации от 30 декабря 2001 г. № 197-ФЗ // Собрание законодательства РФ. 2002. № 1 (ч. 1). Ст. 3 [Labor Code of the Russian Federation No. 197-FZ of 30 December 2001, Legislation Bulletin of the Russian Federation, 2002, No. 1 (part 1), Art. 3], Arts. 3, 64, 261.

[45] *Новиков В.А.* Дискриминация: преступление и административное правонарушение // Актуальные проблемы российского права. 2017. № 3(76). С. 168–174 [Valery A. Novikov, *Discrimination: Crime and Administrative Offense*, 3(76) Actual Problems of Russian Law (2017)].

According to the Federal State Statistics Committee of the Russian Federation,[46] the workforce number amounted to 75.0 million people in October 2020. At the same time, the employment rate for men was 66.1%, while for women it was 51.7%. The unemployment rate for women (6.4%) is 0.3% higher than the unemployment rate for men (6.1%). The average job search period lasted 6.4 months as of October 2020. Compared to men, women looked for a job for 0.2 months longer on average. In 2019, the largest number of men was employed in manufacturing (6291 thousand people), transportation and storage (4815 thousand people) and construction (4815 thousand people). Women worked mainly in trade (7133 thousand people), education (5662 thousand people), healthcare and social services (4550 thousand people). The number of women with higher education has been higher than men. However, women make up the vast majority of workers employed in low-skilled and low-paid jobs in various areas of the public and the private sectors of the economy. The wage gap between men and women is 27.9%.

The unequal distribution of women and men in the field of employment has many causes. Occupational gender segregation is caused by the biological and psychological differences between men and women. Men are more likely to work in physically demanding, harmful or risky jobs, such as miners, firefighters and movers, whereas women are most likely to be employed as nurses, educators and primary school teachers. A woman is responsible for the majority of the family responsibilities, such as caring for children and disabled family members. This is due to the historically patriarchal gender stereotype that a woman should focus on her family and child care, while a man should provide for the family.

According to a survey by the Analytical Center of the National Agency for Financial Research (NAFI) Analytical Center in 2020, stereotypes are reinforced by the images of successful men and women in the media, popular culture, and politics. In the course of the survey, Russians named male leaders among the most successful people in Russia (83%). The dominance of male images is especially noticeable in politics, business and the digital economy. Women are more often associated with success in show business (33% of female names). However, even in this context, women are mentioned far less frequently than men. 15% of Russians work in the digital economy. The number of men and women in this field is nearly equal, with 52% and 48%, respectively. Nevertheless, women are more likely to be employed as sellers, managers and operators. Men are more likely to hold positions as engineers, programmers and system administrators. According to experts, this is due to gender stereotypes.

This perception is largely influenced by social consciousness, upbringing and family life. The majority of Russians (71%) think that the main role of a woman is to

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[46] Статистический сборник «Труд и занятость в России» / Федеральная служба государственной статистики. 2019 [Federal State Statistics Committee of the Russian Federation, Statistical Collection "Labor and Employment in Russia" (2019)] (Mar. 30, 2022), available at https://rosstat.gov.ru/storage/mediabank/Trud_2019.pdf.

be a mother and a housewife. 89% of the respondents believe that a man should provide for his family; only half of them (45%) agree that a woman should provide for herself. Many Russians (35%) assume that a woman should choose between a career and a family; this point of view is more common among those who already have children.[47]

Both employees and employers have a similar perspective on the different life priorities that men and women have, as well as the different roles men and women play in the context of labor relations. Employment practices and the way vacancies are categorized according to gender are both influenced by gender stereotypes. This is also a cause of discrimination.[48] It is much more difficult to prove the existence of a gender preference than it is to prove that an applicant's skills are mismatched.[49]

The analysis of judicial practice has demonstrated that employers frequently refuse to hire pregnant women, women with young children, and mothers with many children. However, women rarely seek court protection in these cases. It is rather difficult to prove the fact of discrimination in the case of denial of employment. Employers justify denial of employment not on the basis of gender preferences but on the basis of the professional qualities of the applicant, which is a valid reason under Russian labor legislation.

Men are more likely to petition the court for protection from gender discrimination when they are denied a job during telephone negotiations due to the fact that the position is for females.[50] A ruling that was handed down in 2013 by the Zamoskvoretsky District Court of Moscow is an example of such a situation. The defendant (the employer) placed an ad in the newspaper that a woman was required for the position of deputy director. The plaintiff, who was male, called the employer and was denied the job. The Court concluded that these actions were lawful since the announcement did not limit the plaintiff's ability to take this position. The telephone call made by the plaintiff to the number indicated in the advertisement and the explanation of the

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47 Стереотипы в отношении женщин и их социально-экономические последствия / Аналитический центр Национального агентства финансовых исследований. 2020 [Analytical Center of the National Agency for Financial Research, Stereotypes Against Women and their Socio-Economic Consequences (2020)] (Mar. 30, 2022), available at https://nafi.ru/analytics/stereotipy-v-otnoshenii-zhenshchin-i-ikh-sotsialno-ekonomicheskie-posledstviya/.

48 *Козина И.М.* Профессиональная сегрегация: гендерные стереотипы на рынке труда // Социологический журнал. 2002. № 3. С. 126–136 [Irina M. Kozina, *Professional Segregation: Gender Stereotypes in the Labor Market*, 3 Sociological Journal 126 (2002)] (Mar. 30, 2022), also available at https://www.jour.fnisc.ru/index.php/socjour/article/view/759.

49 *Лютов Н.Л., Герасимова Е.С.* Дискриминация в сфере труда: вопросы эффективности норм и правоприменительной практики // Актуальные проблемы российского права. 2016. № 3(64). С. 100–108 [Nikita L. Lyutov & Elena S. Gerasimova, *Discrimination in the Sphere of Labor: Issues of the Effectiveness of Norms and Law Enforcement Practice*, 3(64) Actual Problems of Russian Law 100 (2016)].

50 Judgment of Kalininsky District Court of Chelyabinsk of 18 February 2019, Case No. 2-1167/2019; Judgment of Oktyabrsky District Court of Krasnodar of 3 December 2019, Case No. 2-4490/2019.

defendant's employee that women were required for this position did not constitute a refusal to hire the plaintiff and did not indicate gender discrimination.[51] As a result, since 2014, placing ads with a discriminatory tone has been prohibited.

The practice of a court recognizing discrimination is very rare, except in cases where the employer provides the reason for refusal on the basis of gender discrepancy in person and in writing at the meeting. The Volzhsky District Court of Saratov recognized discrimination in one such case concerning the refusal to hire a hostess. The employer refused to hire the applicant due to "non-compliance with the gender requirement" as indicated in a written document submitted during the job interview.[52]

A striking manifestation of hidden gender discrimination is the selection of applicants for employment by private recruitment agencies and employers using information technology tools. Private recruitment agencies ask employers to complete a questionnaire, which includes a section on "gender." As a result, job applications that do not meet gender requirements are automatically excluded using a computer program and never reach employers. Discriminated persons are unaware that they are even being discriminated against since the application based selection mechanism is not available to them. Article 13.11.1 of the Code of Administrative Violations of the Russian Federation establishes administrative liability only for the dissemination of information about vacant jobs containing discriminatory restrictions. Both criminal and administrative liabilities for gender discrimination are ineffective. Therefore, liability for the use of discriminatory mechanisms should be established. The Unified Digital Platform in the Field of Employment and Labor Relations "Work in Russia," which was introduced in November 2021, can contribute to overcoming gender discrimination in electronic employment since this platform operates under the control of the state.

The judicial practice of proving the discriminatory nature of lists prohibiting the use of women's labor in heavy work deserves attention. For example, Anna Klevets applied for the training course for assistant train drivers provided by the State Unitary Enterprise "St. Petersburg Metro." The Constitutional Court of the Russian Federation refused to hear her complaint, citing the List of Jobs with Unhealthy and/or Dangerous Work Conditions, Prohibiting Female Labor.[53]

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[51] Judgment of Zamoskvoretsky District Court of Moscow of 20 June 2013, Case No. 2-2577/2013.

[52] Judgment of Volzhsky District Court of Saratov of 18 December 2018, Case No. 2-4222/2018.

[53] Определение Конституционного Суда Российской Федерации от 22 марта 2012 г. № 617-О-О «Об отказе в принятии к рассмотрению жалобы гражданки Клевец Анны Юрьевны на нарушение ее конституционных прав частями первой и третьей статьи 253 Трудового кодекса Российской Федерации и пунктом 374 раздела XXX Перечня тяжелых работ и работ с вредными или опасными условиями труда, при выполнении которых запрещается применение труда женщин» // СПС «КонсультантПлюс» [Ruling of the Constitutional Court of the Russian Federation No. 617-O-O of 22 March 2012. On the Refusal to Consider the Complaint of the Citizen Anna Yu. Klevets on Violation of Her Constitutional Rights by Parts 1 and 3 of Article 253 of the Labor Code of the Russian Federation and Paragraph 374 of Section XXX of the List of Jobs with Unhealthy and/or Dangerous Work Conditions,

The opposite case is the Buguruslan City Court's decision to remove the discriminatory clause from "Flight College's" admissions policies. The applicant, Ksenia Borisova, sought to enroll at Flight College in the city of Buguruslan, Orenburg region, but the admissions policies stated that only males were recruited to the flight college. The Buguruslan City Court found the actions of Buguruslan Flight College contrary to the law.[54]

The case of Svetlana Medvedeva also deserves attention. She applied for a post as a navigation officer aboard a motor ship in the Samara River Passenger Enterprise. Medvedeva had the required qualifications, but she was refused since women are not permitted to work as navigation officers under current legislation. This prohibition was provided for in the List of Jobs with Unhealthy and/or Dangerous Work Conditions, Prohibiting Female Labor. After being denied in the courts of the Russian Federation, S. Medvedeva filed a complaint about the violation of the Convention on the Elimination of All Forms of Discrimination against Women with the U.N. Committee on the Elimination of Discrimination against Women.[55] The Committee on the Elimination of Discrimination against Women of the Russian Federation recommended Svetlana Medvedeva be provided access to jobs for which she has the appropriate qualifications. The Supreme Court of the Russian Federation sent the case of Svetlana Medvedeva for a new hearing to the Court of First Instance. The Samara District Court of Samara recognized the decision of Samara River Passenger Enterprise to refuse to conclude an employment contract with Medvedeva on the grounds of prohibiting the use of women's labor in harmful jobs as gender discrimination. However, the Court refused the claim to conclude an employment contract due to the absence of appropriate working conditions.[56]

In 2019, as a consequence of the abovementioned judicial practice, the Ministry of Labor and Social Protection of the Russian Federation adopted a new List of Jobs with Unhealthy and/or Dangerous Work Conditions, Restricting Female Labor. This List has been reduced by more than four times. For example, restrictions have been lifted for women in the following professions and jobs: as a driver of heavy trucks and agricultural machinery, except for machinists of construction equipment; a member of the ship's deck crew (such as boatswain, skipper or sailor) except for work in the ship's engine room; and a driver of electric trains and high-speed trains.

Another form of gender discrimination is the granting of leave only to women in law enforcement and military duty. The European Court of Human Rights has a significant

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Prohibiting Female Labor, SPS "ConsultantPlus"] (Mar. 30, 2022), available at http://www.consultant.ru/document/cons_doc_LAW_129887/#:~:text=Новости-,Определение%20Конституционного%20Суда%20РФ%20от%2022.03.2012%20N%20617-О,и%20работ%20с%20вредными%20или.

54 Judgment of Buguruslan City Court of 16 November 2006, Case No. 2-775/2006.

55 Opinion of the U.N. Committee on the Elimination of Discrimination against Women in the case of *Medvedeva v. Russia*.

56 Judgment of Samara District Court of 15 September 2017, Case No. 2-1885/2017.

influence on judicial practice in these matters. The judgment of the European Court of Human Rights in the case of *Konstantin Markin v. Russia* on 22 March 2012 is one example.[57] The applicant, who had a military service contract, applied for a three-year parental leave as he was the sole caregiver of three young children. But he was refused, because the law provides a three-year parental leave only to female military personnel. The Courts of the Russian Federation refused him, citing the specific nature of military duty. The European Court agreed that, given the importance of the army for the protection of national security, certain restrictions on the provision of parental leave may be justified if they are not discriminatory. However, there may be other ways to achieve the legitimate goal of protecting national security other than providing parental leave only to female military personnel.

A similar situation developed in the case of *Gruba and Others v. Russia and the European Court of Human Rights* on 22 November 2021.[58] The applicants were both working as police personnel. They asked their superiors for parental leave, but their requests were denied because parental leave could be granted to a policeman only if his children were left without maternal care. The European Court of Justice concluded that the difference in treatment between male and female police personnel regarding the entitlement to parental leave cannot be called reasonable and objectively justified. The Court held that there was no reasonable relationship of proportionality between the legitimate aim of maintaining the operational effectiveness of the police and the difference in treatment. In this regard, the difference in treatment received by the applicants amounted to gender discrimination.

There is a practice of appealing to the court against gender discrimination in the provision of child care benefits and guarantees in case of dismissal. For instance, the Mosenergo Organization provided the child care allowance only to women. In 2017, the Moscow City Court recognized this condition to be discriminatory.[59]

The Constitutional Court of the Russian Federation declared the provision of guarantees in case of dismissal only to women unconstitutional in the case of A. Ostaev.[60] The applicant was the father of three young children, one of whom was under the age of three, and another was disabled. The applicant's wife did not work and took care of

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[57] European Court of Human Rights (Grand Chamber), *Konstantin Markin v. Russia*, Judgment, Application No. 30078/06, 22 March 2012.

[58] European Court of Human Rights (Third Section), *Gruba and Others v. Russia*, Judgment, Applications Nos. 66180/09 et al., 22 November 2021.

[59] Appeal Ruling of Moscow City Court of 4 December 2017, Case No. 33-45444/17.

[60] Постановление Конституционного Суда Российской Федерации от 15 декабря 2011 г. № 28-П «По делу о проверке конституционности части четвертой статьи 261 Трудового кодекса Российской Федерации в связи с жалобой гражданина А.Е. Остаева» // СПС «КонсультантПлюс» [Resolution of the Constitutional Court of the Russian Federation No. 28-P of 15 December 2011. On the Case of Checking the Constitutionality of the Fourth Part of Article 261 of the Labor Code of the Russian Federation in Connection with the Complaint of Citizen A.E. Ostaev, SPS "ConsultantPlus"] (Mar. 30, 2022), available at http://www.consultant.ru/document/cons_doc_LAW_123657/.

the children. Despite this, he was dismissed due to staff redundancy since guarantees were provided only to women. The fact that such a condition was challenged before the Constitutional Court of the Russian Federation has resulted in improvements to judicial practice and contributed to overcoming gender discrimination. Nevertheless, gender discrimination in employment, mainly due to gender stereotypes, is fairly common.

The Government of the Russian Federation has adopted the National Strategy of Actions for Women for 2017–2022, as well as the Concepts of the State Family Policy and the Demographic Policy for the period up to 2025. These documents indicate that motherhood, as a social role of women, is highly valued by the state and society. The expansion of the scope of flexible forms of employment in the digital economy promotes balancing work with family responsibilities while also contributing to overcoming gender discrimination, opening up wide opportunities for online learning, distance work and business building. The creation of conditions for the full and equal participation of women in the workforce as well as the improvement of human rights mechanisms against gender discrimination should be a priority of state policy.

It is necessary to raise society's awareness about the means of protecting rights in cases of discrimination and to establish responsibility for the use of discrimination mechanisms by recruitment agencies in online hiring. The government needs to take not only legal, but also political, social and economic measures to overcome gender discrimination and gender stereotypes, as well as work with employers and trade unions on these issues.

2.3. Legal Provisions and the Case-Law on Gender Discrimination in India

Gender discrimination in employment and education has plagued developing nations by capping their economic and social productivity, and India is no exception to this phenomenon. In India, women are discriminated against and often even barred from labor markets because of prevailing restrictive social norms. Even though more than 48% of the population in India[61] is comprised of women, gender-based discrimination continues to be a lived reality for millions of women across the subcontinent despite the presence of stipulated legislative measures. Gender-based discrimination usually manifests as unpaid maternity leaves, pay gaps and even sexual harassment and violence in the workplace. As a result, there has been a consistent drop in the female labor force participation rate over the years, from 30.27% in 1991 to 20.79% in 2019.[62] The following section provides an insight into the various legislative measures in India that seek to protect women in the labor market from exploitation. Furthermore, it analyses the different government frameworks

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[61] Population, female (% of total population) – India, The World Bank (Mar. 30, 2022), available at https://data.worldbank.org/indicator/SP.POP.TOTL.FE.ZS?locations=IN.

[62] Labor force participation rate, female (% of female population ages 15+) (modeled ILO estimate) – India, The World Bank (Mar. 30, 2022), available at https://data.worldbank.org/indicator/SL.TLF.CACT.FE.ZS?locations=IN.

that govern such laws and the extent to which the legal bodies in the State enforce them. Finally, it discusses the various forms of discrimination, as well as the ways in which legislation and society can efficiently address them.

Since its inception, India has been a member of the International Labour Organisation and has ratified the vast majority of its conventions related to equal employment and remuneration in the workplace, as well as those protecting women.[63] India has also been at the forefront of adopting recommendations from the ILO. The Indian Government has passed several national laws to encourage women's participation in the workforce and protect them from discriminatory practices in the workplace:[64]

- Equal Remuneration Rules were passed in 1976 (amended in 1987);[65]
- National Commission of Women Act was passed in 1990;[66]
- Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act was passed in 2013;[67]
- Codes on Wages was passed in 2019;[68]
- Maternity Benefit (Amendment) Act of 2017 marked a significant change in maternity leave from 12 weeks to 6 months.[69]

Gender discrimination in the workplace is frequently attributed to gender stereotypes and cultural factors. Cultural restrictions have affected female labor force participation rates, as well as manifested themselves as discrimination in employment and wages offered to women.[70] Gender segregation at work, coupled with society's devaluation of women's paid work, leads not only to opportunity gaps but gender pay gaps as well.[71] Moreover, these stereotypes are concretized due to the lack of human capital and its adverse repercussions. Due to traditional

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63 India, ILO (Mar. 30, 2022), available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11110:0::NO::P11110_COUNTRY_ID:102691.

64 *Id.*

65 Equal Remuneration Rules, 1976 (Mar. 30, 2022), available at https://labour.gov.in/sites/default/files/Equal%20Remuneration%20Rules,%201976.pdf.

66 National Commission for Women Act, 1990 (No. 20 of 1990) (Mar. 30, 2022), available at http://ncw.nic.in/Acts-and-rules/national-commission-women-act-1990-act-no-20-1990-govtof-india.

67 Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (Mar. 30, 2022), available at https://legislative.gov.in/sites/default/files/A2013-14.pdf.

68 Code on Wages, 2019 (No. 29 of 2019) (Mar. 30, 2022), available at https://egazette.nic.in/WriteReadData/2019/210356.pdf.

69 Maternity Benefit (Amendment) Act, 2017 (No. 6 of 2017) (Mar. 30, 2022), available at https://labour.gov.in/sites/default/files/Maternity%20Benefit%20Amendment%20Act%2C2017%20.pdf.

70 John T. Dunlop, *The Task of Contemporary Wage Theory* in *The Theory of Wage Determination* 3 (John T. Dunlop ed., 1957); Millie Nihila, *Marginalisation of Women Workers: Leather Tanning Industry in Tamil Nadu*, 34(16/17) Econ. & Pol. Wkly. WS21 (1990).

71 Barbara F. Reskin and Denise D. Bielby, *A Sociological Perspective on Gender and Career Outcomes*, 19(1) J. Econ. Persp. 71 (2005).

societal factors, women reported relatively low chances of productivity-increasing possibilities like formal schooling, tertiary education, or on-the-job training. Even if women are able to obtain a primary education or a secondary education, for that matter, the quality of education they receive is often inferior as compared to that received by men.[72] Human capital factors determine the opportunity and pay gap, as well as workplace experience.[73] This is especially true for women in India, where the literacy rate is as low as 65.79%.[74] Furthermore, traditional barriers placed by social and institutional factors restrict women from pursuing specific career paths. Studies also demonstrated that discriminatory practices in child-rearing or choices made for education are the primary sources of pre-market discrimination that had unfavorable effects on women's employment and wages.[75] Moreover, the traditional division of labor and discrimination in employment manifest a vicious cycle that is inescapable for women who find themselves in the lower strata of society and have relatively lower cultural and social capital. The existing gender discrimination in the labor market in India demonstrates counter-cyclical effects. The fact that women face significant discrimination in employment stimulates families to reallocate their economic and time resources as per the comparative advantage to parents (based on the traditional division of labor). Therefore, it is observed that men allocate more time to market work and women to non-market work.

Moreover, the traditional division of labor leads to occupational segregation between men and women. Because societies across the globe, developed or developing, consider unpaid care and household work to be primarily a woman's job, women only find job opportunities in similar work.[76] Thus, it is not surprising to see women overrepresented in vocations such as nursing, nannies, domestic workers, kindergarten teachers and so on. Unfortunately, the choice of occupation or employment is often not determined by women for themselves.

Nevertheless, in the majority of circumstances, employers favoured men over women.[77] Moreover, marital status plays a role in selecting a job and role. Not only

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72 Biju Varkkey et al., *Indian Labour Market and Position of Women: Gender Pay Gap in the Indian Formal Sector*, IDEAS/RePEc (2017) (Mar. 30, 2022), available at https://ideas.repec.org/p/ess/wpaper/id12031.html; The World Bank, World Development Report 2012: Gender Equality and Development (2012) (Mar. 30, 2022), available at https://openknowledge.worldbank.org/handle/10986/4391.

73 Barbara Stanek Kilbourne et al., *Returns to Skill, Compensating Differentials, and Gender Bias: Effects of Occupational Characteristics on the Wages of White Women and Men*, 100(3) Am. J. Soc. 689 (1994).

74 Literacy rate, adult female (% of females ages 15 and above), The World Bank (Mar. 30, 2022), available at https://data.worldbank.org/indicator/SE.ADT.LITR.FE.ZS?locations=IN.

75 Joseph G. Altonji & Rebecca M. Blank, *Race and Gender in the Labor Market* in *Handbook of Labor Economics* 3143 (Orley C. Ashenfelter & Richard Layard eds., 1999); Thomas D. Boston, *Segmented Labor Markets: New Evidence from a Study of Four Race-Gender Groups*, 44(1) ILR Rev. 99 (1990); Varkkey et al., *supra* note 72.

76 Varkkey et al., *supra* note 72.

77 Gary Dessler & Biju Varkkey, *Human Resource Management* (15th ed. 2018).

married, but unmarried women also face job rejections. Employer's perceptions or preconceived notions about unmarried women, such as quitting the job because of marriage, relocating with their spouse, taking a break in service before and after marriage and so forth, reduce their chances of getting jobs even before they get married.[78] Furthermore, literature indicates that a woman's need for childcare requirements may lead to gender discrimination in employment. Society, social institutions, and organizations treat motherhood and fatherhood differently. Women with children, and even during the childbearing period, are required to make sacrifices at home and work, referred to as the "motherhood penalty." However, fatherhood affords men a "wage premium." After childbirth, women spend more time doing unpaid care and non-market work, with less time left for leisure and market work. In contrast, men devote more time to market work and leisure. It is disheartening to note that women without (a) child/ren are viewed as "potential mothers" by employers, affecting their job prospects.[79] Thus, the country's social fabric weaves the path to discrimination in the workplace faced by women and is further reinforced by stereotypes.

This section follows a review of cases that have been heard by both the High Court and the Supreme Court of India. These cases have set a precedent for the legalities of discrimination in the Indian labor market and have created awareness to promote gender equality in the workplace.

Vishaka v. State of Rajasthan[80] is a landmark case in this discourse on gender discrimination and the safety of workplaces, owing to certain laws that were ratified as a direct result of this case. The Writ Petition was filed with the Supreme Court of India following the brutal gang rape of a social worker who was trying to stop a child marriage.[81] However, this incident was just the igniting point and the case ultimately led to the broadening of the framework to include the various threats that women and other marginalized genders are prone to in the context of harassment in the workplace. The petition was filed with the goal of enforcing the rights of women in the workplace that come under the purview of Articles 14, 19 and 21 of the Indian Constitution. The case upheld these articles by laying down a framework called the "Vishaka Guidelines" that demarcated and defined sexual harassment in workspaces and paved the way for legislation to address it. These guidelines now serve as the basis for The Sexual Harassment of Women at the Workplace (Prevention,

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78 Biju Varkkey & Rupa Korde, *Gender Pay Gap in the Formal Sector: 2006–2013: Preliminary Evidence from Paycheck India Data*, WageIndicator Data Report (2013), at 3 (Mar. 30, 2022), available at https://wageindicator.org/documents/publicationslist/publications-2013/gender-pay-gap-in-formal-sector-in-india-2006-2013.

79 Varkkey et al., *supra* note 72.

80 *Vishaka and Others v. State of Rajasthan and Others*, (1997) 6 S.C.C. 241 (Mar. 30, 2022), also available at https://main.sci.gov.in/jonew/judis/13856.pdf.

81 *Id.*

Prohibition and Redressal) Act, 2013.[82] However, there were quite a few criticisms of the upkeep of the Vishaka Guidelines concerning Chapter V of the Act, which stipulates a punishment against the complainant if the complaint is false.[83] Critics have argued that such a provision may discourage women from filing a complaint in cases where the offender has the unlawful means to disprove his involvement in the crime.[84]

State of Maharashtra v. Indian Hotel and Restaurants Association[85] was a case involving the bar dancers in Mumbai, who have continued to be a phenomenon since the 1990s. Around 2005, conservative forces, including various women's groups, sparked a controversy surrounding the bars on moral grounds arguing that dancers engaged in dancing should be freed from the "exploitation" that required them to partake in "vulgar" acts of display. The groups further argued that such dancing was degrading to the dancers' dignity and attempted to impose a ban by amending the Bombay Police Act (1951).[86] After protests and opposition from a number of interest groups, including the Union of the Bar Dancers, the case was finally brought before the High Court, where the ban was deemed unconstitutional. The Supreme Court struck down the ban as well, on the grounds that it was discriminatory towards a particular profession and violated Articles 14 and 19(1)(g) of the Constitution, which grant individuals the fundamental right to "practice a profession and carry on any occupation, trade or business."[87] Scholars argue that viewing the ruling as a feminist victory against conservative forces overlooks the arbitrariness of the negative moral value placed on bar dancing and sex work[88] that the ruling failed to address.

Charu Khurana and Others v. Union of India and Others[89] is regarded as one of the most critical judgments passed on gender equality and gender discrimination in India's labor *narrative*. Charu Khurana, a make-up artist, was denied membership by

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82 D. Ramakrishnan, *Sexual Harassment of Women at Workplaces: Legal Safeguards and Preventive Mechanisms in India*, 6(2) Int'l J. Res. & Analytical Rev. 724 (2019).

83 *Supra* note 67.

84 Anagha Sarpotdar, *Examining Local Committees Under the Sexual Harassment of Women at Workplace Act*, LV(20) Econ. & Pol. Wkly 51 (2020) (Mar. 30, 2022), also available at https://www.epw.in/online_issues/8_EPW_Vol_LV_No_20.pdf#page=51.

85 *State of Maharashtra v. Indian Hotel and Restaurants Association*, (2019) 3 S.C.C. 429 (Mar. 30, 2022), also available at https://indiankanoon.org/doc/113334597/.

86 Anna Morcom, *The Cure is Worse than the Disease: Mumbai Dance Bars, and New Forms of Justice in the History of Female Public Performers in India,* 14(4) Cultural & Soc. Hist. 499–512 (2017).

87 Fundamental Freedoms Under Article 19 of the Constitution of India (Mar. 30, 2022), available at http://www.mcrhrdi.gov.in/91fc/coursematerial/pcci/Part3.pdf.

88 Prabha Kotiswaran, *Labours in Vice or Virtue? Neo-Liberalism, Sexual Commerce, and the Case of Indian Bar Dancing*, 37(1) J. L. & Soc. 105 (2010).

89 *Charu Khurana and Others v. Union of India and Others*, (2014) S.C.C. Online S.C. 900 (Mar. 30, 2022), also available at https://indiankanoon.org/doc/8443008/.

the Cine Costume Make-Up Artists and Hair Dressers' Association of Mumbai since its by-laws only permitted men to be its members.[90] The Supreme Court held that denying the membership was a form of discrimination on the grounds of gender and violated her fundamental right to equality, employment and a livelihood. Although these fundamental rights are only enforceable by state authorities, the court noted the fact that the by-laws stated the Association's registration as a trade union under the Trade Union Act, 1926. As a result, the by-laws were struck down as violations of Articles 14, 15 and 21 owing to the Association's registration under the Act, and by extension, its recognition as a state authority. Therefore, the case law in this scenario allows and sets a precedent for the horizontal application of fundamental rights as opposed to their restrictive application.[91]

Air India v. Nergesh Meerza[92] is a case that focuses on the constitutionality of Regulations 46 and 47 of the Air India Employee Service Regulations. According to the regulations, air hostesses have to retire if (i) they reach 35 years of age (extendable up to 45 years at the discretion of the Managing Director), (ii) they get married, or (iii) upon first pregnancy.[93] These conditions did not apply to men in the same position of work. Moreover, the terminology used for men in the service regulations was "Air Flight Pursuers" to demarcate the difference. To understand the distinction between the roles of air hostesses and air flight pursuers, the court used the service conditions as a metric to determine whether the air hostesses were discriminated against by being forced into retiring at a relatively early age as opposed to their male counterparts.[94] After noting that air hostesses and air flight pursuers are different in terms of not only their gender but also in terms of their service conditions and (consequently) grades of pay and promotions, the court concluded that they constitute distinct employment categories. Article 14 guarantees "like treatment to individuals alike" and by extension, treating people who are different in different ways does not amount to discrimination.[95] To that extent, retirement conditions for air hostesses were held valid and reasonable under Article 14. However, the retirement condition pertaining to the age of air hostesses

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90 *Khurana and Others v. Union of India and Others*, Legal Information Institute (Mar. 30, 2022), available at https://www.law.cornell.edu/women-and-justice/resource/charu_khurana_and_others_v_union_of_india_and_others.

91 Jayna Kothari, *Rights Protection in 2014: A Review of the Indian Supreme Court*, Oxford Human Rights Hub, 29 January 2015 (Mar. 30, 2022), available at https://ohrh.law.ox.ac.uk/rights-protection-in-2014-a-review-of-the-indian-supreme-court/.

92 *Air India v. Nergesh Meerza*, A.I.R. 1981 S.C. 1829 (Mar. 30, 2022), also available at https://indiankanoon.org/doc/1903603/.

93 *Air India v. Nargesh Meerza*, Legal Information Institute (Mar. 30, 2022), available at https://www.law.cornell.edu/women-and-justice/resource/air_india_v_nargesh_meerza.

94 Shreya Atrey & Gauri Pillai, *A Feminist Rewriting of Air India v Nergesh Meerza AIR 1981 SC 1829: Proposal for a Test of Discrimination Under Article 15(1)*, 5(3) Indian L. Rev. 338 (2021).

95 *Id.*

was scrapped on account of being arbitrary, and the condition relating to the first pregnancy was changed to the third pregnancy. The line of reasoning provided by the court was that the pregnancy-related condition would discourage air hostesses from having their first child. On the other hand, discouraging air hostesses from having a third child would be beneficial for the State in terms of controlling population growth.[96] Lastly, the marriage condition was held valid and non-arbitrary. This case is regarded as one of the gravest failures of the Supreme Court of India in taking a step towards eliminating gender-based discrimination in the formal sector.[97]

Other landmark cases. Under the purview of this section, it is also essential to look at and elucidate the recent cases that have enshrined protection and curtailed discrimination towards women in multiple sectors. A fine example of the Supreme Court liberalizing the workspace was demonstrated by its decision in February 2020 to allow permanent commission to women officers in the Indian Army who were previously excluded on the grounds of fitness.[98] This clearly implies that jurisprudence is becoming increasingly aware of the imbalance arising out of arbitrariness and previously accepted and misplaced rationales for keeping women out of an increasingly male-dominated profession. Additionally, case law is setting precedent on the issue of maternity leaves for women employed in the government sector. *Municipal Corporation of Delhi v. Female Workers (Muster Roll)*[99] also brings the scenario to the informal sector. In order to uphold Articles 39 and 42, female workers (muster roll) employed by the Municipal Corporation of Delhi were granted the same maternity leave, as granted to regular female employees, both before and after childbirth.[100] Yet, in other cases, the gender pay gap has become increasingly important as a litmus test for true equality. *Mackinnon Mackenzie & Co. Ltd. v. Audrey D'Costa and Another*[101] set a precedent for equal pay for women employed in the same post as men.[102] Furthermore, the landmark judgment in *CB Muthamma v. Union of India and Others*[103] put an end to the longstanding

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96 Atrey & Pillai 2021.

97 *Id.*

98 "Absolute Exclusion of Women from Command Appointments in Army Illegal": SC Dismisses Centre's Appeals Against Delhi HC Verdict, Live Law, 17 February 2020 (Mar. 30, 2022), available at https://www.livelaw.in/top-stories/absolute-exclusion-of-women-from-command-appointments-in-army-illegal-sc-152811.

99 *Municipal Corporation of Delhi v. Female Workers (Muster Roll)*, 2000 (2) S.C.R. 171 (Mar. 30, 2022), also available at https://indiankanoon.org/doc/808569/.

100 *Id.*

101 *Mackinnon Mackenzie & Co. Ltd. v. Audrey D'Costa and Another*, 1987 A.I.R. 1281 (Mar. 30, 2022), also available at https://main.sci.gov.in/jonew/judis/8771.pdf.

102 *Id.*

103 *CB Muthamma v. Union of India and Others*, A.I.R. 1981 S.C. 1829 (Mar. 30, 2022), also available at https://main.sci.gov.in/jonew/judis/4724.pdf.

discrimination against women in the public sector, wherein the petitioner was denied promotions and was asked to submit a letter stating that she would resign if she were to get married. The Supreme Court ruled down this condition because these practices should apply to men as well.[104] To that extent, the role of jurisprudence in setting precedents in matters of gender equality in the workplace should be duly acknowledged as a reinforcement of liberal reform.

Since the ILO's inception in 1919, "Gender Equality at Work" has been one of its fundamental principles. Closing the gender gap is the ultimate goal. Women have become more educated, are working double shifts, and are also joining trade unions, sometimes to the same extent as men. It is a matter of grave concern that, despite the efforts of international organizations and governments, over time, the gender gap in employment has become institutionalized. There is, therefore, a definite need for policy-level interventions complemented by changes in socio-cultural factors as well.

Furthermore, concrete and innovative policy interventions are required to enable women to overcome gendered barriers in the labor market. Primarily, despite the existence of legislation on paper, there is a need to strengthen the enforcement of equal opportunity and equal pay in the workplace. Moreover, the government should improve the monitoring mechanism to keep a close check on the discriminatory practices and intervene proactively rather than reactively. It is also critical that governments strengthen the compliance mechanism for equal employment and wage opportunities, since it is illegal for any organization to pay men more than women for the same job under statutory acts. The scope of such acts should be expanded to cover all levels of employment. Currently, the reporting mechanism for discriminatory practices in the workplace is difficult and tedious. A simple and fair reporting mechanism for unjust treatment in the labor market needs to be created. Last but not the least, the government should raise public awareness about its programs and initiatives in the area of women's empowerment. Thus, this will lead to a wider acceptance of such programs and increased women's participation in the labor market.

2.4. Chinese Law and Case-Law on Discrimination

The Chinese government has always attached great importance to the protection of women's rights and interests. In the process of establishing the socialist rule of law in China, the Chinese government has continuously explored and innovated labor rights protection mechanisms as well as mechanisms with Chinese characteristics for the protection of women's rights and interests. In terms of preventing gender discrimination in employment, China has developed a legal framework for anti-sex discrimination in employment on the basis of the constitution. The main bodies of this framework are the labor standards law, the social security law and the women's

[104] *CB Muthamma v. Union of India and Others, supra* note 103.

rights protection law. This framework also includes a number of other relevant separate laws and regulations of the country and of China's Hong Kong, Macao and Taiwan regions, as well as a variety of local and government regulations in mainland China.

The Constitution of the People's Republic of China stipulates the general principle of equality and the principle of equality between men and women as constitutional norms against gender discrimination in employment. The laws that convert the gender equality principle of the Constitution into legal rights include: the Law of the People's Republic of China on the Protection of Rights and Interests of Women (under Article 22, the state guarantees that women enjoy equal labor rights and social security rights with men); Labor Law of the People's Republic of China (Arts. 3, 12, 13, 29, 46, etc.), Law of the People's Republic of China on Employment Contracts (Art. 3), Law of the People's Republic of China on Employment Promotion (Arts. 3, 26, 27, 62, 68, etc.); the Labor Standard Law, the Gender Work Equality Law, the Labor Contract Law, etc. in Chinese Taipei; the Sex Discrimination Ordinance and Employment Ordinance etc. in Hong Kong, China. The special protection for female employees is mainly provided in the Social Insurance Law of the People's Republic of China, the Special Provisions on Labor Protection for Female Employees, the Law of the People's Republic of China on Population and Family Planning, the Civil Code of the People's Republic of China, the Measures for the Implementation of Suspension of Employment for Parenting in Taiwan, the Sexual Harassment Prevention law among others.

In addition, the Notice on Further Regulating Recruitment Behavior to Promote Women's Employment clarified the issue of gender discrimination in employment in the recruitment process and proposed the "six no" and more detailed penalties. According to this document, in the process of drafting recruitment plans, publishing information, and recruiting, enterprises must not limit gender or gender priority, must not use gender to restrict women's job search and employment, must not inquire about women's marriage and childbirth, must not use pregnancy tests as entry medical examination items, must not use restriction of childbirth as a condition for recruitment and must not differentiate in any way that would raise the recruitment standards for women. Employers who refuse to correct the job posting information on gender discrimination will be fined between 10,000 CNY (not less than) and 50,000 CNY (not more than), and if the circumstances are serious, the service permit will be revoked. The employers who have been punished will also be included in the "blacklist" for untrustworthy punishment.

In 2021, the Ministry of Human Resources and Social Security, issued by the Management Regulations of Online Recruitment Service clarified this once again.

Following the establishment of China's socialist market economy system, the original employment system of the planned economy, which consisted of unified distribution and lifetime employment, was replaced by a system of labor allocation based on market forces. This transformation has also resulted in the use of labor

entities to have choices of preference when hiring laborers, which are often based on pragmatic choices. According to a statistical report in the 1990s, women accounted for 38% of the total labor force in China in 1996, whereas the proportion of women laid off during the same period accounted for 59.2%.[105] This data show that during the reform of the labor market, due to the lack of a specific legal mechanism for equal employment protection for women, employers tended to prefer to retain male employees based on their employment autonomy, and this tendency still persists. In 2018, the proportion of female employees reached 43.7%,[106] but it has not yet reached a relative balance and gender discrimination still exists. One of the root causes of this phenomenon is due to a female's physiological factors and the burden of family obligations. Moreover, China's Special Rules on the Labor Protection of Female Employees provide strict regulations on the rights and interests of female employees, such as occupational taboos, maternity leave limits and four-term protection of female employees (during menstruation, pregnancy, childbirth and lactation periods). These strict regulations are taken into account by employers when selecting female employees and they are an important factor for calculating female labor costs. At present, due to the worsening of population aging, the revised Law of the People's Republic of China on Population and Family Planning (2021) encourages one family to have two children. Based on the policies of late marriage and late childbirth in various regions, women need at least 6–8 months to have two children and cannot engage in work. Similar to Gary S. Becker's theory of preference discrimination, the cost of childbirth is the primary reason employers reject female applicants.

Turning to the analysis of the Chinese case laws, we will now look at certain examples of gender discrimination cases considered in mainland China recently. Using "gender discrimination" as the key word in a full-text search on pkulaw.com, a total of 439 cases were found. However, there were only seventeen civil cases and two administrative cases on gender discrimination in employment in 2017–2019, and the remaining cases involved marriage, family, inheritance, personality rights disputes and so on. When conducting a search on the cause of action for 'gender discrimination', there are only two articles on the entire website. Compared to the large number of judgment documents in labor dispute litigation, the cases involving "gender discrimination in employment" are close to zero. The majority of these seventeen cases took place in Shandong Province, Guangdong Province and Beijing. The mentioned data reflects the lack of legislation on the specific cause of action in cases of gender discrimination in employment in China.

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105 *See* Statistical Bulletin of Labor Development 1996, 3 Journal of Labor Protection and Technology (1997).

106 *See* Statistics Division of Social Science and Technology and Cultural Industries of the National Bureau of Statistics of the People's Republic of China, Women and Men in China – Facts and Figures (2019) (Mar. 30, 2022), available at https://bbs.pku.edu.cn/attachl/63/6e/636e4ad11325ae70/.

During the same time period, a total of 213 cases of labor disputes and personnel disputes were found by using the keywords "termination of labor contract" and "pregnancy." In these cases, the employers discriminated against women before and after pregnancy through "salary reduction and post transfer," "refusal to return to the old post," "suspension of wages," "suspension of social security payment," and "illegal termination of labor contracts" among other practices. In these instances, the demands of the majority of female employees have been met. However, it still shows that some employers are trying to touch (or surpass) the bottom line of the law.

Regardless of whether it is a labor dispute arbitration procedure or a direct entry into the litigation procedure, in many cases, there is first a need to confirm a labor relationship between the employer and the employee. Therefore, gender discrimination during the recruitment stage is excluded from labor dispute cases. For example, in *Cao Ju v. Giant Education Group Case*, *Guo X v. Hangzhou X Cooking Vocational Skills Training School Case*, *Deng XX Application for General Personality Dispute Appeal Application Case* and other cases, although the essence of the cases involves gender discrimination at the recruitment stage, all of the litigations were filed on the grounds of action that the defendant infringed the plaintiff's personal rights, which constituted cases of personal rights disputes. The Notice by the Supreme People's Court about Adding Causes of Action in Civil Cases ([CLI Code] CLI.3.328707) has added "disputes on equal employment rights" as a fourth-level cause of action under "general personal rights disputes." However, this does not change the situation as the relevant labor laws cannot be applied to gender discrimination during the recruitment process. For example, in the Guo X case, Guo X was eventually awarded 4,000 RMB in compensation for emotional distress because his employer violated his personal rights.

The People's Republic of China's Circular Economy Promotion Law provides for four types of discrimination, but the discrimination against women in marriage and childbirth is not clear. The Law of the People's Republic of China on the Protection of Women's Rights and Interests stipulates that labor contracts must not contain content that restricts the marriage and childbirth of female employees, but it does not prohibit employers from knowing the status of female employees' marriage and childbirth. The notice on Further Regulating Recruitment Activities to Promote Equal Employment for Women requires employers not "to ask women about their marriage and childbirth" during the recruitment process. However, marriage and childbirth discrimination exist not only at the recruitment stage but also at every stage of the employer's entire employment process. Employers may implement discriminatory behaviors in more subtle ways. Once a dispute occurs, the lawsuit filed by the discriminated female employee is often not for the realization of equal employment rights but for the maintenance of other labor rights.

In the existing seventeen cases, 35% of the judgments failed to support the discriminated employees' requests due to a lack of evidence. Thus, in *Liu XX v. X Supermarket Co., Ltd. Labor Dispute Case* and *Wang XX v. X Shandong Investment Development Co., Ltd.*, the plaintiff (i.e. employers) lost due to insufficient evidence.

In these circumstances, the judges often analyze the corresponding evidence for the specific demands of the workers, rather than first analyzing the employer's subjective intentions and the unreasonableness of differential treatment from the perspective of discrimination. China's labor legislation does not specify the criteria for judging gender discrimination in employment, particularly how to determine the causal relationship between the gender discrimination and the differential treatment. It is difficult for employees to obtain comprehensive evidence of employers' discriminatory behavior, especially of the employer's subjective intentions. In addition, because labor dispute cases follow standard civil litigation procedures, the parties adhere to the general principle of proof distribution: "whoever advocates – presents evidence." It is evident from the cases that even though the inversion of the burden of proof is stipulated in the Labor Dispute Mediation and Arbitration Law of the People's Republic of China, the employers will only provide evidence that is beneficial to them. As a result, the employees who are discriminated against in such cases must bear an excessive burden of proof.

To sum up, in order to eliminate gender discrimination in employment and promote the realization of women's equal employment rights, China should improve the legal framework for anti-discrimination in employment in the following aspects: (a) giving full play to the guidance of public opinion and social advocacy under the leadership of the government in order to instill the concept of fair employment deeply rooted in the hearts of the people; (b) reducing employers' labor costs by providing appropriate preferential treatment to employers who hire female employees by means of tax incentives or refund policies; (c) establishing a public-private administrative mechanism[107] for achieving equal employment rights through administrative intervention, including adding gender discrimination in employment as a subject of supervision in the "Regulation on Labor Security Supervision" and stipulating the law enforcement powers of the labor security administrative agencies; (d) applying the "Labor Dispute Mediation and Arbitration Law of the People's Republic of China" to cases involving gender discrimination in employment in the scope of labor disputes; (e) incorporating operability provisions into existing relevant laws, such as imposing certain administrative penalties on employers who have a past record of gender-based discrimination in the workplace, while also, including them in the social untrustworthiness evaluation system; (f) clearly defining "employment discrimination" in the existing legislation, conducting a reasonable review of the reasons for employers' general differential treatment, and examining the appropriateness, necessity and proportionality of the differential treatment; (g) expanding the scope of the inversion of the burden of proof in the existing labor arbitration to employment discrimination, as well as improving the existing paternity leave system and establishing the length of paternity leave at the national level, in order to balance the labor costs of male

[107] *See* Xianyong Wang, *Administrative Enforcement Mechanism in China's Employment Discrimination Law*, 2 Sci. L. 153 (2021).

and female employees; (h) restricting employers' rights to obtain marriage and childbirth information of job applicants as part of the scope of personal privacy and information protection.[108] In addition, the establishment of childcare facilities on employers' premises should also be promoted.

2.5. The Laws of South Africa on Gender Discrimination and the Relevant Jurisprudence

The awareness of the existence of discrimination and protection against it can take place at various levels. At a societal level, various educational and awareness programmes can be implemented to bring light to gender stereotypes and the effects of discrimination (such as prohibitive norms, harassment and violence). However, change at the societal level takes time and so, in the interim, what is required is mandated national legislation aimed at equalizing the playing field and empowering women and other minorities to take their seats at the table, and be fully protected in doing so. The concept "gender mainstreaming" was extensively used during the Beijing Conference on Women in 1995 and in the past few years has been embraced in many policy documents, including national strategy plans on the Beijing Platform for Action and within the South African context.[109] Gender mainstreaming is concerned with both the inclusion of women as active participants in existing systems and changes to the existing systems to reduce gender inequalities stemming from women's disadvantaged positions in societies.[110]

The Women's Charter for Effective Equality was introduced in 1994 in South Africa and outlines the vision and desires relating to human rights, dignity and the desire for better material conditions of South African women.[111]

South Africa provides for the following legislation for the protection and advancement of women and other minorities, particularly in regards to equality, discrimination and harassment:

1. The South African Constitution promotes the achievement of equality between men and women,[112] whilst the Bill of Rights[113] promotes the achievement of equality with equality speaking to the equal enjoyment of rights and freedoms by all persons.

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[108] *See* Tang Fang, *Judicial Practice and System Improvement on Discrimination Against Marriage and Childbirth in Recruitment*, 31(1) J. China Women's U. 41 (2019).

[109] Nasima M.H. Carrim, *"Who Am I?" – South African Indian Women Managers' Struggle for Identity: Escaping the Ubiquitous Cage*, PhD dissertation, University of Pretoria (2012).

[110] *Id.*

[111] *Id.*

[112] Constitution of the Republic of South Africa (No. 108 of 1996) (Mar. 30, 2022), available at http://housingfinanceafrica.org/app/uploads/Constitution-of-the-Republic-of-South-Africa-Act-108-of-1996.pdf.

[113] Bill of Rights, Chapter 2, Constitution of the Republic of South Africa.

2. The Employment Equity Act protects women from unfair discrimination and defines women as a part of a "designated group" subject to affirmative action practices in order to achieve employment equity.[114]

3. The Promotion of Equality and Prevention of Unfair Discrimination Act oversees the prohibition of unfair discrimination, harassment and hate speech.[115]

4. The Protection from Harassment Act provides for protection against harassment, which includes that of a sexual nature, bullying or stalking.[116]

Across the world, women are systematically underrepresented in every sector of the labor market, but this is especially true in top management, academia, science and technology, and engineering.[117] Gender stereotypes impede the ability of women and other stereotyped groups from enjoying equal opportunity in the workplace, as well as contributing to and perpetuating more overt forms of discrimination. Gender stereotyping could thus be considered a human rights violation.[118] The prevailing underrepresentation of women in high-level positions is still largely due to the stereotypes that continue to exist and perpetuate in the workplace. As a result of these stereotypes, women and their performance at work are often judged far more negatively when compared to their male counterparts. Within South Africa as well, stereotypes continue to have a detrimental effect on women.

For over 400 years, white males have discriminated against women and the broader black community (including Black, Indian, Colored or Mixed heritage) in South Africa. However, it was during apartheid (which was formally instituted in 1948) that discrimination was legally indoctrinated into the country.[119] In addition, it appears that this extends across cultures and origins. In certain places, for example, customary law permits the dominance of women and the limiting of their rights in the name of maintaining traditional power structures.[120] These persistent stereotypes often legitimize domestic violence.[121]

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114 Employment Equity Act (No. 55 of 1998) (Mar. 30, 2022), available at https://www.labour.gov.za/DocumentCenter/Acts/Employment%20Equity/Act%20-%20Employment%20Equity%201998.pdf.

115 Promotion of Equality and Prevention of Unfair Discrimination Act (No. 4 of 2000) (Mar. 30, 2022), available at https://www.justice.gov.za/legislation/acts/2000-004.pdf.

116 Protection from Harassment Act (No. 17 of 2011) (Mar. 30, 2022), available at https://www.gov.za/sites/default/files/gcis_document/201409/a172011.pdf.

117 Cristian Berrío-Zapata et al., *Gender Digital Divide in Latin America: Looking for a Helping Hand in the BRICS*, Digital Icons (2018) (Mar. 30, 2022), available at https://www.digitalicons.org/wp-content/uploads/2019/02/DI19_8_Zapata_et_al.pdf.

118 Danielle Visser, *Parental Leave in South Africa: Bridging the Gap Between Gender Roles and the Right to Equality*, University of Pretoria (October 2018) (Mar. 30, 2022), available at https://repository.up.ac.za/bitstream/handle/2263/70041/Visser_Parental_2018.pdf?sequence=1.

119 Carrim 2012.

120 Catherine Albertyn, *"The Stubborn Persistence of Patriarchy"? Gender Equality and Cultural Diversity in South Africa*, 2(1) Const. Court Rev. 165 (2009).

121 Committee on the Elimination of Discrimination against Women, Inquiry concerning South Africa conducted under Article 8 of the Optional Protocol to the Convention, CEDAW/C/ZAF/FIR/1, 15 June

Despite having reached a democratic state over twenty-five years ago, attitudes and beliefs of inferiority toward women unfortunately continue to linger, perhaps in more discrete forms, but dangerous and damaging to career advancement nonetheless. Women are inherently perceived as belonging in the home, not the workplace.[122] These characteristics, according to both black and white men in a South African study, do not endear women as being capable of successfully holding managerial positions.[123] Instead, such positions are deemed reserved for those who are considered dominant, assertive and decisive, that being, the "typical" male profile. Given these findings are congruent across studies in other countries as well, it is possible to assume that such stereotypes and the definition of typical gender roles are indeed pan-cultural.[124]

The advancement of human rights relies on achieving gender equality, and yet discriminatory laws against women continue to exist across the world, with laws being enforced that do no justice to half of the population. Legal traditions continue to see women and girls as being classed as second-class citizens with regard to nationality and citizenship; health; education; marital rights; parental rights; property rights, and more pertinently to the topic of this article, employment rights.[125]

Article 1 of CEDAW provides a definition of discrimination against women on the basis of gender:

> For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment and exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

When reviewing South African case law regarding gender discrimination in the workplace, taking this definition into account allows room for further exploration of the jurisprudence and the protection, advancement and empowerment of women.

2022 (Mar. 30, 2022), available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fZAF%2fFIR%2f1&Lang=en.

122 Visser, *supra* note 118.

123 Lize A.E. Booysen & Stella M. Nkomo, *Gender Role Stereotypes and Requisite Management Characteristics: The Case of South Africa*, 25(4) Gend. Mgmt.: Int'l J. 285 (2010) (Mar. 30, 2022), also available at https://repository.up.ac.za/bitstream/handle/2263/15914/Booysen_Gender%282010%29.pdf?sequence=1&isAllowed=y.

124 Romie F. Littrell & Stella M. Nkomo, *Gender and Race Differences in Leader Behaviour Preferences in South Africa*, 20(8) Women Mgmt. Rev. 562 (2005).

125 Office of the U.N. High Commissioner for Human Rights, Combatting Discrimination Against Women (2021).

Although South Africa has a robust and often revered legislative framework for gender equality, meaningful progress toward the application of such jurisprudence remains stymied. In addition to the already existing legislation discussed above, in an attempt to address inequality and discrimination, the South African government launched the National Gender Policy for Women's Empowerment,[126] approximately twenty years ago, on the promise of developing and uplifting gender transformation. However, despite the hope that it would empower women, it left much to be desired. It is not surprising then, that it was never officially published or promulgated because it was developed without consulting women at a grassroots level, contested by a lack of specific and measurable targets and associated plans for action and contained no inclusion of political responsibility on the subject.[127] Unfortunately, this is just one such example of a slew of failing or slow-to-progress measures or policies.

Despite South Africa's highly regarded legislative mechanisms and reforms, they are often insufficiently robust enough to ensure meaningful compliance, and are limited in application within the private domain, where prejudices and "traditional gender-roles" are incubated and acquire their potent influence within the public domain.[128] An instance of the pervading influence of such prejudices is seen in the matter of *Pillay v. The South African Post Office and Others*,[129] in which the perpetrator of workplace sexual harassment claimed ignorance of legislative mandates in this regard. Indeed, South Africa faces various socio-economic and cultural challenges that contribute to gender inequality, including the particular challenge of promoting an equitable, non-gender-focused division of labor and expanding equitable access to work opportunities for women.[130] Within the workplace itself, South African women are frequently marginalized in terms of recruitment, selection, promotion and career management processes.[131] This is perhaps best evidenced by the fact that despite the fact that South Africa has 40% female representation in parliament, there are no

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126 Office on the Status of Women, South Africa's National Policy Framework for Women's Empowerment and Gender Equality (2000) (Mar. 30, 2022), available at https://www.dffe.gov.za/sites/default/files/docs/national_policy_framework.pdf.

127 Nasima M.H. Carrim, *Sandwiched Between Groups: Upward Career Experiences of South African Indian Women*, 52(1) S. Afr. J. Bus. Mgmt. (2021).

128 Public Service Association, Women and the Workplace: Challenges of Diversity and Women Progression (2019) (Mar. 30, 2022), available at https://www.psa.co.za/docs/default-source/psa-documents/psa-opinion/women-and-the-workplace--challenges-of-diversity-and-women-progression.pdf?sfvrsn=18797042_1.

129 *Pillay v. The South African Post Office and Others* (D 407/10) [2012] Z.A.L.C.D. 21.

130 Shikha Vyas-Doorgapersad, *Designing Measurement Instruments for Sustainable Development Goals One, Five and Nine: A Gendered Perspective in South Africa*, 10(3) Afr. J. Public Aff. 118 (2018).

131 Ayola Bangani & Shikha Vyas-Doorgapersad, *The Implementation of Gender Equality Within the South African Public Service* (*1994–2019)*, 8(1) Africa's Public Service Delivery and Performance Rev. (2020).

clear succession programmes in place to support these women, and the majority of positions in local and provincial government remain predominantly male.[132]

Addressing gender discrimination should not be seen as an elective, and the South African government should, in review of the information contained above, ensure that action is taken as a result. Millions of people around the world are denied access to decent work, and those who do have employment opportunities are often restricted to low-paying occupations in specific industries. This could be due to their disability, ethnicity, gender, sexual orientation or other status deemed inadequate. Women and minorities have faced the brunt of this discrimination for hundreds of years. These vulnerable groups are confronted with the full force of oppression: they are exploited, marginalised, left powerless and subject to systematic abuse in their search for work. Discrimination deprives people of their dignity, voice and ability to fully participate. It prevents access to meaningful opportunities, perpetuates stereotypes against men and women, worsens socio-economic tensions and lays the groundwork for further exclusion and poverty.

Conclusion

BRICS has proven to be an effective association with regard to trade and development. However, gender and gender equality have played a minuscule role. Of the five countries, South Africa has perhaps made the most notable contribution to the inclusion of women in the workplace[133] but there is most certainly room for improvement. The authors propose the following suggestions as a way to move forward with gender equality in employment and which are applicable to all of the BRICS countries:

1. Combatting gender stereotypes that restrict women to certain spheres of employment (generally lower-paying) and fix the main role of women in carrying out domestic and family work.

2. Gender discrimination within employment has to be effectively mapped out and researched further. The phenomenon of discrimination is a combination of multiple factors, such as lack of access to education for women; gendered perceptions and stereotyping of women; as well as the separation of issues within the home (which inherently have an effect on the work performed by women), all of which contribute to the marginalisation of women at work.[134]

3. Women have a unique opportunity to organize within the workplace and focus on the shared experiences of discrimination. Women experience common barriers based on cultural relativism and are thus able to create a valuable network

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132 Public Service Association, *supra* note 128.

133 World Economic Forum, Global Gender Gap Report 2020 (2019) (Mar. 30, 2022), available at https://www3.weforum.org/docs/WEF_GGGR_2020.pdf.

134 Berrío-Zapata et al., *supra* note 117.

of solidarity that can be leveraged to combat these invisible barriers and challenges to their equality and advancement.[135]

4. Lastly, when legislation and its implementation thereof are lacking, in conjunction with its BRICS partners, the member countries strive to make valuable use of their shared platform in creating more equitable nations. This could be achieved by looking at the legislation itself and dismantling the often-prohibitive provisions contained within.[136] The issues of the gender pay gap and sexual harassment at work may be highlighted as key issues to be addressed in BRICS.

There is already some movement towards supporting the BRICS activities that are aimed at gender equality. In 2021, Dr Victoria V. Panova, who is the Managing Director of the Russian National Committee on BRICS Research, emphasized the need for a BRICS Collective Commitment to "Women's Economic Empowerment."[137] At the BRICS summit, the toolkit "Women Economic Empowerment in BRICS: Policies, Achievements, Challenges and Solutions" was presented. It presents an analysis of the policies, current trends, barriers, common challenges and opportunities for women's economic empowerment in the BRICS countries, as well as highlights best practices.[138] The BRICS countries could learn from one another, focusing in particular on South Africa's successful experience.

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135 Berrío-Zapata et al., *supra* note 117.

136 Visser, *supra* note 118.

137 BRICS Dialogue on the future of work: Towards a women-led growth framework – June 2, 2021, Observer Research Foundation, 16 June 2021 (Mar. 30, 2022), available at https://www.orfonline.org/research/brics-dialogue-on-the-future-of-work-towards-a-women-led-growth-framework-june-2-2021/.

138 Russian National Committee on BRICS Research, *supra* note 13.

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REGULATION OF TELEWORK IN BRICS: LESSONS FROM THE PANDEMIC

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The COVID-19 outbreak forced many employers worldwide to organize remote workplaces and introduce new technologies of labor organization in order to protect employees from the threat of disease. After the pandemic is over, it is reasonable to anticipate an increase in telework. The legal framework of telework continues to evolve unevenly in different countries around the world. The BRICS countries lag behind the United States and the European Union in terms of the legal regulation of telework, and they lack the necessary statistical data collection. The integration of the BRICS countries calls for the development of unified approaches to the legal status of teleworkers. The creation of new jobs in the conditions of the pandemic requires the development of the regulatory framework, analysis of innovative experience and assessment of law enforcement. This article systematizes the approaches of Russian and world scientists to the major issues of telework regulation, including: the conceptual apparatus, the advantages and disadvantages of remote employment, the analysis of legislative initiatives of the BRICS countries in the context of a pandemic and the allocation of best practices, the features of concluding, changing and terminating an employment contract, determining the rights and obligations of teleworkers, the implementation of the right to social partnership, and ensuring labor protection, safety and well-being. The findings of the analysis lead to the conclusion that in order to achieve decent work in digital economy, the BRICS countries need to design a general approach to the regulation of telework for similar to the approach taken by the European Union, and to upgrade existing legislation.

Keywords: legal regulation; teleworking; teleworkers; pandemic; BRICS.

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Introduction

The development of telecommunication technologies has had a significant impact on the labor market and changed the employment structure. The twentieth century was a period of large industries; flexible forms of work, including teleworking, have become more common in the twenty-first century. The workplace no longer has to be located in factories, banks or offices. The term "place of work" loses its obligatory meaning in employment relations.[1] Information technologies make it possible to work from home and create co-working, which leads to a paradigm shift and requires changes in legislative regulation. In the context of the COVID-19 pandemic, most countries of the world, including the BRICS countries, were forced to impose restrictions and bans on traditional work arrangements and actively implement telework.

In the 1970s, J. Nilles et al. marked the beginning of research on teleworking with the publication of his book *The Telecommunications-Transportation Tradeoff: Options for Tomorrow*.[2] There are several approaches to the definition of teleworking in international practice. In an English-speaking environment, the most commonly used term is "telework." The term "teleworking" is frequently used in the reports of the International Labour Organization (ILO). Telework, as defined by the ILO, is work that is carried out in whole or in part outside the permanent workplace and is based on the use of personal electronic devices such as computers, tablets or telephones.

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[1] *Васильева Ю.В., Шуралева С.В.* Содержание трудового договора о дистанционной работе: теоретические аспекты // Вестник Пермского университета. Юридические науки. 2015. № 2(28). С. 88–97 [Yulia V. Vasilyeva & Svetlana V. Shuraleva, *The Content of the Labor Contract on Remote Work: Theoretical Aspects*, 2(28) Bulletin of Perm University. Legal Sciences 88 (2015)].

[2] Jack M. Nilles et al., *The Telecommunications-Transportation Tradeoff: Options for Tomorrow* (1976).

In the Russian Federation, the term "telework" is not mentioned in legislation. The concept of "telework" was doctrinally used in comparative legal research.[3] Before the introduction of Chapter 49.1 into the Labor Code of the Russian Federation, the terms "work from home," "teleworking" and "remote work" were proposed to be considered one of the flexible forms of work.[4] With the implementation of Chapter 49.1 of the Labor Code of the Russian Federation, the term "remote work" is used.[5]

With an amendment in 2021, the terms "remote work" and "distance work" are now used interchangebly. According to Article 312.1 of the Labor Code of the Russian Federation, remote work is defined as

> working in accordance with an employment contract outside the employer location, its branch, representative office, other separate structural unit (including ones located in another area), outside a permanent workplace, territory or facility which are directly or indirectly controlled by the employer with the use of information and telecommunication networks, including the Internet, and public communication networks for interaction between the employer and the employee.

In 2020, the ILO noted in "An employers' guide on working from home in response to the outbreak of COVID-19" that the term "work from home" (WHF) describes an agreement in which an employee fulfills the basic responsibilities of his or her job while staying at home and using information and communication technologies.[6] The term "work from home" is recommended to indicate temporary work in the pandemic. The concepts of "work from home" and "work-from-anywhere" have already been reflected in the scientific works and in the legislation of some countries.[7] Thus, the

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[3] *Либо М.Г., Кошелева С.В.* Телеработа как новая форма управления персоналом в организациях виртуального типа // Вестник Санкт-Петербургского университета. Менеджмент. 2004. № 3. С. 117–137 [Marina G. Libo & Sofia V. Kosheleva, *Telecommuting as a New Form of Personnel Management in Virtual Organizations*, 3 Vestnik of Saint Petersburg University. Management 117 (2004)]; *Яворчук Н.Н., Шушкина В.В.* Телеработа и фриланс: в порядке постановки проблемы // Юридический вестник Кубанского государственного университета. 2010. № 5. С. 6–10 [Natalia N. Yavorchuk & V.V. Shushkina, *Telework and Freelancing: In the Order of Problem Statement*, 5 Legal Bulletin of Kuban State University 6 (2010)].

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

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

[6] ILO, An employers' guide on working from home in response to the outbreak of COVID-19 (2020) (Apr. 21, 2022), available at https://www.ilo.org/actemp/publications/WCMS_745024/lang--en/index.htm.

[7] Prithwiraj Choudhury et al., *Work-From-Anywhere: The Productivity Effects of Geographic Flexibility*, 42(4) Strateg. Mgmt. J. 655 (2021).

pandemic has led to a fundamental rethinking of the conceptual apparatus and the introduction of new concepts.

1. Materials and Methods

Despite the fact that the comparative method is widely used in legal and economic studies, there has been little research on the comprehensive analysis of Russian and international legislation on teleworking.[8] The focus is on research into the experiences of the United States and European Union (EU) countries, while the experiences of the BRICS countries are still poorly studied. This determines the relevance of the presented work and its scientific novelty.

The main objective of the study is to compare changes in the telework regulations in the BRICS countries in the context of the COVID-19 pandemic.

The research included the following stages:

• compilation of publications on the teleworking regulation based on the Russian Science Citation Index (hereinafter RSCI), the Web of Science and the Scopus database;

• study of the legal framework for teleworking in BRICS in the pre-pandemic period;

• assessment of the legislative process under the influence of the pandemic;

• identification of opportunities and prospects for improving the regulation of teleworking in Russia taking into account the enforcement experience of Brazil, India, China and South Africa.

The results of the study reflect the legal framework and publications as of 1 April 2021.

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[8] Marina Chudinovskikh & Natalia Tonkikh, *Telework in BRICS: Legal, Gender and Cultural Aspects*, 7(4) BRICS L.J. 45 (2020); *Кожевников О.А., Чудиновских М.В.* Регулирование труда дистанционных работников в России и за рубежом // Вестник Санкт-Петербургского университета. Право. 2020. Т. 11. № 3. С. 563–583 [Oleg A. Kozhevnikov & Marina V. Chudinovskikh, *Regulation of Telework in Russia and Foreign Countries*, 11(3) Vestnik of Saint Petersburg University. Law 563 (2020)]; *Лютов Н.Л.* Дистанционный труд: опыт Европейского союза и проблемы правового регулирования в России // Lex Russica. 2018. № 10(143). С. 30–39 [Nikita L. Lyutov, *Russian Remote Labor: The Experience of the European Union and the Problems of Legal Regulation in Russia*, 10(143) Lex Russica 30 (2018)]; *Скавитин А.В.* Телеработа в мировой экономической практике // Менеджмент в России и за рубежом. 2004. № 6. С. 108–117 [Alexey V. Skavitin, *Teleworking in World Economic Practice*, 6 Management in Russia and Abroad 108 (2004)]; *Хусяинов Т.М.* Особенности правового регулирования труда занятых в сети Интернет в Польше // Право и политика. 2016. № 1. С. 61–66 [Timur M. Khusyainov, *Features of the Legal Regulation of the Work of Those Employed on the Internet in Poland*, 1 Law and Politics 61 (2016)]; *Хусяинов Т.М.* Правовое регулирование интернет-занятости в Великобритании: Основные этапы формирования национального законодательства // Финансовое право и управление. 2017. № 1. С. 49–56 [Timur M. Khusyainov, *Legal Regulation of Internet Employment in the UK: The Main Stages of the Formation of National Legislation*, 1 Financial Law and Management 49 (2017)]; *Чудиновских М.В.* Регулирование дистанционного труда в странах Евразийского экономического Союза // Евразийская адвокатура. 2018. № 4(35). С. 109–111 [Marina V. Chudinovskikh, *Regulation of Remote Labor in the Countries of the Eurasian Economic Union*, 4(35) The Eurasian Bar 109 (2018)].

The research definition of key terms made it possible to form the relevant collections of publications in the Web of Science (WOS) and Russian Science Citation Index (RSCI) databases. According to the WOS database, the first publications devoted to teleworking were dated 1985–1986. These publications were sporadic until 1996. With the development of information technology and the growing popularity of teleworking, the number of publications is increasing. The year 2020 was of peak interest for the researchers.

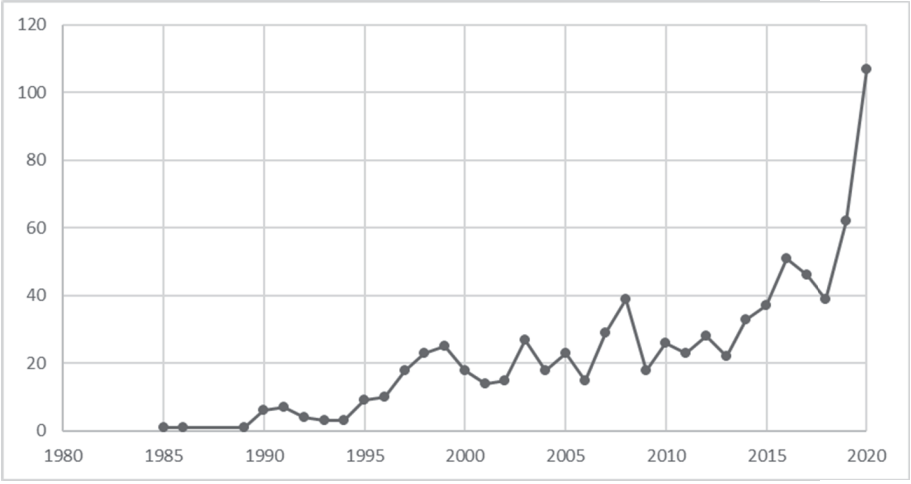

Fig. 1: The number of publications in the Web of Science database (using the keyword "telework")

Source: Created by the author

The sharp increase in research is associated with the unprecedented legislative measures taken by many countries around the world in the context of the pandemic. The number of publications on telework in the Web of Science database remained between 40–60 per year until 2020. In 2020, more than 100 publications were devoted to "teleworking." Taking into account the long indexing, it is possible to predict the growth of research in 2021. In international databases, researchers from the United States of America and the European countries have achieved leading positions. The data on the publications of scientists from the BRICS countries are shown in Table 1 below.

Table 1: The BRICS-specific sample of publications on teleworking in the Web of Science database

Country	Number of publications
Brazil	21
China	15
India	9
Russia	9
South Africa	2

Source: Created by the author

The presented data show that the largest number of publications on teleworking among the BRICS countries is noted in Brazil and China. Researchers from BRICS are still significantly behind scientists from the United States, Great Britain, Canada, and Germany in terms of publishing research results at an international level. The analysis of Russian publications on the teleworking regulation was carried out further. As of 1 March 2021, a total of 1,115 publications devoted to the issues of teleworking are indexed by the RSCI. Table 2 below presents the total number of publications and their main bibliographic indicators.

Table 2: The main indicators of publications on teleworking in the RSCI (1 March 2021)

Indicator	Value
Number of authors, person	1,588
Total number of publications, pcs	1,115
Number of articles in journals, pcs	675
Number of articles in journals included in the Web of Science or Scopus, pcs	6
Number of articles in journals included in the RSCI Core, pcs	18

Source: Created by the author

The distribution of Russian publications over the years reflects the same trend that was revealed in international citation databases. In 2020, the number of publications increased more than three times compared to 2019. The study of teleworking issues is in the field of interests of economists, lawyers, sociologists, as well as representatives of other sciences (Table 3).

Table 3: The distribution of publications by thematic areas

Thematic area	Number of publications	Rate, %
Economic Sciences	535	47,98
Law	238	21,35
Sociology	56	5,02
Computer Technology	28	2,51
Pedagogy	28	2,51
Other sciences	230	20,63
Total	1115	100,00

Source: Created by the author

It should be noted that different conceptual apparatuses are used in economic and legal research. In legal research, the terms "teleworking," "teleworker" and "employment contract" are frequently used. All these terms comply with the current norms of the Labor Code of the Russian Federation. In economic research, the terms "teleworking," "labor market" and "freelance" are more common, although the concept of "freelance" is not included in the Labor Code of the Russian Federation. The analysis of publications using keywords shows that the term "remote work" is more commonly used in the Russian scientific publications, which is not entirely consistent with the accepted international terminology (Table 4).

Table 4: The main keywords of Russian research on teleworking

Keyword	Number of publications
Distance work	494
Remote work	337
Teleworking employment	247
Teleworking occupation	154
Freelance	135
Remote employment	97
Labor market	97
Teleworker	97
Employment contract	77

Source: Created by the author

The analysis of the distribution of publications by regions and organizations shows that scientific schools are being formed in the Russian Federation to study

teleworking issues. The first place in terms of the number of publications is occupied by the Ural State University of Economics (Yekaterinburg), followed by the largest Moscow universities (the Russian University of Economics named after G.V. Plekhanov, Moscow State University, Russian Presidential Academy of National Economy and Public Administration and Financial University). Among other regional universities are the Saratov State Technical University named after Yu.A. Gagarin and the Samara State University of Economics (Table 5).

Table 5: The distribution of publications by organizations

Distribution of publications by organizations	**Number of publications**
The Ural State University of Economics	67
The Russian University of Economics named after G.V. Plekhanov	40
The Moscow State University named after M.V. Lomonosov	30
The Russian Presidential Academy of National Economy and Public Administration	29
The Financial University under the Government of the Russian Federation	27
The Saratov State Technical University named after Yu.A Gagarin	25
The State University of Management	19
The Moscow State Law University named after O.E. Kutafin	17
The Samara State University of Economics	17
The Russian State Social University	15

Source: Created by the author

Increasing publication activity is popular among researchers writing PhD theses or doctoral dissertations, as well as authors who have received support from scientific foundations. The most cited publications were further evaluated in the context of two thematic areas ("Legal Sciences" and "Economic Sciences"). Among the most cited articles in the field of legal sciences are the works of N.L. Lyutov,[9] V. Stepanova,[10]

[9] Lyutov 2018; *Лютов Н.Л.* Трансформация трудового правоотношения и новые формы занятости в условиях цифровой экономики // Журнал российского права. 2019. № 7. С. 115–130 [Nikita L. Lyutov, *Transformation of Labor Relations and New Forms of Employment in the Digital Economy*, 7 Journal of Russian Law 115 (2019)].

[10] *Степанов В.* Дистанционные работники – новая категория работников в российском трудовом праве // Трудовое право. 2013. № 6. С. 9–17 [Vladimir Stepanov, *Remote Workers – A New Category of Workers in Russian Labor Law*, 6 Labor law 9 (2013)].

K.V. Nushtaikina,[11] E.A. Brown,[12] A.V. Serova,[13] N.N. Yavorchuk and V.V. Shukshina,[14] Yu.V. Vasilyeva and S.V. Shuraleva,[15] N.V. Zakalyuzhnaya,[16] M.V. Chudinovskikh,[17] T.Yu. Korshunova,[18] T.M. Khusyainov.[19] In the field of "economics," the highest number of citations was noted in the publications of Yu.V. Dolzhenkova and S.V. Sidorkina,[20] F. Konobtseva,[21] V.N. Gebrial,[22]

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[11] *Нуштайкина К.В.* Реализация права работников на социальное партнерство в условиях дистанционного труда // Вестник Пермского университета. Юридические науки. 2013. № 3(21). С. 152–156 [Ksenia V. Nushtaikina, *Implementation of the Right of Workers to Social Partnership in the Conditions of Remote Labor*, 3(21) Bulletin of Perm University. Legal Sciences 152 (2013)].

[12] *Браун Е.А.* Понятие нетипичной занятости и классификация ее видов // Трудовое право в России и за рубежом. 2014. № 3. С. 11–15 [Elena A. Brown, *The Concept of Atypical Employment and the Classification of its Types*, 3 Labor Law in Russia and Abroad 11 (2014)].

[13] *Серова А.В.* Нетипичные отношения по трудоустройству // Российский юридический журнал. 2014. № 6(99). С. 121–128 [Alena V. Serova, *Atypical Employment Relations*, 6(99) Russian Legal Journal 121 (2014)].

[14] Yavorchuk & Shushkina 2010.

[15] *Васильева Ю.В., Шуралева С.В.* Дистанционная занятость и дистанционная работа с позиций российского трудового права // Российский ежегодник трудового права. 2014. № 9. С. 385–390 [Yulia V. Vasilyeva & Svetlana V. Shuraleva, *Remote Employment and Remote Work from the Standpoint of Russian Labor Law*, 9 Russian Yearbook of Labor Law 385 (2014)]; *Васильева Ю.В.* Дистанционная работа в России: вопросы правоприменения // Вестник Пермского университета. Юридические науки. 2016. № 2(32). С. 216–225 [Yulia V. Vasilyeva, *Remote Work in Russia: Questions of Law Enforcement*, 2(32) Bulletin of Perm University. Legal Sciences 216 (2016)].

[16] *Закалюжная Н.В.* Особенности, возникающие при реализации прав работника в дистанционном трудовом отношении // Трудовое право в России и за рубежом. 2015. № 4. С. 42–46 [Natalia V. Zakalyuzhnaya, *Features That Arise When Implementing the Rights of an Employee in a Remote Labor Relationship*, 4 Labor Law in Russia and Abroad 42 (2015)].

[17] Kozhevnikov & Chudinovskikh 2020; Chudinovskikh 2018.

[18] *Коршунова Т.Ю.* Договор о дистанционной работе как способ оформления нетипичных трудовых отношений // Журнал российского права. 2020. № 2. С. 112–125 [Tatyana Yu. Korshunova, *The Contract on Remote Work as a Way of Registration of Atypical Labor Relations*, 2 Journal of Russian Law 112 (2020)].

[19] Khusyainov 2016; Khusyainov 2017.

[20] *Долженкова Ю.В., Сидоркина С.В.* Дистанционная занятость в России: современное состояние и перспективы развития // Вестник НГУЭУ. 2015. № 1. С. 156–161 [Yulia V. Dolzhenkova & Svetlana V. Sidorkina, *Remote Employment in Russia: Current State and Prospects of Development*, 1 Bulletin of the NGUEU 156 (2015)].

[21] *Конобевцев Ф.Д.* Дистанционный труд как новая форма занятости // Кадровик. 2011. № 9. С. 115–121 [Fedor D. Konobevtsev, *Remote Labor as a New Form of Employment*, 9 Kadrovik 115 (2011)]; *Конобевцев Ф.Д., Лаас Н.И., Гурова Е.В., Романова И.А.* Удаленная работа: технологии и опыт организации // Вестник университета. 2019. № 7. С. 9–17 [Fedor D. Konobevtsev et al., *Remote Work: Technologies and Experience of the Organization*, 7 University Bulletin 9 (2019)].

[22] *Гебриаль В.Н.* Социальные аспекты феномена дистанционной работы как нового вида трудовых отношений // Государственное управление. Электронный вестник. 2008. № 17. С. 3 [V.N. Gebrial, *Social Aspects of the Phenomenon of Distance Work as a New Type of Labor Relations*, 17 Public Administration. Electronic Bulletin 3 (2008)].

A.V. Yudin,[23] V.M. Tregubova,[24] I.M. Gurova,[25] M.V. Ludanik,[26] A.V. Skavitin,[27] N.V. Tonkikh and T.V. Kamarova,[28] I.A. Gvozdkova and A.V. Kurochkin[29] (the authors are listed in the order of the number of citations). The peculiarity of the emergence of scientometric indicators is that the number of citations for influential articles increases after a certain period of time. The publications of 2018–2020 are still behind those of 2013–2014 in terms of citation rates. However, this does not indicate a lower scientific significance or quality.

The previously presented statistics showed that an explosive growth of interest in teleworking issues took place in 2020 in the context of the COVID-19 pandemic. In 2020, the RSCI has already indexed more than 450 publications on teleworking. The RSCI is the leading database in terms of the rate of indexing of publications; therefore, many studies published in 2020 have already reflected the impact of the COVID pandemic. In international studies of 2020 and 2021, the pandemic issues are not yet fully reflected because the average indexation period can be as long as two years. Scientific research is a necessary basis for improving teleworking regulations.

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[23] *Юдин А.В.* Стратегия управления дистанционной формой занятости // Вестник Омского университета. Серия: Экономика. 2012. № 4. С. 121–125 [Andrey V. Yudin, *Strategy of Remote Employment Management*, 4 Bulletin of Omsk University. Series: Economics 121 (2012)].

[24] *Трегубова В.М.* Компьютерные технологии и дистанционная занятость работников // Социально-экономические явления и процессы. 2013. № 2(48). С. 117–120 [Valentina M. Tregubova, *Computer Technologies and Remote Employment of Workers*, 2(48) Socio-Economic Phenomena and Processes 117 (2013)].

[25] *Гурова И.М.* Дистанционная работа как перспективная форма организации труда для российских предпринимательских структур // МИР (Модернизация. Инновации. Развитие). 2016. Т. 7. № 1(25). С. 151–155 [Irina M. Gurova, *Remote Work as a Promising Form of Labor Organization for Russian Business Structures*, Vol. 7. No. 1(25) MIR (Modernization. Innovation. Development) 151 (2016)].

[26] *Луданик М.В.* Дистанционная занятость на российском рынке труда: формирование, развитие и механизмы регулирования: дис. … канд. экон. наук [Marina V. Ludanik, *Remote Employment in the Russian Labor Market: Formation, Development and Regulatory Mechanisms*, Dissertation for the Degree of Candidate of Economic Sciences] (2006).

[27] Skavitin 2004.

[28] *Тонких Н.В., Камарова Т.А.* Оценка распространенности нестандартной занятости на рынке труда Свердловской области Российской федерации по результатам социологического исследования // Вестник Омского университета. Серия: Экономика. 2017. № 2(58). С. 185–196 [Natalia V. Tonkikh & Tatyana A. Kamarova, *Assessment of the Prevalence of Non-standard Employment in the Labor Market of the Sverdlovsk Region of the Russian Federation Based on the Results of a Sociological Study*, 2(58) Bulletin of Omsk University. Series: Economics 185 (2017)].

[29] *Гвоздкова И.А., Курочкин А.В.* Математическое и информационное обеспечение дистанционной занятости // Труд и социальные отношения. 2017. № 5. С. 32–44 [Irina A. Gvozdkova & Alexander V. Kurochkin, *Mathematical and Informational Support of Remote Employment*, 5 Labor and Social Relations 32 (2017)].

2. Changes in the Telework Legal Framework in the BRICS Countries under the Influence of the Pandemic

In the context of the pandemic, all of the BRICS countries implemented a similar set of measures, which included the establishment of restrictions and bans, the transition to teleworking in many industries, and the introduction of distance learning into educational institutions. The first and most active measures were taken by China, which ensured the most effective fight against the epidemic. The main changes in teleworking organizations and approaches to regulation are further considered.

2.1. The Russian Federation: New Approaches to Regulation

The experience of conducting comparative legal research allows us to conclude that, prior to the pandemic, Russian legislation regulated teleworking only sporadically. The gap between domestic and foreign regulations in 2020 was approximately ten years.[30] Leading scientists have repeatedly criticized the norms of the Labor Code of the Russian Federation in terms of:

- the lack of the possibility of concluding a contract on partial telework status;[31]
- the option of dismissing a teleworker based on the reasons specified in the employment contract;[32]
- weak development of legal framework addressing the collective labor rights protection;[33]
- reduction of the employer's obligations in the sphere of labor protection;[34]
- the actual reversal of the burden of equipment, communication service costs to the employee;[35]
- the complexity of the registration process in terms of the use of electronic digital signatures, etc.[36]

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30 *Черных Н.В.* Влияние нетипичных форм занятости на теоретические представления о трудовом отношении (на примере норм о дистанционном труде) // Актуальные проблемы российского права. 2019. № 8(105). С. 108–117 [Nadezhda V. Chernykh, *Influence of Atypical Forms of Employment on Theoretical Ideas About Labor Relations (on the Example of Norms on Remote Labor)*, 8(105) Actual Problems of Russian Law 108 (2019)].

31 *Филиппов В.* Четыре минуса дистанционной работы // Трудовые споры. 2019. № 9. С. 68 [Vyacheslav Filippov, *Four Minuses of Remote Work*, 9 Labor Disputes 68 (2019)].

32 Lyutov 2019.

33 Nushtaikina 2013.

34 *Филаткина А.П.* Надомная и дистанционная работа: сравнительный анализ действующего законодательства // Трудовое право в России и за рубежом. 2015. № 1. С. 11–13 [Anna P. Filatkina, *Home and Remote Work: A Comparative Analysis of the Current Legislation*, 1 Labor Law in Russia and Abroad 11 (2015)].

35 Chudinovskikh 2018.

36 Kozhevnikov & Chudinovskikh 2020.

Russia introduced Federal Law No. 407-FZ dated 8 December 2020 amending the Russian Labor Code in relation to teleworking. Table 6 highlights the most substantive changes in the legislation.

Table 6: Changes in approaches to teleworking in the pandemic

Conditions	**Before 2021**	**Since 2021**
Types of teleworking	Only permanent	Permanent Temporary In case of emergency and pandemic
The reimbursement of costs of a teleworker	The employer's right	The employer's obligation
Additional reasons for dismissal	Any reason included in the employment contract	Two legal reasons (Art. 312.8 of the Labor Code)
Features of registration	An extensive list of the grounds for using electronic digital signatures	The use of electronic digital signatures is reduced

Source: Created by the author

Until 2020, the labor legislation enshrined only permanent teleworking. Teleworking can also be done on a temporary basis since 2021. In addition, employers have the right to implement emergency teleworking under special circumstances, which includes pandemic conditions. Temporary teleworking is also an option during natural disasters and bad weather conditions.

The following positive aspects should be indicated:

• a more detailed description of the rights and obligations of employees and employers;

• enshrinement of the right to the reimbursement of costs;

• protection against wage reductions and unjustified dismissals;

• simplification of the documentary procedure by reducing the number of cases in which mandatory electronic digital signatures are required.

The analysis of enforcement practice showed that one of the most problematic issues is the reimbursement of costs for a teleworker. Until 2020, the legislation established only the right of the employer to set the procedure for such reimbursement, which effectively reversed the burden of equipment, software and Internet costs to the employee. The Labor Code of the Russian Federation now states that the employer "has to compensate a teleworker for the use of his/her or

leased equipment, software and hardware, information security and other means, and also to reimburse the costs related to their use" beginning in 2021 (Art. 312.6 of the Labor Code of the Russian Federation). The period and procedure for such payments must be established in corporation bylaws or employment contracts. If the employer is unable to provide the employee with the equipment, software and other means necessary for teleworking, the time during which this employee does not work is considered downtime for reasons beyond the control of the employer and the employee. Downtime for reasons, which do not depend on the employer and the employee, if the employee informed the employer in writing about the beginning of a downtime, is paid in an amount of not less than two-thirds of the base wage rate (salary).

According to an analysis of Russian law enforcement, another issue was the norm of the Labor Code of the Russian Federation, which establishes the possibility of dismissing a teleworker for reasons specified in the employment contract. As a result, teleworkers were in a much more vulnerable position than other workers. In 2021, Article 312.8 of the Labor Code of the Russian Federation limited additional reasons for terminating a contract with a teleworker if:

• the teleworker does not interact with the employer on dealing with issues relating to the labor function for more than two working days from the date of receipt of the relevant request from the employer without a valid reason;

• the employee changes the work location that makes it impossible to fulfill the employee's obligations under the same conditions in accordance with the employment contract.

Despite the fact that the majority of legislative changes that have taken place are mainly positive,[37] there are still a number of outstanding issues and challenges. In the digital economy, the rate of other modes of labor importation is growing (for example, in accordance with a civil law contract, through digital platforms). The experiment of introducing a special tax regime for self-employed persons started in Russia in 2020. These categories are not protected by the Labor Code of the Russian Federation. The issues of accounting for working hours, overtime and night shifts remain unresolved. The experience of foreign countries shows that the total attendance records can be provided for teleworkers, and that overtime can be compensated. In addition, some European countries impose employer's liability if he or she violates the teleworker's right to rest. This right is called the "right to

[37] *Васюков С.В.* Об отдельных направлениях совершенствования законодательства о дистанционном труде в Российской Федерации // Вопросы трудового права. 2020. № 9. С. 11–18 [Sergey V. Vasyukov, *On Certain Directions of Improving the Legislation on Remote Labor in the Russian Federation*, 9 Labor Law Issues 11 (2020)]; *Костева Д.А.* Новеллы законодательства РФ о труде дистанционных работников: перспективы применения // Научный аспект. 2020. Т. 5. № 4. С. 680–684 [Daria A. Kosteva, *Legislation of the Russian Federation on Work Remote Workers and Application Prospects*, 5(4) Scientific Aspect 680 (2020)].

disconnect."[38] The new edition of the Labor Code of the Russian Federation only states that the time spent interacting with an employer by a teleworker is included in working hours. Thus, there has been a significant rethinking of the norms of labor legislation on teleworking in the Russian Federation in 2020. Chapter 49.1 of the Labor Code of the Russian Federation on teleworking has been updated since 2021. The main purpose of the changes is to better regulate the rights and obligations of the employers and employees. However, enforcement practice continues to pose new challenges for employers, employees and scientists in terms of searching for an optimal model for regulating teleworking.

2.2. Brazil: Flexibility for Employers and Employees

In Brazil, teleworking was actively introduced not only into the commercial sector but also into the public administration sector even before the coronavirus pandemic.[39] By 2020, many government agencies (for example, tax authorities, courts, statistical agencies) provided jobs for teleworkers.[40] In commercial organizations, teleworking is most widespread in:

• call centers (for example, in the assistance customer service centers of the largest Brazilian airlines);[41]

• in the spheres of creative work fields such as design, architecture, publishing, advertising;

• and in telecommunications companies.[42]

One of the driving forces behind growth of teleworking is the requirement for job quotas for disabled people. The use of telecommuting technology allows employers to comply with this legal requirement in Brazil.

The widespread introduction of telecommuting technologies into both the commercial and public sectors has led to the emergence of labor disputes. Thus, disputes over overtime work, working hours and rest hours, as well as compensation

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[38] *Пак Г.С.* «Право отключиться» как ответ на экспансию труда в нерабочее время: кто им воспользуется // Вестник Пермского университета. Философия. Психология. Социология. 2018. № 4(36). С. 508–516 [Galina S. Pak, *"The Right to Disconnect" as a Response to the Expansion of Labor in Non-Working Hours: Who Will Use It*, 4(36) Bulletin of Perm University. Philosophy. Psychology. Sociology 508 (2018)].

[39] Aimée M.S. da Silva, *A aplicação do teletrabalho no serviço público brasileiro*, 3rd Congresso Internacional de Direito e Contemporaneidade (2015) (Apr. 21, 2022), available at http://coral.ufsm.br/congressodireito/anais/2015/1-2.pdf.

[40] Fernando Filardi et al., *Advantages and Disadvantages of Teleworking in Brazilian Public Administration: Analysis of SERPRO and Federal Revenue Experiences*, 18(1) Cadernos EBAPE.BR 28 (2020).

[41] Alvaro Mello, *The Use of Telework in Call Center and Multi-Client Contact Centers Operating in Brazil: Study to Identify the Driving Forces, Restrictive and Recognized Contributions*, PhD dissertation, University of São Paulo (2011).

[42] Alvaro Mello & Armando Dal Colletto, *Telework and its Effects in Brazil* in *Telework in the 21st Century* 211 (2019).

for the costs of teleworkers were considered in the courts of Brazil.[43] It is necessary to note that a large number of studies are being carried out in Brazil as part of evaluating the effectiveness of teleworking. According to Brazilian researchers, the transition to teleworking almost completely solves the problem of absenteeism and dismissals, reduces the costs for both employees and employers, and increases labor productivity.[44] The analysis of scientific publications shows that teleworking is mainly regarded positively in Brazil.

Brazil's labor legislation has been amended in the context of the coronavirus pandemic. On 22 March 2020, the Provisional Measure No. 927/2020 setting labor measures to face the COVID-19 pandemic was adopted by the President of Brazil. The Presidential Decree recommended employers transit employees to teleworking. The main changes of the teleworking regulations in Brazil under the influence of the pandemic are presented in Table 7.

Table7: Telework legal framework in Brazil

	Until 2020	**Since 22 March 2020**
Transition to teleworking	There are changes to agreements on personal work and telework if there is a mutual agreement between the employee and the employee	The main purpose of this measure is to guarantee the protection of the employee's health; that is why it allows unilateral modifications of the employment contract. The employer is obliged to notify the employee about the need to transit to teleworking (with 48 hours' advance notice)
Trainees and apprentices	Teleworking for trainees and apprentices is not allowed	Teleworking for trainees and apprentices is allowed
End of the emergency mode of teleworking	The teleworking regime can be changed as determined by the employer, with a minimum transition period of fifteen days	It is possible to return to the traditional mode of work immediately, irrespective of the existence of individual or collective agreements, and without pre-registration of the individual employment contract changes

Source: Created by the author

In 2020, the Brazilian Public Labor Prosecution Office issued a memorandum of advice to employers on various aspects of teleworking, including digital ethics and

[43] Manuel M.P. Estrada, *Realidade do Teletrabalho no Brasil e nos Tribunais Brasileiros*, 12 Revista Direito e Liberdade 103 (2010).

[44] Sergio Volk, *Teletrabalho: reduza custos e aumente a produtividade*, IBEF (2015) (Apr. 21, 2022), available at http://www.ibefsp.com.br/content-hub/teletrabalho-opcao-para-reduzir-custos-e-aumentar-produtividade.

etiquette, adopting internal teleworking policies, ensuring ergonomics and mental health protection, protecting confidentiality, and informing employees about COVID-19 prevention measures. Thus, Brazil's labor legislation has undergone substantive changes regarding the teleworking regulation. The amendments are intended to enhance flexibility for employers and employees in contractual relationships.

2.3. India: Overcoming Obstacles and Inequalities

The peculiarities of the Indian labor market are the high proportion of small enterprises and the shadow economy. According to E. Bragina, so-called "invisible labor" has developed in India, which, on the one hand, helps millions of people to survive, but, on the other hand, deprives them of many legal and social guarantees.[45] "Invisible labor" is mainly focused on physical work and is thus hardly prone to digital transformation. As noted by Indian researchers, the majority of the workers in India were not familiar with teleworking technologies before the pandemic, and employers generally considered these technologies to have a set of disadvantages.[46] The main difficulties in the transition to teleworking were inaccessibility to technology (especially in rural areas), a decrease in labor productivity, and difficulties in organizing and monitoring telework.[47]

Teleworking in India has spread mainly in the fields of telecommunications and information technology (IT) until 2020. The issue of teleworking regulations in the IT industry is of strategic importance for India. Many Indian programmers are teleworkers at large American and European companies. India pays special attention to information security. The experience of 2020 has shown that teleworking can be the only possible option for continuing work in emergencies, epidemics, and natural disasters. An awareness of the need to improve the legal framework and management system is gradually replacing the critical attitude to teleworking.

In India, teleworking is not only regulated by labor laws. As a result, there was a ban on long-term work from home for IT companies until 2020. After discussions with the largest companies in the IT industry, the Indian Ministry of Communications has significantly simplified the teleworking procedure in 2020. The most important regulatory change is that teleworkers now have the right to work not only from home as part of the "Work-From-Home" concept but from anywhere ("Work-From-Anywhere").

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[45] *Брагина Е.А.* Невидимый труд в экономике стран Азии и Африки // Мировая экономика и международные отношения. 2013. № 11. С. 53–61 [Elena A. Bragina, *Invisible Labor in the Economy of Asian and African Countries*, 11 World Economy and International Relations 53 (2013)].

[46] Melissa Cyrill, *Remote Work in 2021: Tips for HR Managers in India*, India Briefing, 9 December 2020 (Apr. 21, 2022), available at https://www.india-briefing.com/news/remote-work-india-new-normal-2021-key-considerations-employers-21318.html/.

[47] Dharma R. Bathini & George M. Kandathil, *Bother Me Only if the Client Complains: Control and Resistance in Home-Based Telework in India*, 1(42) Empl. Relat. 90 (2020).

As mentioned before, a large number of foreign companies from the United States, European countries, and China are represented in the Indian labor market. These companies have much more experience in organizing remote workplaces. It was this experience that formed the basis for recommendations for ensuring the health, safety and well-being of teleworkers. Indian law does not contain peremptory norms requiring employers to reimburse the costs of teleworkers. However, many large companies began financing programs aimed at purchasing and repairing equipment, training employees, and protecting cyber security during the pandemic. A good example is the experience of the German-based company, DHL. In order to reduce the negative impact of computer technology on health, the company's teleworkers are recommended to alternate 25 minutes of work with a five-minute break. A number of other large companies have also initiated medical and psychological assistance programs for teleworkers. These examples show that not only national requirements, but also the actions taken by large companies are of great importance during a pandemic. In general, there is a significant rethinking of the teleworking model under the influence of the pandemic in India. However, in contrast to Russia, China and Brazil, the spread of teleworking in India is constrained by objective economic factors, such as a high level of poverty, a low level of digital literacy, and gender inequality.

2.4. China: From Workplace to Anyplace

According to Chinese researchers, teleworking was still not widespread 5–7 years ago and met with resistance and misunderstanding on the part of both employees and employers.[48] They emphasized that teleworking was contrary to the traditional spirit of collectivism in the early stages of its implementation.[49] However, there have been radical changes in evaluating the benefits of teleworking in recent years, especially in 2020. A growing number of Chinese residents have begun looking for telework opportunities.[50] When studying the teleworking regulations in China, special attention is paid to the issues of state support for the development of teleworking[51] and the supervision of the activities of teleworkers.[52] Studies aimed at comparing the features

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48 Nicholas Bloom et al., *Does Working from Home Work? Evidence from a Chinese Experiment*, 18871 NBER Working Papers 1 (2013) (Apr. 21, 2022), available at https://www.nber.org/system/files/working_papers/w18871/w18871.pdf.

49 Lien-Yin Hsu & Justin S. Chang, *Telework and Conventional Work: From a Chinese Perspective*, 39(2) J. Nat'l Taipei U. Tech. 105 (2006).

50 Peipei Wang et al., *Research on Policies to Support Telecommuting in China*, The Fourth International Conference on Electronic Business (ICEB2004)/Beijing (2004), at 1368 (Apr. 21, 2022), available at https://aisel.aisnet.org/cgi/viewcontent.cgi?article=1247&context=iceb2004.

51 Sumita Raghuram & Dong Fang, *Telecommuting and the Role of Supervisory Power in China*, 31(2) Asia Pac. J. Mgmt. 523 (2013).

52 Baiyin Yang & De Zhang, *A Theoretical Comparison of American and Chinese Culture and Impacts on Human Resource Theory and Practice*, 3(4) Int'l J. Hum. Resources Dev. Mgmt. 338 (2003).

of Chinese and Western culture can be distinguished into a special group. This issue is especially important because of the active integration of the Chinese economy into the global economy. Large European and American companies not only opened production facilities in China, but also made substantive changes in the practice of regulating labor relations. The rapid development of the Chinese economy over the past decade has led to the emergence of powerful national companies that successfully compete with foreign corporations. China is the world leader in the number of teleworkers because of this intense competition. According to the Statistical Report on Internet Development in China, the number of teleworkers increased to 346 million by the end of 2020. Research has shown that an employer can save more than US$2,100 per teleworker per year.[53]

When evaluating the changes in teleworking in the context of the pandemic, it should be noted that China was the first to recognize the gravity of the new virus threat and begin introducing restrictions and bans, as well as transferring citizens to teleworking. China's experience in regulating teleworking has a number of specific features. The right of teleworkers to maintain wages has been enshrined in legislation, which correlates with Russian practice. Another distinguishing feature is that China pays special attention to the development of national platforms and software. DingTalk by Alibaba, Feishu by ByteDance, and Wechat Work by Tencent have become the most popular apps in the course of the pandemic. All of these platforms offer the same services as Google, Zoom and Microsoft. Monitoring of employee discipline is also carried out using special software. Thus, the main emphasis has been placed not on changing legislation, but on the development of national services and technical capabilities for teleworking in China. Best practices of leading companies (e.g. Alibaba, Tencent, China Telecom) in conducting business have also become very important.

2.5. South Africa: Barriers to Telework

Table 1 above showed that South Africa has the smallest number of scientific publications on teleworking issues among the BRICS. South African researchers have repeatedly noted the sporadic nature of the data and the lack of comprehensive programs for teleworking accounting. Research on teleworking is carried out mainly in the fields of information technology, education, and the financial sector.[54] According to N. Baard and A. Thomas, teleworking can contribute to productivity growth in the field of information technology.[55] Despite the widespread awareness of the benefits of

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[53] China Internet Network Information Center (CNNIC), Statistical Report on Internet Development in China (September 2020) (Apr. 21, 2022), available at https://cnnic.com.cn/IDR/ReportDownloads/202012/P020201201530023411644.pdf.

[54] Crispen Chipunza & Trust Kabungaidze, *Attributes Utilised by Knowledge Workers in Identifying Employers of Choice: Focus on Accountants and Information Technology (IT) Specialists in South Africa*, 31(2) J. Soc. Sci. 137 (2012).

[55] Nicholas Baard & Adèle Thomas, *Teleworking in South Africa: Employee Benefits and Challenges*, 8(1) SA J. Hum. Resource Mgmt. 1 (2010).

teleworking, its spread in South Africa was constrained by a number of factors prior to the pandemic. As a result, South Africa has a highly stratified society, and the literacy rate is extremely low in rural areas.[56] Many areas lack access to not only the Internet, but also to electricity. A significant portion of the population speaks African dialects, and the use of telecommunications technologies requires a high rate of computer literacy, as well as knowledge of the English language.[57]

As a result of all these factors, South Africa ranks lower than the other BRICS countries in terms of the total number of teleworkers and their share in the labor force. The study conducted by D. Morrison shows that the readiness for teleworking depends on a number of factors, including the availability of high-speed Internet, as well as the availability of employee training programs.[58]

When it comes to regulating teleworking in South Africa, special attention is paid to the protection of personal data and the organization of control through technical means. Thus, the Protection of Personal Information Act (POPIA) requires employers to notify employees that their performance is being monitored using special software, cameras, and a system to intercept private messages. Employees in South Africa should be kept informed of working from home best practices and how to deal with fatigue by employers, and the latter should encourage workers to set their own boundaries to achieve work-life balance Employers in South Africa should inform (or educate?) employees about best practices for working from home and how to deal with fatigue, and workers should be encouraged to set their own boundaries to achieve work-life balance.[59]

Gender inequality is also a problem in South Africa. Women have fewer opportunities to transition to teleworking. Furthermore, women were the ones who were most affected during the lockdown, as the majority of them already had low incomes prior to the pandemic. The pandemic has led to an increase in gender inequality and has the potential to exacerbate the growing poverty.[60] For South Africa, one of the priority areas of state policy is the financing of programs aimed at creating infrastructure and developing digital literacy.

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[56] Chidi M. Lebopo et al., *Explaining Factors Affecting Telework Adoption in South African Organisations pre-COVID-19* in *SAICSIT'20: Conference of the South African Institute of Computer Scientists and Information Technologists 2020* 94 (2020).

[57] Chudinovskikh & Tonkikh 2020.

[58] Joseph Morrison, *Explaining the Intention of IT Workers to Telework: A South African Perspective*, A dissertation presented to the Department of Information Systems, University of Cape Town (2017) (Apr. 21, 2022), available at https://open.uct.ac.za/bitstream/handle/11427/25502/thesis_com_2017_morrison_joseph.pdf?sequence=1&isAllowed=y.

[59] Walter Matli, *The Changing Work Landscape as a Result of the COVID-19 Pandemic: Insights from Remote Workers Life Situations in South Africa*, 40(9/10) Int'l J. Sociol. Soc. Pol'y 1237 (2020).

[60] Naila Kabeer et al., *Feminist Economic Perspectives on the COVID-19 Pandemic*, 27(1-2) Fem. Econ. 1 (2021).

Conclusion

This study allows us to highlight the main trends in telework regulations in BRICS. In the context of the pandemic, all of the BRICS countries were forced to impose restrictions, bans, lockdowns, and transition employees to teleworking, as well as amend legislation. By the end of 2020, a critical review of the current labor legislation was made in the Russian Federation. Regulations on teleworking were revised in 2021. In the other BRICS countries, legislative changes were made to both labor legislation and personal data protection procedures, to ensure cyber security related to teleworking.

Teleworking had gained popularity in both the commercial and public sectors prior to the pandemic in Brazil and China. In the Russian Federation, teleworking of public authorities was not introduced until 2020. The analysis of the BRICS countries' experiences highlights the need for a more thorough understanding of the limits and possibilities of introducing teleworking into state authorities in Russia.

The abrupt transition to teleworking during the pandemic has led to the increasing importance of corporations in labor regulation. The adoption of new laws or amending existing ones is a rather lengthy process, which is why large companies have taken on the responsibility of urgently modernizing internal rules, explanatory work, changes to employment contracts, employee training procedures, and technical equipment in workplaces. Due to the fact that some of these responsibilities are enshrined in legislation, they reflect established best practices.

The increase in the proportion of teleworkers aggravates problems of inequality in different ways. Teleworking is focused primarily on skilled and educated workers. For the majority of the BRICS countries, the increase in the proportion of teleworkers can exacerbate the problems of poverty and gender inequality (this problem is especially acute for India and South Africa). The BRICS countries will need to develop and carry out large-scale projects aimed at increasing digital literacy, subsidizing computer equipment and learning foreign languages to cope with the problems of inequality.

Teleworking has been provided with incentives to develop in the context of the pandemic. It will continue to develop even as countries ease restrictions because both employees and employers recognize the advantages and opportunities associated with teleworking. Moreover, teleworking was actively introduced into new industries, stimulating, for example, the development of telemedicine.[61] Thus, the COVID-19 pandemic has led to substantive changes in the labor markets of the BRICS countries and highlights the need to improve legislative regulation. The issues of harmonization of labor laws in the BRICS countries, ensuring data protection and creating equal conditions for citizens' access to teleworking could be included as further areas of research.

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[61] *Путило Н.В.* Телемедицина: потребности общества и возможности законодательства // Журнал российского права. 2018. № 6(258). С. 124–135 [Natalia V. Putilo, *Telemedicine: The Needs of Society and the Possibilities of Legislation*, 6(258) Journal of Russian Law 124 (2018)].

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HARNESSING THE POWER OF LABOUR LAW AND SOCIAL SECURITY LAW TO ACHIEVE THE GOAL OF FORMALIZING LABOUR MARKETS IN THE BRICS COUNTRIES

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The Declaration by the Labour and Employment Ministers of the BRICS countries, "Quality Jobs and Inclusive Employment Policies," guarantees that formalization of labor markets is a global priority for the BRICS countries, as informal employment hampers productivity, potential economic growth and efforts to improve the welfare of populations worldwide. Taking into account this strategic goal, the authors analyze the informal employment processes in the BRICS countries and speculate on the transition from informal to formal employment. The article addresses the issues of inhomogeneous notional ranges used to define informal employment and recommends that the possibilities provided by labor legislation and government employment policy (such as increasing the number of formal working places and dynamic development of labor legislation directed at regulation of new employment forms) be used to tackle these issues. The potential of the social security right for achieving the goals of transition to a formal economy and social security coverage is characterized in detail; various legal forms of social security (for example, government social security, social insurance (mandatory as well as voluntary) and social support) are analyzed; and the possibilities of their application to informal workers in the BRICS countries are defined.

Keywords: informal economy; informal employment; informal workers; social security; social insurance; legal regulation; BRICS.

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Table of Contents

Introduction

The informal economy now employs more than 6 out of every 10 workers, while the International Labour Organisation (ILO) terminology uses the term "worker" to refer to all employed workers, including wage workers, own-account workers (whether or not employing hired labor) and unpaid workers in family businesses. Informality is a comprehensive and significant phenomenon that is growing in many countries around the world.[1]

The broad scale of the informal economy in all its manifestations is a major challenge to the realization of workers' rights, including fundamental social and labor principles and rights, and has a negative impact on public revenues and governments' scope of action, particularly with regard to economic, social and environmental policies in national and international markets. It should be noted that most people find themselves in the informal economy solely due to a lack of employment and livelihood opportunities in the formal economy, particularly in times of crisis, such as the COVID-19 pandemic, and are especially in need of legal

[1] ILO, Transition from the Informal to the Formal Economy: Theory of Change (2021) (Mar. 5, 2022), available at https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/briefingnote/wcms_768807.pdf.

and social protection. Informal employment has multiple causes, including those related to governance issues, and public policy can speed up the process of transition to the formal economy in the context of social dialogue.

1. Development of Labor Markets in the Framework of Transition from the Informal to the Formal Economy: International Law Aspect

Trends in the spread of the informal employment prompted the ILO to adopt Recommendation 204, "Concerning the Transition from the Informal to the Formal Economy" (hereinafter referred to as ILO Recommendation 204) on 12 June 2015, which aims to promote the transition of workers from the informal to the formal economy, encourage the creation, preservation and viability of enterprises as well as decent jobs in the informal economy and prevent the informalization of jobs in the formal economy.

In this Recommendation, the term informal economy refers to the economic activities of workers (and economic units) that are, in law or in practice, not covered or insufficiently covered by formal arrangements and do not involve illegal activities, for example, production and trafficking of drugs, illicit manufacturing and trafficking of firearms, human trafficking, and money laundering.

According to ILO Recommendation 204, the member states should provide social security, maternity protection, decent working conditions and minimum wages to all workers in the informal economy; as well as establish and maintain social protection and social insurance for persons employed in the informal economy and their families. Therefore, all employed workers shall be subject to legislation on labor, social security, taxation regardless of the type and form of employment, and as a result they shall receive relevant guarantees and social protection as well as become tax payers. As a result, informally employed workers shall be covered by the relevant legal regulation and provided with legal protection (including social insurance and the minimum guarantees established by the national labor legislation). Therefore, the legal status of the employed worker is defined by a single legal regulation that meets the minimum national standards. It is established that workers in the informal economy are more vulnerable physically and financially, and therefore they are excluded or fall outside the scope of the social security systems and legislation on occupational safety and health, maternity protection and other provisions of labor law.[2] In addition to the lack of legal regulation, informal employment represents an acute social problem, as it is characterized by a lack of decent work and a disproportionally high share of the working poor. There are

[2] ILO, The Informal Economy in Africa: Promoting Transition to Formality: Challenges and Strategies (2009) (Mar. 5, 2022), available at https://www.ilo.org/wcmsp5/groups/public/@ed_emp/@emp_policy/documents/publication/wcms_127814.pdf.

enough empirical findings showing that poverty jeopardizes workers in the informal economy more than those in the formal economy.[3]

The Ministers of Labour and Employment of the Federative Republic of Brazil, the Russian Federation, the Republic of India, the People's Republic of China, and the Republic of South Africa met on 25–26 January 2016 in Ufa (the Russian Federation). During the first meeting of the Ministers of Labour and Employment of the BRICS countries, they discussed new areas of cooperation in labor and employment, social security and social inclusion, public policy. Their work resulted in the BRICS Labour and Employment Ministers' Declaration on "Quality Jobs and Inclusive Employment Policies." Formalization of labor markets is a global priority, as well as a priority for all the BRICS countries, as informal employment stifles productivity, potential economic growth and efforts to improve people's well-being.

The BRICS countries agreed to follow ILO Recommendation 204 in facilitating the transition of workers from the informal to the formal economy; in promoting the creation, preservation and stability of enterprises and decent jobs in the formal economy and in ensuring coherence of policies in macroeconomics, employment, social protection, and other social programs, as well as preventing the informalization of the formal economy.

The reduction of informality in the labor market is expected to be achieved through the creation of high-quality jobs in the formal economy. The basis for developing high-quality formal jobs and for increasing formal employment includes integration of policies that promote job creation and income opportunities in the formal economy; modernization of enterprises and performance improvement; investing in skills that meet the requirements of the formal economy; expanding labor inspection activities; improving working conditions and safety; enforcing workers' rights and their protection and expanding adequate social protection for all workers.

On 21 November 2016, the Russian Federation and the ILO signed the Program of Cooperation for 2017–2020 (hereinafter referred to as the Program of Cooperation) which is based on the membership of the Russian Federation in the ILO and other international organizations. Its objectives are to promote further development of social and labor relations in such areas as the expansion of employment, social protection and social security, working conditions and safety, international labor standards and fundamental principles and rights at work, which results in the transition from the informal to the formal economy by creating high-quality jobs.

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[3] ILO, Decent Work and Informal Economy, Report VI, International Labour Conference, 90th Session, Geneva (2002) (Mar. 5, 2022), available at https://www.ilo.org/public/english/standards/relm/ilc/ilc90/pdf/rep-vi.pdf; ILO, Efficient Growth, Employment and Decent Work in Africa: Time for a New Vision (2011) (Mar. 5, 2022), available at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_164482.pdf; United Nations Research Institute for Social Development, Combating Poverty and Inequality: Structural Change, Social Policy and Politics (2010) (Mar. 5, 2022), available at https://www.bristol.ac.uk/poverty/downloads/keyofficialdocuments/UNRISD%20Combating%20Poverty.pdf; The World Bank, World Development Report: Employment (2013).

As a result, the formalization of the economy is a process in which both international organizations and specific states are interested. The ways of transition to the formal economy is largely dependent on national conditions, such as prevailing types of economic activity, labor market structure and national legislation. In order to develop a national strategy of formalization, it is necessary to have an understanding of the forms and factors of informality that exist in a particular state, as well as how they are combined depending on the category of employee, the type of enterprises, etc. Formalization strategies can be individual and aimed at specific sectors of the economy, categories of employed workers, types of enterprises, or activities or they can target several aspects at once. An example of such a strategy is an experiment that was first held in some regions of the Russian Federation and later spread throughout the state. In this experiment, the category of own-account workers as tax payers on professional income[4] was introduced into Russian law in order to increase state revenues. However, employers saw their own interest in it and perceived the innovation as a call to action and began to register their employees as own-account workers concluding fictitious contracts of rent for their workplaces with those workers who perform their labor functions on the territory of the employer.[5] This is especially dangerous given that, according to expert surveys in the EU,[6] sham or fake own-account work is considered to be the most precarious forms of employment from the point of protecting the rights of workers. Guided by ILO Recommendation 204 and the BRICS Labour and Employment Ministers Declaration on "Quality Jobs and Inclusive Employment Policies," state authorities have already announced that they will combat abuses of employers in terms of transferring workers to the "own-account work" regime, but such announcements are made by the Federal Tax Service, not by the State Labour Inspectorate.[7] Unfortunately, this demonstrates once again that the state's interest in tax collection currently prevails over the performance of the social function of the state.

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[4] Федеральный закон от 27 ноября 2018 г. № 422-ФЗ «О проведении эксперимента по установлению специального налогового режима «Налог на профессиональный доход»» // СПС «КонсультантПлюс» [Federal Law No. 422-FZ of 27 November 2018. On Carrying Out Experiments on the Establishment of the Special Tax Regime "Tax on Professional Income," SPS "ConsultantPlus"] (Mar. 5, 2022), available at http://www.consultant.ru/document/cons_doc_LAW_311977/.

[5] *Богушевский Р.* Работодатели начали оформлять сотрудников как самозанятых // Daily Storm. 9 января 2019 г. [Rostislav Bogushevsky, *Employers Have Begun to Register Employees as Own-Account Workers*, Daily Storm, 9 January 2019] (Mar. 5, 2022), available at https://dailystorm.ru/obschestvo/rabotodateli-nachali-oformlyat-sotrudnikov-kak-samozanyatyh.

[6] Sonia McKay et al., *Study on Precarious Work and Social Rights*, carried out for the European Commission (VT/2010/084), Working Lives Research Institute, Faculty of Social Sciences and Humanities, London Metropolitan University (April 2012), at 77 (Mar. 5, 2022), available at https://ec.europa.eu/social/BlobServlet?docId=7925&langId=en.

[7] *Бутрин Д.* Недорого, но прозрачно. ФНС вычислит попытки перевести сотрудников в режим налога на профессиональный доход // Коммерсантъ. 15 января 2019 г. [Dmitry Butrin, *Low-Priced, but Transparent. Federal Tax Service Will Track Down Attempts to Transfer Employees to the Regime of Tax on Professional Income*, Kommersant, 15 January 2019] (Mar. 5, 2022), available at https://www.kommersant.ru/doc/3854185.

This position of state authorities clearly demonstrates the willingness of states that receive less than due taxes and insurance premiums as a result of the operation of the informal economy, to receive the necessary revenue for the budget. Moreover, it makes no difference to the state who will act as a taxpayer – an employee in an employment relationship, or any other person. Businesses (employers) that use informal employment, as a rule, aim to reduce fiscal costs (the burden of taxes and insurance premiums for the employee). In such a situation, a person performing a particular production function through his or her own labor is deprived of guarantees derived from the legal status of an employee and his or her position in society becomes vulnerable and socially unprotected both in connection with this function (no one guarantees him or her safe working conditions and decent pay) and in the event of loss of ability to work. It is not possible to change this situation without appropriate legal and management decisions.

Therefore, the formalization of the economy is a process everyone should be interested in. Formalization increases the welfare of society as a whole and of employed workers; it provides economic stability; contributes to equality; reduces poverty and maintains social stability. The formalization of enterprises and other economic entities due to productivity growth and improved access to markets increases their competitiveness. Clearly, the state is more interested in the formalization of employment, as it allows the state to increase income in the form of taxes and insurance premiums as a result of the transition from the informal to the formal economy.

2. Informal Employment as a Manifestation of the Informal Economy in the BRICS Countries

The BRICS countries have seen an increase in the number of informal workers. Informal workers account for nearly 50 percent in Brazil and China, and nearly 90 percent in India.[8]

Experts note the heterogeneity of informal employment and the influence of various factors on it:

• age – the level of informality is higher among young and elderly persons. Globally, three out of four young (77.1 percent) and elderly persons (77.9 percent) are employed in the informal sector;

• level of education – across the globe, when the level of education rises, the level of informality decreases. Persons with secondary and higher education are less likely to be employed in the informal sector compared to workers who either have no education or have only primary education;

[8] OECD, Labour Markets in Brazil, China, India and Russia and Recent Labour Market Developments and Prospects in OECD Countries, OECD Employment Outlook (2007), at 17–53 (Mar. 5, 2022), available at https://www.oecd.org/els/emp/40776587.pdf.

• residence in a village or town – people living in rural areas (80.0 percent) are twice as likely to be in informal employment compared to those living in urban areas (43.7 percent);

• type of economic activity – agriculture is the industrial sector with the highest level of informal employment in the world (93.6 percent). Informality has a lower impact on industry (57.2 percent) and services (47.2 percent);

• gender – globally, men (63.0%) outnumber women (58.1 percent) in terms of informal employment. This is true for averages in both emerging and developed countries and for informal employment in agriculture as well as in the non-farm sector. Just over 740 million of the 2 billion workers employed in the informal sector worldwide are women. However, this global picture is the result of the influence of large countries such as China or the Russian Federation, where female employment is high. In contrast, in low and middle-income countries, the share of women employed in the informal sector is higher than that of men. The picture is different in Africa, however, where 89.7 percent of employed women work in the informal sector.[9]

In India, the majority of informal workers are own-account women workers, domestic workers with and without contracts, as well as own-account entrepreneurs and temporary workers. In Brazil, informal employment is also characterized by an increase in female employment in household services. In China, informal employment is most common among undeclared agricultural migrants and workers who have been laid off or sent on forced leave from state-owned enterprises.

The problem of unemployment is closely related to the problem of informal employment. In 2020–2021, unemployment in Brazil grew by approximately 14.6 percent, with the labor market losing more than 1.1 million jobs. In both Russia and China, the unemployment rate is around 6 percent. In May 2021, the unemployment rate in India was 27.1 percent. South Africa has the highest unemployment rate, accounting for more than 45 percent of the country's population.

As a result, the characteristic feature of the BRICS countries is the compensation of high levels of unemployment through the transition of workers to the informal economy, which reduces the opportunities for social protection for the working population. At the same time, labor supply will grow both in terms of quantity and quality, which raises the question of how to create new jobs that meet the demands of the innovation economy.

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[9] ILO, Women and Men in the Informal Economy: A Statistical Picture (3rd ed. 2018) (Mar. 5, 2022), available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_626831.pdf.

3. Correlation of the Terms "Informal," "Non-Standard" and "Precarious" Employment

There is still no consensus in the literature on the definition of "informality," but there is a general feeling that the world of work in all emerging countries is characterized by a high level of informality, defined as the absence of business registration, social security or employment contract.[10]

In 2003, the 17th International Conference of Labour Statisticians adopted "Guidelines Concerning a Statistical Definition of Informal Employment."[11] According to paragraph 3 of the guidelines, "informal employment" comprises the total number of informal jobs, whether carried out in formal sector enterprises, informal sector enterprises, or households, during a given reference period. These jobs could be those that are held by own-account workers and employers employed in their own informal sector enterprises; contributing family workers, irrespective of whether they work in formal or informal sector enterprises; employees holding informal jobs in formal sector enterprises, informal sector enterprises, or as paid domestic workers employed by households; members of informal producers' cooperative and own-account workers engaged in the production of goods exclusively for their own final use by their household.[12]

As a result, the classification of workers as formal or informal is made according to the nature of the employment relationship in which they participate, that is, according to the characteristics of jobs within entire production units, rather than on the basis of the characteristics of the production units themselves. As a result, a worker is considered informally employed, if he or she is not subject to the formal restrictions imposed by the state regulating the use of labor and its remuneration. That is to say, the informally employed do not have a formal employment relationship in accordance with the current national legislation.

The concept of "informal economy" is formalized in ILO Recommendation 204 and in provisions of the BRICS Labour and Employment Ministers Declaration

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[10] ILO, Women and Men in the Informal Economy: A Statistical Picture (2002 and 2012) (Mar. 5, 2022), available at https://europa.eu/capacity4dev/file/25589/download?token=TwowLfpS; Johannes P. Jütting & Juan R. de Laiglesia, *Is Informal Normal? Towards More and Better Jobs in Developing Countries*, OECD (2009) (Mar. 5, 2022), available at https://www.e-regulations.org/media/website/OECD_is_informal_normal.pdf; Marc Bacchetta et al., *Globalization and Informal Jobs in Developing Countries*, ILO/World Trade Organization (2009) (Mar. 5, 2022), available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_115087.pdf.

[11] Рекомендации, касающиеся статистического определения неформальной занятости [Guidelines Concerning a Statistical Definition of Informal Employment] (Mar. 5, 2022), available at https://www.ilo.org/public/english/bureau/stat/download/guidelines/russian/defempl.pdf.

[12] Ralf Hussmanns, *Measuring the Informal Economy: From Employment in the Informal Sector to Informal Employment*, Working Paper No. 53, Policy Integration Department, Bureau of Statistics, International Labour Office (December 2004) (Mar. 5, 2022), available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---integration/documents/publication/wcms_079142.pdf.

"Quality Jobs and Inclusive Employment Policies" which allow it to be established that informal employment must be understood as workers and economic units involved in economic activities that are – in law or in practice – not covered or insufficiently covered by formal arrangements and that are not engaged in illegal activities. We believe that the above definition of "informal employment" is extremely broad and vague, including various forms of employment, both those regulated and not regulated by national legislation.

In addition, international documents use concepts that are similar to the concept of informal employment. In contrast to "standard employment," which is defined as "full-time employment based on an employment contract in an enterprise or organization, under the direct supervision of an employer or his designated managers,"[13] the concept of "non-standard employment" has emerged as a result of globalization and the development of new technologies. If, on the other hand, informal employment is an unformulated relationship that is not regulated in accordance with the current national legislation, then non-standard employment presupposes the legal regulation of these relations, but with differences in the length of working hours and also presupposes their existence with more than one employer.

ILO specialists distinguish four non-standard forms of employment:

• temporary employment (fixed-term employment contracts, including contract for work on a project or one-time assignments, seasonal work; one-time work, including one-day work);

• part-time work (including on-demand work as well as "zero hours" contracts);

• an employment relationship involving more than two parties (agency work, subcontracting and such.);

• hidden employment and dependent own-account work (labor relations misrepresented as civil law, etc.).[14]

It should be noted that non-standard employment, unlike informal employment, does not necessarily cause insecurity in the sphere of labor. For example, working under a fixed-term employment contract or working on a part-time basis, despite being types of non-standard employment, has long been regulated by legislation. Employees in such employment enjoy nearly full guarantees, which allow us to talk about their social protection.

The conclusion of civil-law contracts with employees should also be classified as non-standard employment. The main motivation of employers to disguise labor

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[13] *Федченко А.А., Колесникова О.В., Дашкова Е.С., Дорохова Н.В.* Неформальная занятость: теоретические основы, исследование, прогноз [Anna A. Fedchenko et al., *Informal Employment: Theory, Research, Forecast*] 28 (2016).

[14] ILO, Non-Standard Employment Around the World: Understanding Challenges, Shaping Prospects (2016), at xxii (Mar. 5, 2022), available at https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_534326.pdf.

relations under the guise of civil law in most countries is related to the costs of ensuring the labor rights of employees. In order to prevent such violations, legislators in Russia have introduced norms in the tax legislation (Art. 420 of the Tax Code of the Russian Federation) requiring the payment of insurance premiums for mandatory social insurance from payments and other remuneration in favor of individuals, paid to them as part of labor relations and under civil law contracts, the subject of which is the performance of work and the provision of services.

Precarious employment, which includes new forms of employment, such as work based on temporary contracts for the provision of workers (personnel) through private employment agencies, work acquired through Internet platforms, work based on verbal agreements between an employee and an employer that are not formalized by any contracts and own-account work, can be identified as a type of non-standard employment. According to estimates of the International Labour Organization, precarious employment can affect all jobs, regardless of the form of employment relationship.[15] Second, precarious employment affects workers who have entered into atypical labor contracts or "quasi-labor" contracts, in which the purpose of the contract is not the creation of an employment relationship, but the provision of services (work based on Internet platforms). In addition, when considering the issues of precarious employment, the focus is frequently shifted from labor relations to civil law relations, and the key players for researchers are no longer workers but entrepreneurs and own-account workers.

As a result, in our opinion, informal employment and non-standard employment are mutually exclusive concepts, since informal employment presupposes the existence of unformulated relations in accordance with the procedure established by law, whereas non-standard employment presupposes the legal regulation of these relations, but it differs from "standard" labor relations, in that it assumes full working hours and the existence of labor relations with a single employer. Non-standard and informal employment can affect any person and reduce the level of social protection provided to employees, the stability of labor relations and the entire system of traditional labor legislation as a whole. Furthermore, it can also undermine the social function of labor law that is inherent in an industry: there are no guarantees of permanent employment and employees do not fully enjoy the benefits and advantages provided by labor legislation.

Precarious employment is a type of non-standard employment that is characterized, not only by the loss of the employee's standard labor relations based on an indefinite employment contract with a full working week, but also by the temporary nature of employment (for example, fixed-term employment contracts, including contracts for work within a project or one-time assignments, seasonal work; single jobs, including one-day jobs). The existence of precarious employment also

[15] ILO, *supra* note 14, at 19.

reduces the level of social protection provided to employees, as well as the stability of labor relations, since it generates negative consequences such as uncertainty in employment planning, loss of meaning in work and, clearly, a lack of societal recognition of such employment.

4. Increasing the Number of Formal Jobs as a Condition for the Transition to Formal Employment

When the BRICS countries signed the Declaration in Ufa in 2015, they recognized the need to emphasize the formalization of national labor markets, as well as the need to develop a well-balanced medium-term strategy for the formalization of labor markets as described in ILO Recommendation 204. In accordance with ILO Recommendation 204, it is expected to address informality, including by promoting the creation, preservation and stability of enterprises and decent jobs in the formal sector of the economy, as well as the coherence of policies in macroeconomics, employment, social protection and other social programs. We believe that one of the reasons for the existence and growth of informal employment is the insufficient flexibility of the labor market, in particular, with the limited offer of formal jobs, including non-standard employment. This is especially important for some categories of workers as well as certain social groups who are permanently facing employment difficulties, such as graduates of educational institutions, persons with family obligations, pre-retirees and retirees.

As documented in the BRICS Declaration, the challenges and prospects for creating quality formal jobs and making them more accessible to job seekers vary from country to country. Nevertheless, all countries agree that the following issues constitute the basis for developing high-quality formal jobs and increasing formal employment: for example, integration of policies that promote job creation and income opportunities in the formal economy; creation of formal employment opportunities through enterprise modernization and performance improvement; development of labor market infrastructure; investing in skills that meet the requirements of the formal economy and others. As we can see, the given list includes political, economic, social and legal measures.

In particular, according to clause 6 of the Declaration, the BRICS countries agreed to focus policy measures on improving the quality and inclusion of employment by promoting, among other things, the development of occupational standards and qualifications and increasing the quality of vocational education and training of workers in line with occupational standards and qualifications that consider current and future requirements of business.

Clearly, more opportunities to upgrade skills and retrain groups in vulnerable positions are required in order to obtain formal employment. It has been established, for example, that shadow employment is prevalent among the youngest workers. This

creates a situation in which young workers gain their first experience of employment under conditions of informal employment or formal employment with partial concealment of income. However, such a labor market entry trajectory fosters a tolerant attitude toward shadow employment and shadow income among the population and may have a significant impact on the subsequent behavior of workers.

As a result, a possible area of activity to reduce the prevalence of such practices could be the policy to promote official employment of students and graduates, which could include the development of cooperation between educational institutions and relevant employers, the creation of a system of official student internships with the possibility of further employment upon graduation and the creation of a database of jobs for specialists without work experience.

The most important prerequisite for economic development, reduction of unemployment, formal employment growth and improving competitiveness of the BRICS countries is the existence of a developed educational system that forms a new layer of young highly qualified specialists who are able to work successfully, including in the framework of partnership. In order to work out a joint policy on the development of education, the BRICS countries have step by step created a legal foundation for cooperation in this sphere. The most important documents issued as a result of the BRICS summits set out strategic guidelines for joint cooperation. In the joint statement of the BRICS leaders made on 16 June 2009 in Yekaterinburg, the BRICS countries confirmed their intention to promote cooperation in science and education and for basic research.[16] The Delhi Declaration, adopted as a result of the fourth BRICS summit on 29 March 2012, supports the expansion of channels of communication, exchange programs and contacts between citizens within the framework of BRICS in the fields of youth exchange and education.[17] The Fortaleza Declaration, adopted as a result of the sixth BRICS summit on 15 July 2014, states the need to explore opportunities for mutual cooperation in the recognition of higher education documents and diplomas, to ensure equal, inclusive and quality education and learning opportunities for all, and supports further cooperation with international organizations as well as the initiative to establish the BRICS Network University.[18] The Ufa Declaration, adopted as a result of the seventh BRICS summit on 9 July 2015, notes the relationship between investment in education, human capital development, and growth in economic performance; recognizes the importance of vocational education as a tool for expanding youth employment opportunities and

[16] Совместное заявление лидеров стран БРИК // Президент России. 16 июня 2009 г. [Joint Statement of the Leaders of the BRIC Countries, President of Russia, 16 June 2009] (Mar. 5, 2022), available at http://www.kremlin.ru/supplement/209.

[17] Делийская декларация // Президент России. 29 марта 2012 г. [Delhi Declaration, President of Russia, 29 March 2012] (Mar. 5, 2022), available at http://www.kremlin.ru/supplement/1189.

[18] Документы VI саммита БРИКС // Президент России. 15 июля 2014 г. [Documents of the 6th BRICS Summit, President of Russia, 15 July 2014] (Mar. 5, 2022), available at http://www.kremlin.ru/supplement/4738.

student mobility; and encourages exploration of opportunities for cooperation in training skilled personnel by sharing ideas and information through top platforms, such as WorldSkills.[19]

Therefore, the development of education is the basis for the development of high-quality formal jobs and for increasing formal employment, which is recognized by the BRICS countries and recorded in joint documents. Joint activities in this direction are aimed at the development of quality education, and obtaining relevant and competitive knowledge, skills and competencies, which would provide young specialists with the opportunities for further employment in the formal economy both in their home country and abroad. At the same time, the need for cooperation, for example, in providing highly qualified engineering personnel, is confirmed by the assumption that if the BRICS countries can train a sufficient number of highly qualified engineers and scientists, the poles of technical innovation may gradually move here from the USA, Europe and Japan.[20] Such a situation will certainly contribute not only to the creation of new quality jobs, but also to the reduction of informal employment, which is fully consistent with the objectives of ILO Recommendation 204 and the BRICS Labour and Employment Ministers Declaration "Quality Jobs and Inclusive Employment Policies" adopted in 2016.

5. Involvement of Unregulated Forms of Labor in the Legal Field

As previously stated, according to ILO Recommendation 204, the informal economy represents economic activities that are not covered or insufficiently covered by the existing national legislation.

Relationships conditioned by the information technology revolution are actively developing and becoming more complicated, and the law is too late to cover them in a preventive way. This generates a number of challenges related to the technical aspects of the legal organization of labor of people employed in these forms of employment, as well as the protection of their labor rights. Changes in people's lifestyles as a result of information technology have begun to radically affect the sphere of human labor activity as well.

In 2015 the European Foundation for the Improvement of Working and Living Conditions (Eurofound) published a study dedicated to the so-called new forms of employment.[21] Such new forms include:

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[19] Документы, принятые по итогам саммита БРИКС // Президент России. 9 июля 2015 г. [Documents Adopted Following the BRICS Summit, President of Russia, 9 July 2015] (Mar. 5, 2022), available at http://www.kremlin.ru/supplement/5002.

[20] Martin Carnoy et al., *University Expansion in a Changing Global Economy: Triumph of the BRICs?* (2013).

[21] Eurofound, New Forms of Employment (2015) (Mar. 5, 2022), available at https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1461en.pdf.

• job sharing (work sharing) is an employment relationship in which one employer hires several (usually two) workers to perform a single job function together, resulting in full-time work;[22]

• casual work is a type of work in which the employment is not stable or long-term in duration, and the employer is not required to provide work on a regular basis, but has the right to call the employee in as needed;

• Information Communication Technology (ICT) based mobile work is a work relationship that occurs in part, but on a regular basis, outside of the main office owned by the employer or a specially adapted home office that uses ICT to connect to the company's general computer networks;[23]

• crowd working (also known as crowd sourcing, crowd employment) is employment in which a special online platform is used for communication between the person doing the work and the customer.[24]

Among all of the new forms of employment mentioned above, platform employment is of particular interest and became even more popular in 2020–2021 due to the COVID-19 pandemic. According to the American magazine Foreign Policy, the largest platform economy in the world has emerged in China, with 15 percent of the total workforce employed in platform employment. In India, there are an estimated 3 million platform workers in the country's 500 million-strong labor force.[25] In Brazil, platform employment is the sole source of income for over 5 million people, with another 11 million people earning additional income from digital platforms.[26] At

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22 ILO, Work Sharing During the Great Recession: New Developments and Beyond (Naj Ghosheh & Jon C. Messenger eds., 2013) (Mar. 5, 2022), available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_187627.pdf.

23 Elena Gerasimova et al., *New Russian Legislation on Employment of Teleworkers: Comparative Assessment and Implications for Future Development Law*, 2 Law. Journal of the Higher School of Economics 116, 124–28 (2017); *Закалюжная Н.В.* Дистанционная работа и схожие правоотношения // Право. Журнал Высшей школы экономики. 2015. № 2. С. 76–91 [Natalia V. Zakalyuzhnaya, *Telecommuting and Similar Legal Relations*, 2 Law. Journal of the Higher School of Economics 76 (2015)].

24 Anne Green & Sally-Anne Barnes, *CrowdEmploy Part I: Crowdsourcing for Paid Work. An Empirical Investigation into the Impact of Crowdsourcing for Paid Work on Employability*, Warwick Institute for Employment Research/Institute for Prospective Technological Studies (2013); *Чесалина О.В.* От нестандартных форм занятости до работы на основе интернет-платформ // Трудовое право в России и за рубежом. 2018. № 1. С. 22–25 [Olga V. Chesalina, *From Non-Standard Forms of Employment to Internet Platform Work*, 1 Labor Law in Russia and Abroad 22 (2018)].

25 Nilanjan Banik, *Opinion: India's Gig Economy Needs Affirmative Policy Push*, The Economic Times (India), 6 January 2020 (Mar. 5, 2022), available at https://government.economictimes.indiatimes.com/news/economy/opinion-indias-gig-economy- needsaffirmative-policy-push/73121847.

26 Guilherme N. Pires, *Gig Economy, Austerity and "Uberization" of Labour in Brazil (2014–2019)*, World Economics Association (WEA) Conferences, No. 1, 2019, Going Digital, 15th November to 20th December, 2019 (Mar. 5, 2022), available at https://goingdigital2019.weaconferences.net/papers/gig-economy-austerity-and-uberization-of-labor-in-brazil-2014-2019/.

the same time, according to the estimates of Instituto Locomotiva, approximately 17 million people use platforms on a regular basis to generate income.[27]

Regarding other forms of employment, for example, Brazilian Law No. 13467/2017 introduced a new work format known as "the temporary (employment) contract" that allows employers to engage workers as employees to provide services on a temporary basis and helps employers maintain a flexible workforce that is ready to provide services when needed. This law has established guarantees for employees. For example, they cannot be paid less than the minimum hourly wage of other company employees who work in the same position under a fixed-term or open-ended employment contract. They are also entitled to a full package of social benefits and allowances. The possibility of using "temporary contracts" by platforms is being discussed, which could limit the amount of informal employment that occurs as a result of people using Internet platforms for work.[28]

The emergence of work based on Internet platforms is, on the one hand, a natural outcome of certain trends in the labor market: the transfer of economic risks from the employer to the employee; the increase in the number of own-account workers: and the proliferation of non-standard labor legal relations and informal employment. On the other hand, the model of work facilitated by means of Internet platforms became possible only due to the development of information technologies (wide use of Internet and cloud technologies). Moreover, platform providers can use this technology to implement completely new mechanisms of control over the labor process (which, nevertheless, still involves a person).[29] The characteristic features of such control are the extent to which information technologies allow control over the activities of the worker (performer) and the lack of physical manifestation of the implementation of such control.[30] Modern technologies allow us to collect a large amount of data, process it, and implement certain management decisions automatically, for example, by sending electronic messages, controlling access to the platform and placing orders. In addition, platform providers take certain measures to avoid having the service provider categorized as an employee or a person who is similar to an employee (for example, they may limit the service provider's work to only one particular client).[31]

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27 Платформенная занятость: определение и регулирование [*Platform Employment: Definition and Regulation*] 16–17 (2021).

28 *Id*.

29 Jeremias Prassl, *Humans as a Service* 55 (2018); Alex Wood et al., *Good Gig, Bad Gig: Autonomy and Algorithmic Control in the Global Gig Economy*, 33(1) Work Employ. Soc. 56 (2018).

30 Mirela Ivanova et al., *The App as a Boss?: Control and Autonomy in Application-Based Management* (2018) (Mar. 5, 2022), available at https://cihr.eu/wp-content/uploads/2015/07/The-App-as-the-Boss.pdf.

31 Debra Howcroft & Birgitta Bergvall-Kåreborn, *A Typology of Crowdwork Platforms*, 33(1) Work Employ. Soc. 21 (2018).

As a result, the last decade has seen a clear departure from traditional, sustainable employment: in many areas and industries, monotonous labor that is closely controlled by the employer in detail is now progressively being replaced with automation, and occupations, which until recently created a lot of jobs are disappearing. Labor, regulated by the norms of labor law, is shifting to the service sector, which is characterized by the autonomy of the person doing the work and a commitment to results. One of the most striking manifestations of the impact of technological progress on labor relations is the spread of the platform or "gig economy" associated with labor through online platforms.

Today, there is no standard regulatory definition of platform employment. International organizations offer the following definitions, two of which are: a form of employment, in which organizations and individuals use an online platform to access other organizations or individuals to solve specific problems or to provide certain services in exchange for payment; or a non-standard form of employment in which online platforms and digital technology are used to mediate between individual service providers (contractors registered on the platform) and customers.[32]

According to the definitions, platform employment implies three participants: customer/client/buyer/consumer of services; contractor/performer/employee and the platform that connects supply and demand for a service. We believe that labor law can regulate the relationship between the platforms that will act as an employer for individuals who are not sole proprietors or own-account workers, with social guarantees, and who, like other workers, will be subject to minimum labor law guarantees.

We believe that platform employment will grow in popularity over time among persons who provide services directly, since it offers advantages compared to traditional forms of employment: in addition to the freedom to choose the scope and mode of work, it allows us to bypass the age limit and allows more participants to enter the labor market than is permitted by the current legislation. Additionally, it allows persons with family obligations, who are mobility impaired, handicapped, or have recently been released from prison, as well as everyone else who is having difficulty finding work, to receive income which significantly reduces the shadow economy. In this regard, it appears that this sphere should be regulated by the state. However, if in specific social and economic circumstances, platform employment is the only source of income to achieve a certain bare minimum level of income, the large amount of work performed and the lack of full rest can lead to irreparable consequences.

We believe that interest in platform employment will continue to grow, requiring legislation to regulate relationships with platform participants in the near future. We believe that legal regulation should first apply to individuals who engage in

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[32] *Platform Employment*, *supra* note 27, at 10.

relationships with platforms but do not have any other legal status. The requirement of the platform on the legality and admissibility of possessing such a status for an individual to become a participant in the relevant relations requires reflection, taking into account the social and economic environment in a country as well as demand on the part of citizens.

New social and economic conditions, as well as the active development of the digital economy have given the BRICS countries the task of transferring platform employment from informal to formal employment by creating the concept of regulating new relationships formed through the use of Internet technologies. We believe that new forms of employment should be gradually integrated into the realm of labor law regulation, and that workers should be provided with all necessary labor and legal protections. We share the opinion that the social value of labor law is to protect the interests of the weaker party and that, at the beginning of labor law, this party was the employee. In terms of platform employment, the labor market is currently characterized by an increase in atypical forms of employment that are organizationally and often economically dependent.

As a result, on the basis of the informal economy definition set out in ILO Recommendation 204, which refers to economic activities by workers and economic units that, in law or in practice, are not covered or insufficiently covered by formal arrangements and that are not engaged in illegal activities, it can be concluded that there is an urgent need for legal regulation of both platform employment and other forms of employment based on the use of digital technologies that currently have no legal regulation in any of the BRICS countries, which automatically moves them into the sphere of informal employment, thereby increasing it. Nevertheless, due to the development of digital technologies, more and more areas of economic activity are covered by digitalization, and an increasing number of citizens become participants in such relations, including those who traditionally constitute informal employment in all countries, such as young people, women and elderly people. We believe that once these relations are regulated, they will leave the sphere of informal employment, which will also contribute to the creation of quality jobs, as discussed in policy documents, both ILO Recommendation 204 and the BRICS Labour and Employment Ministers Declaration "Quality Jobs and Inclusive Employment Policies."

6. Extending Social Protection: The Role of Social Security in Facilitating Transition to a Formal Economy in the BRICS Countries

Extending social security coverage to the population is one of the world's most strategic developments in social security. This international goal is defined in the United Nations Sustainable Development Goals for the period 2015 to 2030. In 2008, the International Social Security Association (ISSA) developed a project called "ISSA

Strategy for Social Security Coverage Extension," and in 2011, a mutual project between ISSA and the BRICS countries' social security organizations was launched.[33]

Let us review in detail the experience of the BRICS countries with social security coverage extension.

In Brazil, the principles of general coverage with allowances and services are reflected in the program *Bolsa Familia*, "Family Purse" which is focused on direct financial support to low-income and poor population. By 2016 this program covered over 50 million citizens. The program provides for the payment of a basic allowance in the amount of 89 rials per month for each household with a monthly income of up to 89 rials per person, as well as an additional monthly allowance in the amount of 41 rials per month for each child aged up to 16 years, pregnant women up to the ninth month of pregnancy and nursing women up to six months with a maximum of five allowances per family; and 48 rials per month for each child up to the age of 16–17 years, with a limit of up to two allowances per family. If the monthly income of a household per person, including basic and transient allowances, is less than 89 rials, the difference between the monthly income of the household and 89 rials shall be paid. The families shall also ensure that their children go to school and are vaccinated.[34] In line with this, experts note that despite progress in narrowing the gap, allowances and services appear to have reached their limits and continue to fall short of what may be considered a typifying welfare state, namely, "Dynamic Social Security."[35]

The National Social Assistance Program (NSAP) directed at providing social pensions to all pensioners was introduced in India with the purpose of extending social insurance coverage. Rashtriya Swastya Bima Yojana (RSBY), a program that provides health care services to the poor, also efficiently operates. It is noteworthy that providing the population with access to health care is a primary task of coverage extension.

By the end of 2019, in China, basic age insurance covered 967 million people, insurance against industrial injuries covered 255 million people, insurance against unemployment covered 205 million people, medical insurance covered 1,354 billion people and maternity insurance covered 214 million people. This data shows that, except for medical insurance, there is a significant gap in insurance coverage, particularly in insurance against industrial injury, insurance against unemployment and insurance for maternity.[36]

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[33] Рамочное сотрудничество в области социального обеспечения между странами БРИКС // ISSA [Framework Cooperation in the Field of Social Security Between the BRICS Countries, ISSA] (Mar. 5, 2022), available at https://ww1.issa.int/ru/brics.

[34] International Social Insurance Association (2019) (Mar. 5, 2022), available at www1.issa.int.

[35] Milko Matijascic & Stephen J. Kay, *Understanding the Brazilian Social Policy Model: Myths, Milestones and Dynamic Social Security*, 67(3-4) Int'l Soc. Secur. Rev. 105 (2014).

[36] Xiaoyan Qian, *China's Social Security Response to COVID-19: Wider Lessons Learnt for Social Security's Contribution to Social Cohesion and Inclusive Economic Development*, 73(3) Int'l Soc. Secur. Rev. 81 (2020).

In the Republic of South Africa (RSA), a large portion of government funds is spent on extending social security coverage. The Old Age Grant (OAG) program was established under which grants are paid in addition to pensions to senior citizens in South Africa based on income testing. It is estimated that this helped to reduce income inequality, as proven by a decrease in the Gini coefficient from 0.77 (without grants) to 0.60 (with grants).[37] Moreover, a system of child allowances has been introduced: the Child Support Grant (CSG) was developed in 1998 and covered poor children up to the age of seven, but it was expanded three times over a 12-year period in order to cover children up to the age of 18; the Foster Child Grant (FSG), which offered grants for adopted children up to the age of 15, was introduced in 2010, and since 2012, parents of adopted children up to 18 years of age may receive them.[38] The social security development trend in the RSA is extension of coverage, as well as the elimination of race discrimination.

The Russian Federation received the general social security system as a heritage from Soviet times, but significant political, economic and demographic transformations have led to the fact that general social security coverage is being challenged.[39] The principle of social security catholicity can still be seen in the provision of free medical and health care, the system of mandatory medical insurance,[40] the expansion of social security coverage through social pensions[41] and in the payment of allowances to both insured and uninsured citizens. Moreover, social support measures for the poor are being actively developed. They are target-focused and take into account the income of a lonely citizen or a family. Such an approach is traditionally stipulated in Federal Law of 17 July 1999 No. 178-FZ "On State Social Care." The Federal Law of 28 December 2017 No. 418-FZ "On Monthly Payments to Families with Children" connects the enforcement of the right to receive monthly payments due to the birth (or adoption) of a first or second child with the amount of family per-capita income that shall not exceed two minimum subsistence levels of

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37 ISSA, Ten Global Challenges for Social Security – 2019 (2019), at 64 (Mar. 5, 2022), available at https://ww1.issa.int/sites/default/files/documents/publications/2-10-challenges-Global-2019-WEB-263629.pdf.

38 ISSA, BRICS Countries: Sustainability Challenges for Social Security Systems (2017) (Mar. 5, 2022), available at https://ww1.issa.int/sites/default/files/documents/publications/2-BRICS%20report%202017-web-222129.pdf.

39 Проблемы Общей части права социального обеспечения: монография [*Problems of the General Part of the Social Security Law: Monograph*] 141 (Elvera G. Tuchkova ed., 2017).

40 Федеральный закон от 29 ноября 2010 г. № 326-ФЗ «Об обязательном медицинском страховании в Российской Федерации» // СПС «КонсультантПлюс» [Federal Law No. 326-FZ of 29 November 2010. On Mandatory Medical Insurance in Russian Federation, SPS "ConsultantPlus"] (Mar. 5, 2022), available at http://www.consultant.ru/document/cons_doc_LAW_107289/.

41 Федеральный закон от 15 декабря 2001 г. № 166-ФЗ «О государственном пенсионном обеспечении в Российской Федерации» // СПС «КонсультантПлюс» [Federal Law No. 166-FZ of 15 December 2001. On State Pension Coverage in Russian Federation, SPS "ConsultantPlus"] (Mar. 5, 2022), available at http://www.consultant.ru/document/cons_doc_LAW_34419/.

working-age population stipulated in the subject of the Russian Federation. Under the Decree of the President of the Russian Federation of 20 March 2020 No. 199 "On Additional Measures for Government Support for Families with Children," a monthly allowance for a child aged 3–7 years shall be paid if the amount of family per-capita income does not exceed the amount of minimum subsistence level stipulated in the subject of the Russian Federation. Similar requirements are specified for the recipients of a monthly allowance for a child aged 8–17 years in the Federal Law of 26 May 2021 No. 151-FZ "On the Introduction of Changes into Specific Acts of Law of the Russian Federation."

Extending social security coverage using government social support tools that are mainly directed at combating poverty, may not solve the problem of achieving a decent social security level, because the amount of payments in this system is specified by the government based on the existing economic resources at a specific development stage and is not related to lost income.

We should note that the social protection system and taxation system are the basic foundations of the redistribution policy. Attempting to achieve universal social security byway of redistributing funds from taxpayers or contribution payers to those who do not pay them because they are employed in the informal economy sector may lead to "bleeding the government social security system white." Therefore, in order to achieve the goal of transitioning from informal to formal employment within the social security system, it is necessary to use other more efficient arrangements.

According to ILO data, over 60 percent of workers in the world are employed in the informal economy. Informal employment is also common in the BRICS countries. For example, the employment structure of China has shifted dramatically: the share of people employed in the tertiary sector increased from one third in 2010 to nearly half in 2019. The number of one-account worker workers in urban regions has nearly doubled, rising from 12.88 percent in 2010 to 24.05 percent in 2019.[42] This contradicts the traditional structure of social insurance programs granting services to workers employed on a stable and formal full-time basis and results in a huge gap in coverage. As a result, many people (particularly those employed in the informal sector of the economy) do not receive adequate social protection and have no access to specific protection measures.

According to researchers, changes in labor relations and employment structure directly influence the social protection system. The interrelation of labor law and the right to social protection is especially apparent in the social insurance field, as insurance is acquired during one's working life. Any changes in labor relations are reflected in the right of social protection. A decrease in the share of hired workers, a shorter working life, the emergence of so-called independent workers, the growth of self-employment and partial and illegal employment are just some

[42] Qian 2020.

of the challenges of the twenty-first century to which social protection law should adapt.[43]

New employment forms offer new possibilities for the organization of social security, but the problems related to the narrowing of coverage and the decrease of payments should be settled too. In general, this may lead to weakening of the collective rights of workers, norms of safety and labor hygiene and social security programs. Instead, more time should be spent on strengthening the complementarity of general tax-financed and fee-based programs.

International law norms contain special provisions in this field. As a result, ILO Recommendation No. 204 (clauses 19 and 20) enables countries to resume their obligation to distribute social security to workers in the informal economy. ILO Recommendation dated 14 June 2012 No. 212 "On Minimum Social Protection Levels" (cl. 15) stipulates that strategies for widening social security coverage shall be applied to the persons employed in formal as well as in informal economies, and that they shall facilitate growth of employment in the formal sector and decrease informal forms of employment.

Based on the analysis of international acts, the authors conclude that the right to social security, including social insurance, is a basic human right that shall not depend on the type of economic sector one works in.[44]

ILO Recommendation dated 12 May 1944 No. 67 on ensuring income security assumes a differentiation of approach to the organization of social security for hired workers and one-account workers. Hired workers should be insured against the complete set of cases covered by the social insurance, and persons working on their own should be insured against invalidity, age and death under the same conditions as hired workers. Moreover, the government shall consider the possibility of their insurance against hospitalization caused by illness and maternity, against illnesses that lasts for several months and against special expenses caused by illness, maternity, invalidity and death (clauses 20–21).

As a rule, this approach is reflected in national legislation: social protection programs are developed taking into account workers' employment status as either hired or one-account workers. Nevertheless, at present, it is difficult to classify some employment forms into one of two categories. This implies a potential gap in the legislation, as well as the absence of collective rights in the fields of national, social and labor regulation and social protection for a part of the working-age population.

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[43] *Васильева Ю.В., Шуралева С.В.* К вопросу о становлении и современном состоянии парадигм российского трудового права и права социального обеспечения // Вестник Пермского университета. Юридические науки. 2018. Вып. 41. С. 454–477 [Julia V. Vasilyeva & Svetlana V. Shuraleva, *On the Formation and Current Status of the Paradigms of Russian Labor Law and Social Security Law*, 41 Perm University Herald. Juridical Sciences 454 (2018)].

[44] Nicola Smit & Lethlokwa G. Mpedi, *Social Protection for Developing Countries: Can Social Insurance Be More Relevant for Those Working in the Informal Economy?*, 14(1) L. Democr. Dev. 171 (2010).

The question then becomes, how can we organize efficient social protection for persons employed in the informal economy? Several variants are possible.

First, informal economy workers may be covered by social programs together with the unemployed. As a rule, coverage is provided indirectly via other family members and is directed at the provision of a minimum standard of living. However, it is important to note that government social support programs may promote a welfare mentality in society, even though the legislation of many countries requires confirmation of income or a specific legal status (for example, unemployed) as a condition for payments and services, which to some extent supports their legalization.

We believe that an optimal variant is one in which the government provides social support in addition to social insurance for economically active populations. Van Ginneken proves that the social security of informal economy workers and their dependents should be covered primarily by those who can contribute to their insurance from their working income.[45]

In the second variation, informal economy workers could be incorporated into existing social security systems thereby equating them with workers or one-account workers. This is how the problem of social security for digital platform workers, one of the categories of citizens employed in the informal economy, is being attempted to be resolved. In Europe, digital platform workers are considered, as a rule, as one-account workers, and corresponding acts of law in the field of social protection apply to them. However, some countries (Austria, Estonia and Switzerland) classify workers employed on digital platforms as hired workers if the legal relations between an employer and an employee are evident or may be actually proved. In France licensed taxi drivers are regarded as one-account workers in accordance with the labor legislation and as hired workers in accordance with the social security legislation, and in Austria, Poland and Hungary legislation in force stipulates treating digital platform workers as hired workers.[46]

Extension of social security coverage to informal economy workers does not require a complete review of social security systems. As a rule, the security of hired workers and one-account workers is stipulated by the social insurance system: the security level in this system is higher than what exists in the government social support system, as allowances replace lost wages and are increased depending on the length of pensionable service. However, there still remains the task of adapting traditional social security systems using legal regulation with the goal of guaranteeing the right to efficient social support because a range of key parameters

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[45] Wouter van Ginneken, *Social Security for the Informal Sector: Issues, Options and Tasks Ahead*, ILO Working Paper (1996) (Mar. 5, 2022), available at https://labordoc.ilo.org/discovery/fulldisplay/alma993162103402676/41ILO_INST:41ILO_V1; Wouter van Ginneken, *Extending Social Security: Policies for Developing Countries*, ESS Paper No. 13 (2003) (Mar. 5, 2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=673121.

[46] Christina Behrendt et al., *Social Protection Systems and the Future of Work: Ensuring Social Security for Digital Platform Workers*, 72(3) Int'l Soc. Secur. Rev. 17 (2019).

that are important for the organization of social insurance (such as salary, length of service, contribution management approach) in the case of informal workers have also changed. According to E. Machulskaya, implemented measures should be directed at the elimination or decrease of threshold values for minimum wage, working time and employment period; increasing system flexibility in the field of contribution gap periods; increasing allowance mobility and provision for efficient minimum allowance levels with the purpose of increasing coverage of nonstandard and one-account worker workers.[47]

However, in practice, organizing social security coverage of informal economy workers may face other obstacles. For example, in China one of the factors preventing complete social insurance coverage of informal employees is a decentralized social insurance management, which leaves them unprotected in the case of moving from one region to another.[48]

Moreover, the question of what fundamentals (voluntary or mandatory) define participation by those employed in the informal economy in the social security programs is a major issue. High insurance payments, as a result of their mandatory nature, frequently promote the transition to a black economy, with people declaring only a portion of their income from which contributions must be paid. In some programs, informal workers may pay contributions voluntarily, but they may also choose not to pay them. In this case, their decision may be a compromise between the price of participation and the possibility of gaining allowances.

In the third variant, the informally employed may be classified into a separate category with a special legal status in the field of social security. Experts recommend using such an approach, in particular for workers employed on digital platforms. However, there are concerns about potential negative consequences, such as attempts to avoid mandatory regulation and arbitration norms.[49]

In India, efforts are being made to regulate relations with those employed in the informal economy on a stage-by-stage basis. Bylaws approved in 2008–2009 (such as the Unorganised Workers' Social Security Act, 2008 (No. 33 of 2008) and the Unorganised Workers' Social Security Rules, 2009) stipulated the creation of social security systems for unorganized workers, such as home workers, one-account workers or workers hired in the unorganized sector, as well as workers in the organized sector who did not fall under any existing legal status. The Code on Social Security adopted in India in 2020 included previously implemented categories of workers as well as the concept of gig-workers (workers employed outside of traditional employer-employee relationships) and platform workers (workers being

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47 Tatiana Anbrekht, *International Seminar "Labour Relations in the BRICS Countries in the Conditions of Precarization of Employment,"* 8(1) BRICS L.J. 163 (2021).

48 Jiwei Qian & Zhuoyi Wen, *Extension of Social Insurance Coverage to Informal Economy Workers in China: An Administrative and Institutional Perspective*, 74(1) Int'l Soc. Secur. Rev. 79 (2021).

49 ISSA, *supra* note 37, at 56.

out of the format of traditional employer relations, such as employees calling on companies or individuals via an online platform and performing work or services on a paid basis). Following registration, they are assigned a corresponding status.

The Indian Code on Social Security states that ensuring basic social security measures is a mutual obligation of the central government, platforms (aggregators) and workers. However, these norms are of a declarative nature and do not define the distribution of the responsibility between three subjects. The need to create federal and regional social security funds for gig-workers, platform workers, as well as one-account workers and unorganized workers is directly stated in the Code. It is noted that social guarantee schemes for workers in such categories may be funded through a combination of contributions from the central government, state governments and platforms (aggregators). The contribution of a platform (aggregator) will be calculated at the rate stipulated by the government and which will not exceed 102 percent of platform's annual turnover. However, such a contribution cannot exceed 5 percent of the amount paid to platform workers by the platform (aggregator). As a result of this recommendation, several platforms operating in India, including Amazon, Flipkart, Swiggy, Ola and Uber donated approximately USD 69 million (1 percent of annual turnover) to a social fund in 2021. But there are concerns that the stipulated amounts of social charges, although not excessive, may become burdensome for operating platforms, many of which are still balancing on the payback edge. Due to this, additional expenses may either lead to the compression of the national platform economy segment or become an additional burden for the contractors, decreasing their welfare.[50]

Similar measures are being implemented in Brazil. Since May 2018 digital platforms managed by transportation companies (such as Uber, 99, Lyft and Cabify) in Rio de Janeiro have been required to pay a tax in the amount of one percent for each trip made via their application. Moreover, drivers from the platforms shall register themselves and their vehicles with the Municipal Transport Department, thereby ensuring compliance with minimum standards for safety, comfort, hygiene and quality during the performance of services. At present, the Ministry of Economy is working on a resolution that will enforce the requirement for the registration of platform drivers as individual micro-entrepreneurs in the Institute with National Social Insurance (INSS). After registration, they will be eligible for a lower taxation rate in the amount of five percent of the minimum salary and social protection (i.e. sick leave, maternity allowance, disability allowance and pension).[51] Thus, special efforts are

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[50] Divya J. Shekhar, *Why the Code on Social Security, 2020, Misses the Real Issues Gig Workers Face*, Forbes India (2020) (Mar. 5, 2022), available at https://www.forbe-sindia.com/article/take-one-big-story-of-the-day/why-the-code-on-social-security-2020-misses-the-real-issues-gig-workers-face/63457/1.

[51] В Рио-де-Жанейро ввели налог на пользование Uber и другими транспортными приложениями // RTVI. 12 апреля 2018 г. [Rio de Janeiro Imposes a Tax on the Use of Uber and Other Transport Applications, RTVI, 12 April 2018] (Mar. 5, 2022), available at https://rtvi.com/news/v-rio-de-zhaneyro-vveli-nalog-na-polzovanie-uber-i-drugimi-transportnymi-prilozheniyam/.

being made in these countries to generate funds for further distribution of means for the purpose of extending social security.

Further we will consider the experience of Russia in attempting to apply the strategy of legal status definition for persons employed in the informal economy sector. In 2019, the obligation for hired workers to pay contributions in the amount of 30 percent of their payroll budget in support of mandatory social insurance together with hired workers covered by mandatory social insurance (relating to pension, health care, temporary disability and maternity), was extended to individual entrepreneurs, who saw their traditional category of "one-account workers" (who have benefits set out in the mandatory pension insurance system at a specified amount, with the allowance that additional amounts may be contributed; who participate in a mandatory medical insurance system, and who may voluntary generate legal relations on mandatory social insurance in the case of temporary disability), transformed into a new formal category of "one-account workers" or professional income taxpayers. This reform had been considered for nearly ten years and was directed at legalization of citizens' income. But the social and legal status of those persons has seen no substantial improvement: they generate rights in the pension insurance system voluntarily, not mandatorily; they use medical services in the medical insurance system not as someone employed but as one unemployed; and they are deprived of the possibility to voluntarily generate legal action for mandatory social insurance in the case of temporary disability. Such regulation clearly demonstrates only the fiscal interest of the government, offering little back to a person performing a professional activity, and represents a violation of the balance between the interests of the individual person and the government.

Conclusion

According to some researchers, changes in the labor market will necessitate a revision of the public agreement model.

> Growth of informal employment is a vivid indicator of problems in the system. Efficient public agreement requires a decent balance between rights and obligations, efficient enforcement of the law and corresponding practices, as well as efficient reporting arrangements. If citizens do not trust the government, if the laws are not observed fairly and efficiently, if legal and institutional functioning basics are considered inefficient and if the taxation system is not considered as a fair and efficient arrangement for funding social needs, the compliance with the formal conditions of a public agreement reflected in the norms of law will stay low.[52]

[52] *Воронин Ю.В., Столяров А.В.* К вопросу о выработке нового общественного договора // Вестник Университета имени О.Е. Кутафина (МГЮА). 2019. № 11. С. 94 [Yuriy V. Voronin & Andrey V. Stol-

We agree with this point of view and believe that until a balance of interests between the working population, employers (of those using labor) and the government is reached, until guarantees of safe working conditions and social protection of those employed in any employment forms are developed, society will seek new types of employment in the informal economy and the government, in turn, will try to lead these relations into the formal sector using the law. This balance can be achieved using the tools of labor law and social security law. After all, these industries were historically formed as a response to a public request to protect the rights and interests of an employee as a less protected side of the relationship from excessive exploitation by entrepreneurs and to ensure increased social protection of the economically active population, primarily through the use of the institution of compulsory social insurance. The choice of measures to ensure the transition from informal to formal employment, despite its global international significance, depends on the strategy of national social and economic policy of individual countries.

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CAN GEOGRAPHICAL INDICATIONS SUPPORT THE INDIAN VILLAGE ECONOMY IMPACTED BY THE ONGOING ECONOMIC CRISIS CAUSED BY COVID-19?

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The post-COVID-19 economic crisis has resulted in widespread unemployment and the migration of workers in India, particularly in the informal sector, which accounts for more than 90 percent of total employment in the country. Migrant workers are returning to their homes and will soon be looking for alternative sources of income. Entrepreneurship centered on locally made traditional products can provide revenue to migrant workers in such conditions. These returning underprivileged workers can use their traditional knowledge and skills to support their families and create new employment opportunities in their communities. Laws relating to geographical indications will aid in the protection and promotion of such traditional product lines in domestic consumer markets. The protection and promotion of such traditional product lines in domestic consumer markets will be aided by laws relating to geographical indications. The same can be further complemented by the new Geneva Act of the Lisbon Agreement, which went into effect in February 2020 and allows for the registration system of Geographical Indications in multiple countries through a single procedure with the World Intellectual Property Organization. As a result, it is proposed that the government should promote geographical indications as a policy instrument to help the rural economy during these ongoing difficult times.

Keywords: geographical indication; Geneva Act; post-COVID-19; rural economy; migrant laborer.

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Introduction

Prior to 2020, the Indian economy was facing slow economic growth in the aftermath of demonetization and the nationwide implementation of the new goods and services tax system. The recent COVID-19 outbreak has aggravated the situation even further. In its recent report of 2020, the Asian Development Bank forecast a negative GDP growth of 9 percent. The current economic crisis caused by the pandemic is causing widespread unemployment, particularly in the informal sector, which accounts for more than 90 percent of total employment in India.[1] Migrant workers are returning to their homes and will need to find alternative sources of income. Entrepreneurship centered on locally made traditional products can provide revenue to migrant workers in such situations. States like Uttar Pradesh have already announced programs to promote traditional and local products.[2] This article focuses on traditional products that have been registered as geographical indications and the various challenges faced by their producers under the existing legal system.

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1 International Labour Organization, Women and Men in the Informal Economy: A Statistical Picture (2018) (Sep. 15, 2021), available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_626831.pdf.

2 *See* UP State Government website on One District One Product Program (Oct. 15, 2021), available at http://odopup.in/en/page/district-wise-products.

1. Geographical Indications – An Overview

Since the beginning of civilization itself, various geographical regions worldwide have been recognized for the quality of the products that they produce. Colombian coffee, Scotch whisky and basmati rice are just some of the products that have enjoyed a distinct reputation for centuries due to their geographical origin. On account of their reputation and distinctive quality from other similar products, geographical indication (GI) products command a premium price in the market over similar products. According to the seminal World Trade Organization (WTO) report,[3] Jamaican Blue Mountain Coffee received a premium of $14.50 per kilo in the consumer market above the benchmark price of Columbian milds. French cheese receives a similar premium over non-French GI cheese. According to the same report, 40 percent of consumers are willing to pay a 10 percent premium for GI products over other comparable products in the market.

Globalization and liberalization have opened international markets for GI producers.[4] This increases opportunities for producers from undeveloped and remote geographical locations.[5] In today's world, GI is increasingly becoming a form of intellectual property that is commercially indispensable because of the economic value and reputation accorded to such products in the market as well as the historical, reputational and traditional aspects of those products. GIs are highly effective at conveying information relating to product quality and origin, to consumers, and are thus extensively used for marketing registered products in international markets. The concept of GI is based upon the rationale that a product's place of origin can add value to it and turn it into a self-sufficient brand.[6] Furthermore, increased globalization has opened new markets for such products.

However, globalization also comes with some costs. The protection of GIs has emerged as a significant concern. As per Article 22(2) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), every member country must recognize and provide legal protection to GIs in their territory. The minimum standard for such protection is set by Article 1.1 of TRIPS which states:

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[3] WTO, World Trade Report 2004 Exploring the Linkage between the Domestic Policy Environment and International Trade (2004) (Oct. 5, 2021), available at http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report04_e.pdf.

[4] Elizabeth Barham, *Translating Terroir: The Global Challenge of French AOC Labeling*, 19(1) J. Rural Stud. 127 (2003).

[5] Maria C. Mancini, *Geographical Indications in Latin America Value Chains: A "Branding from Below" Strategy or a Mechanism Excluding the Poorest?*, 10(32) J. Rural Stud. 295 (2013).

[6] Bruce Babcock, *Geographical Indications, Property Rights, and Value Added Agriculture*, 9(4) Iowa Agric. Rev. 1 (2003).

> Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.

Since Article 1.1 leaves it to different member countries to decide the minimum standard for GI protection, we see diversity in the ways GI is protected globally. For instance, GI products are protected under the existing trademark laws in the United States, the United Kingdom and Australia, while India and the European Union (EU) have a specific body of law to protect GI (known as the *sui generis* legal system). Furthermore, India differs from the European Union in two aspects: protection of non-agricultural products and the level of involvement of state authorities in GI protection. To put it another way, it is the differences in understanding the nature of GI and their significance in various contexts that have led to this diversity in legal systems.

2. History and Origin of GI-Related Regulations in International Trade

GI products have enjoyed protection for centuries. In 1351, King John of France decreed that traders were not permitted to mix two different French wines in order to preserve their quality and taste. The process of making Roquefort cheese has enjoyed protection since the 15th century.[7] Clearly, such measures were localized efforts to protect product quality.

In the 19th century, the rapidly increasing cross-border trade coincided with a new concern about counterfeit products in the consumer market. As a result, a movement arose towards the end of the 19th century to institutionalize intellectual property and protect business owners, dealers and producers engaged in cross-border trade. The Paris Convention for the Protection of Industrial Property of 1883 (Paris Convention) was the first treaty among states to provide protection for intellectual property, including "indications of source," in international trade.[8] With the increase in international trade, the Paris convention was considered inadequate in dealing with newer issues of Intellectual Property Rights (IPR). The Uruguay Round negotiations (1986–1994) attempted to fill the void by concluding the most comprehensive international trade agreement on intellectual property – the Agreement on Trade-Related Aspects of

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[7] Delphine Marie-Vivien, *The Protection of Geographical Indications in India: A New Perspective on the French and European Experience* (2015).

[8] *See* Paris Convention for the Protection of Industrial Property, 1883 (Jun. 12, 2021), available at https://wipolex.wipo.int/en/text/287556.

Intellectual Property Rights (TRIPS). In TRIPS, enforced from 1 January 1995, GI has been recognized as one of the six forms of intellectual property in Part II of the agreement. According to Article 22 of TRIPS, "Geographical Indications" are defined as

> indications which identify a good as originating in the territory of a member, or a region or locality within that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.

Thus, a GI product must show a strong link between its reputation, quality or other characteristics and the place of its geographical origin. For instance, the well-known GI, "Darjeeling tea" is grown only on one of the eighty-seven tea estates in the Darjeeling and Kalimpong districts in India. It is only on these plantations that Darjeeling tea acquires its distinctive taste, texture and unique color.

A special mention is required for the World Intellectual Property Organization (WIPO) administered Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (1958) (Lisbon Agreement). It is an international agreement that ensures the protection and registration of an "appellation of origin" in the member countries. An appellation of origin requires a much stronger connection to the place of origin than GI. This narrow scope of "appellation of origin" is the reason behind its bleak success in attracting many supporters (as of January 2022, it has only thirty member countries). In contrast, GI is a watered-down version of the appellation of origin. The current definition of a geographical indication was negotiated and agreed upon during the Uruguay Round Negotiations and incorporated into TRIPS.

3. Legal Systems and Their Challenges in Registration, Protection and Enforcement of GIs

The rationale behind GI protection is not limited to preventing unfair trade competition in the consumer market. According to Article 4 of EU Regulation 1151/2012, the protection and regulation of GI provides three benefits: (a) ensuring fair market value to underprivileged workers; (b) uniform protection of the name and (c) providing information on the value-added qualities distinguishing it from similar products.[9]

Two situations need to be borne in mind. All intellectual property rights (IPR), including GI, are territorial in nature. Therefore, the registration process must be followed separately in each country where protection is sought. This leads to the

[9] *See* Regulation (EU) No. 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs (Jul. 1, 2021), available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02012R1151-20191214&from=EN.

apparent second situation, in which there is no harmonization of laws relating to GIs at the international level. The laws regulating GIs vary across countries. The United States leads a group of "new world countries" that oppose strong protection for GIs, as proposed by a group of "old world countries" led by the European Union. The TRIPS, a landmark international agreement on GI, offers little help in furthering the harmonization of laws. Moreover, Article 1.1 (TRIPS) allows countries to determine their own manner of implementing the requisite minimum protection (laid down in Articles 22 and 23) within the framework of their own domestic laws.

Currently, countries across the world regulate GI in one of the following three ways, according to the World Trade Organization:[10]

1. *Sui generis* system – Adopted by the "old-world countries," under the *sui generis* system, a separate law exists for the protection and registration of GI. Since GI is a territorial right, a subsequent registration or certification is required under the local laws of every country where the right is sought to be established. For example, in addition to India, Darjeeling tea, as of 2008, is registered in more than twenty countries around the world.[11] Registration in a foreign country generally requires hiring a local lawyer who can file the requisite documents and is familiar with the country's local laws. Thus, it comes with a heavy financial burden that only a select few right holders in India can afford to bear.

2. Certification or collective trademark – Promoted by new world countries, GI is protected under the trademark laws in this system of regulation. These countries regard GI as a species of trademark and are concerned that strong GI protection may be exploited by countries in international trade as non-tariff trade barriers disguised as protectionism. In such countries, a certification or a collective trademark for both "word" and "logo" is required to protect GI. In cases where they are not available, GIs are protected as figurative marks. In the registration procedure, standard trademark principles are applied.[12] In comparison with the *sui generis* system, the trademark system fails to capture the essence of GI. Firstly, as a trademark, there is no control over the quality standard of the product. Secondly, all the requisite powers of certification and protection are outsourced to private bodies instead of governmental authorities.

3. Unfair competition and consumer protection laws – Unfair competition in the consumer market is prohibited by both the Paris Convention (Art. 10 *bis*) and the TRIPS

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[10] WTO, Review Under Article 24.2 of the Application of the Provisions of the Section of the TRIPS Agreement on Geographical Indications, IP/C/W/253, 4 April 2001 (Sep. 23, 2021), available at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=39789,12588&CurrentCatalogueIdIndex=1&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True.

[11] Country Regulations, Tea Board India (Sep. 25, 2021), available at http://www.teaboard.gov.in/TEABOARDCSM/NzI.

[12] Kasturi Das, *Prospects and Challenges in India*, 13(2) J. World Intell. Prop. 155, 159 (2010).

Agreement (Art. 22). Thus, all member countries are obligated to enforce laws against unfair competition in their territory, including countries falling under the two groups of countries mentioned earlier. Passing off cases are a typical example. However, passing off cases are unpredictable in terms of evidence, and in the absence of a specific statute, in such cases, success is not guaranteed even in clear cases of infringement.

This diversity in legal systems creates problems in international trade and acts as a roadblock for the underprivileged right holders of GIs.[13] According to a recent report, weavers of the "Banarasi saree," one of the most well-known GI's in India, are forced to live in abject poverty.[14] In stark contrast, India is the second-largest textile exporter globally (and the sector is the highest employer after agriculture).[15] GI products, in addition, also need to comply with sector-specific rules in the foreign country. For example, Indian mangoes, including Alphonso mango (a product with GI status), faced an import ban in the United States for eighteen years due to poor agricultural practices.[16] For similar reasons, a ban was imposed on Alphonso mangoes by the European Union in 2014.[17]

India's constitution promotes the welfare of the people. In addition, many GIs, like the Banarasi saree and Madhubani paintings, are symbols of India's glorious history and culture. As a result, the government takes measures to protect the interests of the poor right holders. For example, the majority of GI applications in India are filed only by government authorities.[18] This is in contrast to European countries, where only producer groups can apply to state authorities for GI recognition. Additionally, government assistance in India at the application stage rarely extends beyond its borders to foreign countries. As a result, the registration of Indian GI in offshore jurisdictions, as well as their monitoring and enforcement has become complicated and costly. Due to prohibitive costs and a lack of knowledge, most Indian GIs never get registered in foreign countries, leaving them vulnerable to usurpation.

The lack of enforcement and monitoring allows for the proliferation of counterfeit products in the consumer market. This has two adverse results. Counterfeit products

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13 Michael Blakeney, *Proposals for the International Regulation of Geographical Indications*, 4(5) J. World Intell. Prop. 629 (2001).

14 *Suicide & Malnutrition Among Weaver in Varanasi* (2008) (Oct. 13, 2021), also available at http://pvchr.asia/app/uploads/Suicide_&_Malnutrition_Report.pdf.

15 English rendering of the text of PM's address at the Inauguration of Textile India 2017 (Jun. 24, 2021), available at https://pib.gov.in/PressReleasePage.aspx?PRID=1498083.

16 Parija B. Kavilanz, *Indian Mangoes Arrive in the U.S. After Long Hiatus*, CNN Money, 1 May 2017 (Jan. 28, 2022), available at https://money.cnn.com/2007/05/01/news/international/indian_mangoes/.

17 Asit Ranjan Mishra, *EU Agrees to Lift Ban on Alphonso Mangoes*, Live Mint, 8 January 2015 (Feb. 2, 2022), available at https://www.livemint.com/Politics/fMXWwNQ0ZCL5ZjVAoGyhGI/EU-agrees-to-lift-import-ban-on-Alphonso-mangoes.html.

18 Delphine Marie-Vivien, *The Role of the State in the Protection of Geographical Indications: From Disengagement in France/Europe to Significant Involvement in India*, 13(2) J. World Intell. Prop. 121 (2010).

create confusion and many loyal customers of a specific producer of a GI product are lost to cheaper imitations. Secondly, customers will impute the same high quality of a GI good to the fake product. The second case is more detrimental as inferior goods get sold to gullible consumers, which adversely affects the reputation of the GI good in the long run.

The above demonstrates that the minimal protection system, followed by countries by virtue of Article 1.1 of TRIPS, is detrimental to the interests of the right holders in international trade. This minimum level of protection is also in stark contrast to the higher level of protection accorded to wines and spirits under Article 23 (where protection is available even without proof of consumer confusion). Many countries, including India, have vehemently opposed the dual-standard permissible under TRIPS in GI protection.

4. Laws Relating to Geographical Indications in India

Domestic laws in India. It is a myth that India enacted its *sui generis* law on GI to comply with the TRIPS obligations. Before the enforcement of the present GI Act, GIs were commonly protected as certification marks in India under the Trade and Merchandise Marks Act, 1958. This was sufficient to meet the TRIPS agreement's minimum standard requirement. Instead, two significant events in the 1990s pushed India into enacting a *sui generis* law for GI in 1999. The opening of the Indian market in the 1990s meant India's domestic products and rich traditional knowledge had to be protected. Secondly, in 1997, the United States Patent Office awarded the American agri-based company RiceTec a patent for a new variety of Basmati rice. This caught the attention of the international media because Basmati rice, a long grain and aromatic variety of rice, has been traditionally grown only in India and Pakistan for centuries. In order to provide better protection of similar products in the future, India enacted the "Geographical Indication of Goods (Registration and Protection) Act, 1999" (GI Act) and the "Geographical Indication of Goods (Registration and Protection) Rules, 2002" (GI Rules). Furthermore, India used the flexibility provided by TRIPS to enact a law based on domestic requirements. Thus, the GI Act and GI Rules were subsequently enforced from 15 September 2003.

Prior to 15 September 2003, there was no special law for GI protection in India. The misuse of GI was prevented in one of the following ways:[19]

- under consumer protection laws;
- through passing of action in court;
- through trademark certification.

[19] Kasturi Das, *Socio-Economic Implications of Protecting Geographical Indications in India*, Centre for WTO Studies (August 2009) (Oct. 20, 2021), available at https://wtocentre.iift.ac.in/Papers/GI_Paper_CWS_August%2009_Revised.pdf.

The GI Act defines geographical indication and establishes its relationship with the deceptively similar concept of Trademark,[20] allows for registration of "only goods" as a GI,[21] provides for a GI Registry in India[22] and finally provides for both civil and criminal remedies in cases of infringement.[23] Registration of GI is renewable every ten years and, interestingly, is optional under the law. According to section 23, GI registration is only prima facie evidence, which means that, the validity of a GI registration can be challenged in a court of law. The objective is to protect the gullible, poor and often illiterate producers of GI products from unscrupulous traders and intermediaries.

Darjeeling tea was the first GI registered in India in 2004–2005. According to the Geographical Indications Registry of India, 370 GIs have been successfully registered under the GI Act as of May 2020.[24] However, the GI Act is one of the least contested laws in India. Only six cases have been heard by the various High Courts or the Supreme Court in the nearly seventeen years since it was enacted (as of October 2020).[25]

The protection of GI in India has its loopholes. As we shall see in the following paragraphs, enforcement mechanisms and protection of the brand value of GI are intricately intertwined.

International agreements. India has also signed two multilateral agreements for the easier registration of GIs in foreign states. These are the Paris Convention for the Protection of Industrial Property (1883) and the Madrid System, comprising the Madrid Agreement Concerning the International Registration of Marks (1891) and the Protocol Relating to the Madrid Agreement (1989). The Madrid System, administered by WIPO, is primarily a system for protecting and registering trademarks in multiple countries. However, it can also be used for international registration and protection of GI in member countries, such as the United States, which treats GI as a species of trademark. In February 2020, another multilateral agreement for GI protection in foreign countries, the Lisbon System, entered into force. It differs from the Madrid

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20 Sections 2, 25 and 26 of the Geographical Indications of Goods (Registration and Protection) Act No. 48 of 1999.

21 Chapter III (secs. 11–19) of the Geographical Indications of Goods (Registration and Protection) Act No. 48 of 1999.

22 Section 5 of the Geographical Indications of Goods (Registration and Protection) Act No. 48 of 1999.

23 Chapter VII (secs. 31–36) and Chapter VIII (secs. 37–54) of the Geographical Indications of Goods (Registration and Protection) Act No. 48 of 1999.

24 Registered Geographical Indications in India till April 2020 (Jun. 1, 2021), available at www.ipindia.nic.in/writereaddata/Portal/Images/pdf/GI_Application_Register_10-09-2019.pdf.

25 *State of MP v. IPAB*, MANU/TN/2311/2020 (HC), *Tea Board v. ITC Ltd*., MANU/WB/0277/2019 (HC), *The Scotch Whisky Association v. Golden Bottling Ltd*., MANU/DE/1495/2006 (HC), *Khoday Distilleries Ltd. v. The Scotch Whisky Association*, MANU/SC/2361/2008 (SC), *Mount Everest Mineral Water Ltd. v. Bisleri International Pvt. Ltd*., MANU/DE/0410/2010 (HC), *Comité Interprofessionnel Du Vin De Champagne v. Chinar Agro Fruit Products*, MANU/DE/2940/2017 (HC).

System in that it focuses solely on the automatic registration of GIs and appellations of origin in signatory states. The Lisbon System attempts to fill a void left by the Madrid System.

As an alternative to the lack of harmonization of laws and problems with registration issues, countries can protect their GI through bilateral agreements with other nations. This is a common feature of almost all free trade agreements entered into by the European Union. India has used this route in the Comprehensive Economic Partnership Agreement (CEPA) with Japan (Art. 107) and Korea (Arts. 12.1–12.6) to protect its intellectual property in a foreign country.[26] For instance, Article 107 of the India-Japan CEPA states:

> Each Party shall ensure protection of geographical indications in accordance with its laws and regulations and in conformity with the TRIPS Agreement.

Although such unified systems are helpful for GI protection, India has yet to realize its full potential. In stark contrast to the European Union, the majority of the bilateral investment agreements negotiated by India do not contain an IPR or GI protection clause (of all the bilateral agreements till date, specific IPR/GI clauses were found only with Japan and South Korea). As a result, direct application for registration in a foreign country is the most common method used by Indian right holders to protect their GI rights. Interestingly, GI is the only form of IPR that is explicitly negotiated between states because of its public policy nature. For the same reason, similar protection is never afforded to trademarks or patents.

Lessons from China's experience in cross-border GI protection. The EU–China bilateral agreement entered into force on 1 March 2021. It seeks to boost protection for 200 GI products (100 GI products from each country) against infringement. This will increase bilateral trade and market penetration of iconic Chinese GI products such as Pixian Dou Ban (PixianBean Paste) and Anqiu Da Jiang (Anqiu Ginger).[27,28] To reiterate, India has only focused on the broader areas of goods and services in trade agreements until now. Issues like IPR (which includes GI) have largely been ignored. This is especially surprising for a country like India, which has a rich history and culture to showcase. The Indian government should learn from the EU and Chinese

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[26] *See* CEPA with Japan, 13 February 2011 (Jun. 23, 2021), available at https://commerce.gov.in/writereaddata/pdf_download/IJCEPA_Basic_Agreement.pdf. *See also* CEPA with South Korea, 7 August 2009 (Jun. 23, 2021), available at https://commerce.gov.in/writereaddata/trade/INDIA%20KOREA%20CEPA%202009.pdf.

[27] Michele Ferrante, *Food for Thought: The EU–China Agreement on GIs*, 0(0) J. Intell. Prop. L. & Prac. 3 (2021).

[28] EU–China Agreement Protecting Geographical Indications Enters into Force, European Commission (Jan. 20, 2022), available at https://ec.europa.eu/info/news/eu-china-agreement-protecting-geographical-indications-enters-force-2021-mar-01_en.

experiences and incorporate GI products into trade agreements in order to provide for better protection in foreign markets.

5. Challenges Faced by Indian Producers under the GI Act in Domestic and International Trade

For many decades after gaining independence in 1947, India remained a closed economy. Indian governments were wary of foreign powers and emphasized self-sufficiency. Finally, liberalization began after 1991. This opening of borders and access to new markets led to the revival of many traditional Indian products. Thus, economic policies have played an essential role in the development of traditional products.

GI is a type of industrial property, similar to a trademark or patent. Such products can ensure a sustainable and better income for poor producers, particularly in developing nations like India. However, in practice, producers are unable to get fair market value for their products. This is as a result of the many challenges producers face.

A recent study conducted with the producers of GI products revealed a number of other challenges that the producers/manufacturers of the products face.[29] The same can be categorized as shown below.

No protection for technology or know-how. GI products attain fame and reputation through the collective efforts of people over generations. This leads to collective ownership of the unique method and processes. However, GI laws do not protect the technology, method or know-how used in the making of the product. Protection is limited to only the name-place. Consequently, markets get flooded with cheaper machine-made imitations. For instance, one can make and sell the famous Banarasi saree anywhere in the world under a different name, despite being a registered GI in India. As a result, most weavers of the Banarasi saree are being forced out of work because identical sarees from Surat and China are available on the market at a much lower price. Thus, any price-conscious consumer will be attracted to buying the cheaper alternative available in the market. This takes away the level playing field from artisans.

This results in a twisted tale. Artisans cannot adopt new methods or technologies for reasons of cost efficiency. As per GI laws, only the traditional method can be used to make the GI product. In contrast, traders can replicate and manufacture similar GI products using cheaper technology if they do not use the GI registered name. This rigidity in product specifications in a cost-conscious consumer market is the primary reason behind many artisans and producers living in abject poverty.

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[29] Nitya Nanda et al., *The Protection of Geographical Indications in India: Issues and Challenges*, TERI briefing paper (2013) (Jul. 20, 2021), available at https://silo.tips/download/the-protection-of-geographical-indications-in-india-issues-and-challenges.

Ambiguous laws for GI protection. Under Article 1.1 of TRIPS, each member country is free to determine the appropriate method to protect GI in their legal systems. This leads to different levels and types of protection among countries and may result in a subject matter mismatch in international trade. For instance, the European Union does not recognize non-agricultural products such as handicrafts for GI protection under Regulation 1151/2012. However, some EU countries, such as France, do have domestic laws to protect non-agricultural GI products.

The recognition of non-agricultural GIs is a significant issue for India. Approximately three-fourths of GIs registered in India (231 out of 417 as of January 2022) are from the non-agricultural handicraft industry, such as Madhubani paintings and Banarasi sarees.[30] Moreover, the multiplicity of legal systems can create hurdles even for experienced traders. For instance, in Europe, Darjeeling tea is registered as a PGI, despite meeting the more stringent requirements of a PDO. Again, it is registered as a certification mark in the United Kingdom and United States since there is no *sui generis* law. Thus, harmonization of GI-related regulations is required to fully exploit the benefits of the artisans' and producers' unique skills and traditional knowledge.

Confusing definitions of producers/authorized user/proprietor. Interestingly, a for-profit company, Karnataka Silk Industries Corporation Limited, is the sole applicant and proprietor of the GI for Mysore silk.[31] This raises the question: Can a for-profit company represent the interests of all weavers of the famous Mysore silk (even though it is a government enterprise)? Can it result in a single corporate entity establishing a monopoly in the market? In reality, the confusion is embedded in the GI Act. Unlike EU regulations, the GI Act creates a distinction between the producers and proprietors of GI. Section 11(1) states who can apply for registration as

> any association of persons or producers or any organization or authority established by or under any law for the time being in force representing the interests of the producers of the concerned goods.

Consequently, any third party claiming to represent producers' interests can apply for registration as the proprietor of GI goods.

In India, we see heavy state intervention when it comes to registering GI goods as a "proprietor." Under section 17, producers and artisans are required to register themselves as the "authorized users" of GI goods. This distinction between "proprietor" and "authorized user" prevents registration by unauthorized persons and ensures that benefits flow only to the genuine producers. The dual system of the proprietor

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30 Registered Geographical Indications in India, *supra* note 24.

31 *See* Geographical Indications Registry (Jul. 1, 2021), available at http://ipindiaservices.gov.in/GIRPublic/Application/Details/11.

and authorized user is used by other countries as well, for example, Pakistan. In the European Union, however, only producers can collectively file for registration.

Section 2(k) contains a broad and ambiguous definition of "producer." As per section 2(k), in the case of handicrafts or industrial goods, a producer "includes any person who trades or deals in such production, exploitation, making or manufacturing, as the case may be, of the goods." No attempt has been made in the GI Act to differentiate between dealers, retailers and producers. The benefit that should have gone to the vulnerable producers and artisans is diverted in the supply chain to the middlemen, namely dealers and traders. Producers are generally underprivileged individuals who struggle to comprehend the concept of GI and fight for their rights. It should also be emphasized that producer protection should be an integral part of any law on GI, given that without producers there will be no GI products, and consequently, no need for GI laws.

Assistance by government. From the world famous Basmati Rice to Kolhapuri Slippers, the vast majority of GI products in India has been registered by the central/state governments or their agencies. For instance, the Government of Karnataka (Department of Horticulture) is the proprietor of several GIs, including Coorg Orange and Mysore Betel Leaf. Similarly, in the union government, the Development Commissioner for Handicrafts (Union Ministry of Textiles) is the proprietor of GIs such as Blue Pottery of Jaipur and Kathputli (Rajasthan).

This raises three issues. Firstly, section 11 has twin requirements. Firstly, the applicant should be:

- any association of persons or producers or;
- any organization or;
- an authority established by or under any law that is in effect at the time and capable of representing the interests of the producers of the concerned goods.

State and central governments do not fit into any of the above three categories. As a result, they do not fulfill the requirements of section 11(1) as applicants.

Secondly, this creates a conflict of interest because various government agencies serve as the applicant, examiner and authority granting registration. This strikes at the very heart of the non-arbitrary nature of state action that is enshrined in Article 14 of the Constitution.[32] In France, the registration is done by INAO (*Institut national de l'origine et de la qualité*), a public institution. The INAO consists of representatives from among the producers and traders and officers from the management. The representatives determine the geographical area and offer a collective opinion on each application for GI registration. The majority of France's INAO members are producers. This brings trust and transparency to the system. In India, in most cases, public authorities are responsible for GI application, scrutiny, opposition procedures and ultimately, awarding the GI recognition. This highlights the need for an overhaul

[32] *Maneka Gandhi v. Union of India*, A.I.R. 1978 S.C. 597.

of the system along the lines of the French system to establish greater trust and integrity in the GI process.

Post-registration follow-up. The government seldom extends its assistance post-registration of products. Simply registering GIs is not enough for the producers. In a globalized world, the government needs to assist in a variety of ways to protect GI, including capacity-building programs; assistance and reimbursement upon registration of GI in a foreign country; and protection of GI in a foreign market by hiring the services of an international watchdog.

Sustained measures are required to maintain a presence in the market. Such measures vary according to the product and the dynamics of the consumer market, whether domestic or international. There is a need to maintain the quality and standard of goods produced by all of its manufacturers, as well as a marketing strategy to build the brand value of the goods and reduce information asymmetry between the producers and the consumers by informing the consumers about the distinguishing features and qualities of the GI product. In addition, there is a need to continue to develop and enhance the skills and knowledge of the stakeholders, such as producers, dealers, traders and retailers.

Defining the geographical boundary. A GI shares a strong qualitative connection with its geographical origin. It is always critical to carefully delimit the exact geographical boundaries when registering a GI product. Since the government or its agencies file the maximum number of applications in India, the geographical boundary is arbitrarily defined to encompass the entire district or the state. This practice may frequently exclude actual artisans who reside in a particular geographical area which falls outside the area demarcated in the GI application.

No protection of traditional knowledge. It is believed that GI is the most appropriate IPR for the protection of traditional knowledge. The GI Act only protects the name-place of the product and the right to use it. The know-how behind the product is not protected. Nonetheless, the registration of GIs does create a repository of traditional knowledge and products. Knowledge can remain proprietary so long as it remains a secret within the community of producers, as in the case of the GI, the Aranmula mirror. At present, India lacks a law capable of protecting traditional knowledge from usurpation by third parties.

State control. In many cases, the specification and process of GI are defined by state authorities acting as applicants. This excludes any other artisan who produces the same product using a different process or method. For instance, in the case of the Mysore Sandal Soap, the district of Bengaluru is included along with Mysore in the delimited area. The inclusion of Bengaluru is perplexing because the product name itself suggests that it originates specifically from the district of Mysore. One plausible explanation is that the factory of the applicant company, Karnataka Soaps & Detergents Ltd., is located in the Bengaluru district. However, this disregards the traditional and historical importance of Mysore, the region from which the GI

derives its popular name.[33] Secondly, certain instances indicate a lack of coordination between state agencies. As seen in the case of tea, the Tea Board of India holds the GI for Darjeeling tea, whereas another state government entity, the Himachal Pradesh Patent Information Centre, is the proprietor of another tea variety, Kangra tea.[34]

Term. Unlike in the European Union, where GIs are granted permanent protection, in India, a GI is granted registration for only ten years, after which it may be renewed for another ten years. This procedure, which is inspired by the trademark system, is inappropriate for products like Darjeeling tea, which has enjoyed a stellar reputation for centuries.

Information technology. At present, very few GI products have the desired online presence. The majority of the products that are available online are sold by third-party traders.

Information technology and e-commerce can provide visibility and market penetration at a fraction of the cost today. Right holders can use various government schemes to enhance their online presence. For instance, the Pradhan Mantri Mudra Yojana offers low-interest loans of up to Rs 10 lakhs to help micro and small businesses upgrade their technology.

6. Enforcement of Geographical Indication Laws in India

The *sui generis* law of India was drafted and enforced following the TRIPS Agreement. The GI Act allows both civil and criminal remedies for infringement. Civil remedies under the GI Act include:

- temporary and permanent injunctions against further infringement;
- damages;
- delivering up of the infringing material.

Despite the fact that criminal remedies include the imposition of fines and imprisonment or both, and regardless of how effective this remedy may appear, in practice, protecting GI in India remains a difficult task. Firstly, the right holders need to monitor the consumer market continuously to prevent any infringement. Secondly, a system for prosecuting such infringers needs to be established. Furthermore, as we shall see in the next sections, success in such cases is not always guaranteed.

Clearly, the majority of right holders in India lack the financial strength and willingness to fulfill either of the two conditions mentioned above. For instance, Indian markets are flooded with cheap imitations of Banarasi sarees from China or power looms from Surat that cost a tenth of the price. Famous Banarasi saree weavers, who once served only the royal families in India, have no choice but to look for other

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[33] Marie-Vivien 2015, at 183–84.

[34] *See* Geographical Indications Registry (Jul. 20, 2021), available at http://ipindiaservices.gov.in/GIRPublic/Application/Details/25.

means of livelihood due to a decline in their market share.[35] In such a scenario, it would be unreasonable to expect them to monitor the domestic consumer markets for signs of infringement.

Additionally, the GI brand frequently comes into conflict with similar trademarks. In the event of such a conflict, courts in India have favored the coexistence of the two parties involved unless a clear case of misappropriation of brand value or deception can be established.[36]

6.1. Protection of Indian GI Products in Offshore Consumer Markets

The two conditions applied above in the context of the Indian market, namely, proper monitoring of the consumer market and filing cases to deter and stop infringers, are equally applicable to the international market too. Maintaining vigilance in the international market is only possible by hiring the expensive services of an international watchdog and contesting court cases against infringement, including hiring the services of high-priced law firms. In the absence of any financial strength, such right holders as Banarasi saree weavers will find it extremely difficult to enforce their rights.

As the only exception, the Tea Board of India, the right holder of the GI for "Darjeeling tea," has made a concerted effort to protect it in the international market. Since 1998, the Tea Board has used the services of CompuMark to monitor its trademark on the international market.[37] In addition, under a customs notification dated 25 June 2001, no consignment of "Darjeeling tea" may leave India unless a certificate of origin for the consignment of the tea is produced, thus ensuring that all consignments of Darjeeling tea are authentic when they leave the country. However, according to the statistics, 40 million kg of Darjeeling tea are sold globally each year, whereas the actual production is only 9 million kg.

Furthermore, the Tea Board has opposed, with varying degrees of success, efforts against the improper use of the word "Darjeeling." In Europe, it has opposed the use of the name "Darjeeling" by companies in France for perfumes, apparel and telecommunication devices with a misleading logo.[38] Indeed, weak enforcement along with globalization and liberalization has increased the chances of GI misappropriation for undue gain.[39]

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35 Babcock 2003.

36 *Comité Interprofessionnel Du Vin De Champagne v. Chinar Agro Fruit Products*, MANU/DE/2940/2017 (HC).

37 WTO, Protecting the Geographical Indication for Darjeeling Tea (2005) (Nov. 20, 2021), available at https://www.wto.org/english/res_e/booksp_e/casestudies_e/case16_e.htm#:~:text=In%20order%20to%20prevent%20the,unauthorized%20use%20and%20attempted%20registration.

38 *Id.* at 162.

39 Massimo Vittori, *The International Debate on Geographical Indications (GIs): The Point of View of the Global Coalition of GI Producers-Origin,* 13(2) J. World Intell. Prop. 304 (2010).

7. GI is a Weak Marketing Brand for Products

It can take several generations to establish a GI's stellar reputation. "Champagne" is believed to have built a reputation among its consumers after more than 150 years. Producers have to maintain a minimum standard of quality, employ innovative marketing strategies, reduce information asymmetry about products, and make continuous efforts to keep infringing goods off the market. Despite the effort, reputation is not a guarantee of strong sales because there may be cheaper machine-made products claiming identical quality and standards. The question arises as to whether a GI label adds to the image of a GI product in the consumer market.

GI as "pseudo brands." It is argued that GIs are "pseudo brands" because two proprietors operating under the same GI may compete, thus, diluting the GI's actual economic and market value in the eyes of the end consumer. Currently, there are approximately four categories of Darjeeling tea, each of which has its own sub-categories, and each brand that sells it uses the GI "Darjeeling Tea" as a marketing tool. As a result, the consumer market is flooded with brands selling the famous Darjeeling tea, which lowers the brand value of the GI as a marketing tool.

Interestingly, brand-building exercises for GI become more significant and irrefutable if they are publicly unknown, such as "Kangra tea" of India, which draws its name from the Kangra district of Himachal Pradesh where it is grown. Such GIs have little to no reputation in domestic markets, let alone in overseas countries. This indicates that the right holders need to spend additional resources on first building the brand value. When the brand value has been established, only then will the right holders be able to reap the benefits of their GI ownership.

Trademark and GI. At its core, the term "brand" refers to a "name, term, sign, symbol or design, or a combination of them" that informs the consumers and distinguishes a seller's products from those of other competitors. The same goal was the objective behind the development of trademarks and GI as intellectual property rights. As a result, there will inevitably be conflicts from time to time. Some of the differences between the two are discussed below:[40]

1. Objective – The objective of a GI is to inform the consumer about the geographical origin of the product and the consequent reputation it enjoys, whereas the objective of a trademark is to differentiate one seller's product from another.

2. Right holder – Trademark is the exclusive property of a single entity, whereas GI is a community-driven mark. The community of GI producers is dynamic since new members can be included while existing members can be driven out.

3. Dual identity – Products can use the GI symbol along with the company or manufacturer's trademark, providing dual identity to the same product. For example, Indian markets are flooded with different brands of Basmati rice.

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[40] Rashmi Aggarwal et al., *Branding of Geographical Indications in India: A Paradigm to Sustain its Premium Value*, 56(6) Int'l J.L. & Mgmt. 431 (2014).

4. Consumer confusion – Unlike trademarks, GI as an intellectual property right does not enjoy a standardized visual, phonetic, aesthetic or functional element that helps in easy recognition. Thus, GI lacks a vital element of identity in the product.

5. Protection is forever – In many countries (excluding India), a GI is protected for an indefinite time period in order to protect the collective cultural heritage of the inhabitants of a specific territorial area.[41] Therefore, the GI will never be considered generic. The protection afforded to a trademark typically lasts for ten years and can be renewed.

6. Weak GI protection in the trademark system – In trademark regimes such as in the United States and Australia, it is possible to register trademarks that are identical or similar to a GI product but do not have any connection to its geographic origin. This is known as the free-riding problem. The cause of this problem lies in the subject matter that is sought to be protected. Unlike in GI, trademark registration authorities are not required to examine product specifications or links to their origin. The status of Kona coffee, which is grown in the Kona district of Hawaii in the United States, is one such case where multiple companies hold similar trademarks. This adversely affects the hard-earned reputation and thus market penetration of a GI product.

8. Are GI and Trademark Conflicting Rights?

GI and trademark are the intellectual property rights that are most closely related. Both use words and symbols to distinguish themselves from one another as well as to differentiate their respective products in the market. Occasionally, a trademark may come into conflict with a GI. GI and trademark conflict results in the following problems that are listed below:[42]

1. Weak identification mark – A conflict between a trademark and GI diminishes the value of the GI as an indicator of product quality and its origin. As a result, companies end up spending a significant amount of money to build the brand value of their trademark in the consumer market, which ultimately results in the company incurring wasteful and additional expenses.

2. Wasteful competition – Several companies sell the same GI product under their own different brand names. These companies compete amongst themselves, often discrediting each other in the market in an effort to attract customers, thereby reducing the very brand value of the GI tag to naught.

3. Consumer confusion – The existence of various companies selling the GI product and claiming to provide superior quality products on the consumer market leads to customer confusion regarding the quality and reputation of GI.

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41 Felix Addor & Alexandra Grazioli, *Geographical Indications Beyond Wines and Spirits: A Roadmap for a Better Protection for Geographical Indications in the WTO/TRIPS Agreement*, 5(6) J. World Intell. Prop. 865 (2002).

42 Kevin L. Keller et al., *Strategic Brand Management* (2011).

4. Lack of enforcement – The presence of multiple companies selling GI products allows enough room for imitation products to enter the consumer market and claim GI distinction without much fear of repercussions. The absence of a third party to monitor imitation products further exacerbates the problem. For instance, Indian consumer markets are flooded with fake brands selling imitation basmati rice.

Two conflicting approaches. The Budweiser trademark dispute is a well-known example of a series of legal disputes spanning decades and three continents in which either party claims exclusive rights to the name "Budweiser" based on trademark or geographical indication right.[43] The deadlock continues because there is no established international principle that could be used as the basis on which such a conflict could be resolved. However, there are two dominant approaches in the international arena. The first approach favors the GI as a community right over that of a trademark owned by a single entity or individual. This argument can be summarized as:

> Geographical indications are the common patrimony of all producers in a certain area and, ultimately, of the entire population of the area which may potentially qualify for the right to use the geographical indication. It would be unfair to deprive the population of the use of the geographical designation for the exclusive benefit of an individual trademark owner simply because he happened to register the name first as a trademark.

The second approach contends that GI protection inhibits human creativity and innovation, as seen in other forms of intellectual property such as trademarks and patents. This can be best expressed as follows:

> At least in economic terms and perhaps also from the human point of view, trademarks are no less important and no less deserving of protection than any other form of intellectual property. They are nothing more or less than the fundament of most market-place competition. Without trademark protection, there would be little incentive for manufacturers to develop new products or maintain the quality of existing ones.

It is a matter of scholarly debate as to which right should give way in the case of a conflict.[44] It can, however, be argued that the two principles shall be followed in cases of conflict, namely, who has better market recognition and whether the coexistence of the goods may lead to consumer confusion. In India, section 25 of the Indian Patent

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[43] *Anheuser-Busch Inc. v. Office for Harmonisation in the Internal Market*, Case T-366/05 (CJEU) and *Budejovicky Budvar Narodni Podnick v. Anheuser-Busch Inc.*, [2012] E.W.C.A. Civ. 880.

[44] Irene Calboli, *Expanding the Protection of Geographical Indications of Origin under TRIPs: "Old" Debate or "New" Opportunity?*, 10(2) Marquette Intell. Prop. L. Rev. 182, 197 (2006).

and Trademark Act prohibits the registration of a trademark that is similar to another. In the event of a prior trademark registration, section 26 allows both to co-exist.

India's take on the GI vs. trademark conflict – Tea Board, India v. ITC Limited. There is yet to be an agreement on a formula for the harmonization of geographical indication and trademark laws at the international level. Recently, in the case of *Tea Board, India v. ITC Limited*, the High Court of Calcutta was called upon to decide a case involving a conflict between the use of the word "Darjeeling" as a GI and trademark.[45] This case was filed by the Tea Board of India, a statutory body established under the Tea Act, 1953 and proprietor of the famous GI, Darjeeling tea. The defendant was a multinational company that owned a 7-star hotel in Kolkata (West Bengal, India) and named their lounge the "Darjeeling Lounge." The lounge was specifically intended for serving high-end guests with food and beverages. The Tea Board of India approached the High Court for an injunction against the defendant company. The following aspects were debated and raised during the course of the proceedings:

1. Does the use of the word "Darjeeling Lounge" by the defendant company amount to an infringement of the plaintiff's GI and certification mark? On this issue, the court held that infringement of GI, as defined under section 2(1)(e), can only be protected against another good and not against a service. Since the defendant was using the word mark "Darjeeling" for service, there was no infringement of the plaintiff's rights under the GI Act.

2. Does the defendant company's use of the term "Darjeeling Lounge" amount to passing off? The court, in its judgment, emphasized that the aspect of confusion among consumers is the yardstick of any such legal action. The court observed that the defendant was not using the term as a trademark for a similar product or business. Furthermore, the "Darjeeling Lounge" serves only high-end customers who can easily distinguish between a tea variety and a refreshment lounge. Therefore, no consumer confusion could be established, and as a result, the court refused to accept the contention of passing off.

3. Whether the defendant company's use of the name Darjeeling leads to dilution of the "Darjeeling" label? The High Court held that the descriptive word "Darjeeling," which is also the geographical name of a popular tourist destination widely known for its exquisite tea, had been in use for a long time before the GI Act was enacted and, therefore, denied the plaintiff an exclusive right to use the word "Darjeeling" by virtue of its registration as a GI or a certification mark. The court noted that the word 'Darjeeling' is so widely used that no confusion can be said to have occurred by its use by the defendant. As a result, the Honorable High Court dismissed this case with costs after rejecting it on all three grounds.

Selected foreign judgments. In a separate infringement case involving the term "Darjeeling," the Israel Supreme Court ruled in favor of the defendant company that

[45] *Tea Board v. ITC Ltd*., MANU/WB/0277/2019 (HC).

sold Darjeeling lingerie for the exact same reasons.[46] However, in France, the Court of Appeals ruled that the word "Darjeeling" even if used as a trademark for a different product, can lead to dilution of the famous GI.[47] There have been other cases as well in which the European Court of Justice has sought to protect GI even against trademarks that were not identical.[48]

9. Steps Towards International Harmonization of the GI Framework

In many ways, GI is a weak form of intellectual property rights. As a result, countries are adopting innovative measures to strengthen the framework for the protection of GI. These measures can be classified as below:

1. Forming regional organizations – The African Intellectual Property Organization (OAPI) is a regional organization. It is responsible for the recognition and protection of IPR in seventeen French-speaking African countries. The OAPI also acts as the sole representative of member countries while negotiating trade agreements. The European Union is also a regional organization that negotiates trade agreements on behalf of its twenty-seven member countries. Regional organizations have a collective strength, which is especially beneficial when negotiating trade deals with more resourceful countries.

2. Trade agreements – While negotiating bilateral or multilateral trade agreements, countries sometimes include a list of GI products to be automatically protected in contracting states. This strategy allows the European Union to protect its GI in a proactive manner.[49]

3. Domestic state intervention – The right to GI is a right that is driven by the community. As a result, governments play an active role in GI protection. The scope of intervention is not limited simply to the enactment and enforcement of laws, but also includes intervention as a stakeholder in practice. For example, in India, government agencies not only grant but also act as applicants for the majority of GIs. This is necessary since GI is more than just a quality standard. It is a policy instrument for the government that serves many socio-economic purposes for underprivileged communities.[50] It promotes social and economic vibrancy, improves environmental

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46 *Tea Board of India v. Delta Lingerie SA of Cachan*, Case 10639/06, 13 April 2008 (SC).

47 Justin Hughes & Diane Artal, *Translation of the Tea Board v. Mr. Jean-Luc Dusong, Court of Appeals of Paris, 05/20050, Decision of November 22, 2006*, 28 Cardozo Arts & Ent. L.J. 431, 435 (2010).

48 *Consorzio per la tutela del formaggio Gorgonzola v. Käserei Champignon Hofmeister GmbH & Co. KG and Eduard Bracharz GmbH*, Case C-87/97 (CJEU).

49 Patricia Covarrubia, *The EU and Colombia/Peru Free Trade Agreement on GIs: Adjusting Colombian and Peruvian National Laws?*, 6(5) J. Intell. Prop. L. & Prac. 330 (2011).

50 Alaeldin Alkhasawneh, *The Legal System for the Protection of Geographical Indications: A Study in Jordanian and Comparative Law*, 21 J. Intell. Prop. Rts. 304, 309 (2016).

sustainability and addresses the need for healthier food.[51] It reflects a growing concern about preserving common heritage and preventing the unfair exclusion of authorized producers from reaping full benefits in the consumer market.

The Geneva Act of the Lisbon Agreement (Geneva Act). The Geneva Act entered into force on 15 February 2020 following ratification by the United Kingdom. The Geneva Act is a much-awaited revision of the Lisbon Agreement, and the two combined form the Lisbon System. The Geneva Act expands the scope of the Lisbon Agreement by incorporating the definition of GIs in addition to the appellation of origin. The most significant benefit of the Geneva Act is the single registration procedure for GIs through the World Intellectual Property Organization. It will be highly relevant for Indian producers seeking protection of their products in offshore markets. Thus, India should consider ratifying the Geneva Act at the earliest opportunity.

Conclusion

The Indian economy contracted by 23.9 percent in the first quarter of 2020–2021, the highest rate of decline in the preceding four decades.[52] According to the World Bank, this has happened at a time when India needs to create approximately 8 million jobs annually to keep the employment rate constant.[53] In such a scenario, GI has the potential to emerge as a powerhouse for economic development, particularly for the rural economy.

In India, GI is at the intersection of three significant fields – intellectual property, trade and socio-economic policy. Indeed, in addition to their various advantages, including quality, GIs are an easy way of helping the underprivileged producers and artisans in India. As a result, it has significant socio-economic and public policy implications.

GI products can be a source of income for the returning migrant laborers in the wake of the COVID-19 pandemic. GI can provide local employment, protect the heritage and traditions of the local community and ultimately play a significant role in rural development and self-sufficiency.

Without a doubt, the benefits of GI can only be realized when the products are effectively marketed and protected from imitations in the market. In this regard, government support will be critical, and it must be extended beyond the mere registration of GI products. In third world countries like India, where approximately

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[51] Delphine Marie-Vivien & Estelle Biénabe, *The Multifaceted Role of the State in the Protection of Geographical Indications: A Worldwide Review*, 98 World Dev. 1, 4 (2017).

[52] Ministry of Statistics and Programme Implementation Report on Annual and Quarterly Estimates of GDP at constant prices, 2011–12 series (2020) (Oct. 19, 2021), available at http://mospi.nic.in/sites/default/files/press_releases_statements/Statement_13_1sept2020.xls.

[53] World Bank, Jobless Growth?, South Asia Economic Focus (2018) (Sep. 30, 2021), available at https://openknowledge.worldbank.org/bitstream/handle/10986/29650/9781464812842.pdf?sequence=4&isAllowed=y.

22 percent of the population is living below the poverty line and 27.1 percent of the population is illiterate, the federal and state governments need to take a more proactive stand to promote GIs.[54] The government measures should include four essential features:

1. The Ministry of Commerce, in collaboration with the Ministry of Culture, can run capacity-building programs for the authorized users. Such programs can also be integrated with existing government schemes like Swarnjayanti Gram Swarozgar Yojana. In addition, existing programs such as One District One Product should be strengthened and streamlined to identify and support stakeholders in remote areas.

2. Capacity building will be incomplete until stakeholders' knowledge and interface with the internet are prioritized. This will help GI producers in overcoming information asymmetry in the market and adapting to the ever-evolving taste of consumers.

3. In order to navigate foreign legal systems, assistance should be provided for direct registration and hiring of legal services. This is especially true given that Indian GI producers lack the education and resources to achieve this without external support. Priority should be given to India's top three trading partners, namely China, the United States and the United Arab Emirates.[55]

4. Assistance in hiring the services of an international watchdog to regularly monitor the market and keep an eye on infringers of valuable Indian GIs post-registration in foreign countries. For instance, Darjeeling tea has retained the services of an international monitoring agency, Compumark, to report any unauthorized use of the Darjeeling logo.[56]

India should also explore the option of intellectual property protection being secured through collaborative efforts among the BRICS countries. This could be a significant step towards harmonizing GI laws because the BRICS as an association is made up of some of the world's largest and most influential economies.

In addition, India should ratify the Geneva Act at the earliest. It provides for the much-needed single-window GI registration system for all the member countries. This may go a long way towards helping the GI producers in India, who are otherwise facing a grim future and possible extinction due to market erosion.

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[54] As per the latest Census Data of India, 2011 (Jun. 10, 2021), available at https://censusindia.gov.in/2011census/censusinfodashboard/index.html.

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TYPOLOGY OF LEGAL REGULATION OF VALUE-ADDED TAXATION IN THE BRICS STATES

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Value-added taxation (VAT) is an essential component of the financial system of any modern state, which determines the attention of the legislator to the development of its legal regulation, as well as the subject of this article. The processes of transformation of VAT legal regulation systems that are observed in the BRICS countries (the People's Republic of China, the Republic of India, the Federal Republic of Brazil, the Russian Federation, and the Republic of South Africa) demonstrate the greatest activity in this area of legal relations. The task of studying such changes, which makes it possible to identify common features and individual features of various types of legal regulation of value-added taxation, is solved on the basis of an integrated assessment of the characteristics of the tax redistribution of value added. Based on the results of their research, the types of legal regulation of VAT in the BRICS countries are identified and the place that the Russian model of legal regulation of VAT occupies in this classification is determined.

Keywords: BRICS; VAT; GST; legal regulation of value added taxation; turnover tax.

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Table of Contents

Introduction

The prospects for the development of the state are determined, first and foremost, by the definition of the right policy and the quality of management provided by the development of appropriate forms of legal regulation.[1]

The study of the models of VAT legal regulation that have existed in Russia and South Africa for a long time, as well as those that have been developed during the period of active reform in recent years in China and India, leads to the conclusion that such a legal instrument is primarily correlated with specific socio-economic practices localized in different national and public entities.

The research approach used in the proposed work employs a comparative legal analysis of changes in the legal regulation of value added taxation in the People's Republic of China, the Republic of India, the Republic of South Africa, the Federal Republic of Brazil and the Russian Federation. Based on its results, a detailed typology of the models of legal regulation of VAT in the BRICS countries should be formed, each of which has pronounced features of legal regulation, creates its own unique type of economic and legal impacts, its own social activity, and also determines the place and features of the Russian model of legal regulation of VAT in the existing variety of national models of the BRICS states.

The results of the study should provide a sufficient normative, empirical and conceptual basis for a scientifically reasoned platform of basic knowledge to put forward proposals for legal improvements to the legal mechanism of VAT and the regulatory apparatus of the legal regulation of value-added taxation in the Russian Federation as well as in the other BRICS states.

1. Modern Types of Legal Regulation of VAT

As types of VAT legal regulation, it is possible to consider legally defined combinations of financial and legal means, specially structured depending on their

[1] *Стадвелл Д.* Азиатская модель управления: удачи и провалы самого динамичного региона в мире [Joe Studwell, *Asian Model Management: Successes and Failures of the Most Dynamic Region in the World*] 403 (2017).

focus on targeted (fiscal-oriented and (or) socially-oriented) impact on the behavior of subjects of public relations in the field of value-added taxation.

Their classification is based on an integrated criterion that includes the following indicators: (a) constitutionally expressed principles and rules for the distribution of property and value added created in the company, defining the characteristics of tax administration and the target direction of VAT revenues; (b) availability of tax benefits and exemptions; (c) the amount of the basic tax rate.

The classification of the most pronounced types of legal regulation of VAT in modern world practice allows us to identify both common features and individual features of models of such regulation:

• The Western European model (socially-oriented) is characterized by a socially-oriented distribution of VAT, a high tax rate and the availability of tax benefits and exemptions;

• The Eastern European model (fiscally-oriented) is characterized by a fiscally-oriented distribution of VAT, a high tax rate and the availability of tax benefits and exemptions;

• The New Zealand model (universal) is based on a socially-oriented distribution of VAT, a low tax rate and a lack of tax benefits and exemptions;

• The neutral model is a fiscally-oriented distribution of VAT, a low tax rate and the availability of tax benefits and exemptions.

In the proposed classification, the main question is to what extent the actual legal regulation of VAT corresponds to objective public needs combined with the interests of economic efficiency.

The evaluation of the results of the legal regulation of value-added taxation indicates that the regulatory Western European model is applied in the conditions of modern high-tech production in the paradigm of the inseparable unity of the material and ethical structures of the modern Western European state and their connection with the basic political and legal ideas - the idea of property and the idea of the common good. The effects of social correction, economic integration and inhibition of the processes of capital expansion generated by its application have a positive impact on social development in each of the socially oriented states of Europe.

The legal regulation of value-added taxation, which operates within the constraints of a fiscally-oriented model and to which the legal regulation of VAT in the Russian Federation can be attributed, eventually becomes an instrument of financial and legal deterrence for countries with reformed economies whose governments are addicted to excessive VAT taxation. Such a VAT places a heavy tax burden on labor-intensive industries, suffocating and restraining economic development and effectively becoming yet another tax on the poor.

In fact, the universal model of legal regulation of value-added taxation in New Zealand, serves as an example for the design of modern legislation in India and China. The absence of tax benefits and exemptions in the New Zealand Goods and

Services Tax (GST) ensures that tax collection is nearly 100% (C – coefficient – 1). VAT collection in the European Union is 60% (C – coefficient – 0.6). In this regard, the Organisation for Economic Co-operation and Development (OECD) Financial Affairs Committee has recommended legal innovations in the legislation on GST of New Zealand in the development of prospective legal regulation of value-added taxation in OECD countries.

The analysis of the typology of VAT legal regulation also leads to the conclusion that if the purpose of the projected value-added taxation model in a developing country is socio-economic growth, then a universal model should serve as a guideline for its changes.

If we recognize that the regulation of relations is always established by people with the help of the state, then the constitution (basic law) of the country invariably acts as a starting point for the legalization of the rules of social interaction in the field of tax redistribution.

2. Integral Assessment of the Characteristics of the Tax Redistribution of Added Value in the BRICS Countries

Value-added taxation acts as the most important financial and legal regulator of the socio-economic development of the country. Its basic characteristics are formed on a constitutional basis. As a result, the terms of reference for the development of legislative regulation of tax redistribution of added value should first reflect the relevant provisions of the basic law of the state.

Among the constitutional provisions that have the greatest impact on specific procedures for the legal regulation of VAT, it is necessary to highlight the norms that determine the priorities of the state in matters of property and its redistribution in society, as well as ways of managing and improving the efficiency of the national economy.

2.1. VAT Legal Regulation in China

The Constitution of the People's Republic of China states that the basis of the socialist economic system is socialist public ownership of the means of production, that is, public property and collective property of the working masses (Art. 6 of the Constitution of the People's Republic of China). The State guarantees the strengthening and development of the economic sector based on state ownership (Art. 8 of the Constitution of the People's Republic of China).

The Basic Law of the People's Republic of China declares the non-social sector of the economy (individual and private farms) to be an important component of the socialist market economy (Art. 11 of the Constitution of the People's Republic of China), and thus prioritizes socialist public property, while prohibiting any organizations or individuals from appropriating or undermining state and collective property (Art. 12 of the Constitution of the People's Republic of China).

If socialist public property in the People's Republic of China is "sacred and inviolable" (Art. 12 of the Constitution of the People's Republic of China), then private property is only 'inviolable', and the state can requisition or use it in accordance with the law, as well as pay compensation if there are public needs (Art. 12 of the Constitution of the People's Republic of China).

The fundamental task of the State is to concentrate its efforts on socialist modernization (Preamble of the Constitution of the People's Republic of China).

The Chinese state steadily increases labor productivity and economic efficiency, developing the productive forces of society by increasing the activity and technical level of workers, spreading advanced science and technology, improving economic management systems and enterprise management, implementing various forms of socialist responsibility and improving labor organization (Art. 14 of the Constitution of the People's Republic of China).

A distinct feature of the modern Chinese regulation of economic relations is the preservation of the state planning function, which applies to all enterprises of the Chinese economy – state, collective, private, as well as mixed forms of ownership.

Rationally distributing the means of accumulation and consumption, the state takes into account state, collective and personal interests, gradually improving the material and cultural life of the people on the basis of the development of production (Art. 14 of the Constitution of the People's Republic of China). The state is improving macro-regulation (Art. 15 of the Constitution of the People's Republic of China).

A system is maintained in which the distribution of labor dominates in coexistence with other distribution methods (Art. 6 of the Constitution of the People's Republic of China).

State-owned enterprises exercise democratic governance through meetings of workers' and employees' representatives, among other forms (Art. 16 of the Constitution of the People's Republic of China).

Collective economic organizations have the right to independence, to independently conduct economic activities, carry out democratic governance, elect and remove management personnel and to resolve important issues of economic management (Art. 17 of the Constitution of the People's Republic of China).

A systematic interpretation of the norms of the Constitution of the People's Republic of China leads to the conclusion that the socio-economic structure of the Chinese state is based on the dominance of public interests, and the scope of private property rights is enclosed within the boundaries established by the state.

Constitutional and legal principles are further developed in the normative and practical activities of the authorities of the People's Republic of China, with the goal of resolving the problem of balancing the task of economic modernization with the social needs of the people.[2]

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[2] *Кеннеди П.* Взлеты и падения великих держав: экономические изменения и военные конфликты в формировании мировых центров власти с 1500 по 2000 г. [Paul Kennedy, *The Rise and Fall of*

The decision of the XVIII CPC Congress of 8 November 2012 on the major transformation of the Chinese growth model by switching to stimulating domestic consumption is accompanied by a territorial and sectoral expansion of the scope of VAT legal regulation. In assessing the ongoing changes, the Chinese authors argue that the tax policy of modern China is based on the principle of 'efficiency priority with due regard for fairness', which means that the leadership of the People's Republic of China gives more preference to social justice than economic efficiency.[3]

In October 2017, at the XIX Congress of the CPC, Xi Jinping put forward a 50-year program of socio-economic transformations of Chinese society, which will be implemented in three stages (2017–2020, 2021–2035, 2035–2049). The main task of the first stage is to overcome poverty and "build a moderately prosperous society in all respects," namely the middle-income society "*Xiaokan*." Its political and legal support shall be carried out on the basis of strict observance of the principle of "the combination of the rule of law and the rule of virtue."[4]

The socio-economic system of the People's Republic of China is becoming more efficient than the Anglo-Saxon center of the previous world economic system, which no longer generates development processes. Adhering to the socialist ideology, China makes use of the advantages of both planned and market economies. In fact, this is a qualitatively new system of industrial relations and institutions, in which additional development opportunities are created on the basis of a combination of state strategic planning and regulation with market self-organization.

The system of state institutions ensures: (a) the dominance of the public sector in the economy and finance, which maintains a stable and balanced infrastructure and resource base; (b) the development of market mechanisms, directing them to improve the welfare of the entire society and (c) clear guidelines for the development of private entrepreneurship, minimizing the possibility of creating dangerous imbalances in order to obtain excess profits.

The comprehensive nature of the planned changes in Chinese society determines the corresponding large-scale transformations in the legal regulation of value-added taxation.

The normative acts of the current stage of VAT tax reform are imbued with the desire to improve the situation of taxpayers. The main measures are aimed at "reducing permits and convenience for people," limiting tax enforcement, improving the quality of the taxation environment.

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the Great Powers: Economic Change and Military Conflict in the Formation of the World's Centers of Power From 1500 to 2000] 607 (2020).

[3] Gao Peiyong & Ma Jun, *China: Toward the New Stage of Improving its Tax System*, 1(2-3) J. Tax Reform 145 (2015).

[4] Xi Jinping's Report at the 19th CPC National Congress, China Daily, 4 November 2017 (Feb. 20, 2022), available at https://www.chinadaily.com.cn/china/19thcpcnationalcongress/2017-11/04/content_34115212.htm.

In 2017–2019, the PRC implemented a reform of tax rates, which objectively acts as the central point of changes in the legal regulation of VAT. As a result of the gradual reduction of VAT, a three-tier structure of rates for ordinary payers has been formed (13%, 9% and 6%). The announcement of the Ministry of Finance of the People's Republic of China, the Main Tax Administration of the People's Republic of China and the Main Customs Administration of the People's Republic of China No. 39 dated 20 March 2019[5] establishes that the 13 percent rate is declared the main (general) VAT rate, but at the same time, a significant number of business transactions are taxed at the rates of 6 percent and 9 percent.

In 2020–2021, the implementation of a phased tax reduction policy continued, covering the provision of various value-added tax benefits for small taxpayers. The results of this policy are presented in table 1. Within its framework, the reduction of the VAT rate from 3 percent to 1 percent for individual industrial and commercial households has been extended until 31 December 2021.

The reduction of the VAT threshold for small taxpayers from 100,000 yuan per month to 150,000 yuan is considered the most important structural measure in the field of legal regulation of value-added taxation.[6]

According to the report of the State Council of the People's Republic of China for 2020, large-scale tax cuts combined with the improvement of institutional mechanisms have reduced the fiscal burden of economic entities by more than 2.6 trillion yuan during 2020,[7] with VAT revenue accounting for more than 60 percent of the collection of total taxes in the People's Republic of China. The central budget and local budgets each receive 50 percent of the VAT receipts, which are sent to the central budget and local budgets in equal shares of 50 percent.

The task of improving the modern taxation system is focused on supporting and stabilizing the manufacturing industry, consolidating production chains and further optimizing value-added taxation.

To this end, Chapter 21 "Creating a Modern Tax and Financial System" of the fourteenth five-year plan of the National economic and Social development of the People's Republic of China and the Plan of Long-term Goals for 2035 provides for the

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[5] Announcement of the Ministry of Finance and Taxation of the People's Republic of China and the General Customs Administration of the People's Republic of China, No. 39 dated 20 March 2019 "On Deepening the Policy Related to the Reform of Value Added Tax" (Feb. 20, 2022), available at http://www.chinatax.gov.cn/chinatax/n810341/n810755/c4559725/content.html.

[6] 财政部 税务总局关于明确增值税小规模纳税人免征增值税政策的公告财政部 务 总局公告2021年第11号2021-3-31 [Announcement No. 11 of 31 March 2021, The State Tax Administration of the Ministry of Finance to Clarify the Policy of the Exemption from VAT for Small Taxpayers of Value Added Tax] (Feb. 20, 2022), available at http://www.chinatax.gov.cn/chinatax/n359/c5162930/content.html.

[7] 政府工作报告2021年3月5日在第十三届全国人民代表大会第四次会议上国务院总理 李克强 [Report on the Work of the Government Prime Minister State Council Li Keqiang at the Fourth Session of the Thirteenth National People's Congress Representatives on 5 March 2021] (Feb. 20, 2022), available at http://www.gov.cn/zhuanti/2021lhzfgzbg/index.htm.

task of improving the legal regulation of tax rates, the volume of tax exemptions, calculation and payment of VAT.[8] One such measure is the planned reduction in the rates of value-added tax levied on services to 6%–9%.

It should be noted that measures to reduce the fiscal burden of taxpayers are complemented by credit development mechanisms. Today, China is confidently leading the world in terms of the monetization of the national economy, with more than $30 trillion in the accounts of Chinese individuals and legal entities at the start of 2021.

To summarize, the Chinese model of VAT legal regulation is increasingly acquiring the features of a socially-oriented type of value-added taxation, with low tax rates and consistent restrictions on tax benefits and exemptions.

2.2. VAT Legal Regulation in India

In many ways, India uses economic institutions and management mechanisms comparable to those used in China, resulting in the creation of its own convergent management system, the main goal of which is to improve the standard of living of the population. Its integral world economic structure is being created on a democratic basis.

The Constitution of the Republic of India enshrines the primacy of public interests over private ones, proclaiming it as a fundamental duty of the State "to ensure a social order conducive to the welfare of the people" (Art. 38 of the Constitution of India).

The Constitution of the country declares India as a Sovereign Socialist Secular Democratic Republic (Preamble of the Constitution of India)[9] in its first line, and it states that "social, economic and political justice determines the essence of all institutions in which the life of the nation is embodied" (Art. 38 of the Constitution of India).

In India, the dogma that taxes must comply with constitutional norms is consistently expressed. The provisions of the Constitution of India institutionally orient the State to ensure and harmonize public interests.

The State strives to minimize income inequality and eliminate inequalities in status, conditions and opportunities among individuals and groups of the population (Art. 38 of the Constitution of India).

The State pursues a policy aimed at ensuring that property and control over the material resources of society are distributed in such a way as to best serve the

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[8] 中华人民共和国国民经济和社会发展第十四个五年规划和2035年远景目标纲要 [The Fourteenth Five-Year Plan of the National Economic and Social Development of the People's Republic of China and the Plan of Long-Term Goals for 2035] (Feb. 20, 2022), available at http://www.gov.cn/xinwen/2021-03/13/content_5592681.htm.

[9] The words "secular" and "socialist" were added to the preamble of the Constitution of India by the 42nd Amendment Act during the State of emergency in 1976. Конституция Индии // Википедия [Constitution of India, Wikipedia] (Feb. 20, 2022), available at https://ru.abcdef.wiki/wiki/Constitution_of_India.

common good, and the functioning of the economic system does not lead to the concentration of wealth and means of production to the detriment of the common interests (Art. 39 of the Constitution of India).

The Constitution of India provides legal guarantees for taxpayers and the proper use of tax revenues:

• Taxes are established only on the basis of the law. No tax is imposed or levied except by virtue of law (Art. 265 of the Constitution of India);

• Persons may not be deprived of property except by the authority of the law (Art. 300A of the Constitution of India);

• The protection of public property is the duty of every citizen of India (Art. 51A of the Constitution of India).

Measures have been declared to ensure the participation of employees in the management of enterprises, institutions and other organizations in industry (Art. 43A of the Constitution of India).

Adherence to the constitutionally formulated doctrine of "materiality," which presupposes the productive care of the state to solve vital problems of citizens,[10] is quite clearly manifested in the sphere of legal regulation of value-added taxation.

Historically, a wide range of regional and social interests has led to the need to develop a mechanism for common goal-setting, taking into account the diversity and conflicting positions of various groups in Indian society. Many experts consider the country to be fragmented and more akin to a confederation. For example, the Dravidian Southerners in Kerala have favored communists for more than half a century, while the Sikh Northerners in Punjab are ruled by nationalists. Dravidians and Sikhs speak different languages, have different appearances and think differently.[11]

The solution was found in the form of the creation of a special constitutional body for the legal regulation of value-added taxation, whose members represent not only the interests of the central government, but also all the interests of all the states of the country separately. The Goods and Services Tax (GST) Council consists of 30 members: 29 finance ministers from across India, and the Minister of Finance of the country serving as the Chairman.

In its activities, the GST Council applies a management method based on consensus and agreement.[12] This approach makes it possible to link the interests of the population of the country, creating the possibility of synergetic consideration of a variety of views in a multicultural economy.

The Constitution of India establishes a special procedure for the creation of the GST Council (para. 1 of Art. 279A) and its decision-making (paras. 7 and 9 of Art. 279A).

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[10] *Льюис Э.* Без оглядки на богов: взлет современной Индии [Edward Lewis, *Without Regard to the Gods: The Rise of Modern India*] (2009).

[11] *Ландау А.* Краткая история Индии [Alexander Landau, *A Brief History of India*] 573 (2020).

[12] K. Mitra Subrata, *Politics in India: Structure, Process and Policy* 121 (2014).

It is fundamentally important that the work of the GST Council is based on the constitutionally mandated principle of coordinating the structure of the GST with the goals of developing the national market of goods and services (cl. 6 of Art. 279A of the Constitution of India). In particular, on the basis of paragraph 4 of Article 279A of the Constitution of India, the Council determines: goods and services that can be taxed or exempt from goods and services tax; model laws on GST; principles of collection and distribution of GST levied on supplies in the course of interstate trade; principles governing the place of delivery; threshold limit of turnover; tax rates, including minimum rates, as well as rates for a specific period to collect additional resources.

Unlike many other countries with economies in transition, the Indian elite refuses to directly transfer foreign standards and management technologies, instead carefully studying possible options in the context of their own identity, and refusing to allow risky decisions that disrupt the established way of social life.

The legal regulation of value-added taxation is being formed as part of the 2017–2020 reform, the purpose of which is not to solve narrowly focused tasks of fiscal efficiency but to focus on a long-term strategy for the socio-economic structure of Indian society.

It is no coincidence that the new Indian tax on goods and services[13] is characterized by flexibility, practicality and social orientation. The latter characteristic stems directly from the 42nd Amendment to the Constitution of India, which defines the construction of a socialist republic as one of the goals of social development.

Taking into account the preferential application of the 12 percent tax rate in the five-step line of tax rates (0%, 5%, 12%, 18%, 28%), allows us to attribute this type of value-added taxation to the model of predominantly socially-oriented value-added taxation, which does not restrain the development of the economy and does not have a critically significant impact on labor. It should be pointed out that the Indian legislator recognizes the fact that labor contracts are subject to value-added taxation and sets a flat 12 percent rate for them, regardless of the types of goods and services produced by employees.

2.3. VAT Legal Regulation in Brazil

As the basic principle of the organization of economic order, the Constitution of the Federal Republic of Brazil establishes the principle of social justice, combining freedom of initiative with the growth of the value of human labor (Art. 145 of the Constitution of Brazil).

Interference in economic activity and monopolization of certain industries are justified on the basis of public interest, and its scope is limited by the fundamental rights provided by the Constitution (Art. 146 of the Constitution of Brazil).

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[13] Central Goods and Services Tax Act, 2017 (Feb. 20, 2022), available at https://www.indiacode.nic.in/bitstream/123456789/15689/1/a2017-12.pdf.

The law restricts any abuse of economic power when the goal is to dominate the national market, eliminate competition and arbitrarily increase profits (Art. 148 of the Brazilian Constitution).

The use of property is conditioned by public welfare. The law should promote a fair distribution of property with the provision of equal opportunities for all (Art. 147 of the Brazilian Constitution).

Usury in all its forms is punishable by law (Art. 154 of the Brazilian Constitution).

The Law establishes the regime of financial institutions (Art. 149 of the Brazilian Constitution) and creates specialized credit institutions to assist agriculture and cattle breeding (Art. 150 of the Brazilian Constitution).

Financial state control and revision of tariffs for the services of concessionaire enterprises are carried out in such a way that the income of concessionaires does not exceed the fair income from capital (Part V of the Brazilian Constitution).

The worker must have a mandatory and direct participation in the income of the enterprise (Art. 157 of the Brazilian Constitution).

The minimum wage must meet, taking into account the conditions of each district, the normal needs of the worker and his family (Art. 157 of the Brazilian Constitution).

The Constitution establishes the practice of dividing the taxation of turnover into separate taxes administered by different levels of government. The main tax, VAT (ICMS), is administered by the states (Art. 15 of the Brazilian Constitution). The responsibilities of the center include the establishment of a consumption tax, from which items classified by law as a necessary minimum for people with limited economic opportunities (household items, clothing, food, medical care items) are exempt.

A review of the Brazilian media shows that the discussion of VAT reform is taking place in an environment of change under the traditional slogan of the old democracies: "there is no taxation without representation." In Brazilian society, in contrast to the widespread resistance to changes in value-added taxation in India (2016–2017), a broad political consensus has been reached in assessing the current tax system as unfair, regressive and harmful to the Brazilian economy. The authors of the publications state that the reforms proposed in the interests of business, investment and growth are correct, taking into account the economic downturn caused by the sudden global COVID-19[14] pandemic, and that they are being prepared in an open and transparent manner with the goal of widespread acceptance by the majority of citizens.

The most recent the legislative draft (AC 45/2019), which originated with the Center for Tax Citizenship (*Centro de Cidadania Fiscal* (*CCiF*)), calls for the gradual

[14] Romero J.S. Tavares, *Foreword: Assessing Brazil's Tax Landscape in 2020*, International Tax Review, 30 March 2020 (Feb. 20, 2022), available at https://www.internationaltaxreview.com/article/b1ky4qkvpy-c4pd/foreword-assessing-brazils-tax-landscape-in-2020; Guilherme Giglio & Marcelo Natale, *The Long-Expected Brazilian Tax Reform – Objectives, Challenges and Pitfalls*, International Tax Review, 30 March 2020 (Feb. 20, 2022), available at https://www.internationaltaxreview.com/article/b1ky5my4sl0zqx/the-long-expected-brazilian-tax-reform-objectives-challenges-and-pitfalls.

replacement of five taxes (PIS, Cofins, IPI, ICMS and ISS) with a type of VAT called *Imposto sobre bens e Serviços* (*IBS*), which is a goods and services tax.

According to the draft, IBS will have the following characteristics: (a) a broad tax base, including the turnover of tangible and intangible goods, services and rights; (b) exclusion of classification of goods and services into several categories; (c) taxation at the point of destination; (d) exclusion of tax benefits and special regimes.

The IBS should unify the tax competencies of various levels. It provides for the adoption of a constitutional amendment to create a special tax authority in the form of a National Committee for the Management of IBS, responsible for the collection and distribution of tax revenues between the three levels of government (federal center, states and municipalities). The project calls for borrowing from India's experience in creating a special constitutionally authorized authority with broad powers in the field of taxation of goods and services. It is assumed that the political and financial autonomy of the government entities will be ensured by the possibility of changing the rate in relation to the federal, regional or municipal parts of the tax. The total range of IBS rates, ranging from 20 percent to 25 percent, is currently being discussed.[15]

Based on the discussed characteristics of the future tax, it is possible to predict the formation of a socially-oriented model of value-added taxation with a high tax rate and no tax benefits. Among the various types of value-added taxation systems in use around the world, the Canadian model is most similar to the Brazilian type of VAT regulation, in which priority is also given to the sub national (regional) level of taxation.

2.4. VAT Legal Regulation in South Africa

The Constitution of the Republic of South Africa declares the Bill of Rights (Ch. 2 of the Constitution of South Africa) to be the "cornerstone" of democratic values. Public goals and interests are affected in the context of imposed restrictions. Article 25 of the Constitution of South Africa, in particular, prohibits arbitrary deprivation of property and notes that property can be alienated only in accordance with the law of general application for public purposes or in the public interest. The amount of compensation for withdrawal must be decided by the affected parties or by the court. It should reflect a fair balance between the public interests and the interests of the victims, taking into account all the circumstances.

The Constitution contains a detailed provision that the law should provide for a fair distribution of income received at the national level among national, provincial and local spheres of government (Art. 214 of the Constitution of South Africa).

It can be concluded that by paying considerable attention to individual human and civil rights and freedoms, the Constitution of South Africa bypasses the tasks of social development and multiplication of the common good.

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[15] Henrique Erbolato, *Brazilian Tax Reform – Framework and What to Expect*, Bloomberg Tax, 22 January 2020 (Feb. 20, 2022), available at https://news.bloombergtax.com/daily-tax-report-international/brazilian-tax-reform-framework-and-what-to-expect.

There are fairly serious underlying reasons for the significant differences between the South African VAT law[16] and the VAT legislation of other BRICS countries and the European Union. In particular, these include measures to ensure the fulfillment of tax obligations. The study of international experience shows that such broad interim measures are not used in the other BRICS countries, or in the EAEU countries, the European Union and the member states of the Gulf Cooperation Council. There are no provisions in the tax legislation of these states to ensure the fulfillment of current VAT obligations such as depositing of funds by taxpayers who have previously committed tax violations or non-payment of VAT, and requiring participants, members, shareholders or trustees controlling the activities of a legal entity to enter into a surety agreement for these obligations.

According to a comparative legal analysis, the current legislation of South Africa in the field of VAT includes a sufficiently meaningful expression of the principles of universality and neutrality in its fundamental basis, but it falls short of the level of legal, economic and organizational optimality demonstrated by universal taxation of goods and services in New Zealand and Australia.

In general, we should agree with the authors who, in their research, describe VATs in South Africa as a moderately regressive fiscal instrument and a fairly effective source of government revenue.[17]

2.5. VAT Legal Regulation in Russia

The Constitution of the Russian Federation declares the individual rights and freedoms of man and citizen to be of supreme importance (Art. 2 of the Constitution of the Russian Federation). They determine the meaning, content and application of laws, as well as the activities of the legislative and executive authorities (Art. 18 of the Constitution of the Russian Federation) in the context of the ban on the establishment of a state or mandatory ideology in the country (Art. 13 of the Constitution of the Russian Federation).

The Constitution of the Russian Federation provides legal guarantees for owners and taxpayers:

• Everyone is obliged to pay legally established taxes and fees (Art. 57 of the Constitution of the Russian Federation);

• Private, state, municipal and other forms of property equally recognized and protected by the state (Art. 8 of the Constitution of the Russian Federation); this also applies to land and other natural resources (Art. 9 of the Constitution of the Russian Federation);

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[16] Value-Added Tax Act 89 of 1991 (Feb. 20, 2022), available at https://www.golegal.co.za/wp-content/uploads/2016/12/Value-Added-Tax-Act-89-of-1991.pdf.

[17] Delfin S. Go et al., *An Analysis of South Africa's Value Added Tax*, Policy Research Working Paper No. 3671, The World Bank (2005) (Feb. 20, 2022), available at https://openknowledge.worldbank.org/handle/10986/8630.

• The ownership, use and disposal of land and other natural resources are carried out freely by their owners (Art. 36 of the Constitution of the Russian Federation);

• Compulsory alienation of property for state needs may be carried out only on condition of prior and equivalent compensation (Art. 35 of the Constitution of the Russian Federation).

The Constitution of the Russian Federation practically does not address the idea of public goals and interests. Constitutional provisions are primarily shaped by the paradigm of the interests of the state and the individual. In particular, this approach is defined by Article 55 of the Constitution of the Russian Federation, which stipulates that

> human and civil rights and freedoms may be restricted by federal law only to the extent necessary in order to protect the foundations of the constitutional system, morality, health, rights and legitimate interests of other persons, ensuring the defense of the country and the security of the state.

As a result, the paradigm of legal regulation of VAT in the Russian Federation and the Republic of South Africa is formed primarily within the framework of competition between the interests of taxpayers and the state, while the relations of cooperation and constructive policies of joint efforts aimed at developing and achieving common goals and multiplying the common good fade into the background.

3. Typology of Models of VAT Legal Regulation in the BRICS States

The proposed classification allows us to evaluate individual legal forms of VAT and the ways in which they can be used to improve the legal regulation of taxation in the Russian Federation.

Based on the analysis of the international VAT phenomenology of the BRICS states, separate models of legal regulation of value added taxation are identified: the Chinese model (socially oriented); the Indian model (socially oriented); the Brazilian project model (socially oriented); the Russian model (fiscally oriented) and the South African model (fiscally oriented).

It is necessary to highlight the functional features of the models above after studying their characteristics.

The effect of the regulatory-static function of legal regulation by value-added taxation, the main purpose of which is to consolidate the established order of public relations, is expressed in all five models under consideration.

The regulatory-dynamic function of legal regulation by value-added taxation, reflecting the need for legal influence on the subsequent process of social development, is most positively expressed in socially-oriented models of legal

regulation of VAT, as compared to fiscally-oriented models, in which the emergence of the effects of restraining socio-economic development is noted.

The typology of the models of legal regulation of VAT in the BRICS states is created, taking into account the most significant parameters relevant to the classification applied in the first part of this work to the entire phenomenology of legal regulation of VAT of foreign countries.

The target orientation of the use of VAT receipts has been adopted as the leading criterion of the proposed systematization, as determined by taking into account the principles and rules for the distribution of property and value added created in the company, established in the Basic Law of the state, as well as the practices of such distribution implemented in the company.

Table 1: Typology of models of legal regulation of VAT in the BRICS states (as of 2020–2022)

	MODELS OF LEGAL REGULATION OF VAT				
Parameters of legal regulation	Chinese model (socially oriented)	Indian model (socially oriented)	Brazilian model (project) of a socially-oriented orientation	Russian model (fiscal-oriented)	South African model (fiscal-oriented)
By the size of the basic tax rate	Low bid VAT (13%)	Low bid VAT (12%)	High bid VAT (20% – 25%)	High bid VAT (20%)	Average rate VAT (15%)
By the availability of benefits and exemptions	Availability of benefits and exemptions	Availability of benefits and exemptions	Lack of benefits and exemptions	Availability of benefits and exemptions	Minimum benefits and exemptions
According to the target orientation of the distribution of VAT receipts	Socially-oriented VAT distribution	Socially-oriented VAT distribution	Socially-oriented VAT distribution	VAT receipts cover the total budget expenses	VAT receipts cover the total budget expenses

An analysis of the legal regulation of value-added taxation in the BRICS countries allows us to conclude that their current models do not represent an example of economically balanced legislation and are at the stage of gradual, step-by-step improvement.

This is mainly characteristic of the actively developing VAT legal structures of India and China, which are focused on achieving the greatest possible balance of private and public interests.

Such a balance of interests is aimed at the creative multiplication of the common good while steadily reducing the level of poverty.

Despite the accomplishments, such as the adoption of a single tax form that replaced several tax payments from turnover, as well as the reduction of the basic tax rate, difficulties in legislative improvement of VAT are evident. It was not possible to overcome the multiplicity of tax benefits and exemptions, the provision of which is associated with fiscal support for the economic activities of certain categories of taxpayers. The legal regulation of the rules of tax deductions from the tax base presents a significant challenge.

The priority of the legal regulation of VAT in Russia and South Africa is the fiscal interest of filling the budget. As a result, the main vector of impact of the legal regulation of value added taxation in these states is aimed at the fullest possible control of the tax base and effective tax administration.

The fiscal interests of the state do not motivate the legislature to take action to improve the legal structure of the tax, as evidenced by the elimination of excessive taxation of VAT payers through a reduction in the number of tax benefits and exemptions, as well as a reduction in the tax rate. On the other hand, recent changes in VAT legislation indicate the opposite processes: (a) in 2018, despite a reduction in the main tax rates in India and China, there was an increase in the tax rate from 14 percent to 15 percent in the Republic of South Africa and from 18 percent to 20 percent in the Russian Federation; (b) the number of tax benefits and exemptions for certain categories of taxpayers is gradually expanding; (c) the tax exemption of value added generated in the financial sector of the economy still remains.

Such an approach increases the tax burden for ordinary VAT payers, both through an increase in the tax rate and through the shifting of the tax burden of preferential categories of economic entities receiving VAT exemption.

Currently, the Russian Federation does not meet the political, legal and socio-economic conditions for the use of VAT: (a) there is insufficient redistribution of added value to the social sectors of the national economy. The spheres of education, health care and culture are not being modernized, but are instead financed according to the "residual principle"; (b) the extremely low technological level of material production remains; (c) entrepreneurial activity is accompanied by high risks of losing property. The very fact of conducting financial and economic activities in the sphere of the effects of legal regulation of VAT can increase such risks to critical levels.

A comprehensive scientific and practical analysis of the legal regulation of value-added taxation in other countries suggests that if the task of such regulation in the Russian Federation is determined by economic growth based on the restoration and recovery of productive forces, then a universal VAT model with a socially oriented VAT distribution, a low or average tax rate, and the absence of tax benefits and exemptions should become the target for its improvement.

Today, the main vector of reforms of the legal regulation of value–added taxation in the BRICS countries, namely China, India and Brazil lies in this direction.

Conclusion

The analysis shows that the modern legal regimes of value added taxation in the BRICS countries are shaped by a variety of historical and political-legal realities. These conditions, in fact, predetermine the specific principles and rules for the distribution of property and added value created in society, which are established in the constitutions of states.

Based on these circumstances, as well as on the accepted practices of such public distribution, two groups of BRICS states can be distinguished, which implement significantly different strategies for improving the legal regulation of value-added taxation.

In the first group of BRICS states (the Republic of India and the People's Republic of China), the main feature is the fact that this type of taxation acts not only as a fiscal component of social reconstruction programs, but also as a financial and legal instrument that provides ample opportunities for socio-economic development. The project's approach to improving the legal regulation of value added taxation is based on the desire to steadily expand the tax base, which ensures the sufficiency of budget revenues when applying a relatively low tax rate.

The second group of BRICS states (the Russian Federation and the Republic of South Africa) is distinguished by their long-standing legislation on value-added taxation, which focuses primarily on the fiscal interests of the state. They are characterized by the establishment of higher tax rates with a wide number of tax benefits and exemptions extended to non-productive sectors of the economy (including the financial services sector).

It appears that the optimal solution in this area of legal regulation for the developing economies of the Russian Federation and the Republic of South Africa may be the transition to a universal VAT model, which fairly evenly distributes the tax burden among all economic entities on the basis of universality, neutrality and fairness of value-added taxation.

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