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ARTICLES

A COMPARATIVE ANALYSIS OF THE LEGAL REGULATION OF INTERNATIONAL COMMERCIAL ARBITRATION IN RUSSIA AND MAINLAND CHINA

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This article examines international commercial arbitration, one of the most popular methods for the resolution of disputes that arise in the context of international commercial relations. The volume of trade between Russia and China has been gradually increasing in recent years, which testifies to the fact that the study of international commercial arbitration legal regulation in both nations is extremely relevant. The authors examine the concept of international commercial arbitration entities, as well as the sources of legal regulation that govern their establishment and operation in Russia and Mainland China. In addition, the procedures for case consideration, the elaboration of arbitration agreements, the rules for the creation of an arbitration commission, the requirements for arbitral awards and other aspects are investigated. The authors come to the conclusion that the regulations governing international commercial arbitration are similar in the two countries and are based on international law and national legal acts. Both Russia and China have adopted the norms outlined in the United Nations Commission on International Trade Law (UNCITRAL) Model

Law into their legal systems although to different degrees. Both countries provide similar arbitration agreement norms and support the arbitration clause autonomy principle. The difference lies in the fact that China does not follow the competence-competence principle (the arbitrators' power to determine their own competence to consider a certain dispute). Instead, the issue is referred either to the arbitration commission or to the state court for resolution. On the other hand, arbitrators in Russia have the right to determine their competence by themselves. According to Chinese law, a party requires arbitration court mediation in order to be able to submit a request for provisional protection measures to the state court, while under Russian law a direct request is allowed. In China, the norms for the recognition and enforcement of a foreign arbitration award by the court do not provide for the court's ruling to be challenged; the refusal of the recognition and enforcement shall be possible only after the award has been considered by the Supreme People's Court of the People's Republic of China. In Russia, the legislation allows for both challenging and refusing the decision to recognize and enforce the award.

Keywords: international commercial arbitration; UNCITRAL Model Law; Russia; Mainland China; arbitration agreement; arbitration commission; arbitration award.

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Introduction

International commercial arbitration is currently considered to be one of the most popular and efficient methods of international dispute settlement. The economic development of countries leads to the emergence of disputes at both national

and international levels.[1] The Russian Federation (RF) and the People's Republic of China (PRC) also use international commercial arbitration as a means of dispute resolution. The development of international commercial arbitration procedures is still in progress in both countries as new sources of law are adopted and the number of disputes continues to grow.

The comparative analysis of the two countries' legislation allows for the identification of the advantages and disadvantages of the current legal regulation procedures, which is a way to close normative gaps in the national legislation and improve some of the existing provisions based on the positive examples from international law. The findings can serve as the basis for future research as well as be used in practice.

1. International Commercial Arbitration in Russia and Mainland China: Law Theory Analysis

There is no mention of the concept of international commercial arbitration in any of the international agreements or in the legal acts of Russia or China. The legal doctrine, in turn, also lacks a uniform definition of the term although the differences in its interpretation are not great since most definitions are based on the main features of international commercial arbitration. It is important to note that non-Russian legal literature does not typically provide definitions of international commercial arbitration and only speaks about its distinctive attributes.

B.R. Karabelnikov defines international commercial arbitration as a method of international dispute resolution and an alternative to the national court system of dispute settlement. The author singles out a range of important characteristics, for example, the obligatory character of the arbitration agreement, the appointment of impartial arbitrators, the final and binding character of the arbitration award and cooperation between an arbitration tribunal and national courts for the execution of the arbitration award.[2]

In S.A. Kurochkin's opinion, international commercial arbitration is the process of resolving disputes that arise within the framework of international economic relations when one of the counterparties is located in a foreign state.[3]

N.Yu. Erpyleva describes international commercial arbitration as an arbitration court that either operates on a regular basis or is created for each case separately, and the main purpose of which concerns the resolution of international commercial

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[1] Pieter Sanders, *New Trends in the Development of International Commercial Arbitration and the Role of Arbitral and Other Institutions* 112 (1983).

[2] *Карабельников Б.Р.* Международный коммерческий арбитраж: учебник [Boris R. Karabelnikov, *International Commercial Arbitration: Textbook*] 32 (2013).

[3] *Курочкин С.А.* Третейское разбирательство и международный коммерческий арбитраж [Sergey A. Kurochkin, *Domestic and International Commercial Arbitration*] 27 (2021).

disputes by providing an award that is binding for the parties to the deal.[4] S.V. Nikolyukin suggests an almost identical definition.[5]

The authors tend to give similar definitions of international commercial arbitration, based for the most part, on explaining its prominent features that are also reflected in the legislation. The main features are as follows: (a) a foreign component, that is, the parties to the agreement, shall reside or be located permanently in different countries (Art. 1, cl. 1, para. a of the European Convention on International Commercial Arbitration);[6] (b) an arbitration agreement between the parties is obligatory (Art. 1, cl. 2 of the UNCITRAL Model Law on International Commercial Arbitration[7]); (c) the award determined by the international commercial arbitration shall be binding (Art. 3 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958; hereinafter the New York Convention)).[8]

The major advantages of international commercial arbitration stem from its purposes that are aimed at making an arbitration resolution simpler and more open.

One of the purposes of international commercial arbitration is to achieve the independence of arbitration resolution which is possible due to the following factors: the ability to choose a pre-determined arbitration tribunal and impartial arbitrators, the application of international law and the use of international legal procedures and rules.

According to N.D. Eriashvili, Yu.A. Ivanova and R.I. Komilzhonov, international commercial arbitration can indeed be considered as an alternative to the narrower, country-specific approaches to dispute resolution.[9]

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[4] *Ерпылева Н.Ю.* Международные арбитражные соглашения: понятие, виды и основания действительности // Юрист. 2010. № 2. С. 60 [Natalia Yu. Erpyleva, *International Arbitration Agreements: Concept, Types and Grounds for Reality*, 2 Lawyer 56, 60 (2010)].

[5] *Николюкин С.В.* Международный гражданский процесс и международный коммерческий арбитраж: учебник [Stanislav V. Nikolyukin, *International Civil Procedure and International Commercial Arbitration: Textbook*] 131 (2017).

[6] Европейская конвенция о внешнеторговом арбитраже (заключена в г. Женеве 21 апреля 1961 г.) // Вестник ВАС РФ. 1993. № 10 [European Convention on International Commercial Arbitration of 21 April 1961, Bulletin of the Supreme Arbitration Court of the Russian Federation, 1993, No. 10].

[7] Арбитражный регламент ЮНСИТРАЛ (принят в г. Нью-Йорке 28 апреля 1976 г.) // СПС «КонсультантПлюс» [UNCITRAL Arbitration Rules of 28 April 1976, SPS "ConsultantPlus"] (Mar. 1, 2022), available at https://www.consultant.ru/cons/cgi/online.cgi?req=doc&ts=wotQo0Tf1bWdOwG9&cacheid=8111A4DE8AE3454D359023E70AB603BA&mode=splus&rnd=bswqqA&base=INT&n=15032#LPvQo0TgBzAJ9ucE1.

[8] Конвенция Организации Объединенных Наций о признании и приведении в исполнение иностранных арбитражных решений (заключена в г. Нью-Йорке в 1958 г.) // Вестник ВАС РФ. 1993. № 8 [United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, Bulletin of the Supreme Arbitration Court of the Russian Federation, 1993, No. 8].

[9] *Эриашвили Н.Д., Иванова Ю.А., Комилжонов Р.И.* Международный коммерческий арбитраж: понятие, виды, правовая природа // Образование и право. 2021. № 2. С. 253 [Nodari D. Eriashvili et al., *International Commercial Arbitration: Concept, Types, Legal Nature*, 2 Education and Law 252, 253 (2021)].

The chance to choose any arbitration tribunal for dispute settlement proves to be one of the biggest advantages of the institution in question[10] as it eliminates any potential partiality on the part of the "domestic tribunals" representing either of the disputing parties.[11]

The arbitration parties play an important role in the selection of arbitrators. One of the advantages is that the parties possess the autonomy of will to choose any number of arbitrators of any specialization, nationality and so on. Moreover, the arbitrator shall meet the impartiality and independence criteria as indirectly mentioned in Article 12, clause 1 of the UNCITRAL Model Law on International Commercial Arbitration.[12]

Another advantage of international commercial arbitration is the opportunity to employ basic rules and norms adapted for their use in all countries and jurisdictions.[13] By choosing the arbitration resolution method, the parties avoid conflicts of law[14] or conflicts with local legal procedures.

One goal of international commercial arbitration is the obligatory enforcement of foreign arbitral awards. A strong point of international commercial arbitration is the quick and efficient enforcement of awards with fewer exceptions than in the state courts. The latter is possible due to the fact that there are more than 140 contracting states to the New York Convention.[15]

Another goal of international commercial arbitration is to ensure that awards are legally binding. International commercial arbitration has had very few cases of awards being reversed. The court's review of the award generally includes various procedural aspects, while there are rarely any changes in essence as a result.[16] That rule has both advantages and disadvantages. On the one hand, the lack of the court review stage means shorter settlement time and lower legal expenses. On the other hand, an erroneous decision is very hard to correct. However, the advantages ensured

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10 Gary B. Born, *International Commercial Arbitration* 31 (2nd ed. 2014).

11 Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (2008).

12 *Supra* note 7.

13 David D. Caron & Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 30–31 (2nd ed. 2013).

14 *Кискачи М.А.* Использование Принципов УНИДРУА в международном коммерческом арбитраже в отсутствие соглашения сторон об их применении // Электронное приложение к «Российскому юридическому журналу». 2019. № 2 [Maria A. Kiskachi, *Use of the UNIDROIT Principles in International Commercial Arbitration in the Absence of Agreement Between the Parties on Their Application*, 2 Electronic Supplement to the Russian Legal Journal (2019)] (Mar. 14, 2022), available at http://electronic.ruzh.org/?q=ru/system/files/%D0%9A%D0%B8%D1%81%D0%BA%D0%B0%D1%87%D0%B8%20%D0%9C.%D0%90..pdf.

15 *Ланшакова А.Ю.* Преимущества рассмотрения споров в международном коммерческом арбитраже // Вестник ОмГУ. Серия «Право». 2013. № 1(34). С. 166–169 [Anna Yu. Lanshakova, *Advantages of Dispute Resolution in International Commercial Arbitration*, 1(34) Herald of Omsk University. Series "Law" 166, 166–69 (2013)].

16 Born 2014, at 34.

by the binding character of the arbitral award appear to outweigh the possible inconveniences.[17] The discussed goal is confirmed by the existing court practice. For example, the award of the Singapore Arbitration Court states that

> there are many reasons why the parties may prefer the arbitration resolution of disputes … Prompt enforcement of the arbitration award in all the countries whose citizens are parties to the agreement as well as the final and binding character of the award without further reversal.[18]

Low expenses and quick settlement in comparison with the general jurisdiction courts are also goals of international commercial arbitration.[19] It is hard to say whether the former is achievable as the price is a rather subjective matter and arbitration is not always a more cost-effective option than a public court. International commercial arbitration necessitates that the parties bear all expenses, including paying consideration to the arbitrators and reimbursing the logistical fees (transport, accommodation at the place of arbitration, etc.). As a result, the assertion that international commercial arbitration has low costs is a controversial statement as the costs of using general jurisdiction courts vary depending on the country.[20] As for the speed of the settlement, the elimination of the review stage allows us to meet our goal of completing the settlement in the shortest amount of time possible.

The choice of international commercial arbitration as the dispute resolution body allows for a higher level of confidentiality in comparison with the general jurisdiction courts. The degree of confidentiality is usually rather low in national courts due to the main principles of the state: the transparency of the trials and their openness to the public. For example, Article 130 of the Constitution of the People's Republic of China contains provisions on the openness of trials in the People's Courts.[21] Article 10 of the Civil Procedure Code of the Russian Federation also includes provisions on the openness of trials.[22] Unlike national courts, international commercial arbitration allows the parties to stipulate the desired level of confidentiality in the arbitration agreement. The confidentiality of international commercial arbitration is mentioned

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17 *ContiChem LPG v. Parsons Shipping Co., Ltd*., 229 F.3d 426 (2d Cir. 2000).

18 *Tjong Very Sumito and Others v. Antig Investments Pte Ltd*. [2009] S.G.C.A. 41.

19 Born 2014, at 35.

20 Lanshakova 2013.

21 Constitution of the People's Republic of China, adopted at the 5th session of the 5th National People's Congress and promulgated for implementation by the announcement of the National People's Congress on 4 December 1982 (Mar. 14, 2022), available at http://www.lawinfochina.com/display.aspx?id=436178e5d0b17482bdfb&lib=law.

22 Гражданский процессуальный кодекс Российской Федерации от 14 ноября 2002 г. № 138-ФЗ // Собрание законодательства РФ. 2002. № 46. Ст. 4532 [Civil Procedure Code of the Russian Federation No. 138-FZ of 14 November 2002, Legislation Bulletin of the Russian Federation, 2002, No. 46, Art. 4532].

as an important feature in the Resolution of the Plenum of the Supreme Court of the Russian Federation of 10 December 2019 No. 53 "On the Cooperation and Control Performed by National Courts as Regards the Settlements by Means of International Commercial Arbitration."[23]

No uniform definition of international commercial arbitration can be found in either theoretical sources or in legal practice. However, the following are its most commonly recognized features: the presence of parties from different countries; the existence of an arbitration agreement and the presentation of the final and legally binding arbitration award. The purposes and advantages of international commercial arbitration are nearly identical and aim for a greater autonomy of parties and more independent dispute resolution.

As for the sources of international commercial arbitration legal regulation, there is a two-step system. Firstly, there are international normative instruments that have been ratified by both Russia and China. Secondly, there are the countries' individual national legislations.

The twentieth century witnessed the rise of international commercial arbitration. At that time, the international community already saw the necessity of adopting a normative instrument that would regulate international commercial arbitration. The first of such instruments is the Protocol on Arbitration Clauses (signed in Geneva on 24 September 1923)[24] and the Convention on the Execution of Foreign Arbitral Awards (signed in Geneva on 26 September 1927).[25] The mentioned instruments set the basis for modern international commercial arbitration, having established some major concepts for the commercial arbitration, such as an arbitration agreement, an arbitration award and the enforcement of an arbitral award.

The elaboration of international commercial arbitration was put on hold during World War II but resumed development after the hiatus. Several international agreements were concluded that now define the essence of international commercial arbitration. The New York Convention is among such agreements. The creation of the New York Convention was the first step towards the unification of the international

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[23] Постановление Пленума Верховного Суда Российской Федерации от 10 декабря 2019 г. № 53 «О выполнении судами Российской Федерации функций содействия и контроля в отношении третейского разбирательства, международного коммерческого арбитража» // Российская газета. 2019. 25 дек. № 291 [Resolution of the Plenum of the Supreme Court of the Russian Federation No. 53 of 10 December 2019. On the Cooperation and Control Performed by National Courts as Regards the Settlements by Means of International Commercial Arbitration, International Commercial Arbitration, Rossiyskaya Gazeta, 25 December 2019, No. 291].

[24] Протокол об арбитражных оговорках (подписан в г. Женеве 24 сентября 1923 г.) [Protocol on Arbitration Clauses of 24 September 1923] (Mar. 5, 2022), available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/ru/register_texts_vol_ii.pdf.

[25] Конвенция об исполнении иностранных арбитражных решений (подписана в г. Женеве от 26 сентября 1927 г.) [Convention on the Execution of Foreign Arbitral Awards of 26 September 1927] (Mar. 5, 2022), available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/ru/register_texts_vol_ii.pdf.

laws on international commercial arbitration. Russia and China both implemented the right to arbitration clauses during the ratification process. China implemented two of the available clauses: the reciprocity clause on the mutual obligation to recognize and enforce foreign arbitral awards made in a foreign state's territory and the commercial clause. The reciprocity clause was initially implemented by the Union of Soviet Socialist Republics (USSR), and later by Russia.[26]

The 1985 UNCITRAL Model Law on International Commercial Arbitration (hereinafter the UNCITRAL Model Law) is an important source of international commercial arbitration regulation as well.[27] The instrument is not legally binding. The UNCITRAL Model Law aims at helping states create uniform legislation on international commercial arbitration. The Russian Federation currently uses the UNCITRAL Model Law as the basis for its domestic legislation on international commercial arbitration. The UNCITRAL Model Law norms were largely adopted in the Federal Law titled "On International Commercial Arbitration" of 7 July 1993 No. 5538-I (hereinafter the RF ICA Law).[28] As for the People's Republic of China, only a few administrative entities, such as Hong Kong and Macau, have officially integrated the norms of the UNCITRAL Model Law into their legislation. Although Mainland China incorporated the UNCITRAL Model Law norms into its Law "On Arbitration," it never notified the UNCITRAL Secretariat that it would abide by these norms.

In the Russian Federation, the main source of legal regulation for international commercial arbitration is the abovementioned RF ICA Law, which is applied to international commercial arbitration should the arbitration settlement take place in Russia. However, a range of provisions from the law shall be used when the settlement takes place outside of the country (Arts. 8, 9, 35 and 36). If the RF ICA Law fails to cover certain arbitration issues, the Federal Law "On Arbitration (Arbitration Proceedings) in the Russian Federation" shall be used.[29]

In the People's Republic of China, the main source of legal regulation for international commercial arbitration is the PRC Law "On Arbitration" of 31 August 1994.[30] This

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[26] *Supra* note 8.

[27] Типовой закон ЮНСИТРАЛ о международном торговом арбитраже (принят ЮНСИТРАЛ 21 июня 1985 г.) [UNCITRAL Model Law on International Commercial Arbitration of 21 June 1985] (Mar. 5, 2022), available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/ru/07-87000_ebook.pdf.

[28] Закон Российской Федерации от 7 июля 1993 г. № 5338-I «О международном коммерческом арбитраже» // Российская газета. 1993. 14 авг. № 156 [Law of the Russian Federation No. 5338-I of 7 July 1993. On International Commercial Arbitration, Rossiyskaya Gazeta, 14 August 1993, No. 156].

[29] Федеральный закон от 29 декабря 2015 г. № 382-ФЗ «Об арбитраже (третейском разбирательстве) в Российской Федерации» // Российская газета. 2015. 31 дек. № 297 [Federal Law No. 382-FZ of 29 December 2015. On Arbitration (Arbitration Proceedings) in the Russian Federation, Rossiyskaya Gazeta, 29 December 2015, No. 297].

[30] Arbitration Law of the People's Republic of China, adopted on 31 August 1994 (Mar. 5, 2022), available at https://wipolex.wipo.int/ru/legislation/details/6598.

is a mixed law, as it regulates both internal and international arbitration. Another piece of legislation that regulates international commercial arbitration is the 29 October 2010 Law "On the Legislation Applicable to Civil Relations with Foreign Participation."[31] The said normative act is a source of international private law and complements the law on arbitration.

Interviews with international economic actors and their lawyers, both in Russia and in China, reveal that incorporating all norms into a single legal act or creating a separate section in an already existing legal document proves to be the most efficient method of international arbitration legal regulation on a national level.[32] The majority of the respondents spoke in favour of a single legal act on international commercial arbitration.

Aside from the legal regulations, both in Russia and in China, there are high court pronouncements that contain interpretations of the international commercial arbitration norms. In Russia, the major sources are as follows: The Resolution of the Plenum of the Supreme Court of the Russian Federation of 10 December 2019 No. 53 "On the Cooperation and Control Performed by National Courts as Regards the Settlements by Means of International Commercial Arbitration"[33] and "Overview of the Court Practice Concerning the Cooperation and Control Performed by National Courts as Regards the Settlements by Means of International Commercial Arbitration" (adopted by the RF Supreme Court Presidium on 26 December 2018).[34]

In 2006, the PRC People's Court published the interpretation of the arbitration law application procedure,[35] which mostly concerns the norms of the 2006 UNCITRAL Model Law. In 2015, "The Supreme People's Court's Interpretation Concerning the Civil Procedure Law of the People's Republic of China" was published that also contains a range of provisions on arbitration settlements as well as international commercial arbitration.[36]

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[31] Law of the People's Republic of China on the Legislation Applicable to Civil Relations with Foreign Participation, adopted on 28 October 2010 (Mar. 5, 2022), available at https://wipolex.wipo.int/en/legislation/details/8423.

[32] The research was conducted with the assistance of the Southwest University of Political Science and Law (Chongqing, China), September 2021–January 2022, N-21.

[33] *Supra* note 23.

[34] Постановление Президиума Верховного Суда Российской Федерации от 26 декабря 2018 г. «Обзор практики рассмотрения судами дел, связанных с выполнением функций содействия и контроля в отношении третейских судов и международных коммерческих арбитражей» // Бюллетень Верховного Суда РФ. 2019. № 9 [Resolution of the Presidium of the Supreme Court of the Russian Federation of 26 December 2018. Overview of the Court Practice Concerning the Cooperation and Control Performed by National Courts as Regards the Settlements by Means of International Commercial Arbitration, Bulletin of the Supreme Court of the Russian Federation, 2019, No. 9].

[35] Supreme People's Court's Interpretation Concerning Some Issues on Application of the Arbitration Law of the People's Republic of China, adopted on 26 December 2005 (Mar. 5, 2022), available at http://www.bjac.org.cn/english/page/ckzl/htf3.html.

[36] Supreme People's Court's Interpretation Concerning the Civil Procedure Law of the People's Republic of China, adopted on 30 January 2015 (Mar. 5, 2022), available at https://ipkey.eu/sites/default/

Apart from the abovementioned judicial guidance, there are arbitration rules and regulations. Arbitration regulations are documents determining the dispute procedure. The arbitration regulations serve to clarify and interpret the arbitration law provisions as well as aim at creating a mechanism to consider and settle disputes and are binding for the parties that have accepted them. Almost any arbitration centre that considers international commercial arbitration disputes has its own set of regulations. In Russia, the most well-known international commercial arbitration regulations belong to the RF Chamber of Commerce and Industry.[37] In China, the international commercial arbitration regulations of China's International Economic and Trade Arbitration Commission (CIETAC) hold this distinction.[38] The present paper will look into the content and application of these rules and regulations.

Among the bilateral agreements regulating China and Russia's relationship, it is worth mentioning "The Protocol of General Conditions for the Delivery of Goods from the USSR to the People's Republic of China and from the People's Republic of China to the USSR"[39] signed in 1990. The agreement regulates the delivery of goods between the two countries. Currently, the validity of the agreement is a subject of debate. Russia never claimed its legal continuity. However, neither party declared its termination either.[40] It is probably safe to conclude that the Protocol is no longer legally binding, but the conditions stipulated therein can be used in an agreement by the parties. Proof of the disposition character of the Protocol can be found in court practice as well. In Russia, a decision of the Arbitration Court of the Amur Region mentions the use of the Protocol only at the request of the parties to the agreement.[41]

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files/legacy-ipkey-docs/interpretations-of-the-spc-on-applicability-of-the-civil-procedure-law-of-the-prc-2.pdf.

37 Регламент Международного коммерческого арбитражного суда при Торгово-промышленной палате Российской Федерации (утвержден Приказом ТПП РФ от 18 октября 2005 г. № 76) [Rules of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, adopted on 18 October 2005] (Mar. 5, 2022), available at https://mkas.tpprf.ru/ru/reglamentmkas.php.

38 China International Economic and Trade Arbitration Commission Arbitration Rules, adopted on 4 November 2014 (Mar. 5, 2022), available at http://www.cietac.org/index.php?m=Page&a=index&id=106&l=en.

39 Инструкция Внешторгбанка СССР от 25 декабря 1985 г. № 1 «О порядке совершения банковских операций по международным расчетам» // СПС «КонсультантПлюс» [Instruction of the Vneshtorgbank of the USSR No. 1 of 25 December 1985. On the Procedure for Performing Banking Operations for International Settlements, SPS "ConsultantPlus"] (Mar. 5, 2022), available at http://www.consultant.ru/document/cons_doc_LAW_5153/.

40 *Цзэньцзюнь К.* Международный коммерческий арбитраж в Китае (материковый Китай, Гонконг, Макао и Тайвань): дис. … канд. юрид. наук [Kuan Tszentszyun, *International Commercial Arbitration in China (Mainland China, Hong Kong, Macau and Taiwan)*, PhD thesis] 175 (2008).

41 Решение Арбитражного суда Амурской области от 19 ноября 2013 г. № А04-6934/2013 // Судебные и нормативные акты РФ [Decision of the Arbitration Court of the Amur Region No. A04-6934/2013 of 19 November 2013, Judicial and Regulatory Acts of the Russian Federation] (Mar. 5, 2022), available at https://sudact.ru.

All in all, international commercial arbitration as we know it today has been developing since World War II. Nowadays, international commercial arbitration in Russia and China is based on international law, national legislation and bilateral agreements. Moreover, the resolutions and interpretations of the supreme courts as well as arbitration regulations complement the main laws and help to unify the enforcement of the law. The national legislation can be improved by including all international commercial arbitration norms in a single legal act.

2. Particularities of International Commercial Arbitration in Russia and Mainland China: Arbitration Agreement and Arbitration Commission

An arbitration agreement forms the core of international commercial arbitration. An arbitration agreement is binding for the parties and, should a dispute arise, does not allow that the parties to avoid arbitration settlement.[42] The validity of an arbitration agreement depends upon many factors. The present paper will consider the definition, the form and the autonomy of the arbitration agreement.

Article 7 of the UNCITRAL Model Law provides the definition of an arbitration agreement, which is stated to be an agreement between parties according to which all or some disputes that may occur between the parties in the course of doing business shall be considered by an arbitration body.

Arbitration agreements fall into two types. It is either an arbitration clause, that is, an arbitration agreement incorporated into the main agreement, or a separate document. Both options possess equal legal power. An arbitration agreement, regardless of its form, supposes that the case shall be considered by an arbitrator rather than a state court.[43]

The definition suggested by the Russian legislation is identical to that of the UNCITRAL Model Law (Art. 7 of the RF ICA Law). The definition of an arbitration agreement vis-à-vis the Chinese legislation is similar to that given in the UNCITRAL Model Law as well, although it does not copy it word for word. In accordance with Article 16 of the PRC Law "On Arbitration," arbitration agreements can assume the form of arbitration clauses or separate arbitration agreements concluded in writing. The arbitration law also specifies conditions for the arbitration agreement's validity, such as expressing the will to have disputes considered by an arbitration body; choosing the arbitration subject matter and selecting the arbitration commission.

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[42] *Гаврилов В.В.* Арбитражная оговорка и определение применимого права в международном коммерческом арбитраже // Актуальные проблемы международного гражданского процесса: материалы международной конференции [Vyacheslav V. Gavrilov, *Arbitration Clause and Definition of Applicable Law in International Commercial Arbitration* in *Actual Problems of International Civil Procedure: Materials of the International Conference*] 183–190 (2003).

[43] Overview of the Court Practice, *supra* note 34.

The requirement of a pre-selected arbitration commission is uncommon in the majority of jurisdictions. This provision allows institutional arbitration to be conducted in certain places and prohibits ad hoc arbitration until 2016. In 2016, the Supreme People's Court of the PRC published "The Conclusion of the Provision of Judicial Safeguards for the Construction of China Pilot-Free Trade Zones."[44] This judicial guidance allowed ad hoc arbitration, but in a limited capacity. Such arbitration shall only be possible in disputes between residents of the free trade zone; the arbitration body, its composition and procedures shall be specified as well (Art. 9).

Article 7 of the UNCITRAL Model Law provides two variants of an arbitration agreement. The first one insists on the obligatory written form of the agreement. Oral agreements or implicative action are not considered as options. However, the second type of agreement, included in Article 7 of the UNCITRAL Model Law in 2016, does not present the conclusion in writing as an absolute imperative. The creators of the UNCITRAL Model Law have not shown any special inclination towards any of the different agreement types provided in Article 7. The national legislatures of both Russia and China have opted for the first type of arbitration agreement recognized by the UNCITRAL Model Law, that is, the one concluded in writing. There are several reasons why the written agreement has been chosen as the preferable option. Firstly, the parties exclude the possibility of dispute settlement in a state court. Secondly, the written form is proof enough of the fact that the parties have agreed to use arbitration as their preferred means of dispute resolution.[45] Article 7 of the UNCITRAL Model Law as well as the national legislation do not limit the Variant I arbitration agreement to a simple written form but also allow other forms that ensure the documentation of the relevant data and its further use (Art. 7, cl. 3 of the RF ICA Law). The interpretations offered by higher courts provide the following list of agreement forms that are considered to be written: electronic messages correspondence,[46] including telegraph, telefax, fax and email, as well as electronic documents with a clearly traceable sender.[47]

Article 7, clause 5 of the RF ICA Law also considers a lawsuit and a response to it as a viable means of an agreement conclusion should one of the parties mention an existing arbitration agreement between them and should the other party fail to deny it. Meanwhile, neither the PRC Law "On Arbitration" nor the interpretations

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[44] Opinions on the Provision of Judicial Safeguards for the Construction of China Pilot-Free Trade Zones, Conclusion of the Supreme Court of 2016 No. 34 (Mar. 5, 2022), available at https://www.ichongqing.info/business/policies-regulations/opinions-on-providing-judicial-safeguard-for-the-construction-of-china-chongqing-pilot-free-trade-zone-formulated-by-liangjiang-new-area-peoples-court/.

[45] *Коломиец А.И.* Письменная форма арбитражного соглашения – пережиток прошлого или необходимость? // Вестник арбитражной практики. 2017. № 4(3). С. 3–11 [Anna I. Kolomiets, *Is a Written Arbitration Agreement a Relic of the Past or a Necessity?*, 4(3) Bulletin of Arbitration Practice 3–11 (2017)].

[46] Supreme People's Court's Interpretation, *supra* note 35.

[47] Overview of the Court Practice, *supra* note 34.

given by the Supreme People's Court on some issues pertaining to the application of the arbitration law of the People's Republic of China indicate the lawsuit-response exchange as a valid form of the arbitration agreement conclusion. However, considering there is no explicit prohibition or acknowledgment of various types of written agreements, the abovementioned form of concluding an agreement can be seen as acceptable. The inclusion of such a possibility in the Chinese legislation could be a significant improvement as it would ensure that the norms on the forms of an arbitration agreement are more precise and unambiguous.

One of the major features of international commercial arbitration is the autonomy of the arbitration agreement. The autonomy of the arbitration clause implies its independence from the main agreement, while the invalidity of the agreement does not automatically entail the invalidity of the arbitration clause (Art. 16 of the UNCITRAL Model Law and Art. 16 of the RF ICA Law). The provision according to which the legal relationship between the plaintiff and the defendant through an arbitration clause shall be considered separately from the rest of the agreement[48] is also backed by clause 3 of the Supreme Court Resolution No. 53 of 10 December 2019[49] and by court practice. The PRC Law "On Arbitration" mentions the arbitration clause as well. According its Article 19, an arbitration clause operates separately from the main agreement, and any changes in the latter shall not affect the former. The content of the article is also explained in clause 10 of the "Interpretation of Some Issues on Application of the Arbitration Law."[50]

The invalidity of the arbitration clause shall be considered separately. An arbitration clause can be considered void in the event of defective will or violations of the law concerning the content and form of the arbitration agreement.[51]

The arbitration agreement autonomy principle originates in the competence-competence principle, which recognizes the arbitrators' power to determine their own competence to consider a certain dispute.[52] This means that even if the main

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48 Решение Международного коммерческого арбитражного суда при Торгово-промышленной палате Российской Федерации от 13 марта 2014 г. по делу № 102/2013 [Decision of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation No. 102/2013 of 13 March 2014].

49 *Supra* note 23.

50 Supreme People's Court's Interpretation, *supra* note 35.

51 Решение ВТАК при ТПП СССР от 9 июля 1984 г. Конфиденциальное дело № 109/198 (в/о «Союзнефтеэкспорт», г. Москва, против «Джок Ойл, Лтд», Бермуды) // Вестник международного коммерческого арбитража. 2007. № 2. С. 135–167 [Decision of the VTAK at the USSR Chamber of Commerce of 9 July 1984. Confidential Case No. 109/198 (*V/O Soyuznefteexport, Moscow, v. Jock Oil Ltd., Bermuda*), 2 Bulletin of International Commercial Arbitration 135, 135–167 (2007)].

52 *Еремин В.В.* Подходы к определению арбитрабельности: соотношение арбитрабельности, подведомственности и компетенции // Актуальные проблемы российского права. 2019. № 8(105). С. 95–107 [Victor V. Eremin, *Approaches to Determining Arbitrability: Relationship Between Arbitrability, Jurisdiction and Competence*, 8(105) Actual Problems of Russian Law 95, 95–107 (2019)].

agreement is declared void, only the arbitration body can decide whether or not the arbitration clause is valid. Both Article 16 of the UNCITRAL Model Law and Article 16 of the RF ICA Law contain this provision.

The law in Mainland China does not fully agree with this principle. According to Article 20 of the PRC Law "On Arbitration," if there are doubts concerning the validity of the arbitration agreement, a party has the right to apply to the arbitration commission or the People's Court for clarification. If one party applies to the arbitration commission and the other to the People's Court, the dispute is to be resolved by the People's Court. When compared to Russian legislation, the following differences can be seen: firstly, the validity of the arbitration clause is determined by the arbitration commission, not the arbitrators themselves; secondly, the validity of the arbitration clause can be determined by the People's Court, whose decision shall take precedence over that of the arbitration commission in the event of a conflict. The above contradicts one of the main advantages of arbitration, namely, its independence from the state courts. Such a provision is believed to make China less attractive as a venue for arbitration. A possible solution would be to include a provision in Chinese legislation requiring an independent arbitral award on the validity of the arbitration agreement. The first step was already taken in 2015 when a provision was added to the CIETAC Regulations which provides that the arbitration commission shall have the right to determine the existence and validity of the arbitration agreement. Consequently, the parties agree not to refer the dispute over the validity of the arbitration agreement to the People's Court and to have the issue resolved by the arbitration commission alone.

That is to say, both China and Russia follow the autonomy principle, although Mainland China, unlike Russia, does not support the competence-competence principle, instead referring the issue to either the arbitration commission or the People's Court.

When it comes to determining the validity of the arbitral agreement, one should turn to Article 7, clause 9 of the RF ICA Law, according to which all doubts shall be resolved in favour of its validity. This provision is a step aside from the literal construction principle and allows the recognition of agreements with minor defects as being legally valid. Similar provisions on the validity of an agreement can be found in the "Supreme People's Court's Interpretation Concerning Some Issues on Application of the Arbitration Law of the People's Republic of China."[53] The Chinese legislation provides a clearer definition for every type of dispute, thereby allowing for a wider range of cases in which faulty arbitration agreements shall be recognized as valid. Such an approach appears clearer and more specific, making it a better option, and so its application to Russian legislation shall be considered.

An arbitration agreement is one of the key elements of international commercial arbitration. Arbitration centres try to elaborate an "ideal" and uniform arbitration agreement as well as eliminate possible obstacles that may hinder the case consideration.

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[53] *Supra* note 35.

An example of a flawed arbitration clause that led to the rejection of dispute settlement in the International Commercial Arbitration Court for the Russian Chamber of Commerce (ICAC) can be found in ICAC's award of 5 October 2010 in Case No. 81/2010.[54] The parties had the right to pass the arbitration case to ICAC or Uzbekistan's commercial court. In the plaintiff's opinion, the clause was optional and allowed for both ways of resolving the dispute. However, ICAC recognized Uzbekistan's commercial court as the appropriate dispute resolution body and rejected the case.

Another example of a faulty arbitration clause is the case described in clause 13 of the Overview of Court Practice for the Resolution of Disputes Involving Foreign Citizens.[55] According to the arbitration agreement, the parties agreed on a "Paris Institution" as the arbitration body but failed to indicate the specific place in the arbitration clause. In the end, the arbitration court ruled that the agreement could not be fulfilled and the dispute was considered *ad rem* by a state court.

To avoid such inconveniences, arbitration courts publish their own sets of rules and recommend that they should be followed (although it is not obligatory). As mentioned before, both ICAC[56] and CIETAC[57,58] have their own sets of recommendations.

The legislation, both in China and in Russia, contains the norms from the UNCITRAL Model Law. However, unlike China, Russia has implemented the majority of the UNCITRAL Model Law norms.

The two countries have similar interpretations of an arbitration agreement. However, the PRC Law "On Arbitration" specifies stricter conditions for the agreement's validity. Both countries only recognize written agreements (although they adhere to a broad interpretation of the term "written"). Both support the arbitration clause autonomy principle, but the People's Republic of China does not follow the competence-competence principle, preferring instead to refer the competence issues to either the arbitration commission or the People's Court. In addition, China

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54 Споры с контрагентом в международном коммерческом арбитраже // Юрист компании. 23 декабря 2015 г. [Disputes with a Counterparty in International Commercial Arbitration, Lawyer of the Company, 23 December 2015] (Mar. 5, 2022), available at https://www.law.ru/Article/3945-spory-s-kontragentom-v-mejdunarodnom-kommercheskom-arbitraje-neprivychnye-nyuansy.

55 Информационное письмо Президиума Высшего Арбитражного Суда Российской Федерации от 16 февраля 1998 г. № 29 «Обзор судебно-арбитражной практики разрешения споров по делам с участием иностранных лиц» // Вестник ВАС РФ. 1998. № 4 [Information Letter of the Presidium of the Supreme Arbitration Court of the Russian Federation No. 29 of 16 February 1998. Overview of Court Practice for the Resolution of Disputes Involving Foreign Citizens, Bulletin of the Supreme Arbitration Court of the Russian Federation, 1998, No. 4].

56 Рекомендуемые арбитражные соглашения // Международный коммерческий арбитражный суд при Торгово-промышленной палате Российской Федерации [Recommended Arbitration Agreements, International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation] (Mar. 5, 2022), available at https://mkas.tpprf.ru/ru/clause.php.

57 China International Economic and Trade Arbitration Commission, Model Clause (1) (Mar. 5, 2022), available at http://www.cietac.org/index.php?m=Article&a=show&id=2644&l=en.

58 *Id.* Model Clause (2).

provides a more detailed interpretation of faulty arbitration clauses, which helps to reduce the number of arbitration cases that are rejected.

The arbitration commission is an international commercial arbitration body. The purpose of the arbitration settlement is to make a just and final award. The achievement of that purpose depends upon the arbitrators.[59]

Let us proceed to the issue of arbitrators in international commercial arbitration. Article 7 of the UNCITRAL Model Law states that, unless otherwise agreed, three arbitrators shall be appointed. The RF ICA Law contains similar instructions, although it highlights that the number of arbitrators shall be uneven (unless otherwise specified by law). The PRC Law "On Arbitration" allows for the consideration of a case by either one or three arbitrators.

The parties can, however, appoint the arbitrators themselves, either within the framework of the arbitration agreement or in the course of the arbitration proceedings.

While the Chinese legislation allows for either one or three arbitrators, the Russian legislation allows for more than these two options, although they are the most popular ones. The advantage of having three arbitrators is that each party can choose one of the three arbitrators. This is stipulated in Article 11, clause 3, paragraph 1 of the RF ICA Law as well as in Article 31 of the PRC Law "On Arbitration." The third arbitrator (who, as a rule, will also serve as the president) can be selected by the parties, by the other two arbitrators or by the arbitration commission. Additionally, the two arbitrators already nominated by the parties shall choose the third arbitrator. According to ICAC, the president of the arbitration commission can be appointed, that is, the third arbitrator shall be selected by the Nomination Committee for Arbitration of International Commercial Disputes from the existing list of arbitrators (Art. 16, para. 7).

The nomination process for the arbitrator who will preside over the case is different in the People's Republic of China. In accordance with Article 31 of the PRC Law "On Arbitration," the parties either appoint the arbitrators jointly or delegate the task to the president of the arbitration commission. The norms regarding the election of the president of the arbitration commission provided by the CIETAC Regulations prove noteworthy and can be implemented in the Russian legislation. The CIETAC Regulations provide a broader interpretation of the above as, according to the regulations, each party submits a list of one to five arbitrators for the position of the president. Furthermore, the latter is chosen by looking for overlapping names in the lists. If there are several incidences, the CIETAC president shall choose the most suitable arbitrator as regards the essence of the case, the arbitrator's experience and other factors. If no names coincide, the CIETAC president alone shall appoint the chair of the arbitration (Art. 27 of CIETAC).

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[59] *Тер-Овакимян А.А.* Правовой статус арбитров в международном коммерческом арбитраже: автореф. дис. … канд. юрид. наук [Anna A. Ter-Ovakimyan, *Legal Status of Arbitrators in International Commercial Arbitration*, Abstract, PhD thesis] 4 (2018).

As a rule, a sole arbitrator is chosen in cases of simple disputes or those that involve a small amount of money. In Russia, Article 16, paragraph 2 of ICAC establishes that a case can be resolved by a sole arbitrator if the claimed amount is below US$50,000 (or equivalent), excluding penalty fees or recovery of the arbitration expenses. Furthermore, a sole arbitrator shall be appointed if there are other circumstances based on which ICAC has the right to appoint a sole arbitrator for the purpose of dispute settlement. In China, the CIETAC Regulations do not stipulate any conditions upon the basis of which the sole arbitrator shall be chosen. Should the parties agree otherwise, the names of three arbitrators shall be nominated.

To conclude, in both countries single-member and three-member arbitration panels are the most popular types. Russia allows a larger number of arbitrators as long as their total number is uneven, whereas China does not provide any other options at all. Both China and Russia allow the parties to choose the arbitrators by themselves. China's procedure for the election of the chair arbitrator appears more efficient and independent and has the potential to improve the Russian legislation if implemented. In addition, in default of the parties' expressed will, the arbitration commission shall appoint the arbitrators itself, taking into consideration the complexity and type of case as well as any other relevant factors.

Disputes can be settled through international commercial arbitration only if the arbitrator meets certain requirements. These said requirements can be divided into formal and ethical ones.

The formal criteria include age, education and a clean criminal record, among others. The following criteria for international arbitration are established in Russia: a university degree in law attested by a standard certificate recognized in the Russian Federation; twenty-five years old; mental capacity; and a clean criminal record. In some instances, a person cannot be chosen as an arbitrator because of their status (for example, if the person is a judge, as stated in Art. 3, cl. 3, para. 1 of the Federal Constitutional Law "On the Status of Judges in the Russian Federation"[60]), as well as a person whose authority as a judge, lawyer or notary public, among others, has been suspended due to misconduct (Art. 11, cls. 6–11 of the Federal Law "On Arbitration (Arbitration Proceedings) in the Russian Federation") cannot be nominated as an arbitrator either. The university degree requirement is obligatory only in the case of the sole arbitrator. Should there be an arbitration panel, only one arbitrator is obliged to possess a university degree (Art. 11, cl. 7 of the Federal Law "On Arbitration (Arbitration Proceedings) in the Russian Federation").

The Federal Law "On Arbitration (Arbitration Proceedings) in the Russian Federation" stipulates a degree in law as one of the requirements for arbitrators; however, it fails to specify the level of education, for instance a bachelor's or master's

[60] Закон Российской Федерации от 26 июня 1992 г. № 3132-I «О статусе судей в Российской Федерации» // Российская газета. 1992. 29 июля. № 170 [Law of the Russian Federation No. 3132-I of 26 June 1992. On the Status of Judges in the Russian Federation, Rossiyskaya Gazeta, 29 July 1992, No. 170].

degree. The issue is settled as regards the state courts by the Federal Constitutional Law "On the Status of Judges in the Russian Federation"[61] which says that a person shall qualify to become a judge if they have a master's degree in law only if they have also completed bachelor studies in the same field.

On the one hand, arbitration allows the parties to exercise their free will when choosing the arbitrators. On the other hand, international commercial arbitration tends to consider complicated and expensive cases that require certain qualifications. In our opinion, a minimal required qualification should be determined for arbitrators in both national and international arbitration by means of the Plenum resolution or in the Supreme Court's practice overview.

In China, the formal criteria for arbitrators include eight or more years of work experience in arbitration (after having taken the state exam and obtaining qualification in law) or as a lawyer or a judge. A PhD working as a law teacher or a person with work experience in commerce can qualify as an arbitrator as well (Art. 13 of the PRC Law "On Arbitration").

The PRC Law "On Arbitration" does not specify any age requirements for arbitrators. However, due to the work experience requirements (that shall be preceded by prior training), a person younger than twenty-five years of age cannot become an arbitrator. For example, Article 4, clause 6 of the PRC Law "On Judges in the People's Republic of China" states that to qualify as an arbitrator one shall have a bachelor's degree in law and two years of experience in the legal field or a master's degree in law or PhD and one year of experience working as a lawyer.[62]

The People's Republic of China determines only one criterion for the arbitrator to meet, which is work experience in a specific field. However, the criterion also implies the obligatory higher education training required to work in the legal field, as well as the minimum age condition which cannot be too low even if all of the previous requirements are met. The Russian Federation does not include work experience in the list of qualification requirements for arbitrators. The lack of strict and detailed requirements for arbitrators, although based on the autonomy of the parties' will to determine the arbitrators' choice within the framework of the arbitration agreement, appears to result in a less competent case consideration. That is why minimal obligatory requirements for arbitrators should be established via bilateral agreements. Basic legal training and work experience in a specific field shall be included among such requirements.

There are a number of moral and ethical standards for arbitrators to uphold. Article 11, clause 5 of the RF ICA Law specifies independence and impartiality, whereas Article 13 of the PRC Law "On Arbitration" indicates honesty and decency.

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61 Law of the Russian Federation No. 3132-I, *supra* note 60.

62 中华人民共和国法官法2005年05月26日 [Law on Judges in the People's Republic of China of 26 May 2005] (Mar. 5, 2022), available at http://www.gov.cn/banshi/2005-05/26/content_1026.htm.

Russia borrowed the criteria from clause 12 of the UNCITRAL Model Law. China has its own criteria. Despite the fact that the criteria are not identical, their similarity can hardly be denied either, since they are aimed at the independence and fairness of the justice system.

Unlike state courts, arbitration is based on the parties' free will. The parties can stipulate additional requirements for arbitrators. Article 11, clause 1 of the Federal Law "On Arbitration (Arbitration Proceedings) in the Russian Federation," states the possibility of such additional requirements, although the wording of the above norm is sometimes criticized. A.I. Zaytsev remarks that since the parties are free to use any criteria for the arbitrator's nomination (for example, religious denomination or sexual orientation), searching for the candidates and then determining whether or not they meet the set criteria may turn out to be no easy task.[63]

The PRC Law "On Arbitration" does not indicate that the parties introduce additional criteria for arbitrators, but as long as it fails to expressly prohibit it either, the parties can, in fact, establish additional criteria that can touch upon various aspects (e.g. nationality or availability) and shall be included in the agreement.[64] Some requirements are not included in the agreement, such as professional knowledge, qualification and work experience, but can be considered by the parties.[65]

However, only the criteria specified by law shall be deemed obligatory. Additional criteria can be introduced at the request of the parties if they wish to do so.

The independence of international commercial arbitration is also ensured by the opportunity to reject or withdraw an arbitrator due to circumstances that have come to light only after the nomination. The above provision can be found in Article 12 of the RF ICA Law and Article 34 of the PRC Law "On Arbitration." The Russian law is identical to Article 11 of the UNCITRAL Model Law.

While in Russian law the criteria for removing an arbitrator appear to be rather vague since any circumstances that raise doubts about the arbitrator's impartiality and independence can become the basis for their withdrawal, Chinese law imposes stricter conditions, which include the arbitrator's kinship or other ties to one of the parties or their representatives, the arbitrator's partiality and the arbitrator's receiving gifts from the parties or their representatives. The inclusion of similar provisions in

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[63] *Зайцев А.И.* Кто может быть арбитром в соответствии с ФЗ «Об арбитраже (третейском разбирательстве) в Российской Федерации» // Современные тенденции развития гражданского и гражданского процессуального законодательства и практика его применения. 2016. Т. 3. С. 466 [Alexey I. Zaytsev, *Who Can Be an Arbitrator in Accordance with the Federal Law "On Arbitration (Arbitration Proceedings) in the Russian Federation*," 3 Modern Tendencies in the Development of Civil and Civil Procedural Legislation and the Practice of its Applications 465, 466 (2016)].

[64] *Скворцов О.Ю.* Правовое положение арбитров в международном коммерческом арбитраже // Вестник Санкт-Петербургского университета. Право. 2011. № 1. С. 102 [Oleg Yu. Skvortsov, *Legal Status of Arbitrators in International Commercial Arbitration*, 1 Bulletin of St. Petersburg University. Law 99, 102 (2011)].

[65] Ter-Ovakimyan 2018, at 173.

the Russian legislation will ensure a more transparent arbitrator selection process as well as an independent and impartial trial.

The Russian Federation Chamber of Commerce and Industry's Order No. 39 "On the Rules on the Impartiality and Independence of Arbitrators"[66] interprets cases in which the arbitrator's impartiality is unclear. Such cases fall into two types: firstly, those in which there are circumstances that hinder the fair consideration of the case (for example, an arbitrator having kinship ties to one of the parties, their representative, an expert or a witness; the arbitrator having an employment relationship with one of the parties, their representative, etc.) and secondly, those with circumstances that do not necessarily hinder the fair consideration of the case but that should be disclosed to the parties (for example, a close relationship between a party or their representative and the arbitrator; the arbitrator's work as one of the parties' legal representative in a non-arbitration case up to three years prior to the proceedings). Article 30 of the CIETAC Regulations obliges the arbitrator to disclose any facts or circumstances that can put under question their impartiality.

All in all, both Russia and China specify similar circumstances that prevent an arbitrator from participating in international commercial arbitration. The main difference is that China has established certain strict criteria for the removal of the arbitrator in the PRC Law "On Arbitration," whereas Russia, via legislation, only sets general norms with a more detailed interpretation provided in the Chamber of Commerce and Industry's Order No. 39.

Arbitration proceedings in international commercial arbitration begin with the filing of a lawsuit. According to Article 8 of the ICAC Regulations and Article 11 of CIETAC, the date of the lawsuit's receipt by the arbitration commission shall be considered as the beginning date of the arbitration proceedings. Article 21 of the PRC Law "On Arbitration" provides a list of conditions under which a party can approach an arbitration body. These requirements are as follows: an arbitration agreement shall be concluded; the plaintiff shall be able to expose claims, facts and reasoning; and the arbitration commission shall have the competence to consider the case. The RF ICA Law makes no mention of any specific circumstances under which a party shall have the right to an arbitration settlement. Nonetheless, Article 23 of the RF ICA Law states that upon having filed a lawsuit, the party shall reveal the circumstances on which its claim is based, the subject matter of the dispute and the desired compensation. The provision does not expressly indicate that an arbitration agreement shall be concluded despite the fact that it is a basic requirement for the parties to settle a dispute with an arbitration body. Both countries recognize the

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[66] Приказ Торгово-промышленной палаты Российской Федерации от 27 августа 2010 г. № 39 «О Правилах о беспристрастности и независимости третейских судей» // СПС «Гарант» [Order of the Chamber of Commerce and Industry of the Russian Federation No. 39 of 27 August 2010. On the Rules on the Impartiality and Independence of Arbitrators, SPS "Garant"] (Mar. 5, 2022), available at https://base.garant.ru/199168/.

right to change, amend or withdraw the lawsuit (Arts. 23 and 32 of the RF ICA Law, Art. 27 of the PRC Law "On Arbitration").

Arbitration proceedings may take the form of either an oral hearing or written proceedings conducted on the basis of the documents (Art. 39 of the PRC Law "On Arbitration," Art. 24 of the RF ICA Law). The Chinese legislation establishes that closed arbitration hearings shall be held, while public hearings shall only take place upon the agreement of the parties and unless no state secrets are involved (Art. 40 of the PRC Law "On Arbitration"). The RF ICA Law does not specify any requirements as to the form of the hearing. However, the ICAC Regulations advise that a closed-door hearing shall be held unless otherwise agreed by the parties (Art. 32, cl. 1 of the ICAC Regulations). Closed-door sessions are a manifestation of the confidentiality principle. Thus, both countries follow the same approach regarding the confidentiality and publicity of arbitration proceedings.

The main difference between arbitration proceedings in China and those in Russia is that the plaintiff is considered to have dropped the claims if they are absent at the hearing without reasonable excuse. Should the defendant be absent, the case shall be considered without them (Art. 42 of the PRC Law "On Arbitration"). The RF ICA Law does not distinguish between the absences of the parties. If a party fails to attend the hearing or submit any documents, the arbitration court shall make the award based on the available evidence (Art. 25 of the RF ICA Law). The PRC Law "On Arbitration" displays a more stringent attitude to the parties' attendance at the hearings, especially the plaintiff's.

International commercial arbitration both in China and in Russia requires the parties to provide proof of the cited legal facts (Art. 42 of the PRC Law "On Arbitration" and Art. 27 of the ICAC Regulations). Both countries allow the arbitration body to collect the evidence on its own (Art. 43 of the PRC Law "On Arbitration" and Art. 27 of the RF ICA Law). In the Russian Federation, the collection of evidence for international commercial arbitration is conducted by the state (arbitration) courts that hand the evidence over to the arbitration institutions (Art. 74.1 of the Arbitration Procedure Code of the Russian Federation). In the People's Republic of China, the law makes no mention of the state courts. At the same time, there is mention in the legal literature that the collection of evidence for international commercial arbitration can be conducted through the state courts and that this practice is not widespread. The proof procedure is, thus, relatively similar in the two countries, though it has a more detailed legal description in Russia.

The legislation of both countries allows for an assessment to be conducted by an expert on behalf of the arbitration court (Art. 44 of the PRC Law "On Arbitration" and Art. 26 of the RF ICA Law). According to Article 44 of the CIETAC Regulations, Chinese or foreign organizations or natural entities (nationality not specified) may serve as experts. Neither the RF ICA Law nor the CIETAC Regulations express any requirements for experts. Furthermore, both countries allow court-initiated examinations, although in China the procedure is better explained.

International commercial arbitration courts and state courts may work cooperatively if the arbitration institution requests the state court to ensure provisional measures of protection. According to Articles 46 and 28 of the PRC Law "On Arbitration," a party has the right to request that the arbitration court take provisional measures of protection as regards the evidence or property if there is a risk of destruction, the evidence proves hard to obtain or the future arbitral award execution may pose difficulties.

The arbitration commission directs the request for the protection of evidence to the People's Court of the main (first) instance, in accordance with the location of the property. Article 23, clause 3 of the CIETAC Regulations empowers the arbitration court to take measures of protection of its own accord whenever it deems necessary.[67] However, the Civil Procedure Code of the People's Republic of China does not recognize the measures of protection taken by arbitration institutions and shall not enforce them.[68] In other words, the execution of the protection measures taken by an arbitration court of its own accord is not of a binding nature and is not recognized by the state courts.

According to Article 17 of the RF ICA Law, the arbitration court has the authority to institute measures of protection for evidence or property if one of the parties requests it. Article 90, clause 3 of the Arbitration Procedure Code allows a party to request provisional measures of protection from the state (arbitration) court of first instance closest to the arbitration institution in question or to the location of the party's property. Since Article 90 of the Arbitration Procedure Code includes both Russian and international commercial arbitration institutions, the arbitration court has the authority to take provisional measures of protection if the case is being considered by an international commercial arbitration located outside of Russia.[69] However, the provisional measures of protection initiated by the arbitration courts are not of a legally binding nature and are not recognized by the state courts as being enforceable.

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[67] *Кобахидзе Д.И.* Регулирование обеспечительных мер в международном коммерческом арбитраже: сравнительный анализ законодательства Англии, Китая и России // Журнал зарубежного законодательства и сравнительного правоведения. 2017. № 6(67). С. 87–92 [David I. Kobakhidze, *Regulation of Interim Measures in International Commercial Arbitration: A Comparative Analysis of the Legislation of England, China and Russia*, 6(67) Journal of Foreign Legislation and Comparative Law 87, 87–92 (2017)].

[68] Interim Measures in China, How to Ensure Safeguarding of Your Interest, CMS Expert Guide to Interim Measures, 29 November 2018 (Mar. 5, 2022), available at https://cms.law/en/int/expert-guides/cms-expert-guide-to-interim-measures/china.

[69] Информационное письмо Президиума Высшего Арбитражного Суда Российской Федерации от 9 июля 2013 г. № 158 «Обзор практики рассмотрения арбитражными судами дел с участием иностранных лиц» // СПС «КонсультантПлюс» [Information Letter of the Presidium of the Supreme Arbitration Court of the Russian Federation No. 158 of 9 July 2013. Overview of the Practice of Consideration by Arbitration Courts of Cases involving Foreign Persons, SPS "ConsultantPlus"] (Mar. 5, 2022), available at http://www.consultant.ru/document/cons_doc_LAW_149878/.

That is to say, both Russia and China recognize the right of the arbitration courts to take provisional measures of protection of their own accord, although these measures are of a recommendatory character as there is no legally set procedure for their enforcement. In the People's Republic of China, the arbitration parties are permitted to direct their request to the state courts only through the arbitration court itself located within the PRC. This is because the legislation does not provide for a procedure to directly request the introduction of the protection measures from the state court. As a result, if the dispute is considered in another country, a Chinese court will not be able to take any provisional protective measures. In the Russian Federation, a direct request to the state court for provisional measures of protection is stipulated by the legislation, which means that, even if the dispute is considered by an overseas institution, the party still has an opportunity to request the provisional measures of protection.

In Russia, mediation is allowed at all stages of arbitration. The parties may request the court to issue a ruling on the mediation process, in which case the hearing will be postponed in accordance with their request. At the parties' request, the court shall issue a ruling on the mediation process while the hearing is postponed accordingly. If the mediation is successful, the mediation agreement can be approved by the arbitration court as an arbitration agreement on mutually agreed terms (Art. 49 of the Federal Law "On Arbitration (Arbitration Proceedings) in the Russian Federation").[70] Although mediation is permitted in Russia, it shall be conducted by entities other than the Arbitration Commission, and the hearing shall not take place until the mediation process is completed.

In China, the legislation provides a different mediation procedure for arbitration. The difference is that mediation shall be conducted by the court as a part of the arbitration dispute settlement and the judge can take on the role of the mediator[71] (Art. 51 of the PRC Law "On Arbitration" and Art. 47 of CIETAC). If the mediation fails, the parties can have the dispute considered by the previous arbitrators. It is important to note, however, that the parties shall not be permitted to refer to the facts disclosed by the other party in the course of the mediation process (Art. 47, cl. 9 of CIETAC). The fact that the court's consideration and mediation is conducted by one and the same judge is believed to be a negative factor that may affect the judge's impartiality.[72]

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[70] *Supra* note 29.

[71] *Русакова Е.П.* Особенности процедуры посредничества в Китае // Правозащитник. 2016. № 2. С. 4 [Ekaterina P. Rusakova, *Features of the Mediation Procedure in China*, 2(4) Human Rights Defender 4 (2016)].

[72] *Чан П.* Коммерческая медиация в современном Китае: общий обзор // Коммерческая медиация: теория и практика: сборник статей [P. Chan, *Commercial Mediation in Modern China: General Overview* in *Commercial Mediation: Theory and Practice: Collection of Articles*] 61 (Svetlana K. Zagainova & Vadim O. Abolonin eds., 2012).

As we can see, the People's Republic of China, unlike the Russian Federation, has the mediation option imbedded in the arbitration process and provides the parties with a simple procedure should they choose to use it. The unification of the Russian and Chinese legislation appears to be the right step that can improve arbitration in both countries. Although some scholars are of the opinion that having one person serve as both the arbitrator and the mediator has a negative impact on the impartiality of the case consideration.[73]

The norms that regulate an arbitration agreement are similar in the two countries, although the People's Republic of China has stricter validity conditions. Both China and Russia only recognize the written arbitration agreement (however, the term "written" is understood broadly) and support the independence of the arbitration clause. The main difference lies in the fact that China does not follow the competence-competence principle, instead referring the issue to either the arbitration commission or the People's Court.

Furthermore, the normative regulation of the arbitration commissions is similar in the two countries. In Russia, the parties can choose any uneven number of arbitrators, while in China either one or three arbitrators shall be nominated. Although both countries have a list of requirements that an arbitrator shall meet, China's conditions only include work experience in the legal field.

The arbitration procedure is similar in both Russia and China and includes starting a lawsuit, the courts' right to collect evidence of their own accord, initiating evaluations carried out by experts and conducting mediation. The main difference is that in China, a party may only request the provisional measures of protection through the arbitration court, while in Russia a party can make a direct request to the state court. China has the mediation process integrated into the arbitration settlement procedure, and the process can be conducted by the same arbitrators who were nominated for the arbitration hearing. Russia also provides for mediation, but as a separate method of dispute settlement.

3. Arbitration Award as a Key Element of Dispute Resolution in International Commercial Arbitration in Russia and Mainland China

The arbitration process shall result in the making of an award, which is the main purpose of the process. Despite the fact that the parties come to arbitration voluntarily and the award is supposed to be fulfilled of their own free will, the award shall also comply with the New York Convention and the national legislation of the countries in which the award is enforceable.[74]

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[73] *Бенова В.И.* Медиация как альтернативный способ разрешения международных коммерческих споров: автореф. дис. … канд. юрид. наук [Victoria I. Benova, *Mediation as an Alternative Way of Resolving International Commercial Disputes*, Abstract, PhD thesis] 18 (2013).

[74] Karabelnikov 2013, at 244.

The arbitration process can have three possible results: the making of the award, the termination of the arbitration proceedings or a voluntary settlement concluded by the parties before the award has been made.

The final arbitral award is the most frequent outcome of arbitration. According to the Russian legislation (Art. 29 of the RF ICA Law) and the Chinese legislation (Art. 53 of the PRC Law "On Arbitration"), if there is a panel of arbitrators to consider the case, the award shall be made in conformity with the majority's opinion. In the absence of agreement among the arbitrators, the decision shall be taken by the president (Art. 53 of the Law "On Arbitration" and Art. 36, cl. 3 of the ICAC Regulations). These same provisions provide an opportunity for any arbitrator who disagrees with the final award to have the dissenting opinion published alongside the main one. For example, the president of the arbitration commission included a dissenting opinion in ICAC's award of 26 March 2004 No. 62/2003. According to the opinion, the arbitration commission failed to establish the validity of the arbitration agreement, and as a result ICAC did not have the competence to consider the case.[75] However, a dissenting opinion of an arbitrator does not affect the validity of an arbitration agreement.

Should the award be made by a sole arbitrator, the award shall contain the conclusions obtained during the consideration of the case.

The arbitral award shall have a number of features that confirm its validity. According to Article 54 of the PRC Law "On Arbitration," the arbitration award shall contain the parties' claims, the facts of the dispute; an explanation of the award; the award itself; the expenses distribution and the date of the award. Based on the disposition principle, the parties have the right not to specify the facts of the dispute. In addition, according to Article 49 of the CIETAC Regulations, the arbitral award shall indicate the place of arbitration.

The RF ICA Law is based on Article 31, clause 2 of the UNCITRAL Model Law, although it does not copy them verbatim but rather complements them. In accordance with Article 31, clause 2 of the RF ICA Law, the arbitration award shall contain the explanation of the award, the decision on the acceptance or rejection of the demands, as well as the distribution of the expenses between the parties. The date and place of arbitration shall be indicated too. Article 37, clause 1 of the ICAC Regulations establishes the requirements for the arbitral awards that are as follows: the composition of the panel of arbitrators (or the sole arbitrator), names and locations of the parties, the parties' requests, the court's competence to hold arbitration proceedings, the case number and a brief description of the proceedings.

Unlike Chinese law, Russian law does not provide that the parties can abstain from including any of the obligatory items in the arbitral award. It is possible for

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[75] Решение Международного коммерческого арбитражного суда при Торгово-промышленной палате Российской Федерации от 26 марта 2004 г. по делу № 62/2003 [Decision of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation No. 62/2003 of 26 March 2004].

this to occur due to the confidentiality of the arbitral award and the opportunity to indicate the main results in a generalized way.

The rules set by the Chinese legislation are not as strict. The main items are the same in both countries, but the Chinese legislation does not demand that the case number, its summary, the names and locations of the parties and the arbitration commission's competence as regards the subject matter of the dispute be specified.

Apart from the case summary, which is both of a technical and of a legal character and intends to provide a better visual perception of the case, all the other requirements that are absent in the Chinese legislation but present in Russian legislation are of a technical nature. Their inclusion is not considered obligatory by China. Article 138 of the Civil Procedure Code of the People's Republic of China[76] (hereinafter the CPC of the PRC) does not mention these elements as obligatory either.

Article 31 of the UNCITRAL Model Law and Article 31 of the RF ICA Law require that the arbitral award shall be in written form and feature the arbitrators' (or the sole arbitrator's) signature. The PRC Law "On Arbitration" does not contain any indications of the obligatory nature of the written arbitral award. Nevertheless, in our opinion, the written form is implied even though it is not expressly mentioned. This can be confirmed by Article IV of the New York Convention, which indicates that it is due to the objectified form of the arbitral award that a foreign arbitral award can be recognized and enforced.[77]

Overall, both countries use a broad interpretation of the UNCITRAL Model Law when dealing with the major elements of the arbitral award. The obligatory items are similar in the two countries. However, Russia has more detailed technical requirements.

Settlement is a possible outcome of international commercial arbitration both in Russia (Art. 30 of the RF ICA Law) and in China (Art. 49 of the PRC Law "On Arbitration"). The Russian legislation has copied Article 30 of the UNCITRAL Model Law verbatim, while the Chinese norm has its own original wording, although there are hardly any essential semantic differences. Should settlement be the case, "An award on agreed terms shall be made …" (Art. 30, cl. 2). Such an award has the same status and effect as any other arbitral award. If one of the parties refuses to fulfil the terms of the settlement agreement, the party that awaits the fulfilment has the right to request that the court enforce the fulfilment.

One of the particularities of ICAC and CIETAC decision-making is that the decision is reviewed by the secretariat of the arbitration centre. Neither the UNCITRAL Model Law nor the ICAC and CIETAC Regulations contain such a provision. It is not, however,

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[76] Civil Procedure Code of the People's Republic of China, adopted on 9 April 1991 (Mar. 5, 2022), available at https://www.wipo.int/edocs/lexdocs/laws/en/cn/cn029en.pdf.

[77] *Грешников И.П.* Решение международного коммерческого арбитража (отдельные аспекты) // Ученые записки юридического факультета. 2012. № 24-25. С. 48 [Igor P. Greshnikov, *The Decision of International Commercial Arbitration (Selected Aspects)*, 24-25 Academic Notes of the Faculty of Law 45, 48 (2012)].

typical of only the beforementioned arbitration regulations but exists in a number of arbitration institutions (e.g. cl. 32.3 of the Arbitration Regulations of the Singapore Arbitration Centre[78]). Article 40 of the ICAC Regulations and Article 51 of CIETAC provide that the arbitration commission should submit its own draft of the arbitral award to the secretariat of the arbitration institution, which without interfering with the arbitrator's independence checks whether the award complies with the said arbitration institution's requirements. The secretariat's examination of the awards made by the arbitration commission helps to ensure that the award meets the legal regulations criteria as well as minimizes the number of corrections.

Arbitration proceedings can also be terminated. Unlike the arbitral award or settlement on agreed terms, the termination of the arbitration proceedings is not the arbitration's final award and shall not entail any legal consequences.[79]

Article 32 of the RF ICA Law provides three conditions for the termination of arbitration proceedings (also Art. 32 of the UNCITRAL Model Law Regulations), which are as follows: the plaintiff's withdrawal of their claims (unless there are objections from the defendant); the parties' agreement on the termination of arbitration and the arbitration tribunal's decision that the proceedings are not necessary or impossible (the list of grounds according to which the arbitration proceedings can be unnecessary or impossible shall be open to the public and determined by the court for each case separately[80]).

The PRC Law "On Arbitration" does not include any conditions to terminate the arbitration proceedings. However, this institution is reflected in the Chinese legislation, namely in Article 136 of the CPC of the PRC and Article 46, clause 3 of CIETAC. The CIETAC Regulations recognize the withdrawal of all claims by both the plaintiff and the defendant as the only basis for the arbitration termination.

Thus, it is possible to terminate the arbitration proceedings both in Russia and in China, although there are more grounds for the termination in Russia.

Russia and China cite the same grounds to terminate the arbitration, which are the arbitral award, a settlement on mutually agreed terms and the termination of the proceedings. The two countries specify obligatory elements of the arbitral award

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78 Arbitration Regulations of the Singapore Arbitration Centre of 1 August 2016 (Mar. 5, 2022), available at https://www.siac.org.sg/images/stories/Articles/rules/2016/SIAC%20Rules%202016%20(Russian%20version)_Complete.pdf.

79 *Рожкова М.А.* О некоторых аспектах вынесения международным коммерческим арбитражем решения на согласованных условиях и его принудительном исполнении // Вестник международного коммерческого арбитража. 2016. № 2. С. 12 [Marina A. Rozhkova, *On Some Aspects of the Issuance of an Award by International Commercial Arbitration on Agreed Terms and its Enforcement*, 2(8) Bulletin of International Commercial Arbitration 12 (2016)].

80 Определение Верховного Суда Российской Федерации от 24 апреля 1998 г. № 5-Г98-28 // Судебные и нормативные акты РФ [Determination of the Supreme Court of the Russian Federation No. 5-G98-28 of 24 April 1998, Judicial and Regulatory Acts of the Russian Federation] (Mar. 5, 2022), available at https://sudact.ru.

that are interpreted broadly as regards the UNCITRAL Model Law, although there are more detailed technical requirements in Russia.

The making of the arbitral award is the final stage of the arbitration proceedings. But receiving the award does not necessarily mean having it executed. The party that awaits the execution has the right to request that the court recognize the award and enforce its fulfilment by the other party should they refuse to fulfil it voluntarily.

Voluntary fulfilment of the award made by the international commercial arbitration is the simplest way that does not require any additional actions from the parties. As stated in the Resolution of 3 April 2007, No. 14715/06 on Case No. A33-29391/2005 of the Presidium of the Supreme Court of Arbitration of Russia, the awards of the International Commercial Arbitration shall be considered binding and final for their voluntary execution.[81]

The PRC Law "On Arbitration" does not have any provisions to normatively regulate the recognition and enforcement of a foreign arbitration award. Such issues are regulated by the CPC of the PRC and, to a greater degree, by the New York Convention. The Russian regulation is based on section 7 of the RF ICA Law and chapter 31 of the Arbitration Procedure Code of the Russian Federation (hereinafter the APC of the RF).[82]

Should a party refuse to fulfil the arbitral award voluntarily, the party in favour of whom the award was made has the right to demand that the court of the defendant's country enforce the award. Article 241 of the APC of the RF provides that international commercial arbitration awards shall be recognized and enforced if the recognition and enforcement are stipulated by the Russian Federation international agreement and federal law. Article 267 of the CPC of the PRC provides for the recognition and enforcement of international arbitration awards if such recognition and enforcement of international arbitration awards is established by international agreements to which the PRC is a party or based on the reciprocity principle.

Both China and Russia ratified the New York Convention with the addition of the reciprocity clause (Art. 3, cl. 1 of the New York Convention), which states that the parties agreed to recognize and enforce only the awards made by the institutions of the other party to the agreement. The People's Republic of China applies the reciprocity principle to all kinds of disputes independently of the New York Convention. The Russian Federation, meanwhile, fails to establish requirements for the reciprocity principle in its Arbitration Procedure Code, which shall only be

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[81] Постановление Президиума Высшего Арбитражного Суда Российской Федерации от 3 апреля 2007 г. № 14715/06 по делу № А33-29391/2005 // Судебные и нормативные акты РФ [Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation No. 14715/06 on Case No. A33-29391/2005 of 3 April 2007, Judicial and Regulatory Acts of the Russian Federation] (Mar. 5, 2022), available at https://sudact.ru.

[82] Арбитражный процессуальный кодекс Российской Федерации от 24 июля 2002 г. № 95-ФЗ // Российская газета. 2002. 27 июля. № 137 [Arbitration Procedure Code of the Russian Federation No. 95-FZ of 24 July 2002, Rossiyskaya Gazeta, 27 July 2002, No. 137].

considered a serious flaw that must be corrected, since modern practice generally favours bilateral rather than multilateral agreements as the former prove to be more flexible and adaptable to the interests of the parties. The only federal law to mention the reciprocity principle in the defect of other regulatory methods is Article 1, clause 6 of the Federal Law "On Insolvency (Bankruptcy)."[83] Even so, the law only specifies the recognition of the award, not its legal enforcement.[84]

Despite the fact that a foreign arbitral award that was made by a non-contracting state to the New York Convention can be recognized and enforced based on the reciprocity principle in the People's Republic of China, there were no such instances prior to 2018,[85] mainly due to the large number of contracting states to the New York Convention. Worth mentioning are the Provisions adopted at the second forum of the member arbitrators of the Association of Southeast Asian Nations that took place in 2017. According to clause 7 of the Provisions, countries that do not have bilateral agreements on the recognition and enforcement of foreign civil and commercial judgments can take the reciprocal relationship with other countries as a presumption, should there not have been any prior refusal of the recognition and enforcement of a foreign award.[86] To put it another way, the "presumed reciprocity" principle is currently in effect in China. These provisions are a step in the right direction that will facilitate the recognition and enforcement of foreign awards made by non-contracting states to the New York Convention.

In Russia, the request to recognize and enforce a foreign arbitration award shall be submitted to the arbitration tribunal of the RF subject (Art. 242 of the APC of the RF), whereas in China, the request shall be submitted to an intermediate People's Court (CPC of the PRC). In both countries, the request shall be submitted in the debtor's place of residence (or current location) or in the place of location of their property.

The party that is seeking the recognition and enforcement of an arbitral award shall submit the copy of the arbitral award (duly notarized and signed by the parties) as well as the documents confirming the conclusion of the arbitration agreement

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83 Федеральный закон от 26 ноября 2002 г. № 127-ФЗ «О несостоятельности (банкротстве)» // Российская газета. 2002. 2 нояб. № 209-210 [Federal Law No. 127-FZ of 26 November 2002, Rossiyskaya Gazeta, 2 November 2002, No. 209-210].

84 *Ерпылева Н.Ю., Максимов Д.М.* Признание и приведение в исполнение иностранных судебных решений: национальное и региональное измерение // Право. Журнал высшей школы экономики. 2017. № 2. С. 203 [Natalia Yu. Erpyleva & Dmitry M. Maksimov, *Recognition and Enforcement of Foreign Judgments: National and Regional Dimensions*, 2 Law. Journal of the Higher School of Economics 200, 203 (2017)].

85 高晓力. **中国法院承**认和执行外国仲裁裁决的积极实践 // **法律适用** [Gao Xiaoli, *On the Positive Practice of Recognition and Enforcement of Foreign Arbitral Awards by Chinese Courts*, 5 Applicable Law 2 (2018)] (Mar. 5, 2022), available at http://cicc.court.gov.cn/html/1/218/62/164/628.html.

86 **第二届中国**-东盟大法官论坛南宁声**明** [The Second China-ASEAN Justice Forum Nanning Statement, 2017] (Mar. 5, 2022), available at http://www.court.gov.cn/zixun-xiangqing-47372.html.

(Art. 35 of the RF ICA Law) to the court. Article 242 of the APC of the RF stipulates additional requirements for requests for the recognition and enforcement of a foreign arbitration award. These requirements are as follows: the name of the arbitration tribunal, the names and locations of the plaintiff and the debtor, the list of the enclosed documents and so forth. Additional requirements are permitted by Article 3 of the New York Convention that allows the use of the procedural norms of the country in which the recognition and enforcement of the foreign arbitral award is requested.[87]

There is no list of documents required for the recognition and enforcement of a foreign arbitral award in the Chinese legislation. The list of necessary documents can be found in Article 4 of the New York Convention. These are the duly notarized arbitral award or its copy and the arbitration agreement. From our point of view, Article 110 of the CPC of the RF can be applied to the request for the recognition and enforcement of a foreign arbitration award. The provisions specify the obligatory requirements for the lawsuit to proceed, such as the names, locations and occupations of the parties, as well as the claims, facts and arguments upon which each party's position is based. In our opinion, such requirements are commonplace for procedural documents in the People's Republic of China.

As we can see, both countries have similar obligatory requirements for the documents necessary for the recognition and enforcement of foreign awards. Both in Russia and in China, accurate and duly notarized translations of the documents into the language of the country where recognition and enforcement is requested shall be provided.

Upon considering the request for the recognition and enforcement of a foreign arbitral award, the court may refuse the recognition and enforcement. The grounds for the refusal fall into two categories: either the request comes from the party against whom the international arbitration award was made or the court concluded that the recognition and enforcement of the award was impossible.

Article 36, clause 1 of the RF ICA Law and Article 5, clause 1 of the New York Convention determine six grounds for the rejection of the request for the recognition and enforcement of an international arbitration award. The CPC of the PRC does not contain any grounds on which a request for the recognition and enforcement of an international arbitration award can be declined, which means that the New York Convention norms apply. These grounds include the invalidity of the arbitration agreement in accordance with the law of the country and the legislation with which it had to comply; the incapacity of the parties to the arbitral agreement; an undue notification of the party upon the nomination of the arbitrators, the place or date of the arbitration; making an award that does not comply with the conditions of the agreement or is out of its scope; the composition of the panel of arbitrators that

[87] Karabelnikov 2013, at 258.

contradicts the agreement between the parties or the legislation of the country of arbitration; the award made in a foreign state that either has not yet become binding for the parties or has been set aside or suspended.

The following are several cases from court practice where the request for the recognition and enforcement of a foreign arbitral award was refused. As of the time of this writing, there are no known instances of the refusal of such a request due to the incapacity of the parties.[88]

As a rule, the courts rarely allow undue notification as grounds for refusal.[89] Solid evidence is required to refuse the request. For example, in the case *Aiduoladuo (Mongolia) Co., Ltd. v. Zhejiang Zhancheng Construction Group Co., Ltd.* the Supreme People's Court of the People's Republic of China refused the recognition and enforcement of the foreign arbitral award because one of the parties was not notified by post of the hearing date and place, a fact that was proven by the courier delivery services.[90]

In Case No. A40-217058/2018, dealing with the recognition and enforcement of a foreign arbitral award, one of the parties challenged the recognition and enforcement of a foreign arbitral award on the grounds that they had not been informed of the date and place of the hearings. The Russian tribunal established that after the conclusion of the agreement, the party changed its legal address but failed to notify either the other party or the tribunal of that fact. The tribunal decided that the party that failed to notify the other party of the change of the address should bear the risk of not receiving notifications or not receiving them promptly.[91]

The Russian legislation determines two grounds for the tribunal's refusal of the recognition and enforcement of a foreign arbitral award. The CPC of the PRC does not provide any grounds for such a refusal of the recognition and enforcement of a foreign arbitral award, hence Article 5, clause 2 of the New York Convention shall be applied. Both countries have the same grounds for refusal; either the subject matter of the

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88 International Council for Commercial Arbitration, ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges (2011) (Mar. 5, 2022), available at https://icac.org.ua/wp-content/uploads/ICCAs-Guide-to-the-Interpretation-of-the-1958-New-York-Convention-A-Handbook-for-Judges-2.pdf.

89 Руководство по Конвенции о признании и приведении в исполнение иностранных арбитражных решений (Нью-Йорк, 1958 г.) / Организация Объединенных Наций. 2016 г. [United Nations, Guide to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (2016)] (Mar. 5, 2022), available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/ru/v1604041_ebook-r.pdf.

90 *Aiduoladuo (Mongolia) Co. Ltd. v. Zhejiang Zhancheng Construction Group Co. Ltd.*, [8 December 2009] Min Si Ta Zi No. 46.

91 Определение Судебной коллегии по экономическим спорам Верховного Суда Российской Федерации от 29 декабря 2019 г. № 305-ЭС-19-13455 по делу № А40-217058/2018 // Судебные и нормативные акты РФ [Determination of the Judicial Collegium for Economic Disputes of the Supreme Court of the Russian Federation No. 305-ES-19-13455 on Case No. A40-217058/2018 of 29 December 2019, Judicial and Regulatory Acts of the Russian Federation] (Mar. 5, 2022), available at https://sudact.ru.

dispute does not qualify as a subject of arbitration or the recognition and enforcement of the arbitral award is seen as contrary to the public policy of the country.

Here is an example of the refusal to recognize and enforce an arbitral award due to the subject matter that is incapable of settlement in arbitration: in the case *Wu Chunying v. Zhang Guiwen* the Supreme People's Court of the People's Republic of China concluded that succession shall not be a subject of arbitration based on Article 3, clause 1 of the PRC Law "On Arbitration."[92]

The concept of public policy as a barrier to the recognition and enforcement of a foreign arbitral award is not defined in either the Russian or the Chinese legislation. According to clause 51, paragraphs 2 and 3 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of 10 December 2019 "On the Cooperation and Control Performed by National Courts as Regards the Settlements by Means of International Commercial Arbitration,"[93] public policy is understood as fundamental (imperative) principles that constitute the economic and political basis of the legal system, the infringement of which can harm the sovereignty or security of the country as well as violate constitutional rights and freedoms of natural and legal entities. However, public policy may not be used as a cover for other grounds for the refusal of the recognition and enforcement of an arbitral award, as this ground for refusal is a means of protection of the most fundamental rights.[94] In its Resolution No. VAS-8786/10 of 3 August 2010, the Supreme Arbitration Court of the Russian Federation refused to review the judicial actions claimed to be inconsistent with public policy based on the grounds that the arbitral award would not entail a result that contradicted the norms of morality and decency and posed a threat to people's lives and the state's security.[95] In the People's Republic of China, public policy is considered infringed if it has negative impact on society. If there is no negative impact, then there has been no violation of public policy. An example of a negative impact would be gambling.[96]

To conclude, both Russia and China provide the same grounds for the refusal of the recognition and enforcement of the award, whether at the request of a party that

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92 *Wu Chunying v. Zhang Guiwen*, Supreme People's Court, China, [2 September 2009] Min Si Ta Zi No. 33.

93 *Supra* note 23.

94 *Муратова О.В., Щукин А.И.* Проблемы признания и приведения в исполнение решений иностранных судов и иностранных арбитражных (третейских) решений // Журнал зарубежного законодательства и сравнительного правоведения. 2019. № 2(75). С. 140–145 [Olga V. Muratova & Andrey I. Shchukin, *Problems of Recognition and Enforcement of Decisions of Foreign Courts and Foreign Arbitration (Arbitration) Decisions*, 2(75) Journal of Foreign Legislation and Comparative Law 140, 140–45 (2019)].

95 Определение Высшего Арбитражного Суда Российской Федерации от 3 августа 2010 г. № ВАС-8786/10 // Судебные и нормативные акты РФ [Determination of the Supreme Arbitration Court of the Russian Federation No. VAS-8786/10 of 3 August 2010, Judicial and Regulatory Acts of the Russian Federation] (Mar. 5, 2022), available at https://sudact.ru.

96 Годовой доклад о коммерческом арбитраже КНР в 2014 г. [PRC Commercial Arbitration Annual Report 2014] (Mar. 5, 2022), available at http://www.cietac.org/Uploads/201602/56cbb883901f0.pdf.

disagrees with the ruling or on the initiative of the court itself. The People's Republic of China does not include such norms in its legislation and instead applies the New York Convention. On the other hand, the Russian Federation has implemented these norms into its internal legislation and they fully coincide with those of the New York Convention.

Making a ruling on the recognition and enforcement of a foreign arbitral award or on the refusal of its recognition and enforcement has its own procedure. In Russian law, the consideration of the recognition and enforcement of a foreign arbitral award shall end with a ruling. The said ruling can be challenged in the cassation instance. Further on, the case may be challenged in the second cassation in the Judicial Chamber on Economic Disputes of the Supreme Court of the Russian Federation. However, the ruling of the court of first instance shall be considered final and, unless it is challenged, binding. This norm applies to both the recognition and enforcement of a foreign arbitral award as well as the refusal thereof.

The People's Republic of China has a different order for the recognition and enforcement of an award. If an intermediate People's Court considers the award to contradict the Chinese legislation or the international agreements in which the PRC takes part, the court has to get the decision approved by a higher-instance court. Should the higher-instance People's Court approve the refusal, the case will be passed to the Supreme People's Court of the People's Republic of China, which has the competence to refuse the recognition and enforcement of a foreign arbitral award.[97] That is to say, the refusal to recognize and enforce a foreign arbitral award shall only be possible through the ruling of the Supreme People's Court that controls all the lower-instance courts. There is currently no procedure to challenge such a ruling (Art. 158 of the CPC of the PRC). The decisions on the recognition and enforcement of an award or refusal thereof are final and cannot be challenged by the parties. The foregoing is widely criticized as such a system prevents the parties from protecting their interests.[98]

In contrast to the Russian Federation, the People's Republic of China does not currently have a procedure to challenge the recognition and enforcement of a foreign arbitral award or refusal thereof.

The procedures for the recognition and enforcement of a foreign arbitral award in Russia and China have both similar and different features. The similarities include the grounds for the refusal of the recognition and enforcement of a foreign arbitral

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[97] **最高人民法院关于人民法院**处理与涉外仲裁及**外国仲裁事**项有关问题的通**知** 1995 **年** 08 **月** 28 **号** [Notice of the Supreme People's Court on the handling by the People's Court of issues related to foreign-related arbitration and foreign arbitration matters, 28 August 1995], at 2 (Mar. 5, 2022), available at http://cicc.court.gov.cn/html/1/218/62/84/661.html.

[98] *Лю Х.* Особые положения о решениях международного коммерческого арбитража и о принудительном исполнении арбитражных решений на территории Китая [H. Li, *Special Provisions on International Commercial Arbitration Awards and Enforcement of Arbitral Awards in China*] 165 (2000).

award specified in Article 5 of the New York Convention. The main differences are, firstly, "the presumption of reciprocity" in the recognition and enforcement of foreign arbitral awards in China and the virtual non-use of the reciprocity principle in Russia. Secondly, the Chinese procedure for the recognition and enforcement of a foreign arbitral award does not allow for the challenging of the court's ruling.

Thus, both countries have rather similar grounds for the termination of the arbitration proceedings as well as the conditions for the recognition and enforcement of foreign arbitral awards. The Russian Federation provides more detailed technical instructions for the obligatory elements of an arbitration agreement and the termination of the arbitration proceedings. Both China and Russia demand an obligatory verification of the arbitral award (arbitral award on agreed terms) by the secretariat of the arbitration centre.

The procedures for the recognition and enforcement of foreign arbitral awards have similar grounds for the refusal of recognition and enforcement in Russia and China. The main differences are that the Chinese legislation does not provide a procedure for the recognition and enforcement of foreign arbitral awards and that the refusal of the recognition and enforcement of an award shall be approved by the Supreme People's Court of the People's Republic of China.

Conclusion

The comparative analysis of the legal regulations of international commercial arbitration in Russia and Mainland China leads to the following conclusions. The regulations governing international commercial arbitration regulation in the two countries share similar features and are based upon the norms of international law as well as national legal acts. Both China and Russia have adopted the norms of the UNCITRAL Model Law, although to a different degree. The Russian Federation Law "On International Commercial Arbitration" reflects it almost verbatim, while the Chinese legislation implements the UNCITRAL Model Law to a lesser degree.

China and Russia have similar norms on arbitration agreements in that they both accept only the written form (though the written form is understood broadly) and support the arbitration clause autonomy principle. The difference is that the People's Republic of China does not apply the competence-competence principle (the arbitrators' right to determine their own competence to consider an issue), referring the decision on the matter to the arbitration commission or the state courts. The arbitrators in the Russian Federation have the right to determine their own competence.

The Chinese legislation allows for provisional measures of protection to be taken only through an arbitration court's request, while under the Russian legislation a party can file a direct request with a state court. That is, should arbitration take place outside the People's Republic of China, the party will not be able to ensure the provisional measures of protection.

Chinese law has the mediation procedure integrated into the arbitration proceedings and can be conducted by the same arbitrators that consider the case in arbitration. Russian law also provides for mediation; however, it views it as a separate procedure.

The recognition and enforcement of foreign arbitral awards are based on the "presumption of reciprocity" in the People's Republic of China, while in the Russian Federation the reciprocity principle is hardly ever applied.

In China, there exists a different procedure for the recognition and enforcement of foreign arbitral awards which does not provide the opportunity to challenge the court's decision, while the decision to refuse the recognition and enforcement of a foreign arbitral award cannot be made until approved by the Supreme People's Court of the People's Republic of China. In Russia, both the decision to recognize and enforce a foreign arbitral award and the refusal thereof can be challenged.

The legal regulation of international commercial arbitration in Russia seems more dispositional as the parties get more freedom to exercise their will, which reflects the needs and nature of commercial arbitration.

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RETHINKING DUE PROCESS OF LAW IN THE ADMINISTRATIVE SPHERE

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This article discusses the scope of the constitutional due process clause in Brazilian administrative law, based on an analysis of the Brazilian Constitution, the Fifth (1791) and Fourteenth (1868) Amendments to the U.S. Constitution, the International Covenant on Civil and Political Rights, and the European and Inter-American human rights systems. The author concludes that since the due process clause (Brazilian Constitution Article 5.54, namely, "no one shall be deprived of liberty or property without due process of law") was inspired by the U.S. Constitution, Brazilian legislators should exercise their powers of discretion in policy-making to adapt the clause to the realities of the Brazilian administrative authorities and to the experience of the quasi-independent authorities that perform the adjudicative function under U.S. administrative law.

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Introduction

To study how due process of law applies to administrative decisions in Brazilian constitutional law, a rethinking of the three key norms is required. According to the methodology adopted by the author, in Brazil, the principle of a fair trial is formulated in Article 5 of the Federal Constitution, in item 35 regarding access to the Judiciary for protection of rights, in item 55 regarding adjudicative procedural guarantees and in item 54 regarding due process of law.[1]

Indeed, it may be concluded from a literal interpretation of the above-cited provisions that a proceeding before the administrative authorities should have the same characteristics as a trial in court. It so happens, however, that putting such an interpretation into general practice would have disastrous consequences.

That is so because invoking due process of law in the administrative sphere with such a comprehensive approach would make the exercise of disciplinary and regulatory powers conditional on providing procedural guarantees that are unattainable by Brazilian administrative authorities. How could administrative authorities deal with a case that requires observing the principle of the "judge predetermined by the law"? How could they respond to the criticism that the authority presiding over a disciplinary proceeding does not guarantee tenure to its officials and therefore cannot be impartial? Such issues would bring the administrative authorities to a standstill if the proposed solution required the same degree of due process as in the courts.

With that in mind, this article seeks in historical and comparative sources, especially in international systems of human rights, an explanation of the real origin and scope, in Brazil, of due process of law in the administrative sphere; it also explains the reasons why it is not feasible to impose procedural obligations on Brazilian administrative authorities that are typical of the Judiciary.

1. Particularities of the Brazilian Administrative Authorities

Article 5.35 of the 1988 Federal Constitution stipulates that "the law shall not exclude any injury or threat to a right from the consideration of the Judicial Branch." Such a provision was introduced into Brazilian constitutional law by the 1946 Constitution[2] and maintained by the Constitutions of 1967[3] and 1969.[4]

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1 Brazilian Federal Constitution (1988), Art. 5 (Feb. 1, 2022), available at http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm.

2 Constitution of the United States of Brazil (1946), Art. 141, § 4 (Braz.): "The law shall not exclude any injury or threat to an individual's right from the consideration of the Judicial Branch" (Feb. 1, 2022), available at http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao46.htm.

3 Constitution of the Federal Republic of Brazil (1967), Art. 150, § 4º (Braz.): "The law shall not exclude any injury to an individual's right from the consideration of the Judicial Branch" (Feb. 1, 2022), available at http://www.planalto.gov.br/ccivil_03/constituicao/constituicao67.htm.

4 First Constitutional Amendment of 17 October 1969, Art. 153, § 4º (Braz.): "The law shall not exclude any injury or threat to an individual's right from the consideration of the Judicial Branch" (Feb. 1,

Known as the principle of *inafastabilidade da jurisdição*, the provision considers the Judiciary to be the ultimate sphere of dispute resolution. Thus, the law cannot prohibit creating administrative tribunals or similar bodies to resolve disputes in the administrative sphere but their rulings, whenever a violation or threat to civil rights is involved, can always be appealed to the competent court of law in accordance with the applicable rules of procedure.

In the past, that was the intention of the 7th Constitutional Amendment of 1977[5] which amended the 1969 Constitution by authorising the creation of administrative litigation (*contenciosos administrativos*) and setting up mechanisms enabling their decisions to be reviewed directly without passing through the courts of first instance.[6]

With broad powers of review over the administrative authorities' decisions, the Judicial Branch alone is forced to assume the whole burden of the international duties of maintaining a competent, independent and impartial body to ensure a fair trial, as expressed by Article 8.1 of the American Convention on Human Rights (ACHR) and Article 14.1 of the International Convention on Civil and Political Rights (ICCPR). From the standpoint of international human rights law, imposing the duties of competence, independence and impartiality on quasi-judicial administrative bodies will be a matter of the discretionary margin for policy-making by the legislators of the Brazilian State.

The duty of "competence" for the exercise of fair and effective dispute resolution by the State should be understood to mean having adequate expertise and qualifications concerning the question submitted for judgment. In general, Brazilian administrative decision-making bodies have such competence.

Yet, the same cannot be said of the duty of independence, which is a prerequisite for so-called "objective impartiality." The administrative dispute-resolution bodies are by no means staffed with government officials with prerogatives enabling them to act independently, such as tenured decision-making positions. As a logical corollary, it is natural that the decision-maker is not impartial in the eyes of society.

The Maritime Tribunal remains an exception to the rule, serving as an important example in Brazilian law of an administrative dispute-resolution body in which the adjudicators have prerogatives similar to those of court judges. It was created by Law No. 2.180 of 1954 and is linked with the Ministry of Maritime Affairs.[7]

Incidentally, the lack of independence of the administrative authorities is rightly considered to be an important difference between the adjudicatory functions of the Judiciary and the dispute-resolution functions of the administrative authorities.

2022), available at http://www.planalto.gov.br/ccivil_03/Constituicao/Emendas/Emc_anterior1988/emc01-69.htm.

5 Seventh Constitutional Amendment, of 13 April 1977 (Feb. 1, 2022), available at http://www.planalto.gov.br/ccivil_03/constituicao/emendas/emc_anterior1988/emc07-77.htm.

6 José Cretella Júnior, *O contencioso administrativo na Constituição de 1969*, 104 Revista de Direito Administrativo 30 (1971).

7 Law No. 2.180, of 5 February 1954 (Feb. 1, 2022), available at http://www.planalto.gov.br/ccivil_03/leis/l2180.htm.

In legal systems in which the administrative authorities resolve disputes independently and impartially, it is understandable that the adjudicative decision-making powers are distributed between the Judiciary and Executive Branch without implying any undue restrictions on the fundamental human right of access to adjudicative services for the protection of one's rights. If the administrative authorities themselves give individuals access to a proceeding conducted by quasi-judicial authorities with the characteristic guarantees of a court trial, it is reasonable for the law to require that individuals exhaust the means of appeal within the administrative sphere before gaining access to the Judiciary. The same can be said of the power of judicial review of an administrative decision which, in such a case, may be limited to questions of law to the exclusion of questions of fact that may have supported the challenged administrative decision.

In Brazil, where administrative dispute-resolution lacks independence and (objective) impartiality, the courts have broad powers of judicial review of administrative decisions with respect to their formal aspects and legal and factual content,[8] as well as the exercise of their discretionary powers and assessment of vague legal concepts.[9] In this context, an appeal in the administrative sphere appears to be simply one option available to the individual claimant who, when confronted with an injury or threat to his or her rights, may opt from the outset to seek dispute-resolution services from a court,[10] or else forego the administrative channels initially chosen and file a lawsuit instead.[11] Thus, only the absence of an injury or threat to one's rights can block access to the Brazilian courts.

It should be emphasized, however, that certain benefits that the State has a duty to provide are available to citizens only on prior application, because otherwise the State would be unable to identify the scope and beneficiaries of the required benefits. Such is the case, for example, with the pension benefits of voluntary retirement, which the State is not required to pay unless the claimants indicate in advance that they intend to exercise their right.[12]

On this point, it should be noted that, contrary to private law, where a summons to appear in court implies a sufficient demand to establish *mora ex persona*, in administrative disputes, the claimant's application only has to be presented in the administrative sphere. Judicial channels are not the most appropriate, because the courts have no specific qualifications for the initial evaluation of a question concerning

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8 Case of *Barbani Duarte et al. v. Uruguay*, Inter-Am. CtHR (ser. C), § 204, Oct. 13, 2011.

9 S.T.F., RMS 24.699, Reporting Justice: Eros Grau, 1st Panel, Nov. 30, 2004 (Braz.).

10 S.T.F., RE 549.238 AgR, Reporting Justice: Ricardo Lewandowski, 1st Panel, May 5, 2009 (Braz.); S.T.F., RE 549.055 AgR, Reporting Justice: Ayres Britto, 2nd Panel, Oct. 30, 2010 (Braz.).

11 S.T.F., RE 233.582, Reporting Justice: Joaquim Barbosa, Full bench, Aug. 16, 2007 (Braz.); S.T.F., RE 469.600 AgR, 1st Panel, Feb. 8, 2011 (Braz.).

12 S.T.F., RE 631.240, Reporting Justice: Roberto Barroso, Full bench, Sept. 03, 2014 (Braz.).

administrative law.[13] There are three exceptional situations in which the claimant may seek redress directly from the Judiciary without filing a prior administrative request or awaiting a response to it: (a) undue delay by the administrative authorities in responding to the request; (b) the claimant's certainty *ab initio* that the administrative authority will deny his request, and (c) the risk of irreparable harm from allowing summary proceeding to resolve the dispute.[14]

2. Procedural Guarantees in Administrative Proceedings

Article 5.55 of the Federal Constitution of 1998, stipulates that

> the litigants, in judicial or administrative proceedings, and defendants in general shall be guaranteed the right to a full defence in adversary proceedings, with the means and resources inherent therein.

That provision is considered by case law to have established due process of law in the administrative sphere.[15]

In fact, earlier constitutions never referred to "litigants in judicial or administrative proceedings" but only to the right of defence against an accusation and the right to the corresponding resources before the courts.

This is how the earlier constitutional provisions were worded:

> 1891 Constitution, Art. 72, § 16: The defendants shall be ensured the fullest possible defence by law, with the essential means and resources inherent therein, from the statement of charges, delivered to the prisoner within 24 hours and signed by the competent authority, with the names of the accusing party and of the witnesses.[16]
>
> 1934 Constitution, Art. 113.24: The law shall ensure defendants a full defence, with the essential means and resources inherent therein.[17]
>
> 1937 Constitution, Art. 122.11: ... the criminal trial shall be conducted through adversary proceedings, with the necessary guarantees of defence

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[13] Corte Suprema de Justicia de San José de Costa Rica [Supreme Court of Justice of San José], Case No. 04-005845-007-CO, Res. No. 6866-2005, para. VIII, A. (Sentencia, June 1, 2005) (Costa Rica).

[14] S.T.F., RE 631.240, Reporting Justice: Roberto Barroso, Full bench, Sept. 03, 2014 (Braz.).

[15] S.T.F., AI 207.197 AgR/PR, Reporting Justice: Octavio Gallotti, Jun. 5, 1998 (Braz.); S.T.F., RE 244.027 AgR/SP, Reporting Justice: Ellen Gracie, Jun. 28, 2002 (Braz.); S.T.F., MS 24.961, Reporting Justice: Carlos Velloso, Full bench, Nov. 24, 2004 (Braz.).

[16] Constitution of the Republic of the United States of Brazil (1891), Art. 72, § 16 (Feb. 1, 2022), available at http://www.planalto.gov.br/ccivil_03/constituicao/constituicao91.htm.

[17] Constitution of the Republic of the United States of Brazil (1934), Art. 113.24 (Feb. 1, 2022), available at http://www.planalto.gov.br/ccivil_03/constituicao/constituicao34.htm.

ensured before and after the formulation of the accusation by the prosecuting authority.[18]

1946 Constitution, Art. 141, § 25: The defendants shall be ensured a full defence, with the essential means and resources inherent therein, from the statement of charges, which, signed by the competent authority, with the names of the accusing party and witnesses, shall be delivered to the prisoner within twenty-four hours. The criminal trial shall have adversary proceedings.[19]

1967 Constitution, Art. 150, § 15: The law shall ensure defendants a full defence, with the resources inherent therein.[20]

1969 Constitution, Art. 153, § 15: The law shall ensure defendants a full defence, with the essential means and resources inherent therein.[21]

As can be seen, these norms contain rules that do not allow for an interpretation that goes beyond the laws of criminal procedure.

It should be noted that the current Constitution still contains the essence of the normative requirements: "[D]efendants in general are ensured of the adversary system and of full defence, with the means and resources inherent therein" (Art. 5.55). The way in which the provision is worded, referring first to "the litigants, in judicial or administrative proceedings" and, subsequently, to "defendants in general," makes it clear that it is only directed at the "defendants" in the criminal proceeding. That exception to the right of defence against a criminal accusation is now redundant, because Article 5.54 of the Constitution expressly provides for the right to due process of law, which naturally includes criminal proceedings.

What is interesting to research now is the scope of the other part of Article 5.55 ("the litigants, in judicial or administrative proceedings"). Understanding that phrase requires a prior historical analysis of the notion of a fair trial, by placing it in the context of the international human rights scene.

This concept of due process originated in the Declaration of the Rights of Man and of the Citizen of 1789[22] and, starting with the subsequent international human rights norms, began to be accompanied by a separate reference to the "determination of

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18 Constitution of the United States of Brazil (1937), Art. 122.11 (Feb. 1, 2022), available at http://www.planalto.gov.br/ccivil_03/constituicao/constituicao37.htm.

19 Constitution of the United States of Brazil (1946), Art. 141, § 25 (Feb. 1, 2022), available at http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao46.htm.

20 Constitution of the Federal Republic of Brazil (1967), Art. 150, § 15 (Feb. 1, 2022), available at http://www.planalto.gov.br/ccivil_03/constituicao/constituicao67.htm.

21 The First Constitutional Amendment of 17 October 1969, Art. 153, § 15 (Feb. 1, 2022), available at http://www.planalto.gov.br/ccivil_03/Constituicao/Emendas/Emc_anterior1988/emc01-69.htm.

22 Declaration of the Rights of Man and of the Citizen of 1789 (Feb. 1, 2022), available at https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000697056/1789-08-26/.

civil rights and obligations." Even though its original form may be linked with the "Declaration by the Representatives of the United Colonies of North-America,"[23] the fact is that the Declaration of the Rights of Man and of the Citizen of 1789 did not enshrine the requirement of a prior hearing. Instead it merely established the principle, in Article 7, that "no man can be accused, arrested or detained, except in the cases determined by the law and according to the forms it has prescribed."[24]

Under Article 10 of the Universal Declaration of Human Rights of 1948, a prior hearing as a clear prerequisite for any State action restricting individual rights became applicable exclusively with respect to criminal accusations:

> Everyone is entitled, in full equality, to a fair and public hearing by an independent and impartial tribunal, in the determination of their rights and obligations and of any *criminal charge against him*.[25] [emphasis added]

The European Convention on Human Rights (ECHR) made advances, prescribing in Article 6.1 that:

> 1. In the determination of his civil rights and obligations or of any *criminal charge against him*, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.[26] [emphasis added]

Article 14 of the ICCPR reads as follows:

> In the determination of any *criminal charge against him*, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.[27] [emphasis added]

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23 Georg Jellinek, *The Declaration of the Rights of Man and of Citizens: A Contribution to Modern Constitutional History* 2–7, 13–21 (1901) (Feb. 1, 2022), also available at http://oll.libertyfund.org/titles/1176.

24 Declaration of the Rights of Man and of the Citizen of 1789, Art. 7º: "Nul ne peut être homme accusé, arrêté, ni détenu que dans les cas determina par la loi et selon les formes qu'elle um prescrites. Ceux sollicitent qui, expediente, exécutent ou font exécuter des ordres arbitraires, doivent être Purus; Mais tout citoyen appelé ou saisi en vertu de la loi doit obéir à l'instant; il se rend coupable par sa resistence" (Feb. 1, 2022), available at https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000697056/1789-08-26/ .

25 Universal Declaration of Human Rights of 1948, Art. 10 (Feb. 1, 2022), available at https://www.un.org/en/universal-declaration-human-rights/.

26 European Convention on Human Rights, Art. 6.1 (Feb. 1, 2022), available at https://www.echr.coe.int/documents/convention_por.pdf.

27 International Convention on Civil and Political Rights, Art. 14 (Feb. 1, 2022), available at http://www.planalto.gov.br/ccivil_03/decreto/1990-1994/d0592.htm.

Finally, ACHR Article 8.1, on the Right to a Fair Trial, stipulates as follows:

> Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a *criminal nature made against him* or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.[28] [emphasis added]

Although they look equivalent at first glance, there is a subtle difference between criminal cases and other types of cases regarding the way in which the clause affects the fair trial clause in ACHR Article 8.1 and ICCPR Article 14 (and the ECHR Article 6.1). By including the phrase "determination of his rights and obligations," the provisions seek to ensure that individuals have access to a fair trial in order to assert their "subjective" rights. In contrast, linking "substantiation of any accusation of a criminal nature" with the procedural guarantees is not intended to confer a right of action on the defendant but rather to impose restrictions on the State, requiring it to refrain from a criminal conviction without a previous fair trial.

That said, there is an undeniable parallel between the international norms in force in Brazil (ICCPR and ACHR), on the one hand, and the Brazilian Constitution, on the other. Also note the following passages of comparative norms regarding the fundamental human right to procedural guarantees for the protection of civil rights:

> [T]he litigants, in judicial or administrative proceedings, and defendants in general shall be guaranteed the right to a full defence in adversary proceedings, with the means and resources inherent therein. [1988 Constitution Art. 5.55; ACHR Art. 8.1]

On the other hand, due process of law is mentioned in connection with a criminal accusation:

> … and defendants in general shall be guaranteed the right to a full defence in adversary proceedings, with the means and resources inherent therein ... [1988 Constitution, Art. 5.55] ... In the determination of any criminal charge against him ... [Art. 14 of the International Covenant on Civil and Political Rights] ... in the substantiation of any accusation of a criminal nature made against him ... [ACHR, Art. 8.1]

It is important to note that according to the case law of the European Court of Human Rights (ECtHR), the phrase "determination of his civil rights and obligations,"

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[28] American Convention on Human Rights, Art. 8.1 (Feb. 1, 2022), available at https://www.cidh.oas.org/basicos/portugues/c.convencao_americana.htm.

in ECHR Article 6.1 includes administrative law cases.[29] The same is true of the case law of the Inter-American Court of Human Rights (Inter-Am. CtHR), which considers administrative law cases to be covered by the phrase "or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature" in ACHR Article 8.1.

It is worth noting that according to both the ECtHR and the Inter-Am. CtHR, the applicability of the principle of the right to a fair trial under administrative law is restricted to proceedings that are substantially adjudicative on a question of administrative law.[30] Moreover, in Ibero-American administrative law, with the exception of Brazilian law, the expression *processo administrativo* (administrative proceeding) undeniably refers to a court trial concerning an administrative law case that is conducted by bodies endowed with competence, independence and impartiality.

At this point, it is worthwhile questioning what the Brazilian legislature meant by the phrase "judicial or administrative proceedings" under Article 5.55. Could not the objective have been to limit the impact of the provision to judicial proceedings on administrative law cases, which in Brazil are conducted solely before the Judiciary? The same question should be asked about Article 15 of the Brazilian Code of Civil Procedure,[31] which stipulates that "in the absence of rules regulating electoral, labour or administrative proceedings (*processos*), the provisions of this Code shall be applied to them in a supplementary and subsidiary manner."[32] It is possible that the Code is referring to procedural due process in administrative law cases, in addition to electoral law and labour law cases. If so, the subsidiary applicability of the Code of Civil Procedure should be acknowledged for the proceedings of writs of mandamus, federal small claims courts, actions for lack of grounds, class actions, and so on. In the event that this is not the case, it is hard to imagine how a proceeding before the Brazilian administrative authorities could follow the same procedural rules and principles as a court trial.

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29 Case of *Olekasandr Volkov v. Ukraine*, ECtHR (2013) (Feb. 1, 2022), available at http://bit.ly/1J2UjHc. Along the same lines (as a paradigm): Case of *Vilho Eskelinen v. Finland*, ECtHR (2007) (Feb. 1, 2022), available at http://bit.ly/1CwgcKK. *See* René Chapus, *Droit du Contentieux Administratif* 136–138 (2006); Sergio Bartole et al., *Commentario breve alla Convenzione Europea per la salvaguardia dei Diritti dell´Umo e delle libertà fondamentali* 176 (2012); Ireneu Cabral Barreto, *The Europeian Convention on Human Rights* 150 (4th ed. 2010).

30 Case of *Vélez Loor v. Panamá*, Excepciones Preliminares, Fondo, Reparaciones y Costas, Inter-Am. CtHR (ser. C), No. 218, § 108 (Nov. 23, 2010) (Feb. 1, 2022), available at http://bit.ly/1D9AWKS.

31 Law No. 13.105, of 16 March 2015 (Code of Civil Procedure), Art. 15 (Feb. 1, 2022), available at http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13105.htm.

32 S.T.F., ADI 5492/DF, Reporting Justice: Dias Toffoli, pending judgment (Feb. 1, 2022), available at http://portal.stf.jus.br/processos/detalhe.asp?incidente=4959031.

3. Origin and Scope of Due Process of Law in the Administrative Sphere

The 1988 Constitution expressly mentions due process of law in Article 5.54, which reads as follows: "no one shall be deprived of freedom or of property without the due process of law." That is an unprecedented precept in Brazilian constitutional law. The wording chosen for the clause was clearly influenced by the content of the rules underlying the due process clause in the United States. The Fifth Amendment to the U.S. Constitution of 1791 reads as follows:[33]

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation.[34] [emphasis added]

Section 1 of the 14th Amendment of 1868 has a similar orientation:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws.[35] [emphasis added]

Note that, in U.S. constitutional law, the due process clause is open to the protection of life, liberty and property. In the same way, the Brazilian Constitution refers to liberty and property when discussing due process of law.

In reality, to understand due process of law in the administrative sphere and perceive its true scope it is necessary to go back to Article 39 of the Magna Carta of 1215, which is considered to be the forerunner of due process of law:

> No free man shall be seized or imprisoned, or stripped of *his rights or possessions*, or outlawed or exiled, or deprived of his standing in any way,

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33 The Fifth Amendment to the U.S. Constitution (Feb. 1, 2022), available at http://1.usa.gov/1bA2RpE.

34 The laws already provided a similar rule before the 1787 Constitution: Acts of Connecticut (Revision of 1784, 198); of Pennsylvania, 1782 (2 Laws of Penn. 13); of South Carolina, 1788 (5 Stats. of S.C. 55); New York, 1788 (1 Jones & Varick's Laws, 34).

35 14th Amendment to the U.S. Constitution (Feb. 1, 2022), available at http://1.usa.gov/JlDkjF.

> nor will we proceed with force against him, or send others to do so, except by the lawful *judgment* of his equals or by the law of the land.[36,37] [emphasis added]

Since then, the objective of the due process of law has been to enshrine (the prerequisite of) a prior hearing before any State enforcement action that restricts individual rights. Naturally, since no one was thinking about administrative law in that era, the Magna Carta exclusively concerned criminal law enforcement orders by the State which, in addition to individual liberty, affected property rights.

Along the same lines, Article 12 of the Massachusetts Declaration of Rights of 1780 prohibited depriving persons of their property without a prior hearing:

> No subject shall be held to answer for any crimes or no offence until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself; and every subject shall have a right to produce all proofs that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel at his election. And no subject shall be arrested, imprisoned, despoiled, *or deprived of his property*, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.[38] [emphasis added]

As far as the European sources of administrative law are concerned, they can be classified as (either) a system of executive administration similar to that of France (or) a system of judicial administration similar to that of the United Kingdom.[39] At the origin of French law, the prevailing idea was that administrative authorities could enforce their own decisions (*auto-executoriedade*) without judicial intervention, whereas according to the English model, administrative decisions cannot be enforced against individuals without offering them the right of defence in a prior trial.

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[36] The Carta Magna of 1215, Art. 39, available at http://bit.ly/1zrb39q. Original Latin text: "Nullus liber homo capiatur vel imprisonetur, aut disseisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum vel per legem terrae."

[37] *See* William S. Mckechnie, *Magna Carta: A Commentary on the Great Charter of King John, with an Historical Introduction* 377 (1914). On the origin of the 5th Amendment of 1791 to the U.S. Constitution, *see Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1856).

[38] Massachusettes Declaration of Rights of 1780, Art. 12 (Feb. 1, 2022), available at https://blog.mass.gov/masslawlib/legal-history/massachusetts-declaration-of-rights-article-12/.

[39] Juliana Ferraz Coutinho, *Introduction* in *Direito administrativo de garantia: contributos sobre os mecanismos de proteção dos administrados* 117–118 (Juliana Ferraz Coutinho et al. eds., 2018).

Administrative law in countries with common law legal systems has significantly evolved towards implementing "due process of law" in the administrative sphere.[40]

Based on a reinterpretation of the 5th and 14th constitutional amendments, the U.S. Supreme Court confirmed in the 1970 case of *Goldberg v. Kelly* that the due process clause applied to the administrative sphere.[41] At the same time, U.S. administrative law judges and UK and Australian (administrative) tribunals collaborated to achieve due process in the administrative sphere, approximating that in the judicial sphere.

However, under Brazilian law (as explained in Section 2 above) the reality is completely different, because there is no independent trial conducted within the administrative authority itself, which is a prerequisite for the enforceability of an administrative decision that deprives citizens of their individual rights. According to the Brazilian Federal Supreme Court (Supremo Tribunal Federal or S.T.F.), "the principle of due process of law, as worded in the Constitution, also applies to administrative proceedings."[42] With the proviso that it is "true that extending the guarantee of adversary proceedings to administrative adjudication does not make it necessary to adopt all the rules specific to court trials."[43]

Moreover, according to the Inter-American Court of Human Rights:

> 118. Article 8.1 of the Convention *applies not only* to judges and judicial courts. The guarantees established by that provision should be observed in the various proceedings in which State authorities adopt decisions that determine the rights of the individual, because the State also empowers administrative, collegiate and unipersonal authorities to adopt decisions that determine rights.
>
> 119. Consequently, the guarantees established in Article 8(1) of the Convention are also applicable when a public authority adopts decisions that determine such rights, bearing in mind that, *although the guarantees inherent in a jurisdictional body are not required of that authority*, it must comply with the guarantees designed to ensure that his decision is not arbitrary.
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> 120. The Court has established that decisions adopted by domestic authorities that could affect human rights *must be duly justified*, since otherwise they would be arbitrary decisions ...[44] [emphasis added]

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40 *See Murray's Lessee*, *supra* note 37. *See also* APA/Administrative Procedure Act (5 U.S.C. Subchapter II) (Feb. 1, 2022), available at http://1.usa.gov/1xXIdYG.

41 *Goldberg v. Kelly*, 397 U.S. 254 (1970). *See* Thomas W. Merrill, *Jerry L. Mashaw, The Due Process Revolution, and the Limits of Judicial Power* in *Administrative Law from the Inside Out* 39, 40 (Nicholas R. Parrillo ed., 2017).

42 S.T.F., AI 592.340 AgR, Reporting Justice: Ricardo Lewandowski, 1st Panel, Nov. 20, 2007 (Braz.).

43 S.T.F., AI 207.197 AgR/PR, Reporting Justice: Octavio Gallotti, Jun. 5, 1998 (Braz.); S.T.F., RE 244.027 AgR/SP, Reporting Justice: Ellen Gracie, Jun. 28, 2002 (Braz.); S.T.F., MS 24.961, Reporting Justice: Carlos Velloso, Full bench, Nov. 24, 2004 (Braz.).

44 Case of *Claude-Reyes et al. v. Chile*, Inter-Am. CtHR (ser. C) (Sept. 19, 2006).

Law No. 9,784/1999[45] governs federal administrative proceedings and specifies the orientation of the S.T.F. and the Inter-Am. CtHR by requiring their administrative, disciplinary and supervisory powers to comply with rules established thereunder concerning the right of defence and other procedural guarantees, which are not necessarily equivalent to procedural rules and principles pertaining to judicial proceedings under the exclusive jurisdiction of judicial authorities.

With that in mind, it may be said that, given the reality of life in Brazil, "due process of law" in the administrative sphere imposes an obligation on public authorities to provide a statement of grounds for their decisions, in accordance with the Inter-Am. CtHR case law, and requires the application of the rules provided by each branch of government in its laws of administrative procedure (Art. 24.11 of the Constitution). The administrative decision will be subject to full judicial review in any case.

Final Considerations

By rethinking the international rules of human rights with respect to the interpretation of a fair trial, three conclusions may be drawn about the origin and scope of the due process of law in the administrative sphere in Brazil.

First of all, it is not true that administrative due process is anchored in Article 5.55 of the Brazilian Constitution. In reality, Article 5.55 was inspired by the international rules concerning a fair trial, which are interpreted by the European and Inter-American Human Rights Courts to refer exclusively to such administrative adjudicative proceedings as are presided over by competent, independent and impartial authorities.

Secondly, it should be noted that due process of law in the administrative sphere is based solely on Article 5.54 of the Brazilian Constitution. Given the realities of Brazilian administrative law, the scope of the due process clause in the administrative sphere should not be confused with the due process required of judges and courts in the judicial sphere. In practice, administrative due process should be limited to the duty to provide a statement of grounds for decisions and to compliance with the rules of administrative proceedings in force.

Finally, it should be concluded that, since the due process clause (Art. 5.54 of the Constitution) was inspired by U.S. constitutional law, its full and authentic implementation in Brazilian administrative law depends on the legislators exercising their powers of discretion in policy-making to adapt the clause to the realities of the Brazilian administrative authorities and to the experience of the quasi-independent authorities who perform the adjudicative function under U.S. administrative law. That origin would not deviate from the constitutional principle of "non-exclusion

[45] Law No. 9.784, of 29 January 1999 (Feb. 1, 2022), available at http://www.planalto.gov.br/ccivil_03/leis/l9784.htm.

of judicial powers of review" ("the law shall not exclude any injury or threat to a right from the consideration of the Judicial Power") as stated in Article 5.35 of the Constitution, because the Judiciary could still be required to issue a final decision on the administrative authorities. On the contrary, such a measure would also have the advantage of reducing the burden on the law courts, since institutions and claimants would place greater trust in public authorities who exercise their duties independently.

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ADMISSION OF GUILT AS A BASIS FOR CONCLUDING PROCEDURAL AGREEMENTS USING THE BRICS COUNTRIES AS AN EXAMPLE: A COMPARATIVE LEGAL INTERPRETATION

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The main focus of this article is to examine in greater depth the content of the admission of guilt, the issue of agreements with an investigation, and the criteria for the admissibility of confessions, using examples from not only the countries with Anglo-American and continental legal systems, but also taking into account the analysis of the legislation of the BRICS countries. Of particular interest are the attitudes of legislators from different countries towards this legal category, depending on their philosophical views, the political and economic environment, as well as the assessment of their readiness to move forward with the promises of humanization of legislation. The topic of guilty pleas in domestic criminal proceedings is not new for researchers and law enforcement officers. Legal scientists have identified both the advantages and the disadvantages of the forms based on this legal category. However, a gradual rejection of confessions as evidence is noticeable, and in the majority of cases, agreement with the prosecution plays a significant role. Despite the fact that confessions are officially no longer considered "the main thing," in practice we are faced with the fact that, in fact, they are given priority over other forms of evidence. This duality creates uncertainty in scientific circles. We believe that this article can have a positive impact on the process of reforming certain provisions of criminal procedure law regulating procedural components, with mandatory compliance with the rights of participants in legal proceedings guaranteed by the basic laws of the country. To achieve the goal, we used the general scientific dialectical-materialistic method of cognition, as well as the following private scientific methods: logical-legal, comparative-historical, system-structural. Both judicial practice and scientific research are analyzed in depth.

Keywords: admission of guilt; agreement with the investigation; plea bargaining; BRICS countries; United States.

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Introduction

Since the adoption of the new Criminal Procedure Code of the Russian Federation, numerous changes have been made to it, some of which relate to the simplified and summary forms of legal proceedings. Does this circumstance give a negative connotation to the application of the law? It is difficult to give an unambiguous answer to this question. However, one cannot disagree with the claims of Hegel, according to which:

> [O]n the one hand, we must demand simple universal definitions from the official code, and, on the other hand, the nature of infinite material leads to infinite further definitions. On the one hand, the scope of laws should be a complete, closed whole, and, on the other hand, there is a constant need for new legal definitions. But since this antinomy occupies a special place in the field of universal principles, which at the same time remain unshakable, this antinomy does not restrict the right to a complete code, as well as the right to ensure that universal simple principles taken by themselves, distinct from their further special development, are understandable and amenable to a clear formulation.[1]

[1] *Гегель Г.В.Ф.* Сочинения. Т. VII: Философия права [Georg W.F. Hegel, *Works. Vol. VII: Philosophy of Law*] 136–380 (Abram M. Deborin & David B. Ryazanov eds., 1934).

According to Hegel, almost any branch of law is a reflection of the epoch in which it operates and the state of civil society. Therefore, for example, the provisions of criminal legislation cannot be applied in different epochs and are inevitably subject to change. It is noteworthy that Hegel recognized the right of everyone to have his or her case examined by a court, as well as the obligation to appear before a court in the event of committing illegal acts. At the same time, the court was considered as a representative of the official authorities and justice was regarded as the right of the "ruling power," but for the guilty party, it was perceived as an organ of justice. Particular importance was given to the adversarial nature of the process, the possibility of presenting evidence, and the potential negative consequences of such "lengthy formalities" accepted by the parties in advance. Furthermore, the concepts of guilt and recognition have not been left aside. In particular, Hegel noted that "an act can be imputed as the fault of the will," emphasizing that only a person knows what he did. Thus, subjective imputation comes to the fore. In addition, according to the study, the guilty person can either admit or not admit guilt. It all depends on his conscience and inner conviction. At the same time, unlike witness statements and other supporting documents the confession is not given the main role in the evidence. Consequently, agreement with the prosecution should only serve to confirm the facts established during the investigation.

It can be assumed that the establishment of objective truth is not the purpose of the proceedings, because, one way or another, the court, when making a decision, acquires an inner conviction of the guilt or innocence of the person involved, that is, subjectively relates to the behavior of the defendant.

However, it is impossible to deny the fact that the admission of guilt is a kind of testimony of the accused, who voluntarily informs the investigating authorities and the court of the necessary, previously unknown information. Thus, we consider it reasonable to conclude that confessions have at least three meanings: evidence, a guideline for further investigation or a way to protect the accused (suspect).[2] In this case, the court considers the confessions as evidence of the defendant's degree of remorse. Will the confession itself be sufficient without stating the necessary facts? We believe that the answer is negative. Such confessions will have no significance for a proper and high-quality investigation, despite the fact that the accused has the right to "silence." In this situation, the views and activities of the famous Russian lawyer, judge, and state and public prosecutor, A.F. Koni, deserve attention. Koni did not want to overestimate the evidentiary value of the accused's admission of guilt, while at the same time he emphasized the moral duty of the judge not to blindly follow the path of his own consciousness. The true source of evidence, in his opinion, lay in thoughtful research.

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[2] *Перекрестов В.Н.* Уголовно-процессуальное значение признания вины в России: дис. … канд. юрид. наук [Victor N. Perekrestov, *The Criminal Procedural Significance of the Admission of Guilt in Russia*, PhD thesis] 190 (2013).

> During the prosecution, they tried not to rely on the defendants' own consciousness, even made in court, and build their speech like this. As if there was no consciousness at all, drawing from the case objective evidence and evidence that does not depend on one or another mood of the defendant.[3]

After conducting a historical analysis, we believe that the transition from formality to freedom of evaluation of evidence was inevitable.

Returning to the topic of the article, the induction method of research becomes important.

1. The Content of the Term "Plea Agreement" in the Russian Federation

On the basis of the Hegelian concept of the science of law as a part of philosophy, it is reasonable to assume that it will be self-evident upon gaining an understanding of the institution of admission of guilt, to identify the inherent features of this concept.

The term "plea agreement" has three component parts: agreement, guilt and confession.

The concept of guilt at the present stage of the development of legal science is assessed to a greater extent as an internal attitude to what has been done in accordance with the widespread psychological theory. This theory undoubtedly occupies a dominant position. In judicial practice, confessions are viewed by the court as a critical attitude toward what has been done.

Let us turn to the current criminal and criminal procedure legislation. It follows from the analysis that the norms of substantive law consider "guilt" only in terms of its content, which is a set of facts subject to proof for the purpose of legal prosecution. By analyzing judicial practice, we can see that the court in rendering the final decision almost always describes the attitude of the defendant to the charge and begins with the question of admission or non-admission of guilt. Is this really just a formality?

According to the current Criminal Procedure Code of the Russian Federation, not only the event of the crime, its circumstances and its consequences, but also the guilt of the person, the form of that person's guilt and motives are subject to mandatory establishment. In addition, the law says that the validity of the charge is determined only by the court. The admission of guilt does not demonstrate signs of priority, ideality or irrefutability. It is noteworthy that the types of special procedures in legal proceedings are not based on the fact of recognition; on the contrary, the source is agreement with the prosecution. Therefore, we come to the conclusion that the attitude toward what has been done does not come from the suspect (the accused or the defendant), but rather from the version of the preliminary investigation bodies

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[3] *Кони А.Ф.* Приемы и задачи прокуратуры [Anatoly F. Koni, *Techniques and Tasks of the Prosecutor's Office*] 96 (1923).

as it was expressed in the concluding document at the end of the investigation, which was made on the basis of internal conviction. It is probably for this reason that the person involved either agrees or disagrees with the investigating authorities' proposed version of what transpired. As such, the admission of guilt is not mandatory under the current norms. Moreover, if we are talking about the investigation's version of the events, then there can be no question of a guilty plea.

Considering the forms of criminal proceedings that developed in different periods of history, the attitude towards the concept of guilt was not identical. The unifying moment was its establishment by any means. If Hegel wrote that it is impossible to achieve the truth when using torture, since it can be the reason for both the admission of guilt by the person brought to justice and the denial of self-incrimination, thus drawing a parallel between torture and the terms of the plea agreement, the result may be similar.

For example, the private-claim process was characterized by the lack of guarantees for a fair resolution of the dispute, the formal equality of the parties, and the accusatory bias of the prosecution's work in the presence of signs of competition. The admission of guilt was preferred. In contrast to the private lawsuit process, the indictment was characterized by the dominant role of public authorities. The complete lack of rights of the accused is inherent in the inquisition (search) process. Torture was the primary method of obtaining confessions and the concept of evidence was of a formal nature. The search process naturally gives way to an adversarial one when more attention is paid to the evidence of guilt or innocence. In a mixed trial, important characteristics are the presumption of innocence and the court's assessment of all evidence, including confessions, based on internal conviction.

Thus, the evidentiary value of the admission of guilt has traversed the path of historical development from unreliable sources of the fact of recognition to those confirmed by other evidence presented by the parties both during the preliminary investigation and the judicial investigation. If we turn to the transformation of the attitude toward the admission of guilt during the stages of the development of domestic legislation, then, starting with the "Russian Truth" edition, we see the possibility of stopping further investigation in agreement with the prosecution with subsequent compensation for the damage caused. However, it must be borne in mind that the evidence included not only witness testimony but also torture. Further, with the development of a centralized state, according to the Court Books of Ivan the Terrible of 1497 and 1550, the role of torture for obtaining confessions increased. During the same period, the term "confession" appeared, the voluntary nature of which was presumed.

The appeal of turning oneself in was for the mitigation of punishment. This is evidenced by the content of a later normative act, the Council Code of 1649.

By the time of the judicial reform of 1864, the criteria for evaluating confessions were applied, and in the event of non-compliance, other evidence had to be

presented. Furthermore, torture was abolished. Preference was given to the concept of surrender, which has a value that serves to motivate. The system of the formal presentation of evidence has outlived itself. The guidelines followed at this point were an unbiased assessment of the facts.

The most controversial period was the post-war period. It is marked by a prominent representative of jurisprudence, A.Ya. Vyshinsky. Given the complexity of the interpretation of normative acts, the global and sometimes political context of the development of jurisprudence, and despite the call to stop the practice of seeking recognition at any cost, his activities indicate the opposite. The main goal was to get a conviction for political crimes, while the source of the confessions received remained unimportant.[4] Was it a return to formality, or rather a difference in the assessment of *de jure* and *de facto*?

In his writings, A.Ya. Vyshinsky has repeatedly expressed his attitude towards the admission of guilt. For example, he questioned whether the defendant's confessions were relevant to the case and verified by facts. In addition, he argued that the testimony of the person involved, in which he repents of what he has done, may be considered superfluous and lose the value of evidence if the evidence established during the investigation already confirms his guilt. At the same time, the opinion of a scientific legal researcher is given as an example, according to which the accused's own confession becomes the "queen of evidence" when it is received correctly, voluntarily and is completely consistent with other circumstances established in the case. Great importance was attached to the testimony of the accused as the only evidence. In this case, A.Ya. Vyshinsky suggested that the investigation and court authorities approach them objectively. The adversary will be perceived as having a biased attitude towards the accused.[5] We believe that this opinion reflects the ideality of the presentation, since, with rare exceptions, torture was not used and favorable testimony was not obtained.

The Soviet period was characterized by the presence of reduced proceedings in the absence of the need for investigative actions and the obvious indisputability of the case. The freedom to evaluate all evidence was formally secured. It has been repeatedly noted that judicial practice cannot, under any circumstances, be a source of law. It must comply with the requirements of the law. By the time the Criminal Procedure Code of 2001 was adopted, there were both conciliation procedures and a procedure for accepting a confession. In the twenty-first century, simplified and

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[4] *Упоров И.В.* Признание вины в уголовном процессе: взгляд из периода политических репрессий (позиция прокурора Вышинского) // Аллея науки. 2017. № 12 [I.V. Uporov, *Admission of Guilt in Criminal Proceedings: A View from the Period of Political Repression (the Position of the Prosecutor Vyshinsky)*, 12 Alley of Science (2017)] (Nov. 11, 2021), available at https://www.alley-science.ru/domains_data/files/August17/PRIZNANIE%20VINY%20V%20UGOLOVNOM%20PROCESSE.pdf.

[5] *Вышинский А.Я.* Теория судебных доказательств в советском праве [Andrey Ya. Vyshinsky, *Theory of Judicial Evidence in Soviet Law*] 177 (1950).

summary procedures, as well as plea agreements, appeared and were strengthened in the procedural arena. At the same time, we believe that, unlike Westernism, the main motive was not to reduce the burden on investigative and judicial authorities but to achieve justice in the investigation of crimes and consideration of criminal cases by courts.

Let me remind you that the procedure for making a court decision when concluding a pre-trial cooperation agreement with the status of "special" was introduced into the Criminal Procedure Code of the Russian Federation by Federal Law No. 141-FL of 29 June 2009.

According to the explanatory documents to draft Law No. 485937-4, the discussion lasted almost two years before its adoption. The initial draft, submitted by V.A. Vasiliev, V.N. Pligin, A.N. Volkov, O.I. Arshba, M.I. Grishankov, A.M. Rosuvan and A.E. Lebedev, Deputy of the State Duma of the Federal Assembly of the fourth convocation, has undergone a number of changes, including comments from the Supreme Court of the Russian Federation and the Government of the Russian Federation.[6] The officially stated goal is to persuade persons involved in criminal activities to cooperate in order to uncover and investigate crimes involving organizers, instigators and accomplices. This goal is historically justified, particularly in the context of the growth of terrorist threats and the commission of crimes related to the field of illicit trafficking in narcotic drugs and psychotropic substances, and the ongoing fight against corruption and its manifestations. It is worth noting that the draft provided for a confession of guilt; however, the legislature ultimately rejected such an option.

For example, in his dissertation research, V.N. Perekrestov expresses his conviction that

> only after a person admits his guilt, expresses readiness to assist in the investigation of a crime, expresses in exposing the accomplices of the crime, the investigator is obliged to file a petition for an agreement with the prosecutor.[7]

Despite the minimal amount of use of the concept of "guilt" in the current procedural legislation, its significance is great. This pertains not only to criminal and procedural law, but also to penitentiary, as well as civil law. Without guilt, there can be no criminal liability. As precisely stated, guilt individualizes responsibility and,

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[6] Паспорт проекта федерального закона № 485937-4 «О внесении изменений в Уголовный кодекс Российской Федерации и Уголовно-процессуальный кодекс Российской Федерации» (о введении особого порядка вынесения судебного решения при заключении досудебного соглашения о сотрудничестве) // СПС «КонсультантПлюс» [Passport of the Draft Federal Law No. 485937-4. On Amendments to the Criminal Code of the Russian Federation and the Criminal Procedure Code of the Russian Federation (on the Introduction of a Special Procedure for Making a Court Decision When Concluding a Pre-trial Cooperation Agreement), SPS "ConsultantPlus"] (Nov. 11, 2021), available at https://online.consultant.ru/riv/cgi/online.cgi?req=home;rnd=0.44751827658538934.

[7] Perekrestov 2013.

accordingly, punishment.[8] The fact of recognition itself and the information contained in it should not be confused.[9] Thus, we can talk about common features inherent in all proofs. Will such recognition be acceptable, sufficient, reliable and relevant? It is logical and natural to have a sign of the voluntary nature of such testimony, given that "recognition" is an action of legal significance and legal consequences. It implies certain benefits for both parties involved in the criminal process.

At this stage of reasoning, we come to the next component point – the agreement. It is no secret that the term is multidimensional, as it can be found in virtually any branch of law. And initially it is not associated with a criminal orientation. Its essence lies in conventionality, as well as in discussion of favorable conditions, such as assistance to the investigation and limitations on criminal liability, but with its inevitability. The changes made by the legislator to the criminal procedure legislation naturally led to conciliation procedures being shortened and simplified. Having as an example the long-term experience of foreign countries, regardless of the purposes of the procedures, it should be recognized that the criminal process is filled with civil categories. All previously investigated legal phenomena (confession, reconciliation), which were considered to be mitigating circumstances in the framework of the consideration of the tort, inevitably led to the legitimization of cooperation with the investigation. The agreement, which originated on Russian soil and involved a variety of legal proceedings, has advantages and disadvantages in its arsenal. It has been criticized for disenfranchisement on the part of the accused (defendant), limited opportunities for restoring justice and concealment of illegal coercion. However, do not forget that the agreement was originally aimed at the interaction of opposite interests of the parties in the absence of the vice of guilt. The parties are not recognized as equal. This, in our opinion, is the difference from the civilian category. In one way or another, there is a "dependent" side to the agreement. Consequently, the shortcomings that arise in the practice of application are associated with "guile" in its constituent actions.

It should be noted that since the entry into force of Chapter 40.1 of the Criminal Procedure Code, it has been repeatedly corrected. In particular, it was clarified that the sentences that were handed down in a special order in cooperation with the investigation are not a prejudice in other cases, the criteria for the validity of cooperation are prescribed; and the accused who concluded the agreement received a special status in the main criminal case. In addition, explanations of the Supreme Court of the Russian Federation were required, set out in the resolution of the Plenum of 28 June 2012 "On the Practice of Applying by Courts of a Special Procedure for the Trial of Criminal Cases

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[8] *Андросенко Н.В.* Признание лицом своей вины в совершении преступления и его правовые последствия: дис. ... канд. юрид. наук [Natalia V. Androsenko, *Recognition by a Person of His Guilt in Committing a Crime and its Legal Consequences*, PhD thesis] 28 (2008).

[9] Уголовно-процессуальное право Российской Федерации: учебник [*Criminal Procedural Law of the Russian Federation: Textbook*] 265 (Polina A. Lupinskaya ed., 2004).

When Concluding a Pre-trial Cooperation Agreement," and since the prosecutor is one of the main participants of public interest, then the departmental order of the Prosecutor General of the Russian Federation No. 107 of 15 March 2010 "On the Organization of Work on the Implementation of the Prosecutor's Powers When Concluding Pre-trial Cooperation Agreements With a Suspect (Accused) in Criminal Cases."

Referring to the data of the Judicial Department at the Supreme Court of the Russian Federation[10] from 2015 through the first half of 2021 will allow us to determine the level of applicability of the cooperation agreement at the stage of implementation in the domestic criminal process.

Thus, in 2015 out of the total number of criminal cases considered, taking into account those terminated (928,122), 4,543 cases were considered in accordance with Chapter 40.1 of the Criminal Procedure Code (4,134 persons were convicted, while criminal cases against 479 persons were terminated).

For example, depending on the types of crimes, criminal cases involving a terrorist act were considered in accordance with Chapter 40.1 of the Criminal Procedure Code, 2 out of 8 cases submitted to the court, 6 out of 87 cases were considered against persons who facilitated terrorist activities, 70 out of 474 cases were considered on banditry, 1,572 out of 113,946 in the field of illicit trafficking in narcotic drugs and psychotropic substances, 56 out of 1,972 related to accepting a bribe and 33 out of 5,638 cases on bribery were considered by the court.

An almost similar picture appears before us in the criminal cases considered in subsequent reporting periods.

Thus, in 2016, out of 923,899 criminal cases reviewed, decisions were made on 4,121 cases in accordance with Chapter 40.1 of the Criminal Procedure Code (3,794 persons were convicted, 200 persons had their cases terminated); in 2017, 4,381 cases were considered out of 854,102 (3,963 persons were convicted, 514 persons had their cases terminated); in 2018, 4,001 cases were considered out of 811,852 (3,614 persons were convicted, 435 persons had their cases terminated); in 2019, 3,319 cases were considered out of 755,486 (3,009 persons were convicted, 472 persons had their cases terminated); in 2020, out of 706,219 cases, 3,099 cases were considered (2,763 persons were convicted, 302 persons had their cases terminated); in the first half of 2021, 1,547 cases were considered out of 352,410 (1,413 persons were convicted, 135 persons had their cases terminated).

This shows that the issues of adaptation of the "agreement" in Russian legislation and the effectiveness of implementation remain relevant. However, if we take into account that Section X of the Criminal Procedure Code refers to exceptional procedures, then its non-large-scale application is justified.

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[10] Данные судебной статистики Верховного Суда Российской Федерации // Судебный департамент при Верховном Суде РФ [Judicial Statistics Data of the Supreme Court of the Russian Federation, Judicial Department at the Supreme Court of the Russian Federation] (Nov. 11, 2021), available at http://cdep.ru.

Domestic judicial practice in appealing criminal procedure agreements is mainly related to the conviction of other participants in criminal activity on the basis of a decision against a person who cooperates with the investigation. In such situations, the court will justify its decision by citing the stages of evaluation of the evidence obtained.

In this regard, the cassation ruling of the Judicial Board for Criminal Cases of the Supreme Court of the Russian Federation No. 4-CC21-23-A1 of 20 July 2021,[11] the subject of which was the analysis of the results of the pre-trial cooperation agreement, is noteworthy. Thus, one of the arguments of the convict's complaint was the assertion that the testimony of the person with whom the pre-trial agreement was concluded was illegitimate as evidence, despite the fact that there were opposing testimonies before cooperation. Recognizing the guilty verdict as lawful, the court reasoned that the fact of the conclusion of the agreement in itself not only does not predetermine the assessment of these testimonies, but also does not exclude the verification of information on the basis of another evidence base. The Court emphasizes that the reliability of the testimony within the framework of cooperation was determined not by the attitude towards them but by consistency and comparability with other evidence. In addition, there are no other methods of verification, other than those provided by law (Arts. 87, 88 of the Criminal Procedure Code of the Russian Federation). Thus, in practice, the formality of the evidence provided by the investigation is excluded.

In addition, domestic judicial practice also testifies to a serious attitude towards the interpretation of the prejudicial meaning of a court decision.

For example, the Supreme Court of the Russian Federation changed the verdict on the fact of assault and reclassified the actions of the perpetrator as a result of considering the lawyer's complaint (cassation ruling No. 20-CC19-25 of 17 October 2019).[12] The main argument of the complaint was the verdict in the main case against the accomplices, according to which the court concluded that there was no evidence of the existence of an organized group and the commission of crimes by a group of persons by prior agreement. The Court, in making amendments to the decision adopted by the lower court, was motivated in its conclusion by the presence of legal positions set out in resolutions of the Constitutional Court of the Russian Federation No. 6-P of 16 May 2007 and No. 30-P of 21 December 2011, from which it follows that a court decision that has an incorrect reflection of essential circumstances should be corrected. In addition, the recognition of the prejudicial significance of a court decision, which is aimed at ensuring the stability and general validity of a court decision as well as the exclusion of a possible conflict of judicial acts, assumes that the facts established by the court during the consideration of one case, until their

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[11] Банк судебных решений // Верховный Суд Российской Федерации [Bank of Court Decisions, Supreme Court of the Russian Federation] (Nov. 11, 2021), available at https://vsrf.ru.

[12] *Id.*

refutation, are accepted by another court in another case in the same or another type of legal proceedings, if they are relevant to the resolution of this case. The appellate ruling of the Supreme Court of the Russian Federation No. 3-APU19-10 of 17 June 2020 which was based on the results of the consideration of appeals against the verdict in a multi-figure and multi-episode criminal case is interesting from the point of view of the denial of prejudice.

Thus, when passing sentence, the evidence obtained as a result of the conclusion of pre-trial agreements on cooperation with the investigation was taken into account. However, the complaints of the convicts pointed to the inadmissibility of such evidence, the unreliability of the information contained in them and the need to make a private determination on the violation of the terms of the agreement, since the preliminary investigation authorities falsified evidence, which excluded the indictment of the persons who concluded the agreement on a number of crimes. These circumstances indicate a reservation. Considering these arguments, the Court of appeal drew attention to the procedural status of persons with whom a pre-trial cooperation agreement has been concluded. At the time of consideration of the case, it recognized the lawful procedure for their interrogation by analogy with the interrogation of a witness, before making appropriate changes to the Criminal Procedure Code on 30 October 2018 (Art. 278.1 of the Criminal Procedure Code). In addition, it follows from the petitions for the conclusion of cooperation agreements that not only the rights, obligations and consequences of concluding such agreements were explained to each of them, but also other norms of Chapter 40.1 of the Criminal Procedure Code, providing for the consequences of their violation, including the revision of the sentence imposed on such a person. In this connection, the court's failure to explain once again the provisions of this norm does not affect the legality of the procedure of their interrogations. Sentences against persons who concluded pre-trial cooperation agreements were requested at the initiative of the court, which does not contradict the requirements of the law, and attached to the case file. However, the court did not refer to them as evidence from the point of view of prejudice (Art. 90 of the Criminal Procedure Code), and the reference to them in the appealed verdict is purely informative. The refusal of the court to attach to the case the minutes of court sessions in the cases in which they were convicted is legitimate. Since criminal cases against these persons were considered in separate proceedings, arguments about the illegality of the sentences imposed against them, the fairness of the punishment, the illegality of concluding pre-trial cooperation agreements with each of them, and the need for their cancellation are not subject to evaluation and verification within the framework of the proceedings in the main case.

Probably the most frequent drawback of the procedure of "transactions" by law enforcement officers and process legal scientists is that it is considered a violation of the rights of victims.

Again, the analysis of judicial practice shows that courts differentiate between competing interests in criminal proceedings. The motivation of the victim's position,

indicated in the resolutions of the Constitutional Court of the Russian Federation No. 7-P of 24 April 2003[13] and No. 22-P of 17 October 2011,[14] deserves attention, in which it is very clearly stated that legal liability is a means of public legal response. In this connection, the measure of responsibility (the size and type of punishment) should meet public legal, not private interests. However, the court in the decision indicated that in order to comply with constitutional rights, the victim must be provided with access to justice and be given an opportunity to be heard. The victim is not entitled to criminal prosecution and sentencing. The State, with the current judicial system, provides a guarantee of protection of the rights of victims, the possibility of defending their interests and applying compensatory measures.

The next component of the study examines the content and the context of admission of guilt at the conclusion of agreements.

Analyzing the provisions of the current legislation, we come to the conclusion that the emphasis placed on transactions in different legal systems is shifting. Thus, section X of the Criminal Procedure Code recognizes "consent" with the indictment, as well as active cooperation with the investigation, as a reason for considering the case using a special procedure. The mental attitude of the accused towards the deed plays a secondary, optional role. For a long time, the Anglo-American and continental legal systems have been of great interest to researchers. They serve as models of this form of processing. For example, in the United States, the conclusion of a deal with justice has come a long way from secret agreements to legalized ones. Economic, rational, and not necessarily moral factors are at the head. This situation is very clearly characterized by a "new type of social connection," in the process of filtering which

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[13] Постановление Конституционного Суда Российской Федерации от 24 апреля 2003 г. № 7-П «По делу о проверке конституционности положения пункта 8 Постановления Государственной Думы от 26 мая 2000 года «Об объявлении амнистии в связи с 55-летием Победы в Великой Отечественной войне 1941–1945 годов» в связи с жалобой гражданки Л.М. Запорожец» // СПС «КонсультантПлюс» [Resolution of the Constitutional Court of the Russian Federation No. 7-P of 24 April 2003. On the Case of Checking the Constitutionality of the Provision of Paragraph 8 of the Resolution of the State Duma of 26 May 2000 "On the Announcement of Amnesty in Connection with the 55th Anniversary of Victory in the Great Patriotic War of 1941–1945" in Connection with the Complaint of Citizen L.M. Zaporozhets, SPS "ConsultantPlus"] (Nov. 11, 2021), available at https://online.consultant.ru/riv/cgi/online.cgi?req=doc&ts=HHmJTpSPe0xEwYhc&cacheid=8BAF9C1E75A8CC04C0F802A1191355C2&mode=splus&base=LAW&n=42062&rnd=0.44751827658538934#WEnJTpSh7trfOGa5.

[14] Постановление Конституционного Суда Российской Федерации от 17 октября 2011 г. № 22-П «По делу о проверке конституционности частей первой и второй статьи 133 Уголовно-процессуального кодекса Российской Федерации в связи с жалобами граждан В.А. Тихомировой, И.И. Тихомировой и И.Н. Сардыко» // СПС «КонсультантПлюс» [Resolution of the Constitutional Court of the Russian Federation No. 22-P of 17 October 2011. On the Case of Checking the Constitutionality of Parts One and Two of Article 133 of the Criminal Procedure Code of the Russian Federation in Connection with Complaints of Citizens V.A. Tikhomirova, I.I. Tikhomirova and I.N. Sardyko, SPS "ConsultantPlus"] (Nov. 11, 2021), available at https://online.consultant.ru/riv/cgi/online.cgi?req=doc&ts=HHmJTpSPe0xEwYhc&cacheid=03AAD7C53928A4FB5BC8A82F291F1EC2&mode=splus&base=LAW&n=120644&rnd=0.44751827658538934#D6JKTpS4wEPzkK1K2.

the subject becomes an element of market and economic relations.[15] The subject of the transaction is the exchange of preventive measures for admission of guilt (depending on the volume). Or, to put it another way, the offering of services in the market, such as rehabilitation for less serious offenses, the removal of a number of clauses from the charge, the exclusion of aggravating circumstances, all for a cost that is equivalent to a "confession." We venture to assume that the risk of turning the procedure into a business scheme is not excluded. It is interesting to note that historically, the first type of transaction was not an admission of guilt (but also not a challenge), but an agreement with punishment, which later developed into an ambiguous transaction known as the Alford deal.

Let us take, as an example, the proposal of the Prosecutor's Office of the District of Columbia in the United States to conclude an agreement, executed in writing.[16] The letter, which sets out the exhaustive terms of the transaction, was sent to Esther Schwemmer's lawyer. The mandatory item is the validity period of the offer, which in this case is two weeks. After obtaining the client's written consent, this letter acquires the status of an agreement. All the important conditions are prescribed in separate paragraphs. Thus, the defendant must plead guilty to demonstrating or picketing at the Capitol Building in violation of Section 40, United States Code, Section 5104 (e)(2)(G). At the same time, it is clarified that the maximum penalty for this violation is imprisonment of up to six months and a fine. Additionally, the accused confirms that the information contained in the crime statement is accurate and corresponds to the circumstances of the case. The statement is recognized as evidence. It is also indicated that charges on other counts will not be brought by the prosecutor's office. An important clarification included in the letter is that the verdict that will be handed down is a matter solely of the discretion of the court. The court is not obliged to follow any recommendations made during sentencing. The court has the right to impose any punishment, up to the maximum term of punishment provided for by law. The party to the agreement cannot and does not make any promises or statements regarding what sentence the lawyer's client will receive. Moreover, it is implied that the client will not have the right to withdraw the plea if the court passes a sentence that does not comply with the Sentencing Recommendations. Any attempts by the accused to refuse to plead guilty due to the length of the sentence imposed will constitute a violation of this agreement.

In addition, provisions concerning the preventive measure and the consequences of its violation are included.

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[15] *Бахновский А.В.* «Сделка с правосудием»: особенности англосаксонской и континентальной правовой традиции: дис. ... канд. юрид. наук [Alexander V. Bakhnovsky, *"Deal with Justice": Features of the Anglo-Saxon and Continental Legal Tradition*, PhD thesis] 22 (2008).

[16] U.S. Department of Justice, Re: *United States v. Esther Schwemmer*, Criminal Case No. 21-CR-00364, 15 July 2021 (Nov. 11, 2021), available at https://www.justice.gov/usao-dc/case-multi-defendant/file/1438216/download.

The purpose of the agreement is to waive all remedies, the right to any further disclosure of information that has not yet been provided at the time of the client's plea, the right not to plead guilty and the right to a jury trial. By making a deal, the accused voluntarily renounces self-incrimination.

Realizing the uncertainty in assessing which sentence the court will eventually pass, the client consciously and voluntarily waives the right to appeal the verdict, while retaining the right to appeal on the basis of ineffective assistance from a lawyer. In order to repay the losses caused as a result of the riots that occurred on 6 January 2021 (according to the plot), in the amount of US1.4 million dollars, the accused is obliged to provide a full financial report on his income for his compensation. The court has the right to set a repayment schedule. Violation of the obligations under the agreement will entail criminal prosecution for any other crimes, including perjury and obstruction of justice. The text emphasizes the inadmissibility of giving false testimony.

Analyzing this proposal, we dare to assume that it takes into account the nuances that arise in judicial practice on the acceptance of the fact of recognition, as well as guarantees of its compliance aimed at achieving the main goals of an economic nature. In addition, the sequence of actions of the parties, that is, the essential terms of the transaction, are executed in writing.

As long as there are transactions, there will continue to be disputes about negative and positive aspects. The unloading of ships remains a key and permanent advantage for their primary source. At the same time, the task force of the Bar Association has again put on the agenda of 2021 the shortcomings of the system of agreements,[17] citing its solely coercive nature. As a result, we have decisions that are unfair. Unfortunately, the problems of transactions are aggravated by new concomitant vices: racial inequality and the promotion of criminalization.

Currently, the picture of judging in the United States is developing in such a way that the focus is not on the subjects of procedural activity, but on the transaction itself.

The quite obvious negative nature of the transaction is the unformulated delegation of the court's sentencing function to the ranks of the discretion of prosecutors. Thus, public confidence in the justice system is reasonably reduced.

For the Anglo-American legal system, the introduction and development of the institution of transactions has become logical, given the dominant position of precedents. Despite the huge amount of criticism, the encouragement of confessions in the form of the results of agreements is actively used, which indicates the demand for and achievement of the goals of saving procedural costs for nearly two centuries. In this case, is it possible to conclude that the identified shortcomings of the agreement system are not critical?

However, the introduction of transactions into the legal framework of the continental system occurred in a different way, namely, by adapting them into a codified

[17] Criminal Justice Section Newsletter, American Bar Association (Nov. 11, 2021), available at https://www.americanbar.org/groups/criminal_justice/publications/cjs_newsletter/.

form, which, in principle, was done by the legislator. At the same time, it is possible that such a system can get out of control instantly since initially the components are unreliable. In order to avoid negative consequences, we believe there is an increasing need for regulation and legislative consolidation of the guiding rules for concluding agreements with the definition of the initial, intermediate (main) and final stages. For example, because in accordance with Article 37 of the Criminal Procedure Code of the Russian Federation, the indictment (act, resolution) on the case is approved by the prosecutor and the case materials are sent to the court, and given that it is the prosecutor who has the authority to consider the petition and conclude a pre-trial cooperation agreement, then the rules must contain the algorithm of actions of the supervisory authority. If the role of the court is extended to include investigative functions, this will lead to a well-founded allegation of a violation of the adversarial principle and an expression of the clear interest of the judicial system.

Turning to the representatives of the continental system, we note that, having partially adopted the elements of the "progenitor of transactions," despite the commitment to the investigative rather than adversarial nature of the process, the decisive powers were transferred to the court, attaching special importance to the admission of guilt. The researchers note that the active influence of American practice on this legal family was exerted in the post-war period which was in need of restoration.[18] However, the reception of the American model became possible only if there were prerequisites for it in the current legislation of the countries, a favorable environment concerning the observance of the fundamental rights of participants in procedural relations and the introduction of the possibility of collecting evidence by both sides. For example, according to the Criminal Procedure Code of Germany, in addition to simplified and abbreviated forms, the legislator provided for the possibility of concluding transactions in court (257c). In addition, the terms of such agreements should be reflected in the verdict. It is important to note that the subject of agreements can only be legal consequences: the course and result of the process. The court, when announcing the agreement, may specify the range of sanctions. Thus, the main role is given to the court, and the prosecutor and the defendant have the right to agree with the proposal or refuse. In case of a violation of the conditions, the admission of guilt may not be taken into account and the proceedings proceed in a general manner. The caution that permeates the entire criminal process of Germany once again confirms the importance of establishing objective evidence in the case, regardless of the consent of the accused. Moreover, unlike English law, the presence of confessions does not imply the end of a conflict requiring state intervention. Conversely this is another reason for the investigating authorities to conduct thorough procedural actions.

We believe it is impossible to study this legal phenomenon without taking into account foreign experience. At the same time, we will try to move away from the

[18] Bakhnovsky 2008.

usual scheme of using the comparative method and take as a basis countries with different legal systems that differ from well-known examples, such as the United States, Great Britain, Germany and France.

2. Admission of Guilt Under the Legislation of the BRICS Countries

Currently, a strong position on the world stage is occupied by the interstate structure founded in 2006 (within the framework of the St. Petersburg Economic Forum) – BRICS. Despite the fact that this is a political union aimed at guiding the course of the global economy, one should not lose sight of the legal systems of the countries that make up this association.

From this perspective, it is of interest to consider the impact of the institution of admission of guilt on the legislation of the BRICS countries, which are so different from one another, not only in terms of their geographical locations, but also in terms of the process by which their legal systems were formed. The legislation of all the countries represented in this union is based on a symbiosis of legal systems that have undergone a lengthy formation. As of now, this process is still not completed.

We dare to assume that each of the BRICS countries, which are part of this commonwealth, in the modern historical period, to one extent or another, includes the experience of continental or Saxon law as the basis of its institution of admission of guilt.

2.1. Guilty Plea and Deals with Justice under Brazilian Law

The legal system of the Federal Republic of Brazil, for example, differs in that, in general, it can be safely attributed to the Romano-Germanic legal family. The traditions of Roman law have had a strong influence on the formation of the legal framework. At the present, the Brazilian legal system is highly developed. It is worth noting that it pays increased attention to the rights of citizens, particularly in the field of criminal procedure law. Brazil's criminal justice system is influenced by French, Italian, and more recently, American models.

The basic law of the country proclaims the prohibition of torture, the possibility of punishment only after all the facts have been established, the inadmissibility of the death penalty, life or cruel punishment, as well as exile; guilt is confirmed exclusively by a verdict.[19] It is noteworthy that Brazil's 1988 Constitution contains a fairly wide range of provisions on the criminal process, enshrining the basic principles: the right to defense, trial by jury, and even the institute of English law, *habeas corpus*, as well as *habeas data* on the right of a person to claim any document. In addition, illegally obtained evidence is guaranteed to be inadmissible.

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[19] Constituição da República Federativa do Brasil de 1988 (Nov. 11, 2021), available at http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm.

On the territory of Brazil, the Criminal Procedure Code 3.689 of 30 October 1941, with amendments, is in force. Without going into the description of the structure of the document, let us turn to the content related to the admission of guilt and transactions. Thus, in accordance with Article 28-A of the Criminal Procedure Code of Brazil,[20] the prosecutor's office can offer a "non-criminal" agreement on prosecution if a number of conditions are met: punishment for a crime of up to four years; compensation for damages; return of the stolen property; provision of public services and compliance with other proportionate conditions put forward by the prosecutor's office in a certain period. The conclusion of such a document is prohibited for violent crimes against women and minors, as well as for repeat offenders.

A mandatory requirement is imposed on the written form of the agreement, and it is considered to be tripartite: signed by an employee of the prosecutor's office, the accused and the defender. The agreement must then be approved by the court. The victim is notified of all stages of the procedure. Thus, the main elements of the agreement include voluntariness, formality and initiative.

It should be noted that such a consensual approach owes its appearance to the differentiation of crimes into categories such as serious (grave and especially grave) and less dangerous. This institution, introduced in 2019 (Art. 28-A), acts as an instrument of decriminalization. To be more precise, it is aimed at reducing criminal prosecution for minor offenses. This is confirmed by the explanatory note to Law No. 3.689.[21]

At the same time, the legislature pays special attention to the status of silence, which may or may not imply an admission of guilt. The fact of the admission of guilt will be evaluated along with other evidence (Arts. 197–200 of the Criminal Procedure Code).

It is also interesting to think that the legislator is trying to overcome the investigative matrices by introducing new norms into criminal procedure legislation. These procedures have been dubbed as institutions of business justice. Again, the expansion of the space for consensus is due to the inability of the system to cope with the number of criminal cases. The negative element in this institution is precisely the admission of guilt as the basis for concluding an agreement. In addition, the author believes that there is a causal relationship between the tendency to give false testimony and the strong influence of U.S. legislation on Brazilian law. Involuntary false confessions are allowed. The accused has the clear and risky choice between confession under torture and confession under mitigation. The author considers the inevitability of the negative consequences of the one-sidedness of the proposals

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[20] Código de Processo Penal (Decreto-Lei nº 3.689, de 3 de outubro de 1941) (Nov. 11, 2021), available at http://www.planalto.gov.br/ccivil_03/decreto-lei/Del3689.htm.

[21] Explanatory Note to the Law No. 3.689 of 30 October 1941 (Nov. 11, 2021), available at https://legis.senado.leg.br/sdleg-getter/documento?dm=8053755&ts=1576094923538&disposition=inline.

of such agreements. In fact, the State is sacrificing the basic guarantees of the individual.[22]

The law also provides for the possibility of reconciliation, for example, in cases involving libel. It follows from the analysis of the norms that reconciliation is an evaluative category. Its success depends on the judge's internal assessment of the situation (Arts. 519–523 of the Criminal Procedure Code).

A separate chapter V in section 2 is devoted to an abbreviated procedure. It should be noted that its essence differs from the generally accepted one. The Court also conducts a judicial examination of evidence, however, in a shorter amount of time, with limited time for speeches and fewer witnesses on both sides. Accordingly, it is applied to the consideration of minor criminal offenses.

We can find a distant reminder of the deal with justice in the Anti-Corruption Law (on clean companies) No. 12.846 of 1 August 2013 which sounds like a leniency agreement. However, only legal entities can count on this leniency. This law is aimed at Brazilian companies involved in the investigation of corruption cases (Art. 16).[23]

Can this law be called innovative? Definitely. Moreover, they provide for mitigation of punishment in the form of a fine for two-thirds of companies, provided that they take the initiative and inform the authorities about the violation, as well as for mandatory termination of illegal activities and recognition of their participation in it. The Agreement does not release a legal entity from the obligation to compensate for the damage caused. The document is signed by the authorized body, the General Controller of the Union. Such assistance guarantees the non-application of sanctions to the organization in the form of a ban on receiving incentives, subsidies, grants, donations or loans from government agencies and organizations, for a period of one to five years.

However, given the low level of literacy, poverty and high crime rate among the multi-ethnic population of the country (for example, according to data for 2021: South Africa is in 3rd place, Brazil is in 6th place, the United States in 56th place, India in 71th place, Russia in 86th place and China in 109th place),[24] it is difficult to talk about strict compliance with procedural guarantees and procedures, and even more so, the introduction of unadapted borrowings practices.

2.2. Guilty Plea and Deals with Justice under Indian Law

Rene David discovered in his research that the law in these countries is formulated in a different way than in Western countries. It should be noted that when considering

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22 Jander da Cunha Teixeira, *A confissão no acordo de não persecução penal*, Consultor Jurídico, 30 December 2020 (Nov. 11, 2021), available at https://www.conjur.com.br/2020-dez-30/jander-cunha-confissao-acordo-nao-persecucao-penal.

23 Lei nº 12.846, de 1º de agosto de 2013 (Nov. 11, 2021), available at https://www.planalto.gov.br/ccivil_03/_Ato2011-2014/2013/Lei/L12846.htm.

24 Рейтинг стран по уровню преступности // NoNews [Ranking of Countries by Crime Rate, NoNews] (Nov. 11, 2021), available at https://nonews.co/directory/lists/countries/crime-index.

the institution of guilt in the BRICS countries, a special place is given to India. In particular, the legislation of India was strongly influenced by colonial conquests, for example, English law. Prior to the arrival of the British, Muslim law, and in some cases, customs were the governing legal and social systems in force. Subsequently, the recognition by the Indians of the use of the English model was of particular importance.[25] But probably the most important difference from English law is the presence of the basic law in India. In connection with the above, it becomes quite obvious that the criminal process in India is built on Anglo-American positions, but has followed its own unique path of development of the legal system.

The admission of guilt has always existed in Indian law and the current Criminal Procedure Code is no exception.

According to Article 252 of the Criminal Procedure Code of India,[26] when pleading guilty, the court has the right to convict the guilty person at its discretion. It is also possible to convict and collect a fine in the absence of the defendant if the punishment for the crime does not exceed a fine of one thousand rupees, a so-called "minor offense." The legislator did not ignore the possibility of summary proceedings, even though the defendant may not admit his guilt in the charge. Cases with a sanction of imprisonment of up to two years or minor crimes, such as theft or the possession of stolen goods (Art. 260), are considered using a simplified procedure. Are conciliation procedures possible? Yes, for example, Article 348 grants the right to an apology.

The influence of Anglo-American law is reflected in the existence of a plea bargain. It is worth noting that the institute appeared only in 2005, although problems of congestion in courts and overcrowding in prisons have existed for a long time. We can say that its appearance was inevitable, much as it was in the United States. The main requirements for the statement of the involved person about the transaction are its voluntary nature and the absence of conviction on a similar charge. The initiator is the defendant, and such an application is submitted only to the court. Based on the essence of the norms (Art. 265b), the main role is assigned to the court, in contrast to the transaction in the United States, where the court is actually passive. Compared with the criminal process of the Russian Federation, the figure of the "prosecutor" in the transaction is not the key one. Of course, there are restrictions on the application of norms. In particular, this applies to crimes whose sentences exceed seven years or are punishable by life imprisonment or the death penalty, as well as when the accused is a minor or the victims include women and children. Plea agreements are likewise not allowed in cases where the crime may have an impact on the nation's socioeconomic situation. Based on the results of the consideration of the case, the

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[25] *Давид Р*. Основные правовые системы современности [Rene David, *Basic Legal Systems of Modernity*] 431 (1988).

[26] Indian Criminal Procedure Code, Conviction upon Admission of Guilt (Nov. 11, 2021), available at https://www.indianemployees.com.

court has the right to impose a minimum penalty or may impose a sentence in the amount of one-fourth of the punishment provided for such a crime. The victim, who is entitled to compensation, is not deprived of attention, but the victim's role is not nearly as significant.

It should be noted that the application of transactions was not actively accepted in the judicial community. Even after the amendments were made in 2005, there were cases of judges rejecting applications for transactions on the grounds of the absence of norms in the legislation.[27] It is clear that the Indian model of the transaction developed with an American bias, but it did not become widespread. Most likely, the reason is hidden in the distrust of the judicial system, including inherent religious and historical views. The presence of legislative obstacles to the exercise of one's *de facto* and *de jure* right to refuse judicial resolution of a case also does not contribute to the active application of this legal phenomenon.

Turning to judicial practice, we will see the opinion of judges based their vehement rejection of negotiations, both in violation to Article 20(3) of the Constitution of India which prohibits inadmissibility of self-incrimination, and the validity of their introduction into the legal system. The analysis of practice shows that the existing advantages of the institute, such as rapid consideration of cases, non-publicity and lack of government costs, do not outweigh its disadvantages. Among the negative aspects highlighted are a potential corruption component, inattention to the opinion of victims and possible bias towards the accused in the event that accused's application is denied.

For example, in the decision *State of Uttar Pradesh v. Chandrika 1999*,[28] the Supreme Court did not accept the judge's approval of the plea bargain at the initial hearing of the case and considered this practice unconstitutional. No one has the right to agree that the evidence will not be evaluated. The Court was of the opinion that the decision on the case should be made on the merits. If the defendant pleads guilty, he must be sentenced accordingly. However, by 2005, the court recognized the need for negotiations. The Court stated that the very purpose of the law is to ensure prompt justice (*State of Gujarat v. Natwar Harchandji Thakor*).[29]

Many lawyers believe that despite the fact that the transaction is not a solution to the issue of "accumulated cases," a method is required that would facilitate a quick trial and fair sentencing.[30]

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27 Muhammad Ashraf & Absar A. Absar, *Plea Bargaining in India – An Appraisal*, ResearchGate (July 2020) (Nov. 11, 2021), available at https://www.researchgate.net/publication/342783286_Plea_Bargaining_in_India_-An_Appraisal.

28 *State of Uttar Pradesh v. Chandrika*, 1999 Supp(4) S.C.R. 239.

29 *State of Gujarat v. Natwar Harchandji Thakor*, 2005 CriLJ 2957, (2005) 1 G.L.R. 709.

30 Shweta Rathore, *The Notion of Plea Bargaining*, 6(3) J. Emerg. Technol. Innov. Res. (2019) (Nov. 11, 2021), available at https://www.jetir.org.

The analysis testifies to the caution of the legislator in the wide dissemination of the institution of the transaction, as evidenced by the criteria for its implementation enshrined in the law.

2.3. Guilty Plea and Deals with Justice under the Laws of the People's Republic of China

In our opinion, the point of view of Chinese legal scientists in the field of jurisprudence regarding the institution of admission of guilt is very interesting; they practically do not recognize it. In this regard, special attention should be paid to the legislation of the People's Republic of China in the field of criminal procedure law.

It cannot be denied that China has a modernized Soviet version of the continental model of criminal procedure.[31] The criminal process in China is not just unique; it synthesizes philosophical views with Soviet legal constructions. Therefore, there is an obvious similarity between many legal institutions in this country and either the Soviet Union or continental legal systems. Furthermore, China's legislation is characterized by systematic, gradual, even cautious changes.

The criminal procedure legislation of the People's Republic of China deserves close attention, the peculiarity of which lies in the idea of socialist legality, which permeates all areas of jurisprudence. The Criminal Procedure Code was first adopted in 1979 and revised in 1996. The next amendments were made in 2012. It should be noted that the Criminal Procedure Code of the People's Republic of China is more conservative than the Criminal Procedure Code of the Russian Federation, although it was created with the tangible influence of the legislation of the USSR. At the same time, emphasis is placed on the impossibility of building socialism without the participation of workers and the people.

Since 2016 the reform of procedural legislation directed towards humanization and simplification has been actively promoted.

The origins of all the principles are contained in the basic law of the country and the presence of the people can be found in all structures: the Assembly of the people's representatives, public property, the People's Prosecutor's Office and the people's courts. In addition, when deviating towards the entire legal system of China, one should recognize its uniqueness, since it meets the signs of eclecticism. It synthesizes not only the traditional (historical) law of China, which includes the foundations of philosophy and elements of the socialist system, but also elements of international law.

Returning to the characteristics of the modern legal system, the definition of a crime is of interest, which provides for a division into classes: from the state to a specific person. Is this a vestige of the socialist system, unlike other legal systems that put the rights of the individual first? Uniquely. However surprisingly, despite

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[31] Курс уголовного процесса [*The Course of Criminal Procedure*] (Leonid V. Golovko ed., 2016).

the presence of fundamental humanistic principles in the criminal process of the People's Republic of China, there is no possibility of applying procedures related to the admission of guilt. In general, this institution is not properly reflected in the legal system, despite the fact that the principle of competition is proclaimed. Thus, according to Article 42 of the Criminal Procedure Code of the People's Republic of China,[32] the evidence primarily includes the testimony of witnesses, victims and only after that, statements of suspects (accused). The focus on collecting any information on the case indicates an independent approach and a non-accusatory bias. At the same time, one should not overlook the fact that the final result of the investigation and consideration of any criminal case depends on the environment in which procedural legislation developed, the influence of ideology, politicization over a long period and historical prerequisites. Is there a simplified procedure for considering cases in the Criminal Procedure Code? Of course, only Article 174 provides for the conditions for the application of such a procedure: a sanction of up to three years of imprisonment, clarity of factual circumstances and the presence of strong evidence in minor criminal cases. Do confessions play any role here? No Even when an offender is released from punishment for minor crimes, a choice is provided: public censure or an obligation to put one's repentance in writing (Art. 37 of the Criminal Code of the People's Republic of China).[33]

In the event of a confession or a report of an unknown crime confirmed during the investigation, the court may, but is not obliged to, mitigate the punishment.

An interesting fact is that in 2016, an experiment was conducted to introduce accelerated criminal proceedings, including plea agreements, in eighteen territories of the People's Republic of China.[34] As a result, this decision was approved in 2014 at a meeting of the Standing Committee of the National People's Congress. It was assumed that the Supreme People's Court and the Supreme People's Prosecutor's Office were given the authority to consider criminal cases in this order in cases with a penalty of no more than three years of imprisonment. The main goal of the project was to improve the system for leniency upon the admission of guilt. The confession itself implied agreement with the facts presented by the investigating authorities. The suspect's deal with the prosecutor included an agreement on punishment, sentence, leniency for admitting guilt and methods of execution of punishments. The proposed sentence from the Prosecutor's Office was considered an important element. An integral part of the project was the creation of legal aid centers, which would take on their duties after the initiative taken by the prosecution to reach

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[32] Criminal Procedure Code of the People's Republic of China, National People's Congress (Nov. 11, 2021), available at http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/13/content_1384067.htm.

[33] *Id*.

[34] **福建法院刑事**诉讼改革调查：从刑事速裁到认罪认罚从宽 – **中**华人民共和国最高人民法院 [Fujian Court Criminal Procedure Reform Investigation: From Expedited Criminal Judgment to Lenient Punishment, Supreme People's Court of the People's Republic of China] (Nov. 11, 2021), available at http://court.gov.cn.

an agreement, in order to prevent infringement of the rights of the suspect. The demand for increased funding for the activities of lawyers has become increasingly clear. Unfortunately, practice has shown that there are problems with the quality of legal assistance provided by "duty" lawyers. In addition, the pilot project once again confirmed the significance of the defendant's psychological attitude towards confession, activity and sincerity of remorse. It is essential that this be open and be transparent. A positive result was noted following the implementation of a phased mitigation of punishment, depending on the stage of admission of guilt. This means that the sooner the defendant confessed, the more leniencies he or she received. Despite the preliminary findings, no final decision has been reached.

In 2021, a press conference on the interpretation of the application of the Criminal Procedure Code was published on the official website of the Supreme People's Court of the People's Republic of China. One of the questions from the journalists concerned the introduction of a system of guilty pleas as a mitigating circumstance.[35]

Judges mark this system as an important institutional measure guaranteeing a fair trial. Starting with the first pilot project in some regions in 2016 and ending with its nationwide implementation at the end of 2018, the Supreme People's Court has repeatedly stressed that mitigation systems should adhere to the principles of proportionality of guilt and punishment, leniency, as well as evidence in order to prevent ineffective verification of convictions, unbalanced sentencing and improper procedures. It is particularly noted that persons are subject to leniency for frivolous crimes. However, if the defendant pleads guilty to grave and especially grave crimes, such as robberies, kidnappings and murders, the judicial procedure must meet the requirements of comprehensiveness and rigor in order for the decision to be adequate for social justice. The standard of proof cannot be lowered simply because the accused pleads guilty. Thus, much attention is paid to the reform of the system and is actively considered by law enforcement. The attitude towards the admission of guilt under the legislation of the People's Republic of China is formed by the goal of the entire legal system, which consists of improving the effectiveness of punishment for crimes and strengthening judicial protection of human rights.

Despite its inquisitorial nature, the current situation in Chinese legislation is characterized by a mixed form of criminal proceedings, with a smooth transition from accusatory to adversarial. But, given the size of China's population and the growth of crime, the legislator is in no hurry to introduce new forms of legal proceedings. We dare to assume that if such changes are made, their main goal will not be to reduce the burden on the prosecutor's, investigative and judicial corps. The opinion

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[35] **最高法相关**负责人就《最高人民法院关于适用〈中华人民共和国刑事诉讼法〉的解释》答记者问 **中**华人民共和国最高人民法院 [Relevant person in charge of the Supreme People's Court answered a reporter's question on the Interpretation of the Supreme People's Court on the Application of the Criminal Procedure Code of the People's Republic of China, Supreme People's Court of the People's Republic of China] (Nov. 11, 2021), available at http://court.gov.cn.

of Professor Liu Mei of the National People's University of Law and Politics[36] (relevant today) will be quite informative in this context, from which it follows that the process of introducing the institute of transactions with the investigation is being debated. However, the stumbling block is the immaturity of this institution, as well as differences in the procedural concepts of China and, for example, the United States and Italy, since the result of the investigation is understood to be the establishment of all the facts of what was done. That is to say, formal adjudication in China is not an end in itself of procedural activity.

The written repentance and confession provided for in the Criminal Procedure Code indicate that from the point of view of generally accepted legal and social norms, these provisions can be interpreted as an admission of guilt by the person who committed the crime. However, the state, represented by law enforcement agencies, does not yet want to include this in the criminal procedure law of the People's Republic of China as an element or prerequisite for the institution of a deal with the investigation, which we call a plea agreement in the Russian Federation.

2.4. Guilty Plea and Deals with Justice under South African Law

The next country of our attention is the Republic of South Africa, a country where there has never been a coup d'etat. Despite the fact that South Africa is the most developed country on the African continent, in terms of living standards and crime it is approaching the most disadvantaged, ranking third in the world in terms of crime and first in terms of unemployment for 2020.[37] There is no doubt that social factors influence the criminogenic situation and the content of legislation and cannot go unnoticed in the context of the implementation of the criminal procedure policy of the state.

To understand the essence of the South African legal system, it is necessary to turn to Rene David, the author, who attributed it to a mixed type, which borrowed everything that was possible.[38] Historical events and colonization left their mark on the formation of a legal system that combined elements of Romano-Germanic, Anglo-American and traditional. The country has a Constitution that was adopted in 1996. At the same time, there is no denying the realities of the history of apartheid (before the adoption of the basic law) which was based on institutionalized racial discrimination against the non-white population. Its consequences are still noticeable at the present time.

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[36] *Козубенко Ю.В.* Вопросы уголовного судопроизводства КНР // КиберЛенинка [Yuri V. Kozubenko, *Issues of Criminal Proceedings of the People's Republic of China*, CyberLeninka] (Nov. 11, 2021), available at https://cyberleninka.ru/article/n/voprosy-ugolovnogo-sudoproizvodstva-knr.

[37] Рейтинг стран по уровню безработицы // NoNews [Ranking of Countries by Unemployment Rate, NoNews] (Nov. 11, 2021), available at https://nonews.co/directory/lists/countries/unemployement.

[38] David 1988.

The criminal procedure legislation is based on English law. Its main sources are the Constitution of the country and the Law on Criminal Proceedings.[39] In particular, the basic law proclaims and guarantees the basic rights of citizens in the field under study: the right not to make confessions (Art. 35), including those that can be used against a person as evidence, the right to silence and an explanation of the consequences of its violation and the right to a fair trial. In general, the norms indicate compliance with the principles of legality and competitiveness.

The Law on Criminal Proceedings contains a detailed description of judicial procedures. The focus is on the institution of admission of guilt, which is not surprising in light of the unfavorable criminal situation. It is remarkable that by confessing, the guilty person can be immediately sentenced (sec. 112(1)(a)), that is, only on the basis of a statement; other evidence is not subject to mandatory investigation. It is possible to convict a person and impose a fine even if they do not appear in court (Ch. 8, Arts. 57–57a). Thus, the conclusion itself suggests that the legislator actually establishes and encourages a conflict-free situation between the State and the defendant in other circumstances requiring the application of lengthy procedures established by law.

In some cases, if the judge is convinced that the statement corresponds to the confession, then the defendant is sentenced without questioning the latter. This procedure of legal proceedings is applicable only in less serious cases with the impossibility of imposing a penalty in the form of imprisonment or a fine, including a fine exceeding a certain amount. Article 110 of the Law on Criminal Proceedings contains a mandatory notification of the Prosecutor's Office by the accused of his confession statement. At the same time, the role of the court is not passive; namely, the court has the right to clarify the testimony not only to interrogate the defendant but also, if there is a discrepancy with the confession for various reasons, to indicate to the prosecutor to continue the investigation. In order not to hinder the observance of the adversarial principle, the law authorizes the parties to present evidence. The defendant is also not deprived of the opportunity to contradict his confession, even on the basis of the fact that it is incorrectly recorded. Is the fact of recognition proof enough? Certainly, as long as it is not refuted. Even after the refusal of official recognition, it can still be considered by the court as evidence. Interesting in this regard is the decision *S v. Zuma and Others*,[40] an important result of which was the recognition as unconstitutional of the provision of Article 217(1)(b)(ii) on the freedom and voluntariness of a confession made before the trial, the illegality of which must be proved by the defense party, and not by the State. Thus, the realization of the presumption of innocence is guaranteed.

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[39] Constitution of the Republic of South Africa (1996) (Nov. 11, 2021), available at https://www.concourt.org.za/images/phocadownload/the_text/english-2013.pdf; Criminal Procedure Act 1977 (Act No. 51 of 1977, as amended up to Criminal Law (Forensic Procedures) Amendment Act 2010) (Nov. 11, 2021), available at https://wipolex.wipo.int/en/legislation/details/13452.

[40] *S. v. Zuma and Others*, [1995] Z.A.C.C. 1, 1995 (2) S.A. 642 (CC), 1995 (4) B.C.L.R. 401 (CC).

Analyzing the procedural norms, we can summarize that the content of the statement of guilt may be both its non-recognition and its disagreement in part.

In the South African criminal process, the institution of a deal with the prosecutor before the admission of guilt is also represented (Art. 105A). When concluding an agreement, the prosecutor consults with the investigating authorities and takes into account the nature and degree of public danger posed by the deed, as well as the identity of the accused. The terms of the agreement include compensatory and restorative measures. There is no provision made for the participation of the court in the negotiations. During the actual hearing, the court focuses on compliance with the procedural aspects of the transaction, finds out exactly what the defendant agreed to, as well as whether or not the defendant understands the nature of the agreement, and, of course, whether it was concluded voluntarily. In addition, the court, when assessing the circumstances of the case, in agreement with the agreement, may conclude that the agreement on the operative part of the verdict under the agreement is fair. If the court considers the punishment unfair, it notifies the prosecutor and the defendant about it. In such a situation, the parties involved have two options: either refuse the agreement and consider the case in a general manner; or submit it to the discretion of the court. In this regard, we should agree with the opinion that compliance with the terms of the transaction by the court is an extremely delicate and unpredictable moment. Moreover, there is a risk of shadow use of the provisions on the admission of guilt (Art. 112) instead of Article 105 (transaction), since the time-consuming requirements associated with obtaining official permission to conclude an agreement from supervisory authorities and consultations with victims often deter prosecutors who face an unmanageable volume of cases due to the application of the transaction procedure.[41] Again, the question arises with the study of the problem of compliance with the rights to judicial proceedings. But the author considers transactions to be an integral procedural part since they restrict the rights of the accused (defendants) to a lesser extent than other procedural forms, which they are allowed as an alternative to the general procedure of legal proceedings.

Proceeding from the meaning of the law on criminal proceedings, we come to the conclusion that the legislator pays closer attention to the admission of guilt in order to apply a simplified procedure for considering the case. At the same time, it is important for the legislator that the recognition be confirmed. This is evidenced by the content of Article 219, the main purpose of which is to establish the burden of the accused to prove the truthfulness of his own confession made in writing.

It is worth noting that the nature of transactions is an institutional response to the needs of the state and not to the interests of the defendants. Furthermore, the admission of guilt implies the consent of the person involved to be punished for the

[41] Richard Adelstein, *Plea Bargaining in South Africa: An Economic Perspective*, 9(1) Const. Court Rev. 81 (2019).

crime committed, which, in fact, ends the simplified procedure. This content fully complies not only with the norms of Western legislation but also with South Africa.

Therefore, priority is given to the proposal from the prosecution, which has leverage in its assets, for example, the ability to transfer a criminal case for consideration to a higher court, which, when passing a guilty verdict on certain categories of grave and especially grave cases, can only impose life imprisonment.

The institute of admission of guilt is considered by researchers of the law school of South Africa first and foremost, as repentance with the prospect of rehabilitation of the offender and as a guarantee that the crime will not be committed again. To assess the degree of remorse, courts should pay attention not to the words of the defendant but to his actions. Therefore, the admission of guilt does not exclude the absence of remorse, for example, in cases with obvious and irrefutable evidence. If recognition is understood as an "element of good behavior," it can be assumed that its application will depend on the need for this recognition.

However, judicial practice often indicates a different approach to repentance when it is an evaluative concept that does not have clear criteria of relevance and admissibility. In particular, an example of the consideration of a criminal case is given when the defendant's position changed from "innocent" to "guilty" during the trial; thereby the court regarded this fact as a path to rehabilitation.[42] One way or another, by pleading guilty, a person assumes responsibility for his or her illegal behavior, regardless of the motives behind it.

If reliable and solid evidence plays an important role in the adversarial process, one might ask why the admission of guilt, in the majority of cases, accepted unconditionally. The question remains unanswered, while the legislator establishes criteria for verifying such confessions in order to minimize the consequences of side effects.

The subject of discussion by the law commission in 2001 was the advantages and disadvantages of out-of-court settlement as a type of simplified criminal proceedings. In addition to saving time and costs, the report also pointed to the absence of a criminal record, which prompted convicts to appeal the court's decision. In addition, the prospect of achieving the goal of restorative justice is enhanced if all the parties involved in the agreement are unbiased. Despite the significant disadvantage of the lack of judicial control, the commission concluded that it was necessary to introduce this system of out-of-court agreements. It was an innovation to introduce the use of the neutral concept of "negotiations" or "plea discussions," since it was believed that the purpose of the process was to reach a satisfactory agreement, and not so that the accused could conclude a "deal."[43] The question arises

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42 Pieter Du Toit, *The Role of Remorse in Sentencing*, 34(3) Obiter 558 (2013).

43 South African Law Commission, Simplification of Criminal Procedure (Out-of-Court Settlements in Criminal Cases), Discussion Paper 100 (Project 73), 31 December 2001 (Nov. 11, 2021), available at https://www.gov.za/documents/simplification-criminal-procedure-out-court-settlements-criminal-cases-discussion-paper.

as to whether we will not encounter a purposeful substitution of concepts when the essence remains the same.

The legislator also considers options for conflict resolution by means of mediation, but this only transfers the dispute onto the civil-legal plane.

Conclusion

The analysis showed that the category of "admission of guilt" remains the trigger of various forms of legal proceedings since it is of no small importance how the fact of recognition is treated. Cases of self-incrimination are also not excluded, for example, when it comes to the end of the dispute or to the occasion to apply it as mitigating circumstances.

If we consider this legal category as a basis for negotiations, we can conclude that the relevance in the system of transactions based on confessions or agreements with the prosecution does not depend on the relevance to a particular system of law. It should be recognized that modern processes taking place in society dictate legislators turn their attention to the application of transactions. The difference lies in the goals, initial components and implementation of the mechanism, from the attitude to the essence of the fact of recognition or assistance with public authorities.

At the same time, the main guarantee of a lawful decision will continue to be the consideration of the case in a general manner. The court makes a decision based on an objective attitude to the totality of evidence rather than a formal approach, thereby liberating itself in the freedom of their assessment.

If we consider the ideal form of expressing a confession of guilt, then it should have the concept of 'honesty' as one of its basic tenets. Thus, having such a confession at your disposal, you can assert compliance with the guidelines of criminal proceedings for the purpose of conducting a qualitative investigation of the circumstances of the crime. In this regard, the authenticity of the statements of the person involved must be verified.

In addition, the analysis showed that the category of "admission of guilt" is inextricably linked with the sign of voluntariness. A number of researchers point out the need for a clear consolidation of guarantees of such voluntariness in national legislation. At the moment, the main guarantee in Russia is considered to be the provisions of the Constitution of the Russian Federation (Art. 21) prohibiting torture, violence and other cruel or degrading treatment or punishment. International legal acts are not an exception. For example, part 3 of Article 14 of the International Covenant on Civil and Political Rights states: "Everyone has the right, when considering any criminal charge brought against him, not to be forced to testify against himself or to plead guilty." In the framework of the criminal process, important factors in the legality of evidence, including testimony, are the participation of

witnesses and a defender; the absence of abuse by public authorities, as well as the integrity of the performance of official duties. The motive for establishing such guarantees is the illegality of obtaining the testimony of the accused. Turning to the negotiation procedure, voluntariness applies to both sides of the agreement, since it is impossible to force not only the suspect (accused), but also the prosecution side to cooperate. In this regard, the prosecutor's exercise of the right to refuse or change the cooperation agreement provided for in Article 317.2 of the Criminal Procedure Code of the Russian Federation should not affect the change in the testimony of the guilty person or the possibility of assessing the guilty person's consistent position when considering the case is considered by the court in the general procedure from the point of view of mitigating circumstances.

It remains important to achieve the goals of the reforms expressed by researchers, which are aimed at establishing a balance between compliance with the procedure of a qualitative investigation and the establishment of all circumstances, as well as protecting the rights and interests of participants in the process.[44] Perhaps this will be facilitated by the rejection of the influence of the positions of the participants in the procedural relationship. Mistakes made during the investigation and judicial review will be minimized.

Within this range of issues, holding a position on the prospective application of transactions with the expectation not only of guaranteed punishment of the perpetrators but also of prevention and subsequent socialization is not meaningless.

In addition, one should not lose sight of the content of confessions, which may differ significantly from the plan prepared by the investigating authorities. In this regard, the position on combining the concepts of 'admission of guilt' and "consent to the charge" continues to be relevant. If we turn to the current domestic legislation, the emphasis is solely on the latter. Thus, whether this is a flaw in the system or a deliberate choice by the legislator is left to the participant's understanding.

For the legitimate acceptance of a guilty plea and the conclusion of potential agreements, a regulated procedure for their application with a clear algorithm of actions and consequences is crucial.

Considering that the admission of guilt does not play a major role, neither in the conclusion of procedural agreements nor in criminal proceedings in general, we believe it would be advisable to highlight at the legislative level the procedure for concluding cooperation agreements and plea agreements. At the same time, it is impossible to allow a backlash in which such testimony can be treated as the worst of the evidence. It should piece together the full picture of what happened, which, in the end, will make it possible to make a legal decision regarding the participant

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[44] *Кмитюк Е.Н.* Международный опыт применения соглашений о признании вины // Вестник Нижегородской академии МВД России. 2013. № 21. С. 210–213 [Elena N. Kmityuk, *International Experience in the Application of Plea Agreements*, 21 Bulletin of the Nizhny Novgorod Academy of the Ministry of Internal Affairs of Russia 210 (2013)].

of the cooperation agreement itself, to bring the accomplices to justice and to restore the violated rights of the victims without significant costs on the part of public authorities. The effective operation of the mechanism should be ensured by representatives of all parties.

At the same time, the admission of guilt, as the basis of agreements, should under no circumstance, predetermine the course of the investigation and reduce the investigator's work by refusing to collect additional evidence on the circumstances of the case under investigation. Although there is a position based on which the essence of criminal proceedings is a dispute (conflict) between the parties. In this situation, if confessions have been received from a participant, thereby losing the whole point of continuing the dispute (for example, English law), then the trial loses interest for the parties and the further procedure for exercising the right to trial becomes mandatory.

In addition, we believe that the solution to the problem of court congestion (I should point out that in a number of countries it is the main reason for legalizing transactions with justice) will be facilitated by expanding the possibilities of alternative pre-trial procedures along with clear regulation of the categories of crimes related to them.

Undoubtedly, the interest of the investigating authorities, and subsequently the court, in a quick investigation and consideration of the case does not exclude additional benefits from potential agreements. In this regard, it is necessary to consider more closely the possibility of creating conditions for the attractiveness of confession-based.

Of course, there are risks associated with any agreement, but it is important to keep in mind that the investigation and consideration of a criminal case should be not only conducted quickly, but also to a high standard. In this regard, the investigator is charged with fulfilling the obligation to properly prove the guilt or innocence of the suspect (accused), conducting a comprehensive assessment of the evidence obtained, as well as determining the consequences of recognizing the testimony of the person with whom the pre-trial agreement was concluded as reliable. Criminal prosecution must be carried out in accordance with the guidelines of criminal proceedings, despite the presence of confessions of the accused. Only in such a case is it possible to exclude the illegality of the conviction.

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IN SEARCH OF A COMPARATIVE METHODOLOGY IN THE JURISPRUDENCE OF THE SOUTH AFRICAN CONSTITUTIONAL COURT

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This article examines whether a judicial methodology to the use of comparative law has developed in the jurisprudence of the South African Constitutional Court. It does so by examining 10 recent cases where the Constitutional Court has considered foreign law. The author finds that a clear legal methodology to the use of foreign law has not developed in the jurisprudence of the South African Constitutional Court. Foreign law is often relied on in a piecemeal fashion and these examples are often "cherry picked" with little or no justification provided by the Court. The Court still shows a preference for considering "Global North" experiences. In addition, the Court has mostly failed to consider the social realities and cultural considerations of the comparator countries vis-à-vis those of South Africa.

Keywords: South African Constitutional Court; comparative interpretation; legal methodology; comparative/transnational legal theory.

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Introduction

Comparative law must play an increasingly important role in our progressively globalized world. The internet has transformed the world into a global village, and with the advent of the fourth industrial revolution, it is foreseen that legal scholars will gain unprecedented access to resources that are needed to conduct comparative research. More information than ever before on foreign legal systems is available. Comparative law investigates how a different jurisdiction's solution to a legal problem can be used to address a domestic legal problem.[1] Comparative law, therefore, is problem orientated. It seeks to address the question of how a *functional* problem can be solved in a comparable way in another jurisdiction.[2] The aim of comparative interpretation is essentially to increase the persuasiveness of legal arguments.[3] The comparison should not be limited to rules of law but must also include considerations of legal culture and social realities.[4] It is not sufficient to merely consider the black-letter law of a foreign provision. Law is a cultural construct. To better understand what the law is and how it works in a society, one must dig deeper into the fundamental structure of the law.[5] One must learn to analyze a foreign country's law with caution, and one must transcend one's own cultural prejudices.[6]

According to section 39(1)(*c*) of the Constitution of the Republic of South Africa, 1996, "[w]hen interpreting the Bill of Rights, a court, tribunal or forum ... *may* consider foreign law."[7] This means that although courts can use foreign law to interpret domestic law, there is no obligation to do so. Foreign law does not bind South African courts as South African courts are required to administer law only within its own jurisdiction.[8] Foreign law, therefore, is non-binding and can only be used as a form of argumentation. As Ackerman has noted,

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1 Thomas M.J. Möllers, *Legal Methods* 99 (2020).

2 *Id*. at 284.

3 *Id*. at 285. *See also K. v. Minister of Safety and Security*, 2005 (6) S.A. 419 (CC), at 437, para. 35 (S. Afr.).

4 Möllers 2020, at 285.

5 Edward J. Eberle, *The Methodology of Comparative Law*, 16(1) Roger Williams U. L. Rev. 51, 52 (2011).

6 *Id*. at 53.

7 Own emphasis.

8 Möllers 2020, at 104.

> the right problem must, in the end, be discovered in one's own constitution and jurisprudence, but to see how other jurisdictions have identified and formulated similar problems can be of great use.[9]

In addition, comparative law can help identify legal and societal problems and it can also be an important tool to allow judges to confront their own biases and prejudices.[10]

In South Africa, as in other jurisdictions,[11] comparative law is regarded as but one element of interpretation alongside the other four traditional forms of interpretation.[12] That is grammatical,[13] systematic,[14] historic[15] and teleological[16] interpretation.[17] Teleo-

[9] Laurie W.H. Ackermann, *Constitutional Comparativism in South Africa: A Response to Sir Basil Markesinis and Jorg Fedtke*, 80(1) Tul. L. Rev. 169, 184 (2005).

[10] *Id*. at 185.

[11] Möllers 2020, at 104; Pierre-André Côté, *The Interpretation of Legislation in Canada* 193 (1984).

[12] Ellison Hahlo & H.R. Kahn, *The South African Legal System and its Background* (1973) first called for due consideration of these elements and it was based on the methods of interpretation advanced by von Savigny for the interpretation of pandectarian Roman law. Later, in contemporary discourse the fifth element of comparative interpretation was added. This is not to say, however that comparative law is an entirely new phenomenon. As Michal Bobek, *Comparative Reasoning in European Supreme Courts* § 2.1 (2013) has pointed out, comparative interpretation was regularly engaged in even prior to the formation of modern nation-states.

[13] Grammatical interpretation acknowledges that in all interpretation the statutory text should serve as a starting point and that the richness of the textual environment can assist the interpreter in determining the meaning of a statutory provision. Interpreters are required to observe the conventions of the natural language in which the provision is couched. *See* Lourens du Plessis, *Interpretation* in *Constitutional Law in South Africa* 32-208 (Stu Woolman et al. eds., 2008).

[14] Systematic interpretation requires that legislative provision be understood in light of the intra-textual and extra-textual environment of which the provision forms. Systematic interpretation requires that we understand a legislative provision in the light of the text of the Act (i.e. the Constitution) as a whole (the "intra-textual environment") and of principles outside of the Act (the "extra-textual environment"). The "intra-textual environment" includes the Preamble to the Act, the long title, the definition clause, the objects of an Act and interpretation provisions, headings above chapters and articles, and annexures. The "extra-textual environment" refers to the "wider network of enacted law and other normative law-texts such as precedents" as well as to "the political and constitutional order, society and its legally recognized interests and the international legal order." When these intra-textual and extra-textual text-components are not integrated with the particular statutory provision, it becomes disintegrated from the rest of the legal system and will be understood in isolation from each other. *See* du Plessis 2008, at 32-159–32-166; Laurence H. Tribe & Michael C. Dorf, *On Reading the Constitution* 21–30 (1991).

[15] Historical interpretation requires interpreters to consider the tradition from which a provision emerged, allowing the interpreter to consider materials relevant to the text's genesis and other historic events. Historical interpretation requires that the interpreter identify the historical situation that gave rise to the law, although it is sufficient that the spirit of the history be taken into account. *See* du Plessis 2008, at 32-160, 32-170.

[16] Teleological interpretation requires that statutes must be understood in light of their purpose. It is presumed that the purpose of all legislation is to advance broader societal purposes. Teleological interpretation endeavors to advance the values of the legal order. Du Plessis 2008, at 32-160–32-168.

[17] According to Lourens du Plessis, *The (Re)-Systemization of the Canons and Aids to Statutory Interpretation*, 122(3) S. Afr. L.J. 591, 611 (2005): "statutes ... ought not to be understood as 'entities' composed of, for instance, grammatical, systematic, purposive or historical 'elements': these 'elements' should rather be seen as simultaneously given, co-equal modes of existence or being that are 'on the move', overlapping and interacting." According to Wessel le Roux, *Directory Provisions, Section 39(2) of the Constitution*

logical interpretation is the dominant approach to the interpretation of law which has been adopted in South Africa by the Constitutional Court, and this approach seeks to animate the values and rights in the Constitution. Teleological interpretation requires that legal provisions must be understood in light of their purpose and in light of relevant constitutional rights and values.[18] The comparative method is supplementary and protective of teleological interpretation.[19] Constitutional rights and values are often drafted in vague terms, requiring that their exact scope and meaning are left to be determined by the judiciary. However, much guidance can be sought from other jurisdictions to give light to the provisions of the Constitution. The comparative dimension therefore is an important element of meaning and form of interpretation which can do much to assist interpreters to find the "best" meaning that is to be afforded a common law or statutory provision.

Whilst the earlier judges of the Constitutional Court have been described as "constitutional law enthusiasts,"[20] it is questionable whether the same could be said of the most recent occupants of this bench. In what follows, the article considers recent Constitutional Court cases in which the Court made use of comparative interpretation so as to deduce the trend in the Court's treatment of such examples. Although constitutional cases where the Court has utilized comparative interpretation are few and far between, it appears that there has not been a decline in the pace of judgments in which comparative law at least was partially determinative of the outcome of a matter. During the first decade of the existence of the Constitutional Court there were at least 26 such cases.[21] In the last five years the Constitutional Court has extensively utilized foreign law in at least 14 cases. However, it will be shown that, within this time frame, the Court has dealt with foreign law in a piecemeal, superficial

and the Ontology of Statutory Law: African Christian Democratic Party v. Electoral Commission, 21(2) S. Afr. Pub. L. 382, 398 (2006) this means that "a statutory norm can never finally come to rest on any one of its potential modes of being." Du Plessis therefore highlights the "structural complexity" and "many-sidedness" of legislative provisions and points out that their interpretation and the linguistic, systematic, teleological, historical and comparative elements of legislation should be weighed against one another without attributing a superior status to any one of these elements (at 612).

18 *See* Christo J. Botha, *Waarde-aktiverende Grondwetuitleg: Vergestalting van die Materiële Regstaat*, LLD thesis, University of South Africa (1996) (May 6, 2021), available at http://uir.unisa.ac.za/handle/10500/15624. The approach was best described in *African Christian Democratic Party v. Electoral Commission*, 2006 (3) S.A. 305 (CC), at 320, para. 34 (S. Afr.): "[I]n approaching the interpretation of provisions of ... legislation, courts ... must understand those provisions in the light of their legislative purpose within the overall ... [legislative] framework. That framework must be understood in the light of the important constitutional rights and values that are relevant." *See also Department of Land Affairs v. Goedgelegen Tropical Fruits Pty Ltd*., 2007 (6) S.A. 199 (CC) (S. Afr.). According to le Roux 2006, at 386 this "[b]roader approach" favoured by the Court has four distinct steps: First, the purpose of the provision must be established. Second, it should be asked if "that purpose would be obstructed by a literal interpretation of the provision." If that is the case, thirdly, "an alternative interpretation of the provision that 'understands' its central purpose" must be adopted. Fourthly, it must be ensured "that the purposive reading of the legislative provision also promotes the object, purport and spirit of the Bill of Rights."

19 Möllers 2020, at 105.

20 Du Plessis 2008, at 32-185.

21 Ackerman 2005, at 187–190.

and insufficient manner, often using comparative law superficially as support rather for clarification of South African legislative or common law provisions. In addition, there is still a clear preference for comparisons with the "Global North."[22] No clear methodological approach has developed in relation to the identification and use of comparative law.

First, the article considers the jurisprudential limits of the use of comparative law from a theoretical perspective and proposes a methodological approach to the use of comparative law. Second, the article considers and critically analyzes ten recent cases in which the Constitutional Court made use of foreign law. Thereafter, the article makes recommendations how comparative interpretation should proceed. Although the focus of the article is on the jurisprudence of South Africa's apex court, the findings and recommendations made herein will ultimately have implications for the judiciary and legal science at large. As the cases considered range from topics such as reproductive rights to intellectual property law, care has been taken not to impose any value judgment on the correctness of these judgments, but to consider only the Court's use of foreign law, although certain implications may flow from these findings.

1. Limitations and Methodology of Comparative Interpretation

Comparative law has been criticized for lacking a clear canon of methods. Instead, the courts and legal scholars have sought to delineate the limits of this method of interpretation. The first such limitation flows from the nature of the interpretive exercise. The task of the interpreting court is to interpret the South African legal provision and not, in the words of the Constitutional Court, "the wholesale importation of foreign doctrines and precedents." This is so because the comparative dimension is but one element of interpretation together with the grammatical, historical, systematic and teleological dimensions. The comparative dimension should be an element of persuasion, but it can never be conclusive. In addition, a national court is tasked with interpreting domestic law, and the wholesale importation of foreign law, therefore, may be seen as undemocratic, and it may encroach upon the legislative powers of Parliament.[23]

There is also agreement that it is dangerous to seek common ground between jurisdictions where it does not exist. The Constitutional Court has warned about the dangers and limits of comparative research. In *K. v. Minister of Safety and Security*[24]

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[22] The "Global North" refers to constitutional order in the Euro-American tradition, whilst the "Global South" refers to constitutional orders in Asia, Africa, and Latin America. *See* Philipp Dann et al., *The Southern Turn in Comparative Constitutional Law* in *The Global South and Comparative Constitutional Law* 1 (Philipp Dann et al. eds., 2020).

[23] Jo E.K. Murkens, *Comparative Constitutional Law in the Courts: Reflections on the Originalists' Objections*, 41 Verfassung und Recht in Übersee 32, 34 (2008).

[24] *K.*, *supra* note 3, at 419.

the Constitutional Court warned that it is important not "to equate legal institutions which are not, in truth, comparable."[25] The Court, however, went on to hold that "the approach of other legal systems remains of relevance to us" and that "[i]t would seem unduly parochial to consider that no guidance, whether positive or negative, could be drawn from other legal systems' grappling with issues similar to those with which we are confronted."[26] The Court found that the responses of other legal systems might enlighten the understanding of our law and assist us in developing it further.[27] In *H. v. Fetal Assessment Centre*[28] the Constitutional Court held that

> [w]here a case potentially has both moral and legal implications in line with the importance and nature of those in this case, it would be prudent to determine whether similar legal questions have arisen in other jurisdictions.[29]

The Court, however, warned that in making such a determination, it is necessary to consider the context in which these problems have arisen and their similarities and differences to the South African context.

> Of importance is the reasoning used to justify the conclusion reached in each of the foreign jurisdictions considered, and whether such reasoning is possible in light of the Constitution's normative framework and our social context.[30]

So, too, the Constitutional Court in *S. v. Makwanyane*[31] warned that

> [i]n dealing with comparative law, we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution. We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.[32]

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25 *K., supra* note 3, at 437, para. 34.

26 *Id.* at 437, para. 34.

27 *Id.* at 437, para. 35.

28 2015 (2) S.A. 193 (CC) (S. Afr.).

29 *Id*. at 204–205, para. 32.

30 *Id*.

31 1995 (3) S.A. 391 (CC) (S. Afr.).

32 *Id.* at 415, para. 39.

Möllers has identified a pertinent reason why a court in Germany would, generally, refrain from using comparative law.[33] Courts and lawyers may have insufficient knowledge about foreign law. In Germany, section 293 of the *Zivilprozessordnung* or Code of Civil Procedure allows the court to order a report to be drawn up by an expert witness. As the use of comparative law, therefore, would be too costly and time-consuming, the use of comparative law in relatively straightforwarded cases generally is avoided. As the use of comparative law by the courts are voluntary, the parties to a case will have to justify to the courts why foreign law should be utilized.[34] The author, however, has identified three instances where so-called "non-binding" comparative law[35] (*freiwillige Rechtsvergleichung*) is utilized by German courts. First, foreign law is often used when no comparable case has previously been decided on the matter and there is therefore no precedent in national law. So, too, the South African Constitutional Court in *Sanderson v. Attorney-General, Eastern Cape*[36] acknowledged that

> [c]omparative research is generally valuable and is all the more so when dealing with problems new to our jurisprudence but well developed in mature constitutional democracies.[37]

Second, foreign law may be used when judges want to deviate from previous precedents. Although the United States Supreme Court rarely utilizes foreign law in interpreting U.S. law, the Court has utilized foreign law when justifying a divergence from a previous approach.[38] Third, according to the author, the German Federal Constitutional Court (*Bundesverfassungsgericht*) "always uses a comparative approach when substantiating fundamental rights." This is so as constitutional provisions are generally drafted in vague and open-ended terms that require substantiation and are ideally suited for comparative interpretation. A wider viewpoint is particularly helpful if there is a lack of sufficient national experience.

A pertinent question in comparative interpretation relates to the selection of appropriate legal systems with which to compare. Möllers considers the question of whether a court must utilize a legal solution that is most common or must search for the best possible solution (even if most jurisdictions hold the opposite position).[39]

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33 Möllers 2020, at 103–104.

34 *Id.* at 104.

35 In the German context, courts are obligated to take account of comparative law during interpretation under European law, uniform international law and international law.

36 1998 (2) S.A. 38 (CC) (S. Afr.).

37 *Id.* at 53, para. 26.

38 *See Atkins v. Virginia*, 536 U.S. 304 (2002), at 316, n. 21; *Roper v. Simmons*, 543 U.S. 551 (2005), at 561, 575.

39 Möllers 2020, at 285.

While some argue that the most common legal solution should be favored as these positions are more convincing, others argue that the legal position of those countries with which South Africa shares common values should be favored. It is the second approach which best resonates with teleological interpretation. This approach is also in line with the approach of the South African Constitutional Court that the interpretation which *better* reflects the structural provisions of the Constitution should be adopted.[40]

The methodological concern about "forum shopping" or "cherry-picking," in which a court decides a preferred outcome and simply surveys international courts to find a source to achieve the desired goal, is one of the most common objections to the use of foreign research.[41] There are three important and distinct reasons why an interpreter should consider the comparative experience of other countries in dealing with a specific problem. First, it may be argued that norms and principles relevant to legal problems are cut from a universal cloth and that all courts are engaged in dealing with the same sets of problems.[42] Those norms are understood as universal legal principles.[43] According to this view,

> different legal systems give the same or very similar solutions to the same problems of life, despite the great differences in their historical development, conceptual structure and style of operation.[44]

Second, it is argued that legal systems are often bound by complicated historical relationships and that those relationships are sufficient justification to import and apply foreign law norms.[45] Courts favor comparisons with judicial systems that share our legal tradition, and which historically have had an impact on their understanding of the problem.[46] Although it is trite that this form of genealogical comparative

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40 *Wary Holdings (Pty) Ltd. v. Stalwo (Pty) Ltd.*, 2009 (1) S.A. 337 (CC), at 356, para. 46.

41 Andrew Friedman, *Beyond Cherry-Picking: Selection Criteria for the Use of Foreign Law in Domestic Constitutional Jurisprudence*, 44(4) Suffolk U. L. Rev. 873, 875 (2011).

42 Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74(3) Ind. L.J. 819, 825 (1999).

43 *Id.* at 841.

44 *Id*. In *Bernstein v. Bester*, 1996 (2) S.A. 751 (CC), at 811, para. 133 the Constitutional Court held that "particularly where Courts in exemplary jurisdictions have grappled with universal issues confronting us … it would be folly not to ascertain how the jurists of that country have interpreted their precedential provision."

45 *Id.* at 838 & 866.

46 In *K.*, *supra* note 3, at 437, para. 34 the Constitutional Court acknowledged the importance of such genealogical comparators: "There can be no doubt that it will often be helpful for our courts to consider the approach of other jurisdictions to problems that may be similar to our own. Counsel for the respondent argued that because our common-law principles of delict grew from the system of

interpretation is exceptionally useful and relevant, it may, however, be problematic from a decolonization of legal thought perspective, as the countries with which South Africa shares historical connections often are colonizer countries or other colonized countries.[47] So, too, it has become common place for countries (including South Africa) to "borrow" a legal solution from another state. In these cases, it may be necessary for a court to look to the law and its interpretation in the country of origin to shed light on the purpose of such a legal provision.[48] Courts must still consider these purposes in light of South African constitutional and public values and courts must be careful not to also "borrow" legal interpretation, but to engage with all elements of interpretation to come to a South African understanding.

Third, courts identify the normative and factual assumptions that underlie their understanding of any given legal problem by engaging with comparable jurisprudence in other jurisdictions.[49] According to this view, comparative law exposes the practices of one's own legal system as contingent and circumstantial, not transcendent and timeless. It's "dialogical" because courts take this approach to engage in dialogue with comparative jurisprudence in order to better understand their own constitutional system and jurisprudence. It also furthers legal self-understanding as it invites the comparer to compare those assumptions against the assumptions that legal doctrine in its own system both reflects and constitutes.[50]

Roman-Dutch law applied in Holland, a province of the Netherlands, in the 17th century, we should not have regard to judgments or reasoning of other legal systems. He submitted that the conceptual nature of our law of delict, based as it is on general principles of liability, is different from the casuistic character of the law of torts in common-law countries. These differences, he submitted, render reliance on such law dangerous. Counsel is correct in drawing our attention to the different conceptual bases of our law and other legal systems. As in all exercises in legal comparativism, it is important to be astute not to equate legal institutions which are not, in truth, comparable." In *Fose v. Minister of Safety and Security*, 1997 (3) S.A. 786 (CC), at 833, para. 90 the Court declined "to engage in a debate about the merits or otherwise of remedies devised by jurisdictions whose common law relating to remedies for civil wrongs bears no resemblance to ours and whose constitutional provisions have but a passing similarity to our section 7(4)(a)."

47 *See* part 4 hereof and the discussion of decolonization of legal thought in the context of comparative interpretation therein.

48 Bobek 2013, para. 2.2.

49 Choudhry 1999, at 835, 855. Authority for this method of comparison may also be found in the judgment of *K*, supra note 3, at 437, para. 35 where the Constitutional Court held that "[i]t would seem unduly parochial to consider that no guidance, whether positive or negative, could be drawn from other legal systems' grappling with issues similar to those with which we are confronted. Consideration of the responses of other legal systems may enlighten us in analysing our own law, and assist us in developing it further. It is for this very reason that our Constitution contains an express provision authorising courts to consider the law of other countries when interpreting the Bill of Rights. It is clear that in looking to the jurisprudence of other countries, all the dangers of shallow comparativism must be avoided. To forbid any comparative review because of those risks, however, would be to deprive our legal system of the benefits of the learning and wisdom to be found in other jurisdictions. Our courts will look at other jurisdictions for enlightenment and assistance in developing our own law."

50 *Id*.

On this view, comparisons with jurisdictions that have opposite, or different legal principles or social realities are useful exactly because such a comparison exposes assumptions that underly national legal understanding. Here, legal solutions may be convincing even if the outcome is opposed because the interpreter points out differences in law, values, facts or social realities.[51]

Ultimately, however, the goal of comparative interpretation is to search for "the same order of tasks under comparable social circumstances, and not for isolated traits of one or the other system."[52] According to Friedman, "[o]ne cannot discount the extraordinary way in which the society that surrounds the court both influences and is influenced by the decisions made within its walls" and that, therefore, it is "imperative to consider factors other than the law as it exists on paper."[53] The author notes that

> [o]ften, decisions made by societies with high economic power and great resources would not have the same effect in countries with less economic strength.[54]

So, too, courts will have to take cognizance of social realities such as race, ethnicity and religion. What the above highlights is that in searching for the same order of tasks under comparable social circumstances it may be useful to consider not only functional problems from a universalist perspective or genealogical perspective, but also to consider opposite and different experiences so as to shine a light on our own legal assumptions. This is possible, because ultimately what is of importance is not the outcome in foreign jurisdictions but the legal reasoning that was employed in those jurisdictions. As du Plessis noted,

> [w]here the differences between systems go to their historical and conceptual roots, one must simply be careful to avoid the dangers of shallow comparativism and determine – on the merits – whether the foreign jurisprudence is valuable and persuasive.[55]

In order to operate as a legal science, comparative law must have a sound methodology. However, the South African judiciary has given little guidance as to how foreign law research is to be undertaken. Eberle has suggested a four-part comparative law methodology that can be applied "carefully, neutrally, and vigorously."[56]

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51 Möllers 2020, at 286.

52 *Id*. at 284.

53 Friedman 2011, at 889.

54 *Id.*

55 Du Plessis 2008, at 32-187.

56 Eberle 2011, at 57–58.

The first part (Rule 1) is acquiring the skills of a comparativist in order to evaluate law clearly, objectively and neutrally. The second part (Rule 2) is an evaluation of the law as it is expressed concretely, in words, action or orality. We can refer to this as the external law. Once we get an understanding of the law as actually stated, we can move on to the third part (Rule 3) of the methodology, namely, an evaluation of how the law actually operates within a culture. We might refer to this as law in action or internal law. Law in action is quite important, even in Western culture, as the words in the text often take on a different meaning as applied. Law in action is even more important for non-Western cultures, as here the law may be more a result of tradition, custom or orality.

To do this, we need to examine the underlying substructural elements within the culture that drive and influence the law. After we have evaluated the law as stated and the law in action, we can assemble our data (Rule 4) and conclude with comparative observations that can shed light on both a foreign and our own legal culture.

What the first rule advocates is that legal practitioners should be adequately trained in the skills essential to conduct comparative research. Sadly, this aspect often is neglected by South African law schools and by the bar and sidebar. The second rule highlights the importance of finding and understanding the doctrinal matrix within which a legal provision is contained in a foreign comparator's legal system. The third rule highlights the importance of considering such a doctrinal position within the context of extra-legal factors such as cultural, factual, structural and societal considerations that underlie the doctrinal position. The fourth rule, where we assemble "data" and make comparative observations, inevitably will involve considering such comparative "data" together with the other elements of meaning (grammatical, systematic, historical and teleological). This rule again highlights the fact that the comparative dimensions may never be decisive but that it could be important to shed light on both a foreign and our own legal culture. Unfortunately, this proposal neglects the question of how foreign law comparators should be chosen. This article will ultimately attempt to make certain suggestions as to how courts should approach this question.

What this proposed methodology also neglects is what Markesinis and Fedtke have referred to as the "mental disposition as a factor impeding recourse to foreign law."[57] The authors start by identifying several pragmatic impediments for the use of comparative law such as "judge's lack of time, lack of expertise, lack of materials in his own language, inability to be up-to-date, deep differences in the background of each system" and so on.[58] Some judges have been openly opposed to the use of foreign law at all because of jurisprudential reasons.[59] According to the authors, judicial mentality

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[57] Basil Markesinis & Jorg Fedtke, *Judicial Recourse to Foreign Law – A New Source of Inspiration?* 173 (2006).

[58] *Id*.

[59] In *Roper v. Simmons*, 125 S.Ct. 1183, 1229 (2005) Justice Scalia stressed that he did not think that "approval by 'other nations and peoples' should buttress our commitment to American principles."

is the biggest obstacle to using comparative law.[60] Comparative interpretation has been described as a way of suspending "self-centric and self-satisfied normality."[61] This, however, will require a change in the mental presupposition of many jurists.

2. South African Constitutional Court Cases with Consideration of Foreign Law

2.1. A.B. v. Minister of Social Development

In *A.B. v. Minister of Social Development*[62] the Constitutional Court referred to Indian, Canadian and United States law in determining the constitutionality of section 294 of the Children's Act. In this case a single woman considered a surrogate motherhood agreement but, being incapable of donating a gamete, she could not legally enter into a surrogacy agreement as section 294 of the Children's Act required that the gametes of at least one commissioning parent be used in the conception of the child contemplated by the surrogacy agreement.[63] The majority of the Court found that the requirement of donor gamete(s) in the context of surrogacy indeed served a rational purpose of creating a bond between the child and the commissioning parent or parents.[64] It was argued that section 294 of the Children's Act violated the right to bodily integrity.[65] The majority, however, used the Indian, Canadian and United States experiences to strengthen the finding that "security of the person encompasses personal autonomy involving control over a person's bodily integrity."[66] The majority noted the relevant legal positions in these jurisdictions as follows:[67]

• In Canada, individual autonomy and dignity are not freestanding rights but they are encompassed in the right protected in section 7 of the Canadian Charter of Rights and Freedoms.[68]

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60 Markesinis & Fedtke 2006, at 173.

61 Pierre Legrand, *Jameses at Play: A Tractation on the Comparison of Laws*, 65(suppl_1) Am. J. Comp. L. 1 (2017).

62 2017 (3) S.A. 570 (CC) (S. Afr.).

63 38 of 2005 (S. Afr.).

64 *A.B.*, *supra* note 62, at 652, para. 287.

65 S. Afr. Constitution, 1996, § 12(2) provides that "[e]veryone has the right to bodily and psychological integrity, which includes the right (*a*) to make decisions concerning reproduction; (*b*) to security in and control over their body; and (*c*) not to be subjected to medical or scientific experiments without their informed consent."

66 *A.B.*, *supra* note 62, at 661–662, para. 314.

67 *Id.* at 661, note 305.

68 The Constitution Act, 1982 (Can.). The provisions provide that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with principles of fundamental justice."

• The Supreme Court of Canada has held that the sections of the Criminal Code which restrained access to abortion interfered with the liberty and security of the person and that security of the person encompasses a notion of personal autonomy involving control over one's bodily integrity free from state interference.[69]

• The Supreme Court of Canada has also held that the notion was said to extend to an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering.[70]

• The Supreme Court of Canada also confirmed that underlying the rights to liberty and security of the person is a concern for the protection of individual autonomy and dignity.[71]

• Article 21 of the Indian Constitution provides that "[n]o person shall be deprived of his life or personal liberty except according to procedure established by law."

• The Supreme Court of India applied Article 21 to mean that a woman's right to make reproductive choices is also a dimension of "personal liberty" as understood under Article 21 of the Constitution of India and that reproductive choices can be exercised to procreate as well as to abstain from procreating. The Court found that the crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected and that there should be no restriction in the exercise of reproductive choices.[72]

• In the United States of America there is constitutional right to bodily or psychological integrity. Cases which have addressed issues related to these aspects have generally been grounded in the rights that no person shall be deprived of life, liberty or property without due process of law. In addition, the Supreme Court has developed the rights to liberty and privacy in cases involving substantive due process.[73]

The majority, therefore, found that the argument that the donor gametes decision entails a decision regarding the woman's reproduction thus is misconceived. The majority found that the right to reproductive autonomy is on the individual woman's own body and not the body of another woman.[74]

The minority of the Court, however, disagreed and showed that the very cases on which the majority of the court relied in fact favored a broader interpretation. The minority stated that the cases referred to allowed for an interpretation of the right to reproductive autonomy to include not only a physical dimension but also a psychological component. The minority of the Court however criticized the majority's use of comparators because of the following factors:[75]

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69 *R. v. Morgentaler* [1988] 1 S.C.R. 30 (Can.).

70 *New Brunswick (Minister of Health and Community Services) v. G (J)* [1999] 3 S.C.R. 46 (Can.).

71 *Carter v. Canada (Attorney General)* [2015] 1 S.C.R. 331 (Can.).

72 *Suchita Srivastava v. Chandigarh Administration*, A.I.R. 2010 S.C. 235 (Ind.).

73 *Roe v. Wade*, 410 U.S. 113 (1973) (U.S.) and *Eisenstaedt v. Baird*, 405 U.S. (1972) (U.S.).

74 *Id.* at 660–661, para. 313.

75 *Id.* at 596–597, para. 80.

• The Canadian, Indian and United States authorities referred to by the majority all identify the psychological harm of preventing the decision in question. However, none of these cases held that the interests were protected only because it is the person's physical corpus that is affected.

• None of the jurisdictions which were referred to by the majority has a specific, constitutionally protected right to make decisions concerning reproduction.

• The Canadian and Indian Constitutions protect personal liberty and security of the person in a manner akin to our section 12(1).

• The comparative law thus does not support the interpretation that only physical harm to a person's body can give rise to a violation of section 12(2)(*a*).

The minority of the Court found that section 294 violated the right to make decisions concerning reproduction.[76]

It is puzzling that the two differing opinions were able to rely on the very same authority to come to two very different conclusions. Of course, this may simply be a function of language in which meaning cannot always be fully conveyed within the text use by an original author. The texts of judgments (as is the case with all law texts) are always open to interpretation. Indeed, as Endicott has pointed out, "there is no straightforward, general relation between the language used in a legal instrument to make law, and the law that is made."[77] A more compelling argument, however, may be that both the majority and the minority judgments used comparative examples as support rather than clarification. This argument is highlighted by the fact that both judgments fail to identify any reasonable justifications as to why these three jurisdictions had been chosen as comparators. Were these examples the only ones that counsel presented to the Court? In fact, these examples were not mentioned in the parties' pleadings.[78] Is it because the right to reproductive autonomy is cut from a universal cloth or rather because all three comparators are from within the Anglo-American legal fraternity which makes access to and comprehension of these legal materials more palatable to South African jurists?

Potentially, these comparators could also have been used to show why the South African interpretation of the right to reproductive autonomy should be different, especially as none of the jurisdictions referred to have a specific, constitutionally-protected right to reproductive autonomy (as in fact the minority judgment pointed out). What is also highly problematic in addition to the fact that the cited jurisdictions

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[76] *Roe, supra* note 73, at 629, para. 214.

[77] Timothy A.O. Endicott, *The Value of Vagueness* in *Philosophical Foundations of Language and Law* 14, 16 (Andrei Marmor & Scott Soames eds., 2013).

[78] However, in the *amicus curiae* submissions of the Centre for Child Law (Mar. 21, 2021), available at http://www.saflii.org/za/cases/ZACC/2016/43hoa.pdf, the law of Sweden, the United Kingdom, Switzerland, Austria, New Zealand, Iceland, several Australian states and the Netherlands was used as these countries protect the rights of the child to know the identity of their biological parents so as to support the argument that, because South African laws has not yet formalized the right to know one's genetic parents, section 294 is constitutionally defensible based on the right of children to know the identity of their biological parents.

function within different rights-based contexts, is the fact that the case law referred to deals with vastly different contexts (abortion rights as supposed to surrogacy rights). What both judgments attempt to do is to abstract general principles from these cases when these cases were applicable to very specific factual scenarios. It is problematic to deduce from these judgments' general principles when the findings of the courts referred to perhaps never sought to specifically answer the question of whether or not the right to reproductive autonomy incorporates a psychological component.

Instead, it would have been more insightful if the judgments would have considered case law that was delivered specifically on surrogacy requirements as well as the legislative requirements for surrogacy in other countries. It would have been insightful to note if other countries impose similar limitations as in South Africa. Unfortunately, an investigation into this matter is beyond the scope of this article. The court *a quo* (the High Court)[79] referred to "extensive literature regarding the statutory or regulatory framework in numerous foreign legal dispensations."[80] The High Court referred to several examples where foreign jurisdictions require a genetic link for surrogacy agreements (such as in the United Kingdom,[81] several Australian states[82] and The Netherlands)[83] but also to examples where foreign jurisdictions do not require a genetic link for surrogacy agreements (such as Greece,[84] Canada[85] and the Australian state of Tasmania).[86] Interestingly, the High Court noted that different U.S. states diverged in respect of their approach.[87] It is curious that the Constitutional Court would consider the nature of a constitutional right in both Canada and the United States without also considering if specific legislative provisions within these countries accord with the view of the constitutional right or are seen as a justifiable limitation thereto. For example, the fact that Canadian law does not require a genetic link for surrogacy agreements therefore tends to conform with the minority's view that the right to reproductive autonomy includes a physical and psychological component. It would have been more useful had the Court made reference to both the constitutional right within a foreign jurisdiction and the legislative provisions that impact upon it or which give effect to that right.

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79 *A.B. v. Minister of Social Development*, 2016 (2) S.A. 27 (GP) (S. Afr.).

80 *Id.* at 40–41, para. 47.

81 *Id.* at 41–42, para. 49.

82 *Id.* at 42, para. 50.

83 *Id.* at 42, para. 51.

84 *Id.* at 42, para. 52.

85 *Id.* at 43, para. 54.

86 *Id.* at 43, para. 55.

87 *Id.* at 43, para. 53.

2.2. Ascendis Animal Health (Pty) Limited v. Merck Sharpe Dohme Corporation

Another Constitutional Court case where the contextual correctness of reference to foreign legal systems was highlighted was that of *Ascendis Animal Health (Pty) Limited v. Merck Sharpe Dohme Corporation*.[88] In this matter Ascendis instituted patent revocation proceedings against Merck and Merial's patent, claiming that a certain patent was invalid as it lacked novelty and inventiveness. Merck and Merial instituted proceedings claiming damages against Ascendis, in which they claimed that Ascendis had infringed Merck and Merial's patent. The Court had to consider whether a matter, having been heard by the Commissioner of Patents, was *res judicata*, or if further appeal was possible. In the so-called second judgment (which it is more prudent to consider first) it was held that a previously unsuccessful revocation applicant generally, though not invariably, is precluded from raising the validity of the patent as a defense to a subsequent damage claim. In coming to this conclusion, the second judgment referred to three foreign jurisdictions:[89]

• Validity challenges and damages claims are strictly separated in Germany. Specialist courts are in charge of deciding either issue. This raises the possibility of erroneous validity determinations. However, under German law, validity challenges in damages proceedings are prohibited.

• In the United States, a unitary system is in place, with challenges and damages claims being heard in the same court. Inter parties review is now permitted before the Patent and Trademark Office (PTO), signaling a shift to a more bifurcated system. Defendants were shielded from the expense and risk associated with patent proceedings by establishing a separate forum for expedited validity challenges. The penalty, on the other hand, was duplicated validity challenges. As a result, the legislation included a statutory form of estoppel. An unsuccessful challenger is thus barred from raising any previously relied-upon or reasonably raiseable ground during the challenge.

• In Japan, patent validity can be raised as a defense in infringement proceedings, but the court that awards damages has no authority to revoke or declare the patent invalid.

The first judgment held that it would be improper for the Court to conclude that the findings in the revocation proceedings have a final effect and considered the second judgment's reference to the three jurisdictions cited as wholly inappropriate.

The second judgment relies on an analysis of patent laws in three foreign jurisdictions primarily – Germany, the United States and Japan. In essence, the argument put forward is that in each of these three jurisdictions statutes have been written to prevent a litigant from litigating over the validity of a patent in a revocation application and then subsequently in a separate infringement or damages dispute between the same parties. I do not agree with the conclusion from this analysis. The

[88] 2020 (1) S.A. 327 (CC) (S. Afr.).

[89] *Id.* at 362–364, paras. 125–127.

argument in the second judgment, that all of these jurisdictions deemed it necessary to legislate to create an explicit rule, lends support to the fact that under common law, the applicant's defense of invalidity based on new causes of action is not prohibited by *res judicata*. More importantly, these foreign jurisdictions are all examination states. This means that by the time the first revocation proceeding between the two parties begins the State has already tested and at least initially verified the validity of the patent on all of the statutory grounds creating causes of action against validity.[90]

What the first judgment highlights is that comparisons with other jurisdictions that have different legal dispensations are inappropriate. The second judgment therefore seemingly falls foul of the warning in *K.* not to equate legal institutions that are not comparable. Legislative provisions are adopted to cure some real or perceived societal mischief. The fact that other jurisdictions had adopted legislation to deal with patent revocation appeals highlights the fact that the South African legislature might need to consider adopting similar legislation. However, in the absence of such legislation in South Africa, it would be wrong to deduce that such adopted legal principles elsewhere also reflect the South African situation. The first judgment therefore was right to point out that the fact that these jurisdictions adopted specific legislative measures to deal with the matter which had changed the common law position in those countries means that the South African position (in the absence of any similar legislative measures) probably is akin to the common law position in those countries prior to legislative intervention. Barring the courts' powers to develop the common law and to provide constitutional remedies in certain strict circumstances, South African courts cannot source legal principles from elsewhere. This would be an encroachment on the legislative powers of Parliament. At most, our courts can only use foreign law to shine a light on and to clarify the interpretation of South African law.

Again, it may be questioned why the Court chose the three jurisdictions in question as comparators. No justification for these foreign examples was provided by the Court and especially the example of Japan with which South Africa has no historic ties seems questionable. The parties did not point the Court to any comparative experience in their heads of argument.[91] The court *a quo* also made no reference to any foreign law.[92]

2.3. Centre for Child Law v. Media 24 Limited

In *Centre for Child Law v. Media 24 Limited*[93] the Constitutional Court considered the scope of protection provided by section 154(3) of the Criminal Procedure Act (CPA)[94]

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90 *Ascendis Animal Health (Pty) Limited, supra* note 88, at 354, paras. 99–100.

91 Case No. CCT 212/2018 (Mar. 22, 2021), available at http://www.saflii.org/za/cases/ZACC/2019/41hoa.pdf.

92 *See Cipla Agrimed (Pty) Ltd. v. Merck Sharp Dohme Corporation*, 2018 (6) S.A. 440 (SCA) (S. Afr.).

93 2020 (4) S.A. 319 (CC) (S. Afr.).

94 51 of 1977 (S. Afr.).

for the anonymity of child victims, witnesses and accused in criminal proceedings. The provisions provide that

> [n]o person shall publish in any manner whatever any information which reveals or may reveal the identity of an *accused* under the age of 18 years or of a *witness* at criminal proceedings who is under the age of 18 years.[95]

In this case the Centre for Child Law sought to protect a victim of kidnapping from media onslaughts. The first judgment held that the exclusion of child *victims* in section 154(3) was unconstitutional as it limited the right to equality, privacy and dignity and also infringes the best interests of the child. These limitations could not be justified. The Court also held that a person who is subjected to such protection does not forfeit the protections upon reaching the age of 18 but may consent to the publication of their identity after reaching adulthood or may approach a competent court. In coming to its conclusion, the Court primarily looked to the Indian and Canadian experiences.[96] The Court noted that the Indian judiciary held that it was clear that the intention of the Indian legislature was to ensure that child victims should not be identifiable, so that they do not face hostile discrimination or harassment in the future.[97] The Supreme Court of Canada has held that the prohibition on the disclosure of identifying content represented only minimal harm to the media's rights.[98] The Court however held that the media could publish non-identifying content.[99] In acknowledging the importance of reporting rape and sexual offences in the media, the Indian Supreme Court in *Saxena* emphasized that the media can still fulfil this important duty without disclosing the name and identity of the child victim. The Court also referred to legislative provisions of India, Canada, New Zealand and the Australian state of New-South Wales.[100]

In commenting on the principle of "open justice," which the Court found to be a recognized principle in foreign law,[101] the Court looked to the United Kingdom to find that "[t]he media respondents have overlooked the nuances of the principle."[102]

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[95] Emphasis added. However, the provision states that "the presiding judge or judicial officer may authorize the publication of so much of such information as he may deem fit if the publication thereof would in his opinion be just and equitable and in the interest of any particular person."

[96] *Centre for Child Law*, *supra* note 93, at 335, para. 34, 342, para. 58.

[97] *Nipun Saxena v. Union of India* [2012] 565 W.P. (C) (Ind.), para. 11 and *Aju Varghese v. The State of Kerala* [2017] 5247 M.C. (Ind.), para. 8.

[98] *Canadian Newspapers Co. v. Canada (Attorney General)* [1988] 2 S.C.R. 122 (Can.), at 123-4.

[99] *A.B. v. Bragg Communications Inc.* [2012] S.C.R. 567 (Can.), para. 26.

[100] *Id.* at 335, note 30.

[101] *Id.* at 353–354, para. 94.

[102] *Id.* at 354–355, para. 99.

The Court also referred to the Canadian Supreme Court[103] who held that while freedom of the press is an important value which should not be hampered lightly, it must be recognized that it has limits.[104]

In relation to the matter of ongoing protection, the Court proceeded to "gauge what options are available elsewhere, and to consider if they would work in South Africa's unique context."[105]

To this end, the Court referred to Australia, Canada, the United Kingdom, New South Wales, England and Wales.[106]

The two partially dissenting judgments made no reference to foreign law at all. The Court was significantly assisted in using foreign law as the parties' heads of argument contained detailed references to foreign law.[107] There is no doubt that the majority's approach was contextually more appropriate and therefore more sound from a legal-scientific perspective. Nevertheless, in its choice of comparators, the Court only made use of examples from within the Anglo-American legal fraternity and indeed they were only referred to these examples by the parties. The Court referred only to the law of a former colonial master and countries colonized by that colonial master. Of course, there is no doubt that due to the genealogy of the South African legal system, the analysis of the law of countries within the European and Anglo-American systems remains entirely relevant due to South Africa's historic relationship with these countries. However, the topic under consideration is not one that is particular to the Anglo-American or European legal tradition and surely is one that is cut from a universal cloth.

In the context of decolonization of legal thought, it may be argued that the Court's use of examples only from within the Anglo-American legal tradition is inappropriate. Munshi has proposed three legal strategies for comparative legal scholars in general to decolonize legal thought which could have been utilized by the Court.[108] First, the author argues that comparators could abandon the practice of comparison itself, instead adopting a worldly orientation and embracing "the notion that all study is comparative."[109] An example of such a practice would be the way in which neighboring Southern African countries refer to the law of South Africa, as if South African law is applicable to that country and without distinguishing

103 *Canadian Newspapers Co.*, *supra* note 98, at 123–124.

104 *Centre for Child Law*, *supra* note 93, at 356–357, para. 106.

105 *Id.* at 357–358, para. 110.

106 *Id.*

107 Case No. CCT 212/2018, *supra* note 91.

108 Sherally Munshi, *Comparative Law and Decolonizing Critique*, 65(suppl_1) Am. J. Comp. L. 207 (2017). The fourth, that comparative law could move to a "relational" approach to race and racism so as to uncover the colonial roots of contemporary nation-state and racial forms (232), is inapplicable to the current factual context.

109 *Id.* at 223.

between their own domestic law and South African law.[110] Although this phenomenon may be attributed to the fact that most legal scholars of South African neighboring countries are educated in the South African legal tradition and not because of any demonstrable cognitive choice. The wording of the constitutional provision that interpreters *may* have regard to foreign law in addition to nationalist sentiments, will in all likelihood be a serious impediment to the South African judiciary adopting such an approach. In addition, such an approach will arguably allow the courts to create law as they "import" legal principles from elsewhere into South African law and therefore encroach on the powers of Parliament.

Second, comparators could decenter Europe from the focus of their enquiry and broaden the "cultural scope" of the discipline.[111] This arguably is the most achievable of the strategies. The Court could easily have considered foreign law examples from jurisdictions other than those in the Anglo-American and European traditions. Of particular reference could be a consideration of the law of other developing countries and African countries. It is also of importance to consider countries such as Brazil, Russia, India and China with whom South Africa has economic, political and social ties.[112] Third, comparators could explore "the foreignness that lies within a nation's borders."[113] To this end, the Court could, for example, have asked how traditional African kinship societies dealt with cases of childhood victims of crimes. An analysis of the practices and structures of traditional African kinship societies may provide insight into human nature that is unencumbered by the complexities of the modern world. Analyzing older cultures that existed prior to the development of legal systems can provide valuable insight into the fundamental elements and function of modern societies.[114]

2.4. Competition Commission of South Africa v. Standard Bank of South Africa Limited

In *Competition Commission of South Africa v. Standard Bank of South Africa Limited*[115] the Competition Commission of South Africa (Commission) referred

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110 *See, e.g.*, the Zimbabwean Constitutional Court case of *S v. Chokuramba Justice for Children's Trust* [2019] Z.W.C.C. 10 (3 April 2019) (Zim.) where the Court referred to South African cases as if it is domestic law. For example: "It is important that the rule be strictly complied with to ensure that the orders that need to be confirmed are brought to the attention of the Court timeously. This is of particular importance in cases where litigants are not represented." Indeed, the majority of cases referred to by the Zimbabwean Constitutional Court are South African cases and the Court also referred to South African legal textbooks.

111 Munshi 2017, at 221.

112 *See* Lucia Scaffardi, *BRICS, a Multi-Centre Legal Network*, 5 Beijing L. Rev. 140 (2014).

113 *Id.* at 224.

114 Eberle 2011, at 55.

115 *Competition Commission of South Africa v. Standard Bank of South Africa Limited; Competition Commission of South Africa v. Standard Bank of South Africa Limited; Competition Commission of South Africa v. Waco Africa (Pty) Limited and Others*, 2020 (4) B.C.L.R. 429 (CC) (S. Afr.).

complaints to the Competition Tribunal (Tribunal) for anti-competitive behavior. After complaints against the companies were referred, the companies sought to access certain information held by the Commission. The Constitutional Court was called upon to consider if a party can access the Commission's record of investigation after a complaint has been referred to the Tribunal but before the party has answered the complaint. The majority of the Court examined the Tribunal Rules and held that, with regard to complaints that have been referred to the Tribunal, the Tribunal Rules do not envisage the production and discovery of documents before the close of pleadings and the pre-hearing conference. The Court held that the Tribunal Rules were not designed to enable disclosure of information to litigants before the Tribunal. The majority of the Court, however, had to deal with the fact that litigants are entitled to discovery immediately after complaint referral in other jurisdictions. In the European Union, companies that receive a complaint referral are allowed to access the European Commission's file. In the United Kingdom the Competition and Markets Authority will also give the respondent an opportunity to inspect the file. According to the Court, the fact that certain foreign jurisdictions grant access before the close of pleadings suggests that this approach is workable.[116]

The Court nevertheless made no further mention of these examples and instead chose to give an opposite interpretation to South African provisions. It should be noted that, unlike the South African position, specific legislative provisions of the European Commission and the United Kingdom Competition and Markets Authority explicitly allow for discovery immediately after complaint referral.[117] Although one of the respondents relied on the fact that other jurisdictions allow for discovery immediately after complaint referral, it therefore seems that this fact should rather have been detrimental to the respondent's case. Whilst the provisions in these jurisdictions allowed for such discovery, South African provisions do not. Such a comparator would have been more beneficial to the respondent's case if South Africa had a similar provision. At most, the reference to the United Kingdom and the European Union could be authority for the conclusion that the approach of those jurisdictions is workable (as in fact the majority of the Court finds). To import a legal position into South African law when South African legislation does not provide therefore would be an encroachment of the law creating powers of the judiciary *vis-à-vis* that of the legislature. The task of the courts is to interpret law and not to "source" or "find" law from elsewhere. The majority, therefore, was correct not to give these considerations the time of day. It would have been more insightful had the Court's attention been drawn to jurisdictions that share the same or similar legislative provisions. Again, it is also lamentable that the Court considered only the Eurocentric world view.

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116 *Competition Commission of South Africa, supra* note 115, at 429, para. 94.

117 Article 17 of the European Commission (EC) Regulation No. 802/2004 and Rule 6 of the United Kingdom Competition and Markets Authority's Competition Act 1998 Rules.

2.5. D.E .v. R.H.

In *D.E. v. R.H.*[118] the Constitutional Court utilized a thorough comparative analysis in considering the continued existence of a spouse's right to claim damages for adultery against a third party. The Court started by considering the historic Anglo-American origin of the private law claim and the fact that the claim had been abolished in several of these jurisdictions, such as England, New Zealand, Australia, Scotland, Canada, the Republic of Ireland, Barbados, Bermuda, Jamaica and Trinidad and Tobago.[119]

The Court also noted that

> [w]hile at one time adultery was punishable as a criminal offence in France, The Netherlands, Germany and Austria, it no longer exists as a crime in any of these countries; nor do civil claims exist in these jurisdictions.[120]

The Court also referred to a case before the German *Bundesgerichtshof*, which rejected a plea for the development of German law to recognise the claim.[121]

In what can only be described as a triumph for the decolonization of legal thought, the Court also considered the position on private law claims for adultery in several African countries. The Court, however, did note that the exercise was not meant to be comprehensive but that a sufficient number of countries were considered to give us an idea of the trends.[122] The Court referred to Cameroon, Kenya, Zimbabwe, Namibia, Botswana, Seychelles,[123] and Namibia.[124] From the countries surveyed the Court identified that

> the general trend is towards the abrogation of a civil claim following on the heels of the even faster paced international disposal of the crime of adultery.[125]

The Court also noted that "the retention of the claim by some countries is not necessarily an indication that these countries would not abolish it even if called upon to do so," as the question of abolition might not have arisen.[126]

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118 2015 (5) S.A. 83 (CC) (S. Afr).

119 *Id.* at 94, para. 29, 95, para. 32.

120 *Id.* at 94, para. 30.

121 *Bundesgerichtshof* (Sixth Civil Senate) on 22 February 1973 (JZ 1973, 668) (Ger.), quoted by the Constitutional Court at 95, para. 31.

122 *D.E.*, *supra* note 118, at 95, note 62.

123 *Id.* at 96, paras. 34–35.

124 *Id.* para. 26, at 96, para. 36.

125 *Id.* at 97, para. 37.

126 *Id.* at 97, para. 38.

2.6. Gavrić v. Refugee Status Determination Officer, Cape Town

In *Gavrić v. Refugee Status Determination Officer, Cape Town*[127] the Constitutional Court had to determine whether to grant a Serbian national refugee status in terms of section 3 of the Refugees Act.[128] In order to hide his identity while fleeing his native country, the Serbian national seeking refugee status entered South Africa illegally in 2007. He used a fake name and passport to enter the country. The Refugee Status Determination Officer (RSDO) refused to grant the Serbian national refugee status and the High Court confirmed the decision of the RSDO. The Serbian national had fled because he feared for his life following the assassination of the commander of a paramilitary unit for which murder the Serbian national was convicted and sentenced. He applied for refugee protection in terms of section 3 of the Refugees Act on the grounds that he had been falsely believed to be a member of the political group that orchestrated the assassination and had a well-founded fear of being killed. South Africa's exclusion clause is contained in section 4(1) of the Act,[129] and is drawn almost exclusively from Article 1F of the Convention Relating to the Status of Refugees, 1951.[130] The Court turned first to the comparative experience in Europe. Specifically, the Court referred to the Court of Justice of the European Union and to the Czech Republic, Austria and Switzerland[131] Next the Court turned to some African examples. The Court referred to the Commission on Human and Peoples' Rights (African Commission) and the laws in Senegal and Algeria.[132]

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127 2019 (1) S.A. 21 (CC) (S. Afr.).

128 130 of 1998 (S. Afr.). The section provides that "a person qualifies for refugee status for the purposes of this Act if that person (*a*) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or (*b*) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or (*c*) is a dependant of a person contemplated in paragraph (*a*) or (*b*)."

129 The provision reads as follows: "A person does not qualify for refugee status for the purposes of this Act if there is reason to believe that he or she (*a*) has committed a crime against peace, a war crime or a crime against humanity, as defined in any international legal instrument dealing with any such crimes; or Back to contents (*b*) has committed a crime which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment; or (*c*) has been guilty of acts contrary to the objects and principles of the United Nations Organization or the Organization of African Unity; or (*d*) enjoys the protection of any other country in which he or she has taken residence."

130 The article reads as follows: "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (*a*) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (*b*) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (*c*) he has been guilty of acts contrary to the purpose and principles of the United Nations."

131 *Gavrić*, *supra* note 127, at 55–56, paras. 96–99.

132 *Id.* at 56–57, paras. 100–102.

The Court's use of not only the European perspective, but also the African worldview is laudable, especially in the context of the decolonization of knowledge. Again, however, no justification for the use of these specific examples was mentioned. This failure is problematic as it prohibits the judiciary from developing tests to determine when foreign law is to be utilized, under which circumstances it may be used and how to choose foreign comparators. It is laudable that the Court also considered the social realities within which both the Senegalese and Algerian legal position came about. It also laudable that the Court considered not only foreign legislative provisions but also a test that has been developed by a court (in the case of Switzerland) to determine the matter.

2.7. Minister of Justice and Constitutional Development v. Prince

In *Minister of Justice and Constitutional Development v. Prince*[133] the Constitutional Court, in a unanimous judgment, declared that section 4(*b*) of the Drugs and Drug Trafficking Act[134] (Drug Act) was unconstitutional and invalid to the extent that it prohibits the use or possession of cannabis by an adult in private for that adult's personal consumption in private; that section 5(*b*) of the Drugs Act was constitutionally invalid to the extent that it prohibits the cultivation of cannabis by an adult in a private place for that adult's personal consumption in private; and that section 22A(9)(*a*)(i) of the Medicines and Related Substances Control Act (Medicines Act)[135] was constitutionally invalid to the extent that it renders the use or possession of cannabis by an adult in private for that adult's personal consumption in private a criminal offence. The Constitutional Court held these statutory provisions to be constitutionally invalid to the extent indicated as they infringed the right to privacy entrenched in section 14 of the Constitution. In coming to this conclusion, the Court relied heavily on the law of the United States of America and Canada. Interestingly, however, the Court looked to its own earlier jurisprudence[136] where the legal positions had already been considered and simply referred to this prior interpretation.[137]

The Court held that it should be left to Parliament to decide on the quantity of cannabis that an adult person may use, possess or cultivate in order for it to amount to "personal use" as it would infringe the doctrine of separation of powers if the Court determined the amount. In coming to this conclusion, the Court noted that, in other jurisdictions where legalized or decriminalized possession of cannabis in small

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133 *Minister of Justice and Constitutional Development and Others v. Prince (Clarke and Others Intervening); National Director of Public Prosecutions and Others v. Rubin; National Director of Public Prosecutions and Others v. Acton*, 2018 (6) S.A. 393 (CC) (S. Afr.).

134 140 of 1992 (S. Afr.).

135 101 of 1965 (S. Afr.).

136 *Bernstein v. Bester*, 1996 (2) S.A. 751 (CC) (S. Afr.).

137 44 to 47 (S. Afr.).

quantities for personal consumption had taken place,[138] different amounts have been fixed as "small amounts."[139] Had a common trend emerged from these jurisdictions, it therefore is conceivable that the Court itself may have made an order as to what amounts to a small amount for personal use.

Two important points may be discerned from the Court's approach. First, it is imperative that courts must do their utmost to ensure that the comparative law relied on is accurately reflected in its judgment, as it may become concretized in South African domestic law. In this case the Court merely referred to U.S. and Canadian law as previously utilized by the same Court, albeit within a different context. Second, the use of comparative law may be inappropriate where no common denominator could be identified. It remains lamentable that the Court did not consider *how* the jurisdictions decided on the quantity of cannabis that an adult person may use. From here common principles could have been discerned.

2.8. Paulsen v. Slip Knot Investments 777 (Pty) Limited

In *Paulsen and Another v. Slip Knot Investments 777 (Pty) Limited*[140] the Constitutional Court was tasked to consider whether, once litigation has commenced, a debtor can be held liable for accumulated interest greater than the capital amount of the loan. The Supreme Court of Appeal held in the matter that the *in duplum* rule ceases to operate once litigation commences.[141] According to the rule, when the cumulative amount of arrear interest has accumulated to an amount equal to the remaining principal indebtedness, interest on the debt will stop running.[142] The main judgment found that the *in duplum* rule should be applicable during the litigation process as it ignored debtors' right of access to courts. The main judgment, however, disavowed that it developed the common law by overturning the decision of the Supreme Court of Appeal because the separation of powers precluded it from adapting the common law in this case.[143] The dissenting judgment, however, agreed with the outcome and reasoning of the main judgment, but found that the *in duplum* rule is a common law norm that has always been under the oversight of the courts, and its development thus will not encroach on any exclusive terrain of the legislature.[144] The dissenting judgment, however, found that there was no reason to tamper with

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138 These include Austria; Capital territory in Australia; Northern territory in Australia; Canada; Chile; Czech Republic; Portugal; Switzerland; California; Uruguay; Spain and New York.

139 *Prince*, *supra* note 133, at 422, para. 80.

140 2015 (5) B.C.L.R. 509 (CC) (S. Afr.).

141 *Paulsen v. Slip Knot Investments*, 2014 (4) S.A. 253 (SCA) (S. Afr.); relying on *Standard Bank of South Africa Ltd. v. Oneanate Investments (Pty) Ltd. (in liquidation)*, 1998 (1) S.A. 811 (SCA) (S. Afr).

142 *Paulsen*, *supra* note 140, at 512, para. 5.

143 *Id.* at 511–542, paras. 1–102.

144 *Id.* at 542–548, paras. 103–119.

the interpretation that the Supreme Court of Appeal had given to the common law provision, as the purpose of the *in duplum* rule is to protect debtors from creditors who allow interest to run without taking steps to recover the debt.[145]

In the main judgment, the Court referred extensively to the Zimbabwean judiciary for its interpretation of the common law principle, as the *in duplum* rule entered both jurisdictions via the two countries' Roman-Dutch heritage. Insightfully, the Court did not refer to these Zimbabwean judgments in a comparative manner, but instead, in a series of footnotes, seemingly as authority for its interpretation as to what the correct common law position is. The Court used these cases as authority for the meaning of the rule,[146] to show that the interpretation that the *in duplum* rule continued to operate *pendente lite* had been followed by other courts,[147] to show that purpose of the *in duplum* rule was to enforce sound fiscal discipline upon creditors by serving to disincentivize lending money to a bad risk;[148] to show the possibility of creditors exploiting the suspension of the rule so as to avoid it entirely;[149] to show that the rule should not have been developed by the Supreme Court of Appeal in the first place;[150] to confirm that the rule permits interest to run anew from the date of judgment;[151] and to confirm the common law position that the post-judgment interest is the agreed upon contractual rate and not the prescribed default rate.[152] It is clear that the Court's choice of comparator was inspired by genealogical factors and not by any factors related to decolonization of knowledge of shared social realities. The Court's use of Zimbabwean authority in such a manner nevertheless is remarkable and it is clear that the Court is not concerned with nationalist sentiments.

2.9. Rural Maintenance (Pty) Limited v. Maluti-A-Phofung Local Municipality

In *Rural Maintenance (Pty) Limited v. Maluti-A-Phofung Local Municipality*[153] it was considered whether there had been a transfer of business by Rural Maintenance (Pty) Ltd. to the Maluti-A-Phofung Local Municipality in terms of section 197 of the

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145 *Paulsen, supra* note 140, at 548–554, paras. 120–150.

146 *Id.* at 525, note 64: "In fn 1 of *Commercial Bank of Zimbabwe Ltd. v. MM Builders & Suppliers (Pvt) Ltd.*, 1997 (2) SA 285 (ZHC) (*Commercial Bank of Zimbabwe*), Gillespie J gives an interpretation of the original Justinian maxim: 'Interest, and interest on interest ... can neither be stipulated for nor recovered beyond twice the amount, and if paid, may be recovered.'"

147 *Id.* at 528, note 85; *Commercial Bank of Zimbabwe*, *supra* note 146, at 300D-F.

148 *Paulsen*, *supra* note 140, at 536, note 121; *Commercial Bank of Zimbabwe, supra* note 146, at 321F-I.

149 *Paulsen*, *supra* note 140, at 537, note 124; *Conforce (Pvt) Ltd. v. City of Harare*, 2000 (1) Z.L.R. 445 (H) 458C-F (Zim.); *Zimbabwe Development Bank v. Salons* [2006] Z.W.H.H.C. 43 (Zim.).

150 *Paulsen*, *supra* note 140, at 538, note 127; *Commercial Bank of Zimbabwe*, *supra* note 146, at 9–10.

151 *Paulsen*, *supra* note 140, at 539, note 132; *Commercial Bank of Zimbabwe*, *supra* note 146, at 300B–C.

152 *Paulsen*, *supra* note 140, at 541, note 138; *Commercial Bank of Zimbabwe*, *supra* note 146, at 300G–301A.

153 (2017) 38 I.L.J. 295 (CC) (S. Afr.).

Labour Relations Act (LRA).[154] The consequence of section 197 is that all employment contracts that existed immediately prior to the transfer are automatically transferred to the new employer. The Municipality originally entered into an agreement with Rural to manage, operate, administer, maintain and expand the municipal electricity distribution network. The municipality transferred 16 employees to Rural. Rural started to perform under the agreement and increased its workforce to 127 employees. Later, however, the Municipality informed Rural that it considered the contract to be null and void because the erstwhile municipal manager did not have the requisite authority to conclude such a contract. Rural contended that there had been a transfer of business as a going concern by it to the Municipality and, therefore, that the employment contracts of the 127 employees should be transferred to the Municipality.

It has been settled law that the inclusion of "service" in the definition of "business" means that it is the business that supplies the service, and not the service itself, that must be transferred.[155] Rural, however, argued that

> local and international developments in relation to so called "service provision changes," as opposed to standard transfer of businesses, necessitated the reformulation or development of our law.[156]

Rural submitted that

> European jurisprudence has in effect developed two different tests for transfers, one for transfer of a business or undertaking and another for service provision changes.[157]

The term "service provision change" was introduced into the British Transfer of Undertakings (Protection of Employment) Regulations (TUPE Regulations) in 2006.[158] As such, Rural submitted that the courts should develop our law to take cognizance of such developments in the United Kingdom, as our courts have previously looked to these Regulations to interpret our own provisions relevant to the transfer of undertaking.[159] They submitted that these Regulations had therefore been incorporated into South African law.[160]

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154 66 of 1995 (S. Afr.).

155 *See, e.g.*, *City Power (Pty) Ltd. v. Grinpal Energy Management Services (Pty) Ltd.*, 2015 (6) B.C.L.R. 660 (CC) (S. Afr.).

156 *Rural*, *supra* note 153, at 303, para. 21.

157 *Id.* at 303, para. 22.

158 246 of 2006 (S. Afr.).

159 *See National Education Health and Allied Workers Union (NEHAWU) v. University of Cape Town*, 2003 (3) S.A. 1 (CC) (S. Afr).

160 *Rural*, *supra* note 153, at 306, para. 32.

The majority of the Court refused to do so. First, the majority pointed out that the term is not one used in section 197 of the LRA. The inclusion of "service" in the definition of "business" in the LRA was enacted in 2002. It precedes the 2006 TUPE Regulations and differs in both wording and context from the latter.[161] Second, the majority pointed out that although a court had previously referred to these Regulations, it does not mean that our courts "accepted them as now constituting a separate test for service provision changes."[162] Indeed, as the Court pointed out, courts also referred to the decisions of the European Court of Justice (ECJ) in interpreting the Acquired Rights Directive of the European Union (EU Directive)[163] to interpret the South African provisions,[164] and that the approach of the ECT also corresponded to the South African legal interpretation of provisions relevant to transfer of undertakings.[165] As such, the majority of the Court found that there was no basis to develop the South African law so as to comply with developments in the United Kingdom.[166]

In a dissenting judgment per Zondo J, the Court justified reference to both the EU Directive and the TUPE Regulations. It was held that, although "mindful of the difference in language between section 197 and those instruments and the legal context in which each occurs, our courts should seek to benefit from the jurisprudence of other courts."[167] The minority judgment considered several decisions dealing with the EU Directive and the TUPE Regulations to reach the conclusion that the contracts of employment of all 127 employees had been transferred from Rural to the Municipality, with the result that they became the Municipality's employees.[168] According to the minority, the test to determine whether there has been a transfer of business as a going concern, according to the third judgment, is whether, after the transfer, the business retains the *identity* it had prior to the transfer.[169] This test is wholly inspired by the jurisprudence of the ECJ.[170]

From the above it is clear that the Court has endorsed the view that reference to comparative legal examples and the use thereof to interpret South African provisions is not tantamount to the incorporation of those principles into our domestic law. This can be explained by the fact that the comparative dimension is but one of the

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161 *Rural, supra* note 153, at 305, para. 26.

162 *Id.* at 306, para. 33.

163 77/187/EEC.

164 *Id*. *See Carlito Abler and Others v. Sodexho MM Catering Gesellschaft GmBH* [2004] I.R.L.R. 168 (E.C.J).

165 *Rural*, *supra* note 153, at 307, para. 34.

166 *Id*. at 310, para. 40.

167 *Id*. at 334, para. 141.

168 *Id.* at 336–337, 333, paras. 146–147, paras. 149–150, note 64.

169 *Id.* at 310, paras. 147, 149.

170 *See Spijkers v. Gebroeders Benedik Abbatoir v. Alfred Benedik en Zonen* [1986] 2 C.M.L.R. 296 (E.C.J.); *Oy Liikenne Ab v. Pekka Liskojärvi, Pentti Juntunen* [2001] I.R.L.R. 171 (E.C.J.).

textual elements that courts must consider giving meaning to legislative provisions. In this case, the text of South African legislative provisions did not warrant a change of meaning and there also was no consensus from the jurisdictions considered that such a change was necessarily warranted. It is insightful that the minority justified the use of the EU Directive and the TUPE Regulations by the Court and that the Court highlighted the genealogical link between our provisions and the comparative instruments.

2.10. United Democratic Movement v. Speaker of the National Assembly

In *United Democratic Movement v. Speaker of the National Assembly*[171] the Constitutional Court was tasked to consider if the Constitution requires, permits or prohibits votes by secret ballot in motions of no confidence in the President. The Constitutional Court held that a motion of no confidence serves the purpose of enhancing the effectiveness of regular accountability mechanisms and of safeguarding the best interests of the South African people. It also held that the Speaker of Parliament has the power to prescribe that a motion of no confidence in the President be conducted by secret ballot under appropriate circumstances. The Constitutional Court referred to the Constitutions of the Republic of Korea, Singapore, Kenya and Germany in finding that

> constitutions of *comparable democracies* prescribe a vote by secret ballot only for the general elections, the election of the President, the equivalent of the Speaker and her counterpart in the second House.[172]

For example, the Constitution of the Republic of Korea requires a secret ballot for general elections for the National Assembly and the President explicitly in Articles 41 and 67 respectively. However, when it comes to impeachment of the President, Article 65 is silent on the voting method and only requires it to be "approved by two thirds or more of the total members of the National Assembly," while it is Article 130 of Chapter XI of the National Assembly Act of the Republic of Korea that indicates that "a secret vote shall be taken to determine whether a motion for impeachment is adopted." Similarly, Article 22L(4) of the Constitution of the Republic of Singapore, which deals with the impeachment of the President, only requires the motion to be adopted by "not less than half of the total number of Members of Parliament," while remaining silent on the voting method. In Kenya, Articles 144 and 145 of the Constitution, which deal with the removal of the President on grounds of incapacity and by impeachment, both remain silent on the voting method. Further, in the German Basic Law, Article 61, which deals with impeachment, remains silent on the voting method and only states that

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171 2017 (5) S.A. 300 (CC) (S. Afr.).

172 *Id.* at 318, para. 62. Emphasis added.

> [a] decision to impeach requires a majority of two thirds of the members of the House of Representatives or of two thirds of the votes of the Senate.[173]

In considering the purpose of a secret ballot, the Constitutional Court referred to a European convention, and to judicial pronouncements in Botswana and Zimbabwe.[174]

The use of comparative examples from Asia and Africa in this case is refreshing. Although the Court does not wholly justify its choice of comparators, the reference to "comparable democracies" is insightful. However, it is not clear why Singapore, the Republic of Korea, Germany, Botswana and Zimbabwe are comparable. Certainly, it is not because of socio-economic considerations. Arguably, they are comparable because these countries have similar constitutional provisions and because these countries have justiciable constitutions. The parties in their heads of argument referred only to the legal positions from Zimbabwe and Botswana.[175]

Findings and recommendations

From the above it is clear that several problems may be discerned from the approach of the Constitutional Court to the use of comparative law in recent cases. First, the impression is often created in the jurisprudence of the Court that comparable examples are "cherry picked" with little or no justification provided by the Court. Whilst it may be immediately obvious to the Court as to why comparisons with certain countries are chosen, it is not always obvious to the reader of the Court's judgment. This is especially problematic from a legal scientific perspective as a methodology that may be utilized to decide which jurisdictions should be considered in any given case, and which should not be, has not developed in the jurisprudence of the Constitutional Court. Of course, it is the obligation of the parties to legal proceedings and their legal practitioners to advocate the use of a certain legal experience and to justify why such a legal solution should be preferred.

Second, and following from the above, the Court still shows a preference for considering "Global North" experiences.[176] The Constitutional Court favors interpretive comparisons with so-called "premier" courts such as the United States Supreme Court, the United Kingdom Supreme Court, the Canadian Supreme Court, and the Federal Constitutional Court of Germany.[177] While attempts have in certain instances

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[173] *United Democratic Movement, supra* note 171, at 318, note 52.

[174] *Id.* at 320–321, paras. 71–73.

[175] Case No. CCT 212/2018, *supra* note 91.

[176] This trend is also present in other constitutional democracies where viewpoints from the "Global South" are generally underrepresented in "global constitutional debates, teaching materials, publications, and conferences." *See* Dann et al. 2020, at 1.

[177] David S. Law & Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, 86(3) Wash. L. Rev. 523 (2011).

been made by the Constitutional Court to move beyond such experiences, reference to African or the "Global South" viewpoint has often only been added after first considering the "Global North" viewpoint. The "Global North" viewpoint has often not been contradicted by references to "Global South" viewpoints. Again, much of the blame should be placed at the feet of parties to cases and their legal practitioners who, having been trained in the Anglo-American and Roman-Dutch legal traditions, often are unwilling and probably unable to look to other legal families. Such arguments, however, can only go so far as other sub-Saharan countries are also members of the same legal families. In addition, as Daly has noted,

> the [Constitutional] Court appears far more open to citing other international courts … especially the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU).[178]

As Dann, Riegner and Bönnemann have averred,

> [t]hinking about and with the "Global South" denotes a specific epistemic, methodological, and institutional sensibility that reinforces the ongoing move towards more epistemic reflexivity, methodological pluralism, and institutional diversification in comparative constitutional scholarship generally.[179]

Third, it is clear from the cases surveyed herein that the Court has mostly failed to consider the social realities and cultural considerations of the comparator countries *vis-à-vis* those of South Africa. In none of the cases considered above has the Court considered the contextual environment in which the law of a foreign comparator functions. This is problematic as it is incumbent upon the comparator to justify the choice of comparator and as the contextual environment within which a law functions should be directly related to the choice of comparator. Again, the "Global North"/"Global South" divide is particularly relevant here. As Dann, Riegner, and Bönnemann argue, there is a

> distinctive context that emerges from the history of colonialism and the peripheral position of the South in the geopolitical system, placing Southern constitutionalism in a dialectical relationship with its Northern counterpart.[180]

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178 Tom G. Daly, *Kindred Strangers: Why Has the Constitutional Court of South Africa Never Cited the African Court on Human and Peoples' Rights*, 9(1) Const. Ct. Rev. 387, 401 (2019).

179 Dann et al. 2020, at 3.

180 *Id.*

Several recommendations can be deduced from the above in order for the South African judiciary to fully unlock the potential of comparative research. First, it is imperative that lawyers should be adequately trained in the skills of a comparativist. As can be deduced from the cases considered, the comparative legal position was often not placed before the Court at all by the parties and their legal practitioners. When legal practitioners rely on comparative law, it often is without any societal or cultural facts wherein the law abides. Erroneous interpretations of foreign law may also be magnified due to the doctrine of precedent. Courts will also be more likely to use foreign law if the legal position of the comparator is easily obtainable. Recent technological trends and open-information movements have made it easier than ever to obtain such information, but courts will be more inclined to look to consider foreign law if it has been considered in peer-reviewed legal articles.

Second, all comparative interpreters (including judges and legal practitioners) bear the onus of providing a justification as to why a specific legal comparator should be used. The choice of comparator may not be arbitrary, and a comparator must be chosen because a functional problem has universal application and has been dealt with extensively in the case law of a foreign comparator, because the foreign comparator has specific historical ties with South Africa which makes such a comparison highly relevant or valuable, or because the legal position is so different within the foreign comparator that a comparison may reveal underlying extra-legal and cultural assumptions that may be highly relevant in resolving the functional problem in South Africa.

Third, comparative interpreters must consider the social realities and cultural considerations of the comparator countries. It is not sufficient to merely consider the black-letter law of a foreign comparator. As law is a cultural construct that functions in the contexts of certain social realities, we must seek to understand the fundamental structure of the law. In this regard, it is also imperative that judges should actively search for comparative examples from the "Global South."

It is clear that a definitive methodology to the use of comparative law has not developed in the jurisprudence of the Constitutional Court. Comparative law is used by the Court in a piecemeal fashion and there still is an over-reliance on the law of South Africa's colonizers or other colonized countries. The willingness of the Court to consider foreign legal positions nevertheless is laudable and the Court may be regarded as a comparative law leader in comparison with other apex courts. The development of a clear methodological approach in the jurisprudence of the Court, therefore, could also be beneficial to legal science as a whole and assist other apex court in utilizing comparative law. As a precondition to the emergence of such a methodology, the Constitutional Court will have to reflect on and enunciate the conscious and unconscious decisions that are made in the selection and use of comparative law. Although in so doing the Court would inevitable open itself to internal and external criticism, this will allow for a clear methodology to emerge and develop in the context of our constitutional order.

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THE GRAIN MARKET IN INDIA AND THE CREATION OF THE BRICS GRAIN UNION

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The article examines the current situation in the wheat market in India and its potential within the global food security dynamic. In particular, it analyzes a number of instruments and programs of national policy in the grain sector: minimum support prices, public procurement, public distribution systems, storage facilities and their management, market regulation, trading mechanisms and platforms. In the aspect of the development of Indian grain trade and infrastructure, the Electronic Platform for National Agriculture Market (eNAM) and food commodities exchanges are considered. The article provides explanation on why India's ambitious plans announced several years ago to expand wheat exports to the world market can hardly be fully realized in the near future due to such reasons as climate risks, phytosanitary problems and quality controls, lack of storage and logistics infrastructure, as well as the huge social and political importance of wheat supplies in the local market. Through the continuation of the current reforms in an efficient manner, India can resume the position of one of the leading wheat exporters. It is proposed that Russia, India and South Africa (as well as the potential new members – Iran and Argentina) create a new BRICS Grain Union.

Keywords: food security; Indian wheat market; wheat futures trading in India; grain market regulation in India; BRICS Grain Union.

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Introduction

Despite the developments of new technologies, growing level of internet access and financial inclusion, food security remains a challenge for many regions of the world. Per capita world food production in 2010 was 5359 calories,[1] which amounts to 2870 kcal per capita per day after deducting food waste, animal feed, and non-food consumption.

According to researchers, international trade liberalization in the second half of the twentieth century resulted in a decreased level of food security in African countries, which used to be food self-sufficient. According to Luan et al., Africa's food self-sufficiency rate declined from 100% in 1961 to 80% in 2007.[2] Presently, food self-sufficiency is hardly possible in 66 countries, MENA and Andean countries having the highest dependency

[1] Jennifer Clapp, *Food Self-Sufficiency: Making Sense of It, and When It Makes Sense*, 66(1) Food Pol'y 88, 90 (2017), referring to Food and Agriculture Organization (FAO), FAO Statistical Yearbook 2012: World Food and Agriculture (2012), at 174 (Jun. 20, 2022), available at http://www.fao.org/docrep/015/i2490e/i2490e00.htm.

[2] Clapp 2017.

on imports.[3] There are various reasons for the increase of import reliance.[4] These reasons include: production decline, demographic and dietary changes, and the availability of relatively cheap foods in the international market. As depicted by MacDonald, there is a tendency of bilateral dependency of an importing country from the main exporting country supplying particular foods (high level of concentration).[5]

The Action Plan for 2021–2024 for Agricultural cooperation among BRICS countries, adopted in 2021, provides for enhanced cooperation in the agricultural sphere among the member countries. It includes, among others, the topics of food security, farmers' welfare, and promoting digital agricultural solutions.

India is the world's second largest producer of wheat and rice.[6] Among other important cereals produced by the country are paddy, sorghum, millet, barley and maize. Together with Russia, India is on the list of major grains exporters, thus the country plays an important role in enhancing food security globally.

The crises in the financial markets and shocks in the global supply chains as a result of financial imbalances and the global pandemic led to new issues and challenges to international food commodity trading. India's recent ban on wheat exports requires a detailed look at the situation in the country's grain market, its production, trade and distribution, and the role the state plays in these processes.

This paper provides a systematic overview of the grain market in India, its challenges and prospects, with a special accent on the wheat market. We analyze the factors influencing the country's export of wheat, including production capacity, minimum support price policy, procurement and distribution programs as well as mechanisms for trading in wheat in the open market.

1. India in the World Trade Map of Grains

India's overall trade balance is negative: almost $395 billion of exports against over $570 billion of imports in 2021.[7] When it comes to food trade, India is a net exporter: $46 billion of agricultural exports against almost $29 billion of agricultural imports, in 2021. However, the situation was not the same half a century ago. Until the 1960s India suffered from deficit of wheat and had to import it for the purpose

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[3] Marianela Fader et al., *Spatial Decoupling of Agricultural Production and Consumption: Quantifying Dependences of Countries on Food Imports Due to Domestic Land and Water Constraints*, 8(1) Env't Res. Lett. 014046 (2013).

[4] Clapp 2017, at 90, with reference to Yibo Luan et al., *Historical Trends of Food Self-Sufficiency in Africa*, 5(3) Food Secur. 393 (2013) and Manitra A. Rakotoarisoa et al., *Why Has Africa Become a Net Food Importer? – Explaining Africa Agricultural and Food Trade Deficits* (2011).

[5] Graham K. MacDonald, *Eating on an Interconnected Planet*, 8(2) Env't Res. Lett. 021002 (2013).

[6] Cereals, Agricultural and Processed Food Products Export Development Authority (APEDA) (Jun. 20, 2022), available at https://apeda.gov.in/apedawebsite/six_head_product/cereal.htm.

[7] U.N. Comtrade Database (Jun. 20, 2022), available at https://comtrade.un.org/.

of food security. Due to a series of agricultural reforms, started in 1960s, the country achieved self-sufficiency, and gradually became a net exporter of wheat.

Cereals are by far the largest agri-export item: it forms almost 27% of total agri-exports, with $12.4 billion in 2021.[8] India is the second largest exporter of wheat and the world leader in rice export. Rice export takes a portion of over 87% in total cereals export.[9] In 2021, Indian rice exports reached 21.3 million tonnes worth $9.6 billion; wheat exports amounted to 6 million tonnes worth $1.7 billion.[10] The increase in agri-exports in 2020–2021 was mainly due to the significant increase in exports of wheat (840%), vegetable oils (268%), and other cereals (257%).[11] The core buyers of Indian rice are Saudi Arabia, Iran, Iraq, Yemen and the UAE for basmati rice (total export in 2020–2021 worth $4 billion),[12] and Benin, Nepal, Bangladesh, Senegal and Togo for non-basmati rice.[13] The country's main export destinations for wheat are Bangladesh, Nepal, the UAE, Sri Lanka, and Yemen.[14]

BRICS total imports of Indian basmati rice is less than 1% of the total export, South Africa being the largest buyer within the group;[15] for non-basmati rice the share of BRICS importers is 5%, with China and South Africa being the leaders.[16] In wheat exports to BRICS, only South Africa buys a small portion of the total exports, which is far below 1%.[17] India created Agri-cells in 15 countries, in order to bring focus on agricultural exports, among them are two BRICS countries – China and Brazil.

The food situation in India had significant problems even before the COVID crisis, but the pandemic showed that the situation in the field of food security is unstable and can fall relatively quickly into a critical one.

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8 Fish and seafood, which is the second largest export item, brought to India $6.7 billion in 2021.

9 Cereals, *supra* note 6.

10 U.N. Comtrade Database, *supra* note 7.

11 Department of Agriculture & Farmers Welfare, Ministry of Agriculture & Farmers Welfare, Government of India, Annual Report 2021–22, at 157 (Jun. 20, 2022), available at https://agricoop.nic.in/sites/default/files/Web%20copy_eng.pdf.

12 Basmati Rice, APEDA (Jun. 20, 2022), available at https://apeda.gov.in/apedawebsite/SubHead_Products/Basmati_Rice.htm; India Export of Agro Food Products, Product: Basmati Rice, AgriExchange, APEDA (Jun. 20, 2022), available at https://agriexchange.apeda.gov.in/indexp/Product_description_32head.aspx?gcode=0601.

13 Non-Basmati Rice, APEDA (Jun. 20, 2022), available at https://apeda.gov.in/apedawebsite/SubHead_Products/Non_Basmati_Rice.htm.

14 Wheat, APEDA (Jun. 20, 2022), available at https://apeda.gov.in/apedawebsite/SubHead_Products/Wheat.htm; Exports from India of Wheat, AgriExchange, APEDA (Jun. 20, 2022), available at https://agriexchange.apeda.gov.in/product_profile/exp_f_india.aspx?categorycode=0603.

15 Exports from India of Non-Basmati Rice, AgriExchange, APEDA (Jun. 20, 2022), available at https://agriexchange.apeda.gov.in/indexp/Product_description_32head.aspx?gcode=0601.

16 India Export of Agro Food Products, Product: Basmati Rice, AgriExchange, APEDA (Jun. 20, 2022), available at https://agriexchange.apeda.gov.in/product_profile/exp_f_india.aspx?categorycode=0602.

17 Exports from India of Wheat, *supra* note 14.

India has been struggling with hunger for a long time. In 2019, 195 million people – 14.5% of the population – were malnourished as a result of extreme inequality, a lack of investment in rural communities (which are home to 70% of the population), a failure to protect workers living in poverty, corrupt and inefficient systems for distributing food aid and social support, and an increasingly erratic and extreme climate. On 23 March 2020, the Indian government announced a lockdown to control the spread of the coronavirus. Millions of people who were already living precarious existences on the brink of hunger – rural communities, lower castes, minority groups, women and children – were suddenly tipped over the edge. An estimated 40 million people, predominantly lower-caste migrant workers who make a living as domestic workers, street vendors, or daily wage labourers on construction sites, were made jobless overnight. Facing starvation and disease in the overcrowded slums they call home, and with public transport shut down, hundreds of thousands of people began walking sometimes hundreds of kilometres back to their villages. Strict restrictions on travel also left farmers without a migrant labour force at the peak of the harvest season, forcing many to leave crops in the field to rot. This had a huge impact on farmers' incomes and the food security of rural communities. Five weeks into lockdown, a survey of 5,000 rural households across 12 states revealed that half were having to cut back on the number of meals they ate, while almost a quarter had been forced to ask others for food since the lockdown began. It also showed that a significant proportion of households were getting into debt or selling assets to get by, with 22% of households reporting having to sell livestock and 16% saying they had recently borrowed from money lenders.[18]

The 2022–2023 season has brought a number of shocks to the international wheat market. Initially, India was regarded as an important wheat supplier to balance the unstable supplies from the Black Sea region. In March 2022, it set up a helpline for wheat exporters.[19] However, the drought that happened in April which led to the drop in harvest made the Indian government correct its forecast: the initial 110 million tonnes of production was reduced to 106 million tonnes for the year 2021–2022, and the forecast for the season 2022–2023 was reduced to 99 million tonnes (Table 1),[20] which meant an almost double reduction of exports forecast – from 10 million tonnes to 6 million tonnes.[21] For the international community this was a shock. This resulted

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[18] The Hunger virus: how COVID-19 is fueling hunger in a hungry world, Oxfam International, 9 July 2020, at 12–13 (Jun. 20, 2022), available at https://www.oxfam.org/en/research/hunger-virus-how-covid-19-fuelling-hunger-hungry-world.

[19] APEDA, Helpline for Wheat Exporters, 31 March 2022 (Jun. 20, 2022), available at https://apeda.gov.in/apedawebsite/Announcements/Helpline_Wheat_Exporters.pdf.

[20] Directorate of Economics and Statistics, Department of Agriculture and Farmers Welfare, Ministry of Agriculture and Farmers Welfare, Third Advance Estimate of Production of Foodgrains for 2021–22, 19 May 2022 (Jun. 20, 2022), available at https://eands.dacnet.nic.in/Advance_Estimate/Time%20Series%203%20AE%202021-22%20(English).pdf.

[21] U.S. Department of Agriculture (USDA), India: Grain and Feed Update, 8 June 2022 (Jun. 20, 2022), available at https://www.fas.usda.gov/data/india-grain-and-feed-update-30.

in growing demand for the reduced amount of wheat, and subsequently, price spikes in the global market.

Indian producers started tending to prefer selling in the international markets at higher prices rather than selling to the government. In January–April, 2022, India sold six times more wheat in USD compared to the same period of 2021.[22]

However, on 13 May 2022, the Indian Government declared a wheat export ban. The suddenness of the ban led to chaos and a huge accumulation of wheat destined for export at logistics hubs, in particular in the port of Kandla.[23]

One of the reasons contributing to such decisions was a low level of wheat procurement, which is the result of the speculators' and traders' activities in the international market, who were aiming at getting higher wheat stocks in the context of growing uncertainty in international wheat supplies. The speculators were buying wheat directly from the Indian local farmers.[24] As it is stated in a U.S. Department of Agriculture (USDA) report, in June 2022 the situation with state procurement was still tough since the market prices were much higher than the government minimum support price.[25]

Table 1: Indian wheat production, exports and stocks, million tonnes[26]

Marketing year starting from April	2020–2021	2021–2022	2022–2023
Beginning stocks	24.7	27.8	19.5
Production	107.9	109.6	99.0
Exports	2.6	8.1	6
Total consumption	102.3	109.8	104
Ending stocks	27.8	19.5	8.5

The Indian Government's decision on the export ban of wheat was first of all aimed at stabilizing the situation in the local market. In the country which is edging towards having the largest population of the world, wheat and rice form the most important food commodities. The decision on the export ban was referring to the "sudden changes in the global market for wheat" resulting in food security risks for

[22] Department of Commerce, Ministry of Commerce & Industry, Government of India (Jun. 20, 2022), available at https://tradestat.commerce.gov.in/ftpa/comgrp.asp.

[23] Jenny Daniel, *India's Kandla Port faces cargo flow disruptions due to wheat export ban*, Container News, 26 May 2022 (Jun. 20, 2022), available at https://container-news.com/indias-kandla-port-faces-cargo-flow-disruptions-due-to-wheat-export-ban/.

[24] *Мишутин Г.* Индия запрещает экспорт пшеницы, за исключением зерна для бедных соседей // Ведомости. 16 мая 2022 г. [Gleb Mishutin, *India Bans Wheat Export, Except Grain for Poor Neighbours*, Vedomosti, 16 May 2022] (Jun. 20, 2022), available at https://www.vedomosti.ru/finance/articles/2022/05/15/922116-indiya-zapreschaet-eksport.

[25] USDA, *supra* note 21.

[26] *Id*.

"India, neighbouring and other vulnerable countries." The new measures did not involve shipments with an irrevocable letter of credit issued on or before the date of the decision. It is worth noting that on the date the decision was announced out of 2.2 million tonnes of wheat in the Indian ports only up to 20% had issued LCs.[27] An exception was made for the consignments under Customs examination before 14 May 2022.[28] As it is explained in the official documents, the supplies to other countries "to meet their food security needs" would be possible under the Government permission,[29] and "will be allowed on case-to-case basis, with the specific approval of competent authority."[30]

This is not the first time in recent history when India has imposed an export ban for wheat. The previous export ban was imposed on wheat and rice in 2007–2008 "to meet domestic needs,"[31] with a number of successive exemptions for certain countries, and removed in 2011, with certain limits imposed on the total amount to be exported.[32]

Within a few days of the export ban, India received requests from several countries for the supply of wheat. These countries need large quantities of 1.5 million tonnes in order to fight the shortage. According to expert estimates, more people in Afghanistan may die of starvation in the near future than due to 20 years of war. Farmers and the people of Kabul are already waiting in line for humanitarian aid, which is not enough. This is the first time this has happened in the country. Half of the people in Afghanistan, or at least 20 million, do not have enough food. People have already begun to starve in Sri Lanka, Lebanon and Morocco.[33] In fact, Sri Lanka

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27 Rajendra Jadhav, *Exclusive: India's surprise wheat export ban traps 1.8 million tonnes at ports*, Reuters, 16 May 2022 (Jun. 20, 2022), available at https://www.reuters.com/markets/commodities/exclusive-indias-surprise-wheat-export-ban-traps-18-mln-t-ports-trade-2022-05-16/.

28 Directorate General of Foreign Trade, Department of Commerce, Ministry of Commerce & Industry, Government of India, Trade Notice No. 07/2022-23, Implementation of Notification No. 06/2015-2020 dated 13th May, 2022 – Prohibition on export of wheat, New Delhi, 17 May 2022 (Jun. 20, 2022), available at https://content.dgft.gov.in/Website/dgftprod/d612e853-cc32-441b-9ae5-05598a8e646e/TN%2007.pdf.

29 Directorate General of Foreign Trade, Department of Commerce, Ministry of Commerce & Industry, Government of India, Notification No. 06/2015-2020, Amendment in the Export Policy of Wheat, New Delhi, 13 May 2022 (Jun. 20, 2022), available at https://apeda.gov.in/apedawebsite/DGFT_notificationfile/Notification_No_13_05_2022.pdf.

30 Directorate General of Foreign Trade, Department of Commerce, Ministry of Commerce & Industry, Government of India, Trade Notice No. 06/2022-23, Implementation of Notification No. 06/2015-2020 dated 13th May, 2022, 14 May 2022 (Jun. 20, 2022), available at https://content.dgft.gov.in/Website/dgftprod/2c5e002d-8a42-4e71-a5b0-4f9b4464c785/TN%2006.pdf.

31 Cereals, *supra* note 6.

32 Wheat, APEDA (Jun. 20, 2022), available at https://apeda.gov.in/apedawebsite/Latest_Notification/Wheat.html; Cereals, *supra* note 6.

33 Индия поставит пшеницу нуждающимся странам // Agrotrend.ru. 1 июня 2022 г. [India Will Supply Wheat to Needy Countries, Agrotrend.ru, 1 June 2022] (Jun. 20, 2022), available at https://agrotrend.ru/news/26743-indiya-postavit-pshenitsu-nuzhdayuschimsya-stranam.

is already experiencing street food riots that could easily escalate into civil war. According to the Prime-Minister Ranil Wickremesinghe, Sri Lanka received a wheat offer from Russia.[34]

The importance of the Indian local market of wheat can hardly be underestimated. The self-sufficiency of wheat and other types of staple food is the main concern for the Indian Government. Therefore, it strives to take the necessary precaution measures in order to provide stability in the local food supplies.

The uncertainty with the supply of Black Sea grain to the international market, which arose in March–April 2022, and the initial forecast of Indian wheat exports could have been a good chance for India to increase its market share in the global wheat market. India was able to more than double its wheat exports over the past few years, to about 6 million tonnes per year, and announced an ambitious program aiming for super-fast export growth to 15 million tonnes per year as early as 2023. In April 2022, India reached a record wheat export volume of 1.4 million tonnes.[35] Although extreme heat was the direct cause of the export ban, even in the absence of a heat wave, the feasibility of such a program was in doubt. First, it is doubtful that India has the logistical capacity for such a surge in supplies. Secondly, India has significant phytosanitary problems in terms of grain quality[36]. Thirdly, it is unlikely that India was going to offer wheat at prices significantly below market prices so it is not clear where the poor countries would get the money to buy enough. Fourthly, such a program is unlikely to be fully compatible with ensuring domestic food security. At the same time, India's success in promoting the export of cheap rice to China should be recognized.

2. Specifics and Organization of the Local Grain Market in India: Production, Procurement, Storage and Distribution

2.1. Hunger, Food Security and the Farmers

The National Food Security Mission was created in India in 2007–2008, with the aim to increase the production of the main grain commodities – rice, wheat and pulses.[37] The mission includes the implementation of certain programs aimed at farmers.

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[34] Krutika Pathi, *The AP Interview: Sri Lanka PM says he's open to Russian oil*, Associated Press News, 12 June 2022 (Jun. 20, 2022), available at https://apnews.com/article/russia-ukraine-moscow-china-asia-314a2bc7c9ce9d3dabb02f19b3cf6418.

[35] Mayank Bhardwaj & Rajendra Jadhav, As *Black Sea supplies fall, India sells record 1.4 mln tonnes wheat in April*, Reuters, 10 May 2022 (Jun. 20, 2022), available at https://www.reuters.com/world/india/black-sea-supplies-fall-india-sells-record-14-mln-tonnes-wheat-april-2022-05-10/.

[36] Pratik Parija & Abdel Latif Wahba, *Quality Matters in India's Drive to Fill Global Wheat Export Gap*, Bloomberg, 19 April 2022 (Jun. 20, 2022), available at https://www.bloomberg.com/news/articles/2022-04-19/quality-matters-in-india-s-drive-to-fill-global-wheat-export-gap.

[37] Department of Agriculture & Farmers Welfare, *supra* note 11, at 60.

By 2020–2021 the mission has been active in certain districts in 28 states and 2 union territories.

The agricultural sector in India plays an important role for the citizens, as almost half of its households are involved in agriculture.[38] According to the Ministry of Agriculture, in 2011, 54.6% of the total workforce was engaged in the agricultural sector.[39] There are about 146.5 million farming families who own agricultural land.[40] Moreover, it is more about small farmers who are contributing to the general agricultural production, with average land size of 1.1 hectares, around 12% of which are producing crops on leased land.[41] The land used for rice and wheat production accounts for 23% and 16% of the total cropped land.[42]

This is not to say about the high level of poverty and hunger. The extreme poverty rate[43] and low middle income poverty[44] in India was estimated by the International Monetary Fund (IMF) at 1.4% and 18.5% respectively, in 2019. These rates increased during the pandemic, to 2.5% and 26.5% respectively. However, the government food subsidy program "absorbed a major part of the pandemic shock."[45] In the Global Hunger Index India ranks 101,[46] the worst among BRICS countries. This reflects the importance of social subsidy programs in India, which have been in place for the last 50 years.[47]

Therefore, the government is extremely interested in securing the necessary food stocks in the country, which is achieved through the public procurement at minimum support prices (MSP). Another objective is providing access to the small farmer to the trade platforms so that the bigger part of the income would be with the farmers and not the intermediaries.

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38 National Bank for Agriculture and Rural Development (NABARD), All India Rural Financial Inclusion Survey 2016–17 (2018), at 109 (Jun. 20, 2022), available at https://www.nabard.org/auth/writereaddata/tender/1608180417NABARD-Repo-16_Web_P.pdf.

39 Department of Agriculture & Farmers Welfare, *supra* note 11, at 1.

40 Chandrasen Kumar et al., *Warehouse Storage Management of Wheat and Their Role in Food Security*, Frontiers (2021) (Jun. 20, 2022), available at https://www.frontiersin.org/articles/10.3389/fsufs.2021.675626/full.

41 NABARD, *supra* note 38.

42 Department of Agriculture & Farmers Welfare, *supra* note 11, at 2.

43 This poverty rate includes people who live on less than 1.9 USD per day.

44 This poverty rate includes people who live on less than 3.2 USD per day.

45 Surjit Bhalla et al., *Pandemic, Poverty, and Inequality: Evidence from India*, IMF Working Paper, WP/22/69, 5 April 2022, at 31 (Jun. 20, 2022), available at https://www.imf.org/en/Publications/WP/Issues/2022/04/05/Pandemic-Poverty-and-Inequality-Evidence-from-India-516155.

46 Global Hunger Index Scores by 2021 GHI Rank, Global Hunger Index (GHI) (Jun. 20, 2022), available at https://www.globalhungerindex.org/ranking.html.

47 Bhalla et al., *supra* note 45, at 17.

The U.N.'s World Food Program (WFP) has adopted the India Country Strategic Plan (2019–2023) upon the request of the Indian Government. The plan includes a joint effort by the WFP and the Government in reducing the level of hunger and malnutrition in the country. The program's budget is 20 million USD, which is formed by the parties and the private sector.[48]

In 2016, the Committee on doubling the farmers' income was formed in the Government of India. It identified seven sources of potential income growth, which include: increase in crop productivity; increase in livestock productivity; resource use efficiency; increase in cropping intensity; diversification towards high value crops; improvement in real prices received by farmers; and a shift from farm to non-farm occupations.[49] Subsequently, the government adopted a number of programs and reforms to increase the farmers' income. Among them is the fixing of the MSP at a level of at least 50% margin, adopting the Model APLMC Act, establishing 22,000 Gramin Agricultural Markets (GrAMs), and an Agri-Export Policy aimed at the doubling of agri-exports. A number of funds were established: the Agricultural Infrastructure Fund, the Micro Irrigation Fund, the Agri-Marketing Fund, to strengthen eNAM and GrAMs.[50] There is also a number of government initiatives aimed at the creation of a common electronic ecosystem in the country's agricultural sphere.[51]

The Agricultural Infrastructure Fund is aimed at providing low-interest loans to the farmers through a certain range of cooperatives and unions, to create infrastructure "at the farm gate."[52]

2.2. The Policy of Minimum Support Prices

Minimum support prices for agricultural produce in India has been in place for several decades. MSP is a method to support farmers and protect them from uncertainties at the times of low prices for their crops. MSP was first introduced for wheat, at the time of the first agricultural reforms in the 1960s. This was invented as an incentive to farmers for the production of labour-intensive wheat of certain quality during the times of food crisis.

Presently the level of MSP is recommended for 23 commodity products (including wheat) by the Commission for Agricultural Costs and Prices (CACP) in the Ministry of

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48 Department of Agriculture & Farmers Welfare, Ministry of Agriculture & Farmers Welfare, Government of India, Memorandum of Understanding between the Government of India and the United Nations' World Food Program for cooperation during 2019–2023, New Delhi, 11 February 2019 (Jun. 20, 2022), available at https://agricoop.nic.in/sites/default/files/GoI-WFP%20MoU%202019-2023.pdf.

49 Department of Agriculture & Farmers Welfare, *supra* note 11, at 9.

50 *Id*. at 10.

51 *Id*. at 32.

52 *Id*. at 10.

Agriculture. It is announced "well before" each agricultural season (rabi and kharif).[53] MSP is regarded by the Ministry of Agriculture as an incentive to the farmers to adopt new technologies.

Although MSP is not written as a part of any federal law, in recent history, MSP has become a political instrument. It is often proclaimed in the election campaigns. Guaranteed MSP for farmers is a matter of social policy and if there are doubts over the guarantees, the farmers are likely to initiate protests. In 2018, at a time of low prices, as a response to farmers' protests over the drop in prices for their products, the government announced the MSP at the level of 150% of the cost of production for two agricultural years.[54] This level of a 50% minimum margin still forms a part of the MSP policy.[55] The cost of production includes: hired human resources, wages for family labour, bullock and machine labour, land rent (for owned and leased land), expenses for seeds, fertilizers, manures, irrigation electricity etc., insurance charges, as well as depreciation for machinery and buildings.[56]

In the season 2020–2021 and 2021–2022, the margin over the cost of production for basmati rice was 50%, for wheat – 100%. The latter is the highest support over the cost, which is also the level for rapeseed/mustard (Table 2). The MSP for wheat and rice for the period from 2010–2011 to 2021–2022 is presented in Tables 3 and 4. When stipulating the MSP level, the CACP considers a number of factors, in addition to the cost of production. These include the market prices in the states, country-wise and internationally, trade terms and the potential effect on the regions, and the country's economy.[57]

Table 2: The expected return to farmers within the MSP program over the cost of production

Commodity	2020–2021			2021–2022		
	Cost	MSP	Return over cost	Cost	MSP	Return over cost
Wheat	960	1975	106%	1008	2015	100%
Rapeseed/ mustard	2415	4650	93%	2523	5050	100%

[53] Department of Agriculture & Farmers Welfare, Ministry of Agriculture & Farmers Welfare, Government of India, Price Support Scheme (PSS): The Operational Guidelines, at 3 (Jun. 20, 2022) available at https://agricoop.nic.in/sites/default/files/pssguidelines.pdf.

[54] Explained: How the 1.5-times formula for crops MSP is calculated, The Indian Express, 2 December 2020 (Jun. 20, 2022), available at https://indianexpress.com/article/explained/explained-how-the-1-5-times-formula-for-crops-msp-is-calculated-7075865/.

[55] Department of Agriculture & Farmers Welfare, *supra* note 11, at 8.

[56] Department of Agriculture & Farmers Welfare, *supra* note 53.

[57] *Id*.

Bajra	1175	2150	83%	1213	2250	85%
Lentil	2864	5100	78%	3079	5500	79%
Gram	2866	5100	78%	3004	5230	74%
Barley	971	1600	65%	1019	1635	60%
Basmati rice	1245	1868	50%	1293	1940	50%
Maize	1213	1850	53%	1246	1870	50%
Sunflower seed	3921	5885	50%	4010	6015	50%

Source: Ministry of Agriculture & Farmers Welfare[58]

Table 3: Average annual futures prices (National Commodity and Derivatives Exchange Limited, NCDEX) and minimum support prices for wheat in India, 2010–2011 – 2020–2021 (Rs. quintal)

	2010–2011	2011–2012	2012–2013	2013–2014	2014–2015	2015–2016	2016–2017	2017–2018	2018–2019	2019–2020	2020–2021	2021–2022
Futures price	1239	1187	1442	1564	1577	1517	1787	1659	1871	1993	NA	
MSP	1120	1285	1350	1400	1450	1525	1625	1735	1840	1925	1975	015

Source: compiled by the authors based on the data from the Securities and Exchange Board of India (SEBI), NCDEX,[59] Farmers' portal[60]

Table 4: Minimum support prices for basmati rice in India, 2010–2011 – 2020–2021 (Rs. quintal)

Rice type	2010–2011	2011–2012	2012–2013	2013–2014	2014–2015	2015–2016	2016–2017	2017–2018	2018–2019	2019–2020	2020–2021	2021–2022
Common	1000	1080	1250	1310	1360	1410	1470	1550	1750	1815	1868	1940
Grade A	1030	1110	1280	1345	1400	1450	1510	1590	1770	1835	1888	1960

Source: Farmers' portal,[61] Ministry of Agriculture of the Government of India

[58] Department of Agriculture & Farmers Welfare, *supra* note 11, at 9.

[59] SEBI, Handbook of Statistics 2020, Table 50, Commodity-wise Trading Statistics at NCDEX (Jun. 20, 2022), available at https://www.sebi.gov.in/reports-and-statistics/publications/may-2021/handbook-of-statistics-2020_50238.html.

[60] Minimum Support Prices, Statement Showing Minimum Support Prices – Fixed by Government (Rs. quintal), Farmer Portal (Jun. 20, 2022), available at https://farmer.gov.in/mspstatements.aspx.

[61] *Id*.

Researchers claim that the policy of MSP can result in price distortions across markets and lead to shifts in land allocation.[62]

2.3. Public Procurement

The MSP policy is part of the government's public procurement activities for the main agricultural commodities through the Food Corporation of India and other public and private agencies. The Ministry of Agriculture usually announces the duration of the procurement period together with the MSP for the certain type of commodity. The duration of MSP and procurement is usually limited to 90 days, but can vary state-wise and commodity-wise.[63]

In order to implement the public procurement, the government appoints the responsible agencies, the quality requirements for the crops, and organizes the logistic infrastructure. The latter includes identification of the points for procurement, packaging (gunny bags), transportation, weighing and testing facilities, warehouses (godowns) etc. The program includes establishing the new infrastructure whenever possible and necessary, including godowns and processing plants, through public private partnership schemes.

Procurement of wheat takes place in the main wheat producing states, – Punjab, Haryana, Uttar Pradesh, Madhya Pradesh, Himachal Pradesh, Uttarakhand, and Bihar. The procurement period is from April to June. The distribution is mainly in the states which do not produce wheat. Some other regions are used for wheat transit.

The procurement procedure consists of the following steps: the farmers bring their crop to the local market; the sample grain is tested as per the fair average quality stipulated by the government; the grain which meets the requirements is weighed in bags, upon which the farmer gets the receipts for payment. The government purchases any quantity of wheat that farmers are ready to sell at MSP, subject to the wheat meeting quality requirements.

The level of procurement has been increasing throughout the last 10 years. The procurement level for grain (procurement to production) in 2015–2016 – 2018–2019 was between 33–38% for rice and 25–36% for wheat.[64] Average wheat procurement till the season 2021–2022 was about 36 million tonnes, out of which only around 80% was subject to distribution, which led to a high level of storage wheat.[65] The level of wheat procurement increased from average 35% of total production to 40% and above during the pandemic years of 2019–2020 and 2020–2021. This was part

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62 Luis E. Morales et al., *How Has the Minimum Support Price Policy of India Affected Cross-Commodity Price Linkages?*, 24(2) Int'l Food Agribus. Mgmt. Rev. 179 (2021).

63 Department of Agriculture & Farmers Welfare, *supra* note 53, at 3.

64 Ministry of Consumer Affairs, Food & Public Distribution, Government of India, Storage of Foodgrains, 16 July 2019 (Jun. 20, 2022), available at https://pib.gov.in/Pressreleaseshare.aspx?PRID=1578907.

65 Kumar et al., *supra* note 40.

of the COVID-19 relief package, which included increased procurement to support farmers and increased distribution.

2.4. Public Distribution System

The Public Distribution System (PDS) is implemented by the Government, enhanced by the National Food Security Act, adopted in 2013, and involves the bottom two-thirds of the population (bottom 75% of rural population and 50% of urban population)[66] and includes either in-kind support or food price subsidies.[67] The grain (wheat or rice) in-kind support was 5 kg per person per month, which was doubled during the pandemic, which in fact was totally covering the basic need for the grain, since 10 kg per month is the average total consumption of grain in the country for the last 18 years.[68]

The PDS has its challenges. According an IMF working paper, around two-thirds of the subsidized food does not reach the recipient due to corruption.[69]

The stock utilizations include distribution under the Targeted Public Distribution System, and other schemes. Among the types of distributions are:

• Ration Cards and Fair Price shops, where the food is provided to the poor at subsidized rates. The amount is 25 kg wheat[70] per family per month (around 90 million people are subject to this program);

• Priority households (around 703 million people) are provided with 5 kg rice/wheat per person per month at subsidies prices;

• During the pandemic the government distributed free amounts of wheat/rice 5 kg per person to around 800 million people, specifically, the people who lost their jobs, the poor and migrant workers.[71]

The types and amount of the people subject to each type of distribution are stipulated through the Antyodaya Anna Yogana program, launched in 2000, focusing on the poorest part of the population.

2.5. Storage Facilities for Grain in India and their Management

A country's performance in grain production, export and distribution is highly dependent on the state of its storage and logistics system. Without a proper and up-to-date system of storage and transportation and its efficient management, there

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66 Bhalla et al., *supra* note 45, at 18.

67 For example, if the market price for rice is 30 Rp/kg, the subsidies price is 3 Rp/kg.

68 Bhalla et al., *supra* note 45, at 18.

69 *Id*. at 19.

70 Other sources stand for an increase to 35 kg per month. *See* Antyodaya Anna Yojana (AAY), Department of Food & Public Distribution, Ministry of Consumer Affairs, Food & Public Distribution, Government of India (Jun. 20, 2022), available at https://dfpd.gov.in/pds-aay.htm.

71 Kumar et al., *supra* note 40.

is high risk of losses and leakages of grain, which implies physical deficit, inadequate or deficient quality of grain, and financial losses. As a result of improper management and lack of infrastructure (in the case of India), millions of poor people will not receive their necessary nutrition throughout the year, and the country will not have the necessary volumes of grain for exports when the international prices are attractive.

The storage losses of grain is between 1–2% in the developed countries, but it can be up to 50% when there is no necessary infrastructure in place and the process is not managed professionally.[72] Researchers identify over 20 factors that can affect the grain if it is stored or managed improperly, among which are temperature, moisture level, air velocity, insects, dirt, etc.[73] This is especially relevant for open air storage.

In India, the level of food losses was estimated at 15% by the Foundation for Community Driven Innovation (FDCI) and 40% by the Food and Agriculture Organization (FAO),[74] which mainly related to fruits and vegetables. The major portion of losses was at the storage phase. For grains, the official figure for losses was up to 6% in 2019–2020, which is around 13–18 million tonnes of grain, according to the National Academy of Agricultural Sciences. Around 10% of produced wheat is subject to annual losses due to improper storage.[75]

The Food Corporation of India (FCI) is the agency in charge of the grain procurement at MSP, storage and distribution in the regions with food deficit, as well as stock management. The governments of states distribute the grains through the Targeted Public Distribution System. Part of the food procured is sold in the open market. The FCI was created in 1965 in the framework of the significant shortage of grain (specifically, wheat) in the country (which was importing wheat at that time).

India's Warehousing Development and Regulatory Authority (WDRA) has a list of accredited warehouses, which are integrated with eNAM for trade.[76] The storage capacities are under the FCI, Central Warehousing Corporation, state warehousing corporations, and privately owned warehouses. The total storage capacity as of May 2019 was 862.45 lakh metric tonnes. The average utilization level of storage for wheat, rice and pulses was 82–88% throughout 2017–2019.[77] For grains, usually four types of storage facilities are being used in India: covered warehouses or godowns

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72 Digvir S. Jayas, *Storing Grains for Food Security and Sustainability*, 1(1) Agric. Res. 21 (2012).

73 Kumar et al., *supra* note 40.

74 Shantanu G. Ray, *To stop wastage, India developing capacity to store 10 million tonnes of food grains*, Sunday Guardian Live, 7 August 2021 (Jun. 20, 2022), available at https://www.sundayguardianlive.com/news/stop-wastage-india-developing-capacity-store-10-million-tonnes-food-grains.

75 Virat Bahri, *Foodgrain storage losses in India: Waste not, want not*, Trade Promotion Council of India, 19 June 2020 (Jun. 20, 2022), available at https://www.tpci.in/indiabusinesstrade/blogs/foodgrain-storage-in-india-waste-not-want-not.

76 Department of Agriculture & Farmers Welfare, *supra* note 11, at 139.

77 Ministry of Consumer Affairs, *supra* note 64.

with grain stored in jute bags; storage in the open with the necessary precautions against humidity and rats; silos; plastic tubes (for short-term storage).

Back in 2013, India had to admit the high level of inefficiency of its food storage system. Food leakages and losses are claimed to be the result of corruption and inefficiency. Additionally, there is a huge lack of storage facilities at the farm level, and a significant imbalance in storage infrastructure from region to region. The majority of storage facilities are in the producing states, but there is a significant shortage in the food consuming states. This is not to mention that many existing warehouses and tubes need improvement or replacement by up-to-date facilities. Moreover, the management of the grain storage and logistics is not up to contemporary standards. All these problems in the storage system in India have been outlined in a Comptroller and Auditor General (CAG) report published in 2013.[78] In many cases, the precaution measures when storing in the open air were not taken at all. According to the report, around 100,000 tonnes of wheat were damaged due to the fact that the management of the relevant two agencies did not follow the "first-in-first-out" (FIFO) principle in grain storage.

To address these and other issues, the government of India formed a six-member committee chaired by Shanta Kumar. The main task of the committee was to suggest reforms related to FCI in order to improve efficiency in procurement, storage and distribution of food grains.

The committee released a list of profound recommendations aimed at improving the food distribution system[79], which are summarized below:

• The forwarding of all procurement operations of grains to the states that gained more experience in this regard, and possess the necessary infrastructure;

• Private companies should be admitted to the procurement process to support competition;

• The procurement rules and procedures should be announced and brought to the interested parties before the crop season;

• A negotiable warehouse receipt system should be introduced.[80] Farmers should have the opportunity to store the grain right upon harvesting and receive advance payment from the banks based on the receipts;

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[78] Ministry of Consumer Affairs, Food & Public Distribution, Government of India, Report of the Comptroller and Auditor General of India on Storage Management and Movement of Food Grains in Food Corporation of India for the year ended March 2012, Report No. 7 of 2013 (Performance Audit) (Jun. 20, 2022), available at https://cag.gov.in/cag_old/sites/default/files/audit_report_files/Union_Performance_Ministry_Consumer_Affairs_Food_Public_Distribution_7_2013.pdf.

[79] Ministry of Consumer Affairs, Food & Public Distribution, Government of India, Recommendations of High Level Committee on restructuring of FCI, 22 January 2015 (Jun. 20, 2022), available at https://pib.gov.in/newsite/PrintRelease.aspx?relid=114860.

[80] It should be noted that, according to Prabina Rajib, negotiable warehouse receipts have been introduced by the Indian government in 2011. Probably, the system did not work for all types of commodities. *See* Prabina Rajib, *Indian Agricultural Commodity Derivatives Market – In Conversation with S. Sivakumar, Divisional Chief Executive, Agri Business Division, ITC Ltd*., 27 IIMB Mgmt. Rev. 118, 119 (2015).

• MSP policy should better cater for the food that is being imported at lower prices;

• The level of 67% of the population receiving the food distribution should be lowered to 40%, and the weight should be increased from 5 kilo/person to 7 kg;

• These people should be given 6 months ration immediately after the procurement season, that would save the cost of storage for agencies;

• Cash transfers should be gradually introduced;

• Storage should be outsourced on a competitive bidding basis;

• Covered storage facilities – open air should be phased out and replaced with silo bag technologies and conventional storage;

• Containarizing grain transportation.

Although some of the Shanta Kumar Committee's statements and recommendations were broadly criticized, during the 5 years after its report was released, certain improvements have been seen in storage management.

In 2021, a research article was published, stating that the FCI has a wheat procurement, storage and distribution system unique to the world, which is "the best example of a sustainable food storage system with only 0.3% storage losses in 3 years of wheat storage."[81] It should be noted however that two out of four of the research authors are FCI representatives.

Based on the research, presently FCI uses 2,085 warehouses and cover and plinth (CAP)[82] systems for storage of cereals. The CAP system is used for short-term storage of less than 12 months. As it is described by the authors, wheat storage is managed based on FIFO principle, and certain measures, including sampling, are undertaken to ensure quality control. The total wheat storage capacity of FCI in 2020–2021 was 41.19 million tonnes, including warehouse storage capacity of 37.45 million tonnes (out of which 65% is hired from other agencies and private companies).[83]

It is also stated in open sources, that the Government of India and the FCI are working on expanding storage capacity for grain. In particular, there are plans to develop silo capacities of 10 million tonnes on a bidding basis, and 249 sites across the country are already identified, mainly close to railway stations.[84] As well, there are plans to eliminate storage in the open by the end of 2022. There are still around 19 million tonnes of grain storage in the open, where the cereals should not be stored for longer than 6 months.[85]

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81 Kumar et al., *supra* note 40.

82 The CAP storage looks as follows. A plinth is constructed on a suitable site. Dunnage is provided and covers are made of polyethylene. The covers are secured by nets and nylon lashing. To prevent condensation, a layer of paddy husk-filled sacks are put on top of the stack under the polyethylene. CAP storage is vulnerable to wind damage and the storage system requires frequent inspection.

83 Kumar et al., *supra* note 40.

84 Ray, *supra* note 74.

85 Sandip Das, *FCI to stop storing wheat in the open by September*, Financial Express, 12 March 2022 (Jun. 20, 2022), available at https://www.financialexpress.com/market/commodities/fci-to-stop-storing-wheat-in-the-open-by-september/2458581/.

3. Grain Market Regulation in India and Grain Trading Mechanisms

3.1. Wheat Trade Regulation: History and Recent Reforms

The history of agricultural market regulation in India goes back to 1897, when the British Empire adopted the Berar Cotton and Grain Market Law of 1897. This was however aimed at increasing supplies of cotton to the mills in Manchester.[86] Generally, the period of the British Rule in India is characterized with the withdrawal of agricultural output from the population.

As depicted by Bisen and Kumar, the discussion on the reasons for the inefficiency of the current agricultural market in India is ongoing, with the main outlined challenges being the inefficiency of the distribution system and lack of modern market institutions. Generally, there are proponents and opponents to a high level of state intervention into the market. However, the tendency in recent years has been towards market liberalization and a lower level of the state intervention.[87]

Some of the important steps towards the increase of the market integration of farmers, price liberalization and creating the necessary infrastructure were the Agricultural Produce Markets Regulations Acts (APMRA), adopted by most of the Indian states in the 1980s.[88] In many states, market areas (yards) were constructed, and in order to regulate the local markets, special committees were formed – Agricultural Produce Market Committees (APMCs).

However, over time, further steps were needed to continue improving and upgrading the infrastructure and limiting the excessive intermediaries' intervention. Further reforms came in the beginning of the 2000s, within the framework of adjusting to the World Trade Organization (WTO) rules, when the Model Agricultural Marketing Act was issued. Among the new initiatives was eliminating barriers for private farmers to trade, including prohibiting fees from the farmers (which, however was not followed in many cases, and in practice the commission size was from 1 to 2.5% for grains, not to mention about other fees and intermediary activities),[89] establishing standardization in many related processes, and promotion of contract farming. Another issue was the great difference in price for the same commodity between the states and even inside one state. There are cases when the price difference per one tonne in the markets was up to 850 rupees at the same day.[90]

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86 Jaiprakash Bisen & Ranjit Kumar, *Agricultural Marketing Reforms and e-National Agricultural Market (e-NAM) in India: A Review*, 31 Agric. Econ. Res. Rev. 167, 167 (2018).

87 *Id*. at 170.

88 *Id*. at 169.

89 *Id*. at 170.

90 Rajib 2015, at 120.

A number of traders and wholesale buyers started practicing contract farming. Among them are Cargill India, ITC-ABD, Marico, Nestle, Hindustan Unilever, and Satnam Overseas.[91]

It took around 10 years for the states to start adopting the new model. An important achievement was the switch from the manual trading system to the electronic trading system, which was first implemented by the Karnataka state with the support of the NCDEX.[92] As a result, in 2016, the Unified Market Platform (UMP) was created in the state as a joint venture of the state government and NCDEX, under the name of Rashtriya e-Market Services (ReMS), uniting over 100 markets from 27 districts, with the participants being admitted based on unified market license. The system admitted international traders to join.[93] The Karnataka's positive experience was followed by other states, and supported by the federal government. The Indian Government further allocated budget funds through an Agritech Infrastructure Fund aimed for establishing electronic agricultural platforms in wholesale markets.

3.2. Electronic Platform for National Agriculture Market (eNAM)

In 2016, the electronic platform for National Agriculture Market (eNAM) was established, as a "platform for platforms."[94] As it is stated on the project's website, eNAM is

> a pan-India electronic trading portal which networks the existing APMC mandis (physical markets) to create a unified national market for agricultural commodities. Small Farmers Agribusiness Consortium (SFAC) is the lead agency for implementing eNAM under the aegis of the Ministry of Agriculture and Farmers Welfare, Government of India.

As of June 2022, the platform united 1000 markets (APMCs) across the country. Each APMC was granted a sum up to 7.5 million rupees for the necessary hardware and software, such as computers and internet access, as well as equipment related to sorting, grading, cleaning and packaging.[95]

In total there are over 115 thousand participants in the system as per the number of unified licenses issued by 22 states.[96] The system is multilingual and includes

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91 Rajib 2015, at 120.

92 Bisen & Kumar 2018, at 170.

93 *Id*. at 170–171.

94 Department of Agriculture & Farmers Welfare, *supra* note 11, at 140.

95 *Id*. at 135.

96 Number of Unified Licenses, National Agriculture Market, Government of India, 31 May 2022 (Jun. 20, 2022), available at https://enam.gov.in/web/state-unified-license/no-of-unified-licenses.

12 local languages. Farmers can register with the system either individually or by forming a group, called Farmer Producer Organization (FPO), that acts as aggregator of the agricultural produce of its members in order to increase their bargaining power. As of 2022, there were over 2,000 FPOs registered with the eNAM.[97] There are 26 types of grain traded in the system. In order to enable online transactions, five banks have been integrated into the system.

The achievements of eNAM however met hurdles via a number of challenges. Transportation as an important element of agricultural commodities sales were difficult due to the underdeveloped logistic infrastructure in many states (roads, warehouses, etc.), as well as a lack of high-speed internet connection in some areas, and the low level of smartphone penetration in rural areas (18% only[98]). In some states, another impediment was an inactive APMC, a committee which plays a crucial role in the integration into eNAM, combined with a lack of professional human resources. Additionally, there was slow information spread on the opportunities of the system in some of the areas.

It is likely that the existence of the common electronic agricultural market resulted in the fact that many farmers in 2022 tended to sell the products for export purposes and the state faced difficulties in wheat procurement. Back in 2016, Chand highlighted farmers' reduced dependency on public procurement as one of the features of eNAM.[99] The two years of pandemic are an exception in this case.

Therefore, India's way towards the current electronic trade system was through the creation of general rules, establishing local markets regulated by committees, picking up the positive state-wise cases and extrapolating the best practice country-wise. Then uniting all the markets in a unified electronic trading system with no institutional or legal barriers (a common agri-market). This approach fully takes account of the specifics of the Indian agrarian sector. To continue the positive developments, infrastructure creation, increasing awareness of the electronic trading system, and reduction of harvest loss are among the main tasks of the federal and state governments.

3.3. Food Commodities Exchanges in India

India has six exchanges registered with the SEBI.[100] Three commodity exchanges (Table 5) deal in agricultural commodities. They all were established in 2002–2003 in the development of the recommendations of the special committees. The exchanges

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97 FPOs, National Agriculture Market, Government of India (Jun. 20, 2022), available at https://enam.gov.in/web/stakeholders-Involved/fpos.

98 Department of Agriculture & Farmers Welfare, *supra* note 11, at 27.

99 Ramesh Chand, *E-Platform for National Agricultural Market*, 51(28) Econ. Polit. Wkly 15 (2016).

100 Details of Stock Exchanges, List of Stock Exchanges, SEBI, 17 January 2020 (Jun. 20, 2022), available at https://www.sebi.gov.in/stock-exchanges.html.

function in the form of electronic commodity exchanges. One of the major tasks of the exchanges is to increase market transparency and to assist the farmers in price discovery. This led to the decrease of the share of the intermediaries and speculators in the commodity price. Another function successfully performed by the exchanges was raising the level of contracts standardization with regard to the terms of payment and delivery, and quality of the product.

Table 5: India's main commodity exchanges and online trading portals dealing in agricultural commodities

Commodity exchange	Type of commodities traded	Financial instruments	Significant shareholders
National Commodity and Derivatives Exchange Limited (NCDEX) (est. 2003, Mumbai)	Commodities (mainly agricultural) The trade leaders: barley, wheat & soybean	Futures on 23 commodities and options on 7 commodities; three agricultural commodity indexes	Life Insurance Corporation of India (LIC), the National Stock Exchange of India Limited (NSE), and the National Bank for Agricultural and Rural Development (NABARD) ICICI Bank, LIC, CANARA BANK, PNB, CRISIL, IFFCO, Goldman Sachs, Intercontinental Exchange, Renuka Sugar, J.P. Capital
Multi commodity exchange of India Limited (est. in 2003 in Mumbai)	Over 40 commodities. Agri Commodities, Bullion, Metals, Pulses, Oils & Oilseeds, Energy, Plantations, Spices and other soft commodities	Commodity derivatives	National spot exchange limited, India energy exchange, Singapore mercantile exchange global board of trade, IBS Forex, National Bulk Handling Corporation, ticker plant limited.
National Multi commodity exchange of India Ltd. (NMCE) (est. in 2002, Ahmedabad)[101]	Cash crops, food grains, plantations, spices, oil seeds, metals & bullion etc.	–	• Central warehousing corporation • Gujarat State Agricultural Marketing Board • Gujarat Agricultural Industries Corporation Limited • National Institute of Agricultural Marketing • Neptune Overseas • Punjab National Ban

Source: compiled by the authors based on the data from the SEBI

[101] This exchange is not listed on the website of SEBI (Jun. 20, 2022), available at https://www.sebi.gov.in/stock-exchanges.html.

The exchange which more than others specializes in agricultural commodities is the National Commodity and Derivatives Exchange Limited (NCDEX) (established in 2003, with the main office in Mumbai). It is the only commodity exchange that trades in wheat-related contracts.[102] As it was depicted by a market practitioner Sivakumar in 2015, the commodity futures market is India is "lacking depth": the prevailing futures instruments in the commodity exchanges were only 1–2 month long, while the market needed longer-term futures.[103] For certain reasons, the farmers due to the low scale of their individual production, as well as due to standardization and financial reasons do not actively participate in futures trading. One of the reasons for low level involvement of agriholdings in the wheat futures market is the specifics of the commodity: the low level of price volatility and the high level of government intervention in the market:

> given the high influence of Government actions on wheat prices – such as minimum support prices to farmers, consumer prices through public distribution, and extent of buying by the Government agencies, the market is distorted and commodity exchanges are not able to offer viable risk management mechanisms.[104]

As of March 2021, options for wheat as well as five other commodities were traded at NCDEX.[105] However, in December 2021, the SEBI banned futures and options trading in a number of agricultural commodities, including wheat and basmati rice, for a period of one year. As it is explained, this ban is aimed at keeping inflation down.[106] The efficiency of this measure is questioned by some researchers.[107] In general, the number of commodities permitted for futures trading in NCDEX decreased from 28 in 2010 to 22 in 2020. Subsequently, the turnover of agricultural commodities futures decreased from 337 million tonnes to 43 million tonnes respectively.[108] Similarly,

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[102] List of contracts approved for continuous trading – Annexure Q. 1-330, 251. Master Circular for Commodity derivatives Market, SEBI/HO/CDMRD/DMP/P/CIR/2022/64, 17 May 2022. SEBI (Jun. 20, 2022), available at https://www.sebi.gov.in/legal/master-circulars/may-2022/master-circular-for-commodity-derivatives-market_58937.html.

[103] Rajib 2015, at 124.

[104] *Id*. at 126.

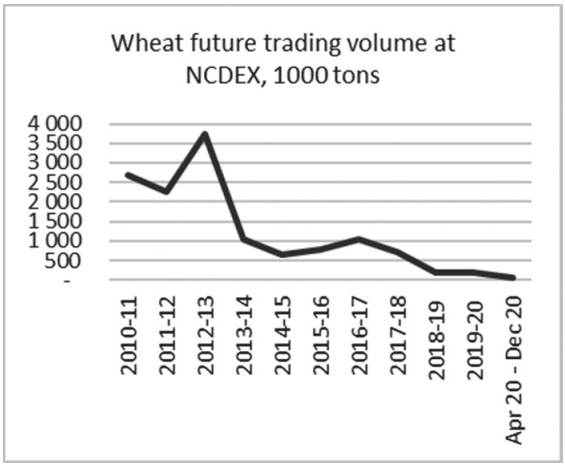
[105] SEBI, Annual Report 2020–21, at 91 (Jun. 20, 2022), available at https://www.sebi.gov.in/reports-and-statistics/publications/aug-2021/annual-report-2020-21_51610.html.

[106] Rajendra Jadhav, *India halts futures trade in key farm commodities to fight inflation*, Reuters, 20 December 2021 (Jun. 20, 2022), available at https://www.reuters.com/world/india/indias-regulator-restricts-futures-trading-some-agri-commodities-2021-12-20/.

[107] S. Kalyansundaram, *Commodities futures ban: Adding to farmers' troubles*, Business Line, 24 December 2021 (Jun. 20, 2022), available at https://www.thehindubusinessline.com/opinion/commodity-futures-ban/article38022818.ece.

[108] SEBI, *supra* note 59, Table 42, Trends in Commodity Futures and Options at NCDEX.

a decrease in number can be spotted with regard to metal and energy commodities.[109] The volume of wheat futures trading declines respectively (Figure 1a,b). Basmati rice futures trading seems to have been on an experimental basis, and is documented only in the 2019–2020 marketing year in the amount of 1,000 tonnes.[110]



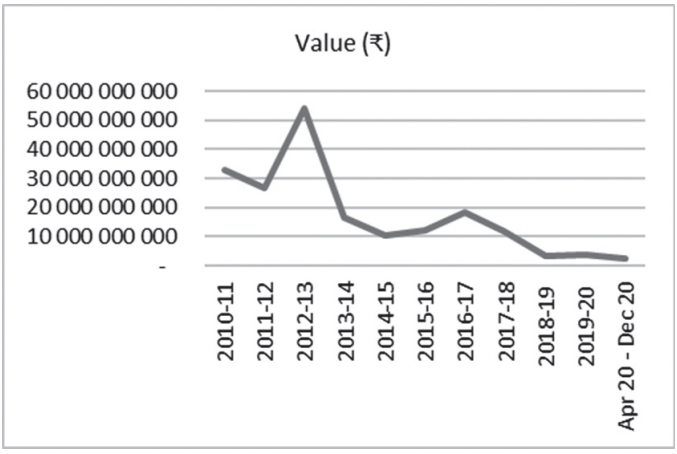


Fig. 1: a) Wheat futures trading at NCDEX, 2010–2020, thousand tonnes
b) Wheat futures trading at NCDEX, 2010–2020, rupees

Source: made by the authors based on the data from the Handbook of Statistics 2020, Table 50

[109] SEBI, *supra* note 59, Table 39.

[110] *Id*. Table 50, Commodity-wise Trading Statistics at NCDEX.

This situation implies that spot trading is the only type of trading in these commodities in 2022. The ban for futures trading implies that farmers will not tend to wait for the forecasted price increase for their products, and will most likely sell their grains at the prevailing spot prices. This is not the first time when a ban on grain futures was imposed in India. It happened in 2007, when the Forward Markets Commission imposed a trading limit on wheat and rice futures until the running contracts terminated.[111]

The emergence and development of commodity exchanges in India significantly contributed to market development, making pricing more transparent and closer linked to the international market, which is to the benefit of the farmers. Spot trading through exchanges was another incentive from the market to develop the storage infrastructure.[112]

In 2020, the SEBI formed the Commodity Derivatives Advisory Committee, with the range of responsibilities including recommending measures for improving market safety, efficiency and transparency, advising on matters related to delivery and storage mechanisms, and recommending changes in the regulatory framework.[113]

4. BRICS Grain Union instead of International Grains Council

Far from supporting American sanctions, India has worked out local-currency swap and investment mechanisms to conduct trade with Russia in rubles and rupees and invest Russia's surplus proceeds in the Indian corporate bond market.[114] India is proposing to settle trade with Russia in rupees, according to a person with knowledge of the matter, as the South Asian nation presses ahead with purchases of oil and weapons from the sanctions-hit country. India had a trade deficit of $6.61 billion with Russia in the year ended March 2022, with total bilateral trade at $13.1 billion. New Delhi is working on boosting exports of products such as pharmaceuticals, plastics and chemicals to balance the books.[115] Settlements in national currencies between India and Russia have already been tested in the supply of tea. It is unlikely that the settlements will be only in rupees. Probably, settlements in dollars and euros between Russia and India in the second half of 2022 will remain only for oil, all other

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111 Kalyansundaram, *supra* note 107.

112 Rajib 2015, at 126.

113 Commodity Derivatives Advisory Committee (CDAC), SEBI (Jun. 20, 2022), available at https://www.sebi.gov.in/sebiweb/about/AboutAction.do?doMember=yes&committeesId=40.

114 Demographics push China-India-Russia triple entente, Asia Times, 27 April 2022 (Jun. 20, 2022), available at https://asiatimes.com/2022/04/demographics-push-china-india-russia-triple-entente/.

115 Shruti Srivastava, *India Proposes Settling Russia Trade in Rupees as Purchases Rise*, Bloomberg, 16 June 2022 (Jun. 20, 2022), available at https://www.bloomberg.com/news/articles/2022-06-16/india-proposes-settling-russia-trade-in-rupees-as-purchases-rise.

settlements will be completely transferred to rubles and rupees. In this case, the Chinese yuan could be used as the base currency.

The efficiency of Russia, India and South Africa's participation in the International Grains Council (IGC) is questionable, as it limits their freedom of action, with no power forthcoming. In the organization, two voting systems are used. Under the first system, out of 2000 votes, Russia has only 86, India 42, and South Africa has 15 votes. However, the USA, the European Union, Australia, Canada and Japan have a total of 1307 votes. Under the second system, out of 2000 votes, Russia has only 56, India 28, South Africa 31 votes, and the US, EU, Australia, Canada and Japan have a total of 1084 votes.[116] Brazil and China are not the members of the IGC.

According to the XIV BRICS Summit Beijing Declaration of 23 June 2022, the BRICS countries declared the following:

> BRICS countries produce around $^{1}/_{3}$ of the world's food, we stress our commitment to furthering agricultural cooperation and driving sustainable agricultural and rural development of BRICS countries aimed at safeguarding food security of BRICS countries and the world. We emphasize the strategic importance of agriculture inputs, including, inter alia, fertilizers, on ensuring global food security. We reiterate the importance of implementing the Action Plan 2021–2024 for Agricultural Cooperation of BRICS Countries, and welcome the Strategy on Food Security Cooperation of the BRICS Countries.

The BRICS members also stressed the importance of issues including infrastructure development and food for the sustainable development of Africa.[117]

Based on the above, it is therefore suggested that BRICS could work out a regional Grain Union to meet their objectives with regard to food security and develop an efficient grain supply trading system.

Conclusion

India has been witnessing significant development of its agriculture, through implementation of various programs, schemes and incentives aimed at production increase, improvement of the farmers income level, and raising efficiency in grain storage and trade systems.

Apart from the procurement systems, which accounts for around 36–43% of wheat produced, trade in wheat in the country is switching to the electronic system,

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[116] International Grains Council, Report for Fiscal Year 2019/2020 (January 2021) (Jun. 20, 2022), available at http://www.igc.int/downloads/publications/rfy/rfy1920.pdf.

[117] XIV BRICS Summit Beijing Declaration, 24 June 2022, paras. 56 & 61 (Jun. 20, 2022), available at http://brics2022.mfa.gov.cn/eng/dtxw/202206/t20220624_10709295.html.

uniting all the producing states, buyers and traders. It is very important that the system is supported by the physical markets (mandis) located at sites and registered and managed in a proper manner by the relevant committees. This is the necessary guarantee for the buyers of the physical availability of the commodity on sale.

With regard to futures trading, India has shown doubts in its efficiency for wheat market development, specifically, in times of uncertainty. In particular, there are concerns that wheat futures stimulate inflation. This resulted in a ban for all wheat derivatives until the end of 2022. However, it should be noted that wheat futures as a financial instrument didn't enjoy growing demand, which is one of the outcomes of the high level of market distortion due to the state interference through MSP and public procurement.

The lack of storage facilities at the farm gate may be an issue impeding trade. Without proper storage, the grain sold is subject to losses and a decrease in quality. For this reason, the FCI's efforts and the government's programs to upgrade storage facilities (including those in the consuming states) and volumes and to improve the management efficiency are crucial.

Once the country solves the issue of grain leakage and losses, builds up an efficient logistic chain for wheat, from farm to port, it will lead to improving India's position in the poverty rank, as well as making the country stronger in wheat export, and these events would increase its budget inflows, as well as contribute to improving the food security in the neighboring and African countries.

The authors believe that the future BRICS membership of Iran and Argentina is strategically important for ensuring the food security of the countries of Asia and Africa, since Argentina is one of the world's leading wheat producers, and Iran can become a global food hub. The food security of the countries of Asia and Africa is highly dependent on the grain exporting countries, and this task is a global mission of the BRICS countries. The creation of a BRICS Grain Union could be an important step in achieving this objective, in addition to ensuring their own food security which the Union will provide as well.

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PATENTABILITY OF COMPUTER PROGRAM ALGORITHMS IN THE G20 STATES

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Ubiquitous computerization and digitalization are contributing to the unprecedented growth of the software market. Computer programs are protected as subject of copyright law in international law and domestic legal systems. However, copyright law does not protect the interests of the copyright holder from borrowing ideas and algorithms which often have a great commercial value. This circumstance has prompted the legal science and law enforcement practice of the most developed states to justify the possibility of protecting computer programs and their algorithms. The leading states chosen for in this paper are the G20 states. The relevance of this choice is due to the following: 1) The G20 states account for 86% of global GDP; 2) All world leaders in computer software development are G20 members; 3) All BRICS states are G20 members; 4) The law-and-orders of the G20 states are relevant to all existing traditions of the legal protection of intellectual property in the world. The legal systems of the G20 states follow one of three approaches according to the criterion of patentability of computer programs and their algorithms. We call the first approach "neutral." It includes States which legislation does not explicitly prohibit the patenting of computer programs, but computer programs themselves are not mentioned among the subject matters of inventions. The second ("positive") approach includes those states which legislation explicitly classifies computer programs as patentable inventions. On the contrary, the third ("negating") approach includes states where it is legally established that computer programs as such are unpatentable. The results of the research demonstrate that there is no direct correlation between the way of solving the issue of patentability of computer program algorithms in different legal systems and the state's place in the global IT market. For example, the United States and China take a neutral approach, Japan takes a positive approach, the EU Member States and India take a negating approach. We believe

that the most flexible approach is a neutral approach from the point of view of patent law policy. The most liberal and consistent approach is the positive approach presented by the Japanese legal system. Finally, the negating approach is the most controversial and at the same time widespread among the G20 and BRICS states.

Keywords: algorithm; computer program; patentability; software patent; intellectual property; G20; BRICS.

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Introduction

All new achievements of the fourth industrial revolution are effectively based on digital and information technologies and are improved on the basis of computational capability. Such achievements include, for example, uncrewed vehicle, 3D printing, robotics, the Internet of things, artificial intelligence technologies, facial recognition, blockchain. Ubiquitous computerization and digitalization are contributing to the unprecedented growth of the software market: its volume amounted to 3.65 trillion U.S. dollars in 2020, and it is expected to reach about 3.92 trillion U.S. dollars in 2021.[1]

The commercialization and high-cost characteristics of software predetermine the significance of effective mechanisms for its legal protection. Computer programs are protected as by copyright law on international level and in domestic legal systems. The fundamental principle of copyright law is that it protects the creative expression of ideas rather than the ideas themselves. Accordingly, copyright law protects the source text, object code, and audiovisual representation of a computer program, but not the underlying ideas and algorithms.

[1] Information technology (IT) worldwide spending from 2005 to 2022, Statista (Feb. 26, 2021), available at https://www.statista.com/statistics/203935/overall-it-spending-worldwide/.

It is as difficult both to accurately define the term "algorithm" and to define the concept of artificial intelligence expressed in legal science.[2] In general, an algorithm is any method consisting of a relatively small number of sequential steps that should be taken to solve a particular problem. The term is derived from the famous ninth-century astronomer and mathematician al-Khwarizmi who introduced the Indian numerals, which we know as Arabic. Al-Khwarizmi discovered the rule for adding multi-digit numbers. This rule became known by the name of its creator in Europe after the conquest of Spain by the Arabs. The rules of calculation became known as the "algorithm" alongside with the development of mathematics. When computers appeared, this term also began to designate the rules of calculation that underlie the operation of these machines. It should be clarified that algorithms can be written in various ways: in the form of text or a conditional visual flow-chart or a computer program in a specific programming language.

Algorithms of a computer program often have very high commercial value. Algorithms are often compared to the building blocks of modern advances in the sphere of information technology. However, the interests of software developers cannot be protected by copyright law from borrowing their algorithms, because the expression of the algorithms may be different depending on which programming language the developer uses. Undoubtedly, algorithms can be protected as confidential information. However, such protection is ineffective because it does not protect the interests of the copyright holder from the parallel creation of the same algorithms by others.

The lack of copyright protection of computer program algorithms and the ineffectiveness of their protection through the confidential information regime have prompted the jurisprudence of many states to substantiate the possibility of protecting these subject matters by means of patent law. According to the forecast of the analytical company Gartner, by 2020 the number of patent applications mentioning "algorithm" in the claims or in the title should have reached half a million.[3] The approaches to solving the problem of algorithms patentability offered today by legal science and judicial practice are insufficiently defined and often inconsistent. This undoubtedly has a negative impact on the harmonization process and complicates enforcement.

Our research is based on G20 states' cases. The relevance of this choice is due to the following:

1) The G20 states account for 86% of global GDP;

2) All world leaders in computer software development are G20 members;

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[2] *The Cambridge Handbook of the Law of Algorithms* (Woodrow Barfield ed., 2020).

[3] Gartner Says Within Five Years, Organizations Will Be Valued on Their Information Portfolios, Gartner, 8 February 2017 (Dec. 21, 2020), available at https://www.gartner.com/en/newsroom/press-releases/2017-02-08-gartner-says-within-five-years-organizations-will-be-valued-on-their-information-portfolios.

3) All BRICS states are G20 members;

4) The legal systems of the G20 states belong to different legal families;

5) The law-and-orders of the G20 states are relevant to all existing traditions of the legal protection of intellectual property in the world.

The purpose of this paper is to determine the vectors of lawmaking development, legal thought and judicial practice in the sphere of patenting computer program algorithms by comparing various approaches adopted in the G20 states.

The international legal framework for the protection of computer programs and their algorithms will be considered in the first part of this paper. Acts of international law give G20 states relative freedom in the patentability of computer programs. Unsurprisingly, these states have established different rules regarding the patentability.

We believe that the legal systems of the G20 states should be divided into three groups according to the criterion of patentability of computer programs and their algorithms.

In the second part of this paper, we will consider legal systems which do not explicitly prohibit the patenting of computer programs in their legislation, but computer programs themselves are not mentioned among the subject matters of inventions. We call this approach "neutral."

In the third part, we will consider legal systems that explicitly classify computer programs as patentable inventions in their legislation. This approach is inherently "positive" or "permissive."

Finally, in the fourth part, we will analyze the legal systems that prohibit patenting of computer programs as such in their legislation. This approach is addressed as "negating" or prohibiting in the paper.

1. International Legal Framework for the Protection of Computer Programs

The modern history of computers originates from the developments of the American John Atamasoff and the German Konrad Zuse, who independently built computers operating in the binary number system at the turn of the 1930s–1940s. Information about Atamasoff's computer was unknown due to World War II. For many years people believed that the first electronic computer was the Electronic Numerical Integrator and Computer (ENIAC) created by John Mauchly and John Presper Eckert in 1944–1945. However, U.S. District Court for the District of Minnesota ruled its judgment in 1973 that the Atanasoff-Berry Computer was the first electronic computer in the world.[4]

[4] John Vincent Atanasoff – The father of the computer (October 4, 1903 – June 15, 1995), Columbia University (Dec. 21, 2020), available at http://www.columbia.edu/~td2177/JVAtanasoff/JVAtanasoff.html.

The software was rigidly linked to a particular computer model in the early days of computers. The problem of independent legal protection of computer programs did not exist. In 1964, the IBM System/360 computer was released, the architecture of which was so successful that it became the industry standard for computing technology. Many companies began to produce computers compatible with the IBM 360. In fact, the compatibility of computers from different manufacturers and different models have become a prerequisite for the foundation of an independent software market.

With the formation of the software market at the turn of the 1960s–1970s, the need for effective protection of the interests of computer program developers arose. Copyright law and patent law were considered as the main legal regimes for such protection. However, not all experts were convinced of the need for such protection then. In 1970 Stephen Breyer (now a U.S. Supreme Court Justice) wrote in his classic article that the lack of copyright protection for computer programs is unlikely to significantly affect the development of such programs. He believed that it would be unwise to extend copyright protection to virtually all computer programs, because such expansion could cause significant harm. If computer manufacturers were to protect almost all of their programs through copyright law, there would be a serious problem of transaction costs.[5] According to S. Breyer the widespread protection of computer programs may lead to the fact that many users will borrow only the algorithm of the program and recreate the program itself or, more likely, make various modifications to it to avoid the appearance of copying.[6]

The issue of the protection of computer programs began to be discussed at the international level in 1971, when World Intellectual Property Organization (WIPO) organized a meeting of experts to prepare appropriate research. Also, in 1971 the last revision of the Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886 – the most important act of international copyright law, took place.[7] It is clear that the protection of computer programs is not reflected in the Berne Convention in any way.

In 1978 WIPO published the Model Provisions on the Protection of Computer Software – the result of six years of work by the International Bureau of WIPO and invited experts.[8] The introduction to the Model Provisions justifies the need for software protection and suggests two main models of such protection: patent law and copyright law. According to WIPO copyright law is the preferred form of

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5 Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84(2) Harv. L. Rev. 281, 346–347 (1970).

6 *Id.*

7 Berne Convention for the Protection of Literary and Artistic Works (1886) (Dec. 21, 2020), available at https://www.wipo.int/edocs/lexdocs/treaties/en/berne/trt_berne_001en.pdf.

8 Copyright: Monthly Review of the World Intellectual Property Organization (WIPO) (January 1978) (Dec. 21, 2020), available at http://www.wipo.int/edocs/pubdocs/en/copyright/120/wipo_pub_120_1978_01.pdf.

protection. Firstly, many states, as well as the European Patent Convention, exclude computer programs from the list of patentable inventions. Secondly, even if patent protection were generally available, it would cover an insignificant part of computer programs, because most of them do not meet such a condition of protection as inventive step (non-obviousness).[9]

The research carried out on behalf of WIPO by the outstanding German scientist Eugen Ulmer had a major influence on the concept of the Model Provisions. Professor Ulmer compared the introduction of a program into a computer with the reproduction of a literary work and concluded that computer programs can be protected as subject matters of copyright law.[10]

In 1985, WIPO organized an expert meeting on the protection of computer programs. One of the items on the agenda of that meeting was the conclusion that many states were gradually starting to grant copyright protection to computer programs based on legislation or precedents, without waiting for an international agreement.[11] In fact, this meeting led to a decisive breakthrough and consensus that computer programs should be protected by copyright law. For example, France, Germany, Japan, and the United Kingdom legally recognized programs as subject matters of copyright law in the summer of 1985.[12] Thus, the issue of adopting a treaty for the protection of computer programs has become irrelevant and has been removed from the WIPO agenda.

The first global international agreement establishing the protection of computer programs was the TRIPS Agreement of 15 April 1994.[13] According to clause 1 of Article 10 of the Agreement – computer programs both source text and object code are protected as literary works in accordance with the Berne Convention as amended in 1971. The legal equalization of computer programs with literary works is based on the position of WIPO. For example, it is noted in the commentary to the Model Provisions on Copyright Law that some States grant protection to computer programs as literary works, while others grant protection as independent works. The first approach is preferable according to the WIPO experts.[14]

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9 Copyright, *supra* note 8.

10 Delia Lipszyc, *Copyright and Neighbouring Rights* 112 (1999).

11 Copyright: Monthly Review of the World Intellectual Property Organization (WIPO) (April 1985) (Dec. 21, 2020), available at http://www.wipo.int/edocs/pubdocs/en/copyright/120/wipo_pub_120_1985_04.pdf.

12 WIPO, Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms (2005) (Dec. 21, 2020), available at https://www.wipo.int/edocs/pubdocs/en/copyright/891/wipo_pub_891.pdf.

13 Agreement on Trade-related Aspects of Intellectual Property Rights (1994) (Dec. 21, 2020), available at https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm.

14 Committee of Experts on Model Provisions for Legislation in the Field of Copyright, Third Session (Geneva, 1990) in Copyright: Monthly Review of the World Intellectual Property Organization (WIPO) (September 1990), at 241 (Dec. 21, 2020), available at https://www.wipo.int/edocs/pubdocs/en/copyright/120/wipo_pub_120_1990_09.pdf.

The original draft of Article 10, clause 1, of the TRIPS Agreement, proposed by Japan, also stated that the copyright protection of computer programs under this agreement does not apply to any programming language, rule, algorithm used to create such a program.[15] However, this offer was modified in order to comply with section 102 of the United States Copyright Act of 1976. According to section 102

> In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.[16]

As a result, the special provision on unprotected elements of a computer program was transformed into the general rule of clause 2 of Article 9 of the TRIPS Agreement: copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.

Computer programs were recognized as subject matters of copyright law, but the TRIPS Agreement did not prohibit their protection by patent law. Clause 1 of Article 27 of the Agreement states that patents shall be available for any inventions, whether products or processes, in all fields of technology. This general rule does not mean that World Trade Organization (WTO) Member States have to recognize computer programs or software as patentable. This neutral approach is beneficial to developing states because it leaves the question of the patentability of computer program algorithms to their discretion.[17]

The WIPO Copyright Treaty was adopted in 1996 and also provided copyright protection for computer programs.[18] According to Article 4 of the Treaty computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression. Agreed statement concerning Article 4 states that the scope of protection for computer programs under Article 4 of this Treaty, read with Article 2, is consistent with Article 2 of the Berne Convention and on a par with the relevant provisions of the TRIPS Agreement. The purpose of such Agreed statements is to provide guidance on how the provisions of the Treaty should be interpreted. In particular, clause 2 of Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969[19] provides

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15 *Resource Book on TRIPS and Development* 154 (2005).

16 Copyright Law of the United States (Title 17) (1976) (Dec. 23, 2020), available at https://www.copyright.gov/title17/.

17 *Resource Book on TRIPS and Development*, *supra* note 15, at 366.

18 Copyright Treaty (WIPO) (1996) (Dec. 23, 2020), available at https://wipolex.wipo.int/en/treaties/textdetails/12740.

19 Vienna Convention on the Law of Treaties (1969) (Dec. 23, 2020), available at https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

that the context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty. Thus, the WIPO Copyright Treaty did not contain anything new regarding the scope of protection of computer programs.

In summary, the TRIPS Agreement and the WIPO Copyright Treaty recognized computer programs as subject matters of copyright law at the end of the 20th century. Copyright protection extends primarily to the source code and object code of a computer program. On the contrary, copyright law does not protect the algorithms of a computer program. The TRIPS Agreement does not establish any obligations regarding the patentability of computer programs and their algorithms. Accordingly, G20 States have relative freedom on this issue.

2. Neutral Approach to Patentability of Computer Programs and Algorithms

The most flexible approach is a neutral approach from the point of view of patent law policy. This approach implies that the patent laws of some G20 States do not contain provisions that prohibit the patenting of computer programs and their algorithms, as well as there are no provisions that allow it. This approach is a conservative solution for those legislators who prefer not to respond to technological changes and leave the task to the courts and patent offices. The neutral approach is enshrined in the legislation of the United States, Australia, Canada, the Republic of Korea, China, and Saudi Arabia.

The United States is one of the world leaders in both the number of registered patents in general and the number of software patents. The philosophy of American patent law is reflected in the U.S. Constitution, which states that the Congress shall have power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries (Art. I, sec. 8).[20] Thus, the purpose of granting exclusive copyright and patent rights is the development of society, not the idea of the author's natural rights.

The main requirements for patentable subject matters are set out in Section 101 of the U.S. Patent Act: whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.[21] This act does not contain a list of subject matters that cannot be protected

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[20] U.S. Const., Art. I (Dec. 23, 2020), available at https://www.senate.gov/civics/constitution_item/constitution.htm.

[21] U.S. Patent Act (1952) (Dec. 23, 2020), available at https://wipolex.wipo.int/en/legislation/details/15705.

as inventions, unlike the patent laws of many states. Also, the U.S. Patent Law does not prescribe anything about the patentability of computer programs and their algorithms. This task is traditionally handled by American courts.

The evolution of patent protection of computer program algorithms in the United States can be divided into three stages. At the first stage, the Patent and Trademark Office and the courts refused to grant patent protection to computer programs. These subject matters were regarded as a way of thinking rather than as a patentable product or process. It is important to note the case *Gottschalk v. Benson*, considered by the Supreme Court in 1972.[22] The company filed an application for an invention concerning a method for converting numerical information from binary-coded decimal numbers into pure binary numbers. The Supreme Court explained the refusal of patentability of such a solution by the fact that this process is a mathematical method – an idea. It did not fall under the concept of an invention.

The second stage is characterized by a gradual liberalization of the approach to the conditions of patentability of computer programs. We believe that it began with the Supreme Court's decision in the case *Diamond v. Diehr* (1981).[23] The Supreme Court recognized an invention relating to a computer program as patentable for the first time. This invention concerned a rubber vulcanization process, which was carried out under the control of a computer device that constantly monitored the temperature of the process and calculated on its basis certain parameters of the mold operation.

The most important precedent of the second stage is the decision of the United States Court of Appeals for the Federal Circuit in the case *State Street Bank & Trust Co. v. Signature Financial Group* (1998).[24] This precedent had the effect of a dam failure, because after it the number of granted patents for computer programs increased significantly. The essence of the patent granted to the company "Signature Financial Group," is that the invention is a data processing system for managing a financial services configuration of a portfolio established as a partnership. The court noted that a mathematical algorithm as such is not patentable, since it represents an abstract idea. However, such an algorithm is patentable if it is used to achieve a certain useful and practical effect. This rule has come to be known as the "practical application' test."

The decision in the case *State Street Bank* case was the highest point on the way to reducing the requirements for patentability of computer program algorithms in the United States. Its consequences have raised concerns that the wave of patents on algorithms would lead to excessive monopolization of the market of ideas and business methods and would negatively affect competition and economic development. As a result, at the third stage, the Supreme Court issued

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22 *Gottschalk v. Benson*, 409 U.S. 63 (1972).

23 *Diamond v. Diehr*, 450 U.S. 175 (1981).

24 *State Street Bank & Trust Co. v. Signature Financial Group, Inc.*, 149 F.3d 1368 (1998).

a series of decisions that tightened the requirements for patentability of computer programs.

The first of these precedents was the decision in the case *Bilski v. Kappos* (2010).[25] In this case, the inventor Bernard Bilski tried to patent a method (algorithm) of hedging risk. The Supreme Court was reviewing the decision of the United States Court of Appeals for the Federal Circuit,[26] which ruled that the abstract investment strategy set out in the application was not patentable. The Court of Appeals rejected the previously formulated practical application test (the *State Street Bank* case) and based its decision on the "machine-or-transformation test." The essence of this test is that the condition for patentability of a process or method is: 1) the process ties to a particular machine or apparatus; or 2) the process transforms an article from one state to another. The Supreme Court generally agreed with the Court of Appeal, but it did not go so far as to say that "machine-or-transformation test" – is the only test for patentability. This rule is one of the useful tools for determining the patentability of computer programs and algorithms. In the *Bilski* case the Supreme Court refrained from formulating any general rules on the patentability of computer programs.

The most recent Supreme Court precedent to date is the decision in the case *Alice Corp. v. CLS Bank International* (2014),[27] in which the Court also refrained from general considerations about whether algorithms and computer programs are patentable or not. "Alice Corporation" owned four patents for electronic methods and computer programs, the purpose of which was to hedge risks in conducting trading operations and settlements. "Alice" accused "CLS Bank International" of using a similar technology and violating its patents. "CLS Bank" responded by filing a counterclaim to challenge the patents.

The Supreme Court unanimously admitted "Alice's" patents invalid and ruled that an abstract idea cannot be patented just because it is implemented on a computer. In this case, the Supreme Court applied the so-called two-part test to verify the patentability of algorithms and business methods. The first step is to determine whether the subject matter contains an abstract idea (for example, an algorithm, a calculation method, or another general principle). If the answer is yes, then the next step should be taken. It is necessary to determine whether the additional elements transform the subject matter into a patentable invention, whether they add something additional to the abstract idea or algorithm that embodies the inventive concept. The court decided that the normal use of a general-purpose computer was not sufficient to convert an abstract idea into a patentable invention.

The "Alice" decision fundamentally changed the patentability requirements of algorithms and methods. Although the decision does not contain general

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25 *Bilski v. Kappos*, 561 U.S. 593 (2010).

26 *In re Bernard L. Bilski and Rand A. Warsaw*, 545 F.3d 943, 88 U.S.P.Q.2d 1385 (Fed. Cir. 2008).

27 *Alice Corp. v. CLS Bank International*, 573 U.S. (2014).

considerations and rules on the conditions of patentability of computer programs, as well as the prohibition of their patenting. Many patents for computer programs have been invalidated in the United States following this precedent. In 2019, the U.S. Patent and Trademark Office published a guide on the patentability of computer programs, which essentially summarizes the judicial practice of the last decade.[28] The guide is not a binding act.

In Australia, the requirements for patentability of inventions are essentially the same as in the United States patent law.[29] The Australian Patent Act of 1990, following the American tradition, is silent on the patentability of computer programs and business methods.[30] Unlike the United States, the Australian Patent Office did not provide explanations and examples that would help determine the limits of patentability of ideas and algorithms.

Judicial practice in Australia today is characterized by approximately similar requirements for patentability of algorithms and computer programs, compared to the U.S. practice following the *Alice* case. For example, in the case *Research Affiliates LLC v. Commissioner of Patents* the court was deciding whether a method of creating a securities index by means of a computer is an invention.[31] The court ruled that simple loading a scheme into an ordinary computer is not patentable unless there is a technical solution to how exactly the computer implements the scheme or method. This decision is notable because here the court considered different approaches to software patenting in the U.S. and Europe. However, the court made it clear that while it may be useful to study foreign approaches, they should not be used if they contradict Australian law and judicial precedent. A similar position to prohibit the patenting of algorithms related to information retrieval and data management was formulated in a recent court decision in 2019 in the case *Encompass Corporation Pty Ltd. v. InfoTrack Pty Ltd*.[32] The Court established that the claimed method was essentially an instruction for the application of an abstract idea using common computer technology without any additional technical features.

Canadian legislation also follows the patent tradition of the United States and is silent on the patentability of software. The two rules by which courts decide on

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[28] U.S. Patent and Trademark Office announces revised guidance for determining subject matter eligibility, United States Patent and Trademark Office, 4 January 2019 (Dec. 27, 2020), available at https://www.uspto.gov/about-us/news-updates/us-patent-and-trademark-office-announces-revised-guidance-determining-subject.

[29] B. Delano Jordan et al., *A Global Perspective on Patent Subject Matter Eligibility and Software-Related Inventions: Court Cases, Legislation and Regulations Are Described Along with Practice Hints for Navigating Patent Eligibility in Australia, Canada, China, Europe, Japan, Korea and the United States*, Intellectual Property Owners Association (2019) (Jan. 5, 2021), available at https://ipo.org/wp-content/uploads/2019/12/IPO_elegibility_whitepaper11-20-19.pdf.

[30] Australian Patent Act (1990) (Jan. 5, 2021), available at https://wipolex.wipo.int/ru/text/579247.

[31] *Research Affiliates LLC v. Commissioner of Patents* [2014] F.C.A.F.C. 150; 227 F.C.R. 378; 109 I.P.R. 364.

[32] *Encompass Corporation Pty Ltd. v. InfoTrack Pty Ltd*. [2019] F.C.A.F.C. 161; 372 A.L.R. 646; 145 I.P.R. 1.

the patentability of computer program algorithms are: 1) the provision of Article 2 of the Patent Act of 1985 on the concept of invention; 2) Article 27(8) of this act, which provides that no patent shall be granted for any mere scientific principle or abstract theorem.[33] It should be noted that until 2005 the Canadian Intellectual Property Office (CIPO) rejected applications for patenting computer programs on the basis of these rules.[34]

The main precedent on the patentability of computer programs in Canada is the decision of the Federal Court of Appeal (2011) *Attorney General v. Amazon.com, Inc*.[35] "Amazon" has filed a patent application for its one-click method of internet shopping. The application was rejected by the Patent Office. In general, the court supported the applicant and returned the application to the Patent Office for expedited reconsideration. As a result, the patent was granted to "Amazon" in December 2011. The following aspects are interesting in this case. Firstly, the court did not consider the arguments that similar patents had been granted in the U.S., Australia and New Zealand. Secondly, the court, resorting to general reasoning about the patentability of methods and algorithms, observed: if the only new aspect of the claimed invention was a mathematical formula, then such subject matter was unpatentable, because scientific principles and abstract theorems could not be patentable. The court also emphasized that patentable subject matter must be something that physically exists or something that exhibits a noticeable technical effect.

Following this court ruling, CIPO issued guidance in 2013 stating that software can be patentable if the computer is an essential physical element of the claims.[36] Implementing algorithms as such by means of a computer is not an invention. However, an algorithm or method is patentable if the invention involves controlling the operation of a computer to achieve a technical result. This result is expressed in the fact that the invention should lead to a change in the state of the physical object. These explanations have attracted critical reviews, because they significantly hinder the patenting of algorithms.[37] For example, the CIPO guidance states: if the claimed software algorithms can be implemented without a computer (for example, with a pen and paper), regardless of the inconvenience or impracticality, then the specified computer hardware is not an essential element of the invention.

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33 Patent Act of Canada (1985) (Jan. 5, 2021), available at https://wipolex.wipo.int/ru/text/566713.

34 Ravindra Chingale & Srikrishna Deva Rao, *Software Patent in India: A Comparative Judicial and Empirical Overview*, 20(4) J. Intellect. Prop. Rts. 210 (2015).

35 *Canada (Attorney General) v. Amazon.com, Inc*., 2011 F.C.A. 328 (CanLII).

36 Practice Guidance Following the Amazon FCA Decision, Canadian Intellectual Property Office, 8 March 2013 (Jan. 5, 2021), available at http://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/wr03628.html.

37 Isi E. Caulder & Nicholas Aitken, *Canada: Pulling Out All the Stops – Patenting Computer Implemented Inventions in Canada Despite Unprecedented Obstacles*, Bereskin & Parr LLP (2016) (Jan. 6, 2021), available at https://www.mondaq.com/canada/patent/458794/pulling-out-all-the-stops--patenting-computer-implemented-inventions-in-canada-despite-unprecedented-obstacles.

Thus, the test of additional technical features or notable technical effect applied by the Australian and Canadian courts is essentially similar to the two-part test applied by the U.S. Supreme Court in the *Alice* case. This view is shared by Brad Sherman[38] in his main paper. He calls the test applied by the courts in Australia and Canada the rule of a concrete, tangible, physical, or observable effect.

A neutral legislative approach to the patentability of computer programs is also present in dynamic economies such as the Republic of Korea and China.

The Korean Patent Act of 1961[39] provides exactly the same definition of invention as the Japanese Patent Act of 1959.[40] Article 2 of the Korean Patent Act states that the term "invention" means the highly advanced creation of a technical idea utilizing the laws of nature. In this sense, the patent law of these States develops within the same tradition. However, unlike Japan, the Korean Law does not contain any specific provisions regarding inventions related to computer programs.

The examination guidelines,[41] developed by the Patent Office of the Republic of Korea have a separate section on a computer-related invention (Ch. 10, Pt. IX). A patent for such an invention may be granted if the claimed subject matter falls within the definition of an invention and meets the criteria for patentability. A computer program cannot be a suitable subject matter, because it is considered as instructions for a computer and therefore does not correspond to the concept of an invention as a technical idea using the laws of nature. Furthermore, the guidelines state that the algorithm to be patented cannot be of an abstract nature. In other words, the examination is required to establish whether there is an inseparable link between the software and the hardware which is necessary for the subject matter to be patentable.

An example of unpatentable solutions in Korea is the method of creating a password by combining letters, numbers and symbols. Such a method is considered as not based on the use of the laws of nature, as it is related to the rules of language and alphabet (*Patent Court decision 2001Heo3453*).[42] On the other hand, data processing may be patentable if it is claimed as unique information processing by means of software implemented on certain hardware (*Supreme Court decision 2007Hu265*).[43]

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38 Brad Sherman, *Computer Programs as Excluded Patentable Subject Matter*, SCP/15/3, Annex II (Jan. 6, 2021), available at https://www.wipo.int/edocs/mdocs/scp/en/scp_15/scp_15_3-annex2.pdf.

39 Patent Act of the Republic of Korea (1961) (Jan. 6, 2021), available at https://wipolex.wipo.int/en/legislation/details/17484.

40 Patent Act of Japan (Act No. 121 of 1959) (as amended up to 1 April 2020) (Jan. 6, 2021), available at https://wipolex.wipo.int/en/legislation/details/19899.

41 Korean Intellectual Property Office, Patent Examination Guidelines (January 2020) (Jan. 6, 2021) available at https://kipo.go.kr/upload/en/download/Patent_Examination_Guidelines_2020.pdf.

42 Delano Jordan et al., *supra* note 29.

43 *Id*.

The Patent Law of 1984 forms the basis of China's patent law (as amended on 17 October 2020)[44]. The second most important act dealing with the issue under consideration is the Patent Examination Guidelines[45] approved by the Decision of State Intellectual Property Office of the People's Republic of China (SIPO) as amended on 24 May 2006. The Patent Law is silent on the patentability of computer programs. Article 25 of the Patent Law deals with the unpatentable subject matters, specifies, for example, scientific discoveries, rules and methods for intellectual activities.

Meanwhile, the dynamic development of information technology and artificial intelligence in China has actualized the issues of legal protection of algorithms and methods. However, Chinese scholars have also taken the position that China should not accept the practice of granting patents on these subject matters due to the fact that this would upset the balance of public and private interests and could adversely affect the development of science, technology and commerce.[46]

This criticism was not supported in the process of determining the directions of the national state policy in the field of intellectual property and the choice was made in favor of granting protection to algorithms as inventions, subject to a number of conditions. The implementation of the indicated strategy took place in several stages. The revisions to the provisions of the Guidelines on examination came into force on 1 April 2017. These revisions significantly expanded the ability to grant patents on algorithms and business methods.[47] Thus, it was stated that a computer program was different from software-related inventions: the first subject matter was unpatentable (Pt. II, Ch. 1, cl. 4.2).

On 1 February 2020, a new section of the Patent Examination Guidelines was introduced: "6. Relevant regulations on the examination of patent applications for inventions that include algorithmic features or business rules and method features."[48] The technical nature of the solution is identified as a key aspect to distinguish

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[44] Patent Law of China (1984) (Jan. 5, 2021), available at https://www.chinajusticeobserver.com/law/x/patent-law-of-china-20201017/chn; http://www.jxnf.gov.cn/art/2020/12/1/art_1009_3591086.html.

[45] 中华人民共和国知识产权局, 专利审查指南 2019 [China National Intellectual Property Administration, Guide to the Patent Examination of China (2019)] (Jan. 5, 2021), available at http://www.tsailee.com/upload/2020版大陸專利審查指南.pdf.

[46] 谢黎伟, 利益平衡视角下的商业方法可专利性, 海峡法学 [Xie Liwei, *Patentability of Business Methods from the Perspective of Balance of Interests*, 3 Cross-Strait Legal Science 74 (2010)] (Jan. 10, 2021), available at https://core.ac.uk/download/pdf/41434858.pdf.

[47] 新修改的《专利审查指南》将于4月1日起施行 [The newly revised patent examination guidelines will come into effect on 1 April 2017] (Jan. 10, 2021), available at http://www.gov.cn/xinwen/2017-03/07/content_5174235.htm#1.

[48] 国家知识产权局关于修改《专利审查指南》的决定 [The Decision of the State Intellectual Property Office to amend the guidelines for Patent Examination was reviewed and adopted at the bureau meeting and published by the announcement of the State Intellectual Property Office (No. 343, 2019)] (Jan. 10, 2021), available at http://www.gov.cn/zhengce/zhengceku/2019-12/31/content_5465485.htm.

protectable algorithms from unprotectable rules and methods of intellectual activity (cl. 6.1). The authorized body is instructed not only to analyze the place and role of the algorithm in the claims, but also to determine whether it allows solving a specific technical problem, whether its application produces a technical effect. It is stated that during the examination it is necessary to consider the invention as a complete subject matter, and not only to isolate its algorithmic features. When drawing up a patent application, it is recommended to pay special attention to the "functionally correlated" of the algorithmic and technical features of the invention. Only if they are inextricably linked and it is impossible to achieve a technical result without using the algorithm, the authorized body will have the right to register the invention, the content of which is the algorithm.

The Guidelines provides an application for Multi-Sensor Based Fall Prediction Method for Humanoid Robots as an example of a patentable algorithm (Example No. 7). The claims of such an invention denote that the algorithm discloses robot gait planning and feedback control based on sensory information, and a method for determining the stability of the robot, including an assessment of its stability. In contrast, the algorithm for converting the binary-decimal system to binary will be classified as unprotected subject matters.[49] Algorithms for obtaining a purchaser discount are also not patentable, because such algorithms do not contain any technical features and have no technical effect, which allows them to be classified as rules and methods of intellectual activity.

This section concludes with an analysis of the approach of Saudi Arabia, one of the most closed G20 states. According to Article 2 of the Law of Saudi Arabia "On Patents, Layout-Designs of Integrated Circuits, Plant Varieties, and Industrial Designs" (2004)[50] an invention is an idea developed by the inventor that results in a solution of a certain problem in the field of technology. By virtue of Article 45 of the Act, mathematical methods, business models, rules, methods or types of mental or game activities are not protected as inventions. The Act is silent on the patentability of computer programs. We therefore include the Saudi Arabian law in the group of states taking a neutral approach. A similar point of view is shared by the authors of the WIPO report on the patenting of computer programs.[51]

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[49] Qiang Liu, *Research on Patentability of Artificial Intelligence Algorithms Invention*, 17(4) Presentday L. Sci. 17 (2019).

[50] Law on Patents, Layout-Designs of Integrated Circuits, Plant Varieties, and Industrial Designs, promulgated by Royal Decree No. M/27 of 29/5/1425H (17 July 2004), and amended by Decision of the Council of Ministers No. 536 of 10/19/1439 (3 July 2018) (Jan. 17, 2021) available at https://wipolex.wipo.int/en/legislation/details/19744.

[51] Committee on Development and Intellectual Property, WIPO, Patent-Related Flexibilities in the Multilateral Legal Framework and Their Legislative Implementation at the National and Regional Levels – Part III, CDIP/13/10, 27 March 2014 (Jan. 17, 2021), available at https://www.wipo.int/edocs/mdocs/mdocs/en/cdip_13/cdip_13_10.docx.

However, in accordance with Article 3 of the Patent Regulation of the Cooperation Council for the Arab States of the Gulf of 1992[52] computer programs are not considered inventions. Thus, there is a contradiction between this Act and the Saudi Arabian Patent Law. Apparently, in practice, it is allowed in favor of limited patenting of computer programs. The website of the European Patent Office (EPO) notes that in Saudi Arabia a patent may be granted for a software-related invention, while the program itself may only be protected by copyright law.[53] The scientific literature notes that programs as such are not patentable, but if the invention is a piece of hardware, the operation of which is provided by the program, it is subject to registration as patentable subject matter.[54]

3. "Positive" Approach to Patentability of Computer Programs

One of the most liberal approaches to the patentability of computer program algorithms is presented in the Japanese legal system. Article 1 of the Patent Act (1959) captures the utilitarian idea of protecting patent rights:

> The purpose of this Act is, through promoting the protection and the utilization of inventions, to encourage inventions, and thereby to contribute to the development of industry.[55]

However, in practice, Japan's intellectual property rights protection system is more protective of the interests of the rights holders, rather than of other participants in the turnover or of society as a whole.[56]

An invention is defined in Article 2(1) of the Japan Patent Act as "the highly advanced creation of technical ideas utilizing the laws of nature." One of the subject matters of the inventions is a product that includes computer programs (Art. 2(3) of the Patent Act). This provision was included in the Patent Act in 2002.[57] As for the

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52 Patent Regulation of the Cooperation Council for the Arab States of the Gulf and its Implementation (2006) (Jan. 17, 2021), available at https://www.saip.gov.sa/wp-content/uploads/2020/07/Patent_Regulation_of_the_Cooperation_Council_for_the_Arab_States_of_the_Gulf_and_its_Implementation_Bylaw.pdf.

53 FAQ – Saudi Arabia (SA), EPO (Jan. 17, 2021), available at https://www.epo.org/searching-for-patents/helpful-resources/asian/faq.html.

54 Mohammed El Said, *Intellectual Property Law in Saudi Arabia* 17 (2018).

55 Patent Act (Act No. 121, 1959, as amended up to 1 April 2020) (Jan. 17, 2021), available at https://wipolex.wipo.int/en/legislation/details/19899.

56 James Korenchan et al., *A Comparison of U.S. and Japanese Patent Subject Matter Eligibility*, Patent Docs, 28 May 2019 (Jan. 17, 2021), available at https://www.patentdocs.org/2019/05/a-comparison-of-us-and-japanese-patent-subject-matter-eligibility.html.

57 Hideo Furutani, *Patentability of Business Method Inventions in Japan Compared with the US and Europe*, presented at USPTO, Arlington, Virginia, 3 November 2003 (Jan. 20, 2021), available at http://www.furutani.jp/e/Business_method_patents_in_Japan.pdf.

other G20 States, computer programs are not legally classified as a product in a sense of a patentable invention. Japanese law is also unique in that the Copyright Act of 1970 explicitly states that copyright protection shall not extend to any algorithms of computer programs (Art. 10, cl. 3).[58] At the same time, the Act provides an official definition of the term "algorithm": "algorithm" means a procedure in a computer program, which consists of a set of instructions for the computer.

Japan has adopted Examination Guidelines for Patent, which explains in great detail (unlike other G20 states) the rules of patentability of computer programs.[59] The first thing to consider when assessing the patentability of a computer program is whether it falls within the concept of an invention and whether it is the creation of a technical idea using the laws of nature. It is clarified that economic laws are not considered to be laws of nature. When examining a patent application, it is important to establish that the processing of information by software is carried out precisely with the use of computer equipment (hardware resources). For example, the following algorithm does not meet the specified condition: a phonebook data structure in which data items containing the name, address, and phone number of a subscriber are stored and managed as a set of records, which is used by a computer to search for a phone number using the name as a key.[60]

Next, it should be found out whether the claimed invention falls within any of the unpatentable subject matter, for example, simple representation of information, game rules, mathematical formulas. Examples of unpatentable inventions are: 1) programming languages; 2) the method of collecting money to pay electricity or gas bills by rounding off the amount to be paid; 3) a method of playing Japanese chess between distant players, including the transfer of moves over a computer network via a chat system.[61]

In our opinion, the liberality of the provisions on the patentability of computer programs in the Japanese legal system is expressed in the fact that there are no requirements that the running a program on a computer should give an additional technical effect that goes beyond the usual or normal physical interaction between the program and the computer hardware, in contrast to the European legal systems.

Indonesia is one of the most problematic states of the G20 States in terms of the effectiveness of intellectual property protection. For example, about 87% of the software installed on computers in this country in 2011 was unlicensed.[62] O.K. Saidin

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58 Copyright Act (Act No. 48 of 6 May 1970, as amended 2020) (Jan. 20, 2021), available at https://wipolex.wipo.int/en/legislation/details/20024.

59 Examination Guidelines for Patent and Utility Model in Japan, Japan Patent Office (2015) (Jan. 20, 2021), available at https://www.jpo.go.jp/e/system/laws/rule/guideline/patent/tukujitu_kijun/.

60 *Id.*

61 *Id.*

62 Indonesia and IPR developments, a new dimension, Intellectual Property Expert Group (Jan. 20, 2021), available at https://www.ipeg.com/indonesia-and-ipr-developments-a-new-dimension/.

explains the problem of implementing western and international standards for the protection of intellectual property in Indonesian legislation by the fact that culturally the structure of their life is communal, not individualistic. The TRIPS Agreement is based on an individualistic culture and ideology that does not correspond to Indonesian culture.[63] Indonesia is the only G20 State that participated in the Berne Convention (from 1913 to 1945 as part of the Netherlands and then as an independent State), denounced the Convention in 1960 and then re-acceded to it in 1997. Considering the patent legislation of Indonesia at the beginning of the 21st century as a whole, it can be said that it is not perfect in terms of establishing clear criteria for patentability of innovative inventions, as well as the grounds and procedures for issuing compulsory licenses. However, with the adoption of the new Patent Act in 2016, there has been some improvement in the effectiveness of intellectual property protection.

The Indonesian Patent Act of 2001 did not contain any provisions regarding patent protection for computer programs.[64] In Article 4 of the Patent Act of 2016[65] relating to unprotected subject matter established that rules and methods that contain only computer programs are not inventions. On the face of it, Indonesia prohibits patenting of computer programs and their algorithms. However, this conclusion would be erroneous, because the official explanations to this law[66] state: If a computer program has symbols (instructions) that have a technical effect and functionality to solve a problem, then such subject matter would be patentable. It is also stated in the Explanation that an algorithm means an efficient method expressed as a finite set of well-defined instructions for calculating a function. Furthermore (this is important to underline) the algorithm is named as an example of a patentable invention.

It is clear that the patent protection regime for computer programs in Indonesia is controversial and uncertain. About this mode, scientific papers describe the following: "there are two important elements of software related to computer programs: 1) the basic process and algorithms of the operating system and 2) a set of instructions that explain the process in detail,"[67] the first element would be protected by means of patent law, and the second by means of copyright law. The development of legislation towards strengthening patent protection and expanding

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63 O.K. Saidin, *Transplantation of Foreign Law into Indonesian Copyright Law: The Victory of Capitalism Ideology on Pancasila Ideology*, 20(4) J. Intellect. Prop. Rts. 238 (2015).

64 Law No. 14 of 1 August 2001, Regarding Patents (Jan. 20, 2021), available at https://wipolex.wipo.int/en/legislation/details/2261.

65 Law of the Republic of Indonesia No. 13 of 2016, on Patents (Jan. 23, 2021), available at https://wipolex.wipo.int/en/legislation/details/16392.

66 *Id.*

67 Abdul Atsar, *Perlindungan hukum terhadap invensi di bidang teknologi informasi dan komunikasi sebagai salah satu upaya meningkatkan kesejahteraan masyarakat di Indonesia* (2017) [Abdul Atsar, *Legal Protection of Inventions in the Field of Information and Communication Technology as One of the Efforts to Improve the Welfare of the Community in Indonesia* (2017)] (Jan. 24, 2021), available at https://osf.io/preprints/inarxiv/uwv29/.

the list of patentable subject matter is understood by Indonesian legal scholars as an international trend. It ensures the development of technology and business. However, scholars still note a number of problematic aspects of Indonesian patent law, including the lack of legal certainty expressed in the fact that the provisions on the patentability of algorithms are not contained in the law itself, but only in the explanations to the law.[68]

4. "Negating" Approach to Patenting

The idea of a legal ban on patenting computer programs as such goes back to the European Patent Convention of 1973 (EPC).[69] The EPC introduced the European patents equal to the national patents of the EPC member states. Although all European Union (EU) member states have joined the EPC, it is not included to the EU law system. Moreover, the EPC members include non-EU states, such as Turkey, Switzerland, and Norway. Speaking of the EU law, it is worth to be mentioned that at the beginning of the 21st century European scientists have conducted extensive research on the patentability of computer programs[70] and, in 2002, the European Parliament and Council have tried to propose a Directive on the patentability of computer-implemented inventions.[71] However, on 6 July 2005, the European Parliament rejected the Directive, and the European Commission abandoned its further development.

Article 52(1) of the EPC enshrines that European patents shall be granted for any inventions which are susceptible of industrial application. Article 52(2) of the EPC provides a list of unpatentable subject matters, which includes schemes, rules and methods for performing mental acts, playing games or doing business, and programs for computers. Article 52(2) inclines that such objects shall not be considered inventions in the sense of aforementioned Article 52(1). While Article 52(3) of the EPC further specifies that provisions of Article 52(2) shall exclude patentability of the subject-matter or activities referred to in that provision only to the extent to which a European patent application or European patent relates to such subject-matter or activities as such.

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68 Atsar, *supra* note 67.

69 European Patent Convention (1973) (Jan. 24, 2021), available at https://www.epo.org/law-practice/legal-texts/epc.html.

70 Puay Tang et al., *Patent Protection of Computer Programmes*, Final Report, submitted to European Commission, Directorate-General Enterprise (2001) (Jan. 24, 2021), available at http://www.juergen-ernst.de/download_swpat/studie_tang.pdf; Directorate-General for Research, European Parliament, The Patentability of Computer Programme: Discussion of European-Level Legislation in the Field of Patents for Software, Working Paper (April 2002) (Jan. 24, 2021), available at http://www.europarl.europa.eu/meetdocs/committees/juri/20020619/SoftwarePatent.pub.pdf.

71 Proposal for a Directive of the European Parliament and of the Council on the patentability of computer-implemented inventions, COM/2002/0092 final – COD 2002/0047, EUR-Lex (Jan. 24, 2021), available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52002PC0092.

Nevertheless, despite such seemingly strict rules, there is practice of the EPO and the national patent offices to grant patents for the aforementioned subject-matters. Lionel Bently and Brad Sherman note that, although it was thought that copyright law, rather than patent law, would protect subject-matters based on information technology, since the enforcement of the EPC (1977), there has been a trend of increasing patent protection of computer-related inventions.[72] This trend is based on a whole contents approach, which is that an invention that includes a computer program can be patentable if the invention as a whole is a technical solution.[73] At the same time, it is considered that a computer program is of a technical character where it is a source of technical influence when run on a computer. Moreover, the impact itself should be more than the basic physical interaction between the program and the computer.

The way to patent computer programs was unlocked by a landmark decision of Board of Appeal of the EPO dated by 15 July 1986. In the case of *VICOM Systems Inc.*[74] the Board of Appeal recognized the claimed method of improving the digital image as patentable. In another case, the EPO stated that a computer program written on a tangible medium was no longer a computer program as such and was therefore patentable.[75] This decision led some authors to conclude that almost any computer program can be patented in Europe.[76] The last one is arguable as the European requirements for patentability of computer programs are slightly stricter comparing to the leading Common law legal systems and Japan. For example, as it is mentioned earlier in this paper, in the United States, Canada, and Australia, "Amazon" was granted a patent for its one-click method of internet shopping. While a similar application was rejected by the EPO on the grounds that the method of reducing the number of steps required to purchase from an online store does not have the inventive step required to grant a patent.[77]

The rules for the examination of inventions based on computer programs are provided in the Guidelines for Examination in the European Patent Office (Pts. G, H).[78]

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72 Lionel Bently & Brad Sherman, *Intellectual Property Law* 410 (2004).

73 *Id*. at 411.

74 T 0208/84 (Computer-related invention), ECLI:EP:BA:1986:T020884.19860715, 15 July 1986 (Jan. 26, 2021), available at https://www.epo.org/law-practice/case-law-appeals/recent/t840208ep1.html.

75 T 0424/03 (Clipboard formats I/MICROSOFT), ECLI:EP:BA:2006:T042403.20060223, 23 February 2006 (Jan. 26, 2021), available at https://www.epo.org/law-practice/case-law-appeals/recent/t030424eu1.html.

76 Susan J. Marsnik & Robert E. Tomas, *Drawing a Line in the Patent Subject Matter Sands: Does Europe Provide a Solution to the Business Method and Software Patent Problem?*, 34(2) B.C. Int'l & Comp. L. Rev. 294 (2011).

77 T 1244/07 (1-Click/AMAZON), ECLI:EP:BA:2011:T124407.20110127, 27 January 2011 (Jan. 26, 2021), available at https://www.epo.org/law-practice/case-law-appeals/recent/t071244eu1.html.

78 Guidelines for Examination in the European Patent Office, EPO (March 2022) (Jan. 26, 2021), available at https://www.epo.org/law-practice/legal-texts/guidelines.html.

The rules provide that a computer program can be considered as an invention where it has a technical effect going beyond the "normal" physical interactions between the program (software) and the computer (hardware). In other words, a computer program or its algorithm do not have enough technical character based the simple fact that they were designed in such a way that they can be automatically executed by a computer.

The impact of the EPC on the patent law of the EU member states is reflected in the fact that the European Patent System is based on the active cooperation between the EPO and the national offices of member states, which implies the harmonization of national patent law with the EPC.

Despite the unlike history and traditions of copyright and patent law, the leading EU legal systems (Germany, France, Italy) and the UK (exited the EU in 2020) generally adhere to the same approach with regard to the computer programs patentability. In 1977, the UK specifically incorporated the EPC provisions into its Patent Act. Happened substantial amendments of both the material and procedural UK patent regulations were called by Susan J. Marsnik and Robert E. Tomas: "the greatest culture shock in the history of British patent law."[79] The basis of the approach is the legal provisions that computer programs as such are not inventions: Article 1(2) of the UK Patent Act of 1977;[80] Section 1(3) of the German Patent Act of 1980;[81] Article L611-10(2) of the French Intellectual Property Code of 1992;[82] Article 45(2) of the Italian Industrial Property Code of 2005.[83]

However, aforementioned does not negate the fact that there is still a certain practice discrepancy between the EPO and patent offices and courts of Germany, France and the UK. The EPO policy is generally more favorable to the patenting of computer programs comparing to the national patent offices' policy of aforementioned States. As a result, a patent registered by the EPO can be challenged and is sometimes challenged in the courts of Germany, France or the UK.

Germany's approach to patenting computer programs has long been considered one of the most conservative comparing to other EU States' legal systems. However, on 22 April 2010, the German Supreme Court has issued a groundbreaking decision considering the case of patent application for the method of dynamic generation

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79 Marsnik & Tomas 2011, at 302.

80 UK Patent Act (1977) (Jan. 26, 2021), available at https://www.gov.uk/government/publications/the-patents-act-1977.

81 German Patent Act (1980) (Jan. 26, 2021), available at https://wipolex.wipo.int/ru/legislation/details/17611.

82 French Intellectual Property Code (1992) (Jan. 26, 2021), available at https://wipolex.wipo.int/ru/legislation/details/19865.

83 Italian Industrial Property Code (2005) (Jan. 26, 2021), available at https://wipolex.wipo.int/ru/legislation/details/19852.

of structured documents.[84] Affirming the patentability of the claimed method, the Supreme Court considerably expanded the existed concept of the technical means provided to solve a technical problem and significantly unified the German practice to that of the EPO. According to the Supreme Court, such means are available not only when the components of the device are modified or fundamentally changed. It is sufficient, for example, if the sequence of data processing that is used to solve the problem is determined by technical factors that lie outside the data processing system, i.e. the computer.

Among the G20 states, Turkey is also a member of the EPC. Article 82(2) of the Turkish Industrial Property Law of 2016[85] establishes that computer programs are not considered inventions. The wording of the EPC that these subject matters are not patentable "as such" is implemented in Turkish Law through the phrase "only these subjects are excluded from the patentability." Talat Kaya justifiably points out that these expressions have the same meaning.[86]

The possibility of granting a patent in relation to algorithms of computer programs, if they meet the general criteria for the patentability of an invention, is testified by the law enforcement practice. So, in 2017, a patent for "Method, controller and display device of RGB image content" was granted (application No. 2017/08960).[87] In 2020, a patent application by Huawei Technologies for the invention "method for determining precoding matrix set and transmission apparatus" was granted (Application No. 2020/15584).[88] At the same time, scientific papers note the presence of gaps in regulation in the field of patenting algorithms and propose to resolve the issue of their protection legislatively, by means of intellectual property rights.[89]

The prohibition of patenting computer programs as such is also established outside the EPC member states: among the G20 states, these are four out of five BRICS

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84 German court ruling Xa ZB 20/08, upholding Siemens patent, End Software Patents, 19 May 2010 (Jan. 26, 2021), available at http://endsoftpatents.org/2010/05/german-court-ruling-upholding-siemens-patent-as-text/.

85 Law No. 6769 of 22 December 2016, on Industrial Property (Dec. 21, 2020), available at https://wipolex.wipo.int/en/legislation/details/16609.

86 Talat Kaya, *A Comparative Analysis of the Patentability of Computer Software Under the TRIPS Agreement: The U.S., the E.U., and Turkey*, ResearchGate (2007) (Dec. 21, 2020), available at https://www.researchgate.net/publication/265264361_A_Comparative_Analysis_Of_The_Patentability_Of_Computer_Software_Under_The_Trips_Agreement_The_US_The_EU_And_Turkey.

87 Method, controller and display device of RGB image content (Dec. 21, 2020), available at https://portal.turkpatent.gov.tr/anonim/arastirma/patent/sonuc/dosya?patentAppNo=2017%2F08960&documentsTpye=all.

88 Önkodlama matris kümesi belirleme yöntemi ve iletim cihazı [Precoding matrix set determination method and transmission device] (Dec. 21, 2020), available at https://portal.turkpatent.gov.tr/anonim/arastirma/patent/detayli.

89 Pelin Özkaya & Refik Samet, *Yazılım Ürünlerinin Telif Hukuku Kapsamında Korunması* [*Protection of Software Products Within the Copyright Law*], 6(1) Uluslararası Bilgi Güvenliği Mühendisliği Dergisi 17 (2020).

members (Brazil, the Russian Federation, South Africa, India), as well as Argentina and Mexico. As seen, the European approach is adopted by both the states of the continental legal family and the Anglo-American. First, let us analyze the continental legal order, and then – the legal systems of the common law.

The prohibition of patenting computer programs in the Russian Federation is established in Article 1350(5) of the Civil Code. Its formulation is very similar to the provision of Article 52(2) and (3) of the EPC.

The Federal Service for Intellectual Property (Rospatent) and its Guidelines for the Examination of Applications for an Invention explain that an application for an invention may relate to an algorithm of a computer program, which is set forth in the form that ensures the achievement of a technical result of a sequence of actions on signals (material subject matter), and is carried out with the help of computer technology (material means). In such a case, the grounds for recognizing the declared subject matter as a technical solution exist (cl. 2.4.36)[90]. As an example of inventions related to algorithms, that were granted in Russia can be considered following: patent No. 2535504 "System for treating site content," No. 2586249 "Method for processing a search request from a user associated with an electronic device", No. 2251737 "Method for automatic recognition of text containing fragments, written in several languages."[91] At the same time, in the mentioned Guidelines it is stated that "a subject matter cannot be considered as an invention, if the application is filed for a computer software product," which only technical result is the reduction of time needed to search for information, as stated by the applicant.

The decision of the Intellectual Property Rights Court dated 8 June 2018[92] is Significant for the Russian patent law. The court upheld patent No. 2553452 "Method for managing connections within a mobile radiotelephone network." In this case, the court did not provide any new and significant criteria for the patentability of computer programs and their algorithms. In fact, the position of Rospatent that the algorithm of a computer program can be patentable, if the sequence of actions on a material object with the help of the computing technology ensures the achievement of a technical result was reproduced.

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[90] Приказ Роспатента от 27 декабря 2018 г. № 236 «Об утверждении Руководства по осуществлению административных процедур и действий в рамках предоставления государственной услуги по государственной регистрации изобретения и выдаче патента на изобретение, его дубликата» // СПС «КонсультантПлюс» [Act of Rospatent No. 236 of 27 December 2018. On Approval of the Guidelines for the Implementation of Administrative Procedures and Actions within the Framework of the Provision of State Services for the State Registration of an Invention and the Issuance of a Patent for an Invention, its Duplicate, SPS "ConsultantPlus"] (Dec. 21, 2020), available at http://www.consultant.ru/document/cons_doc_LAW_316428/.

[91] Patent No. RU 2251737; No. RU 2586249; No. RU 2535504 (Dec. 21, 2020), available at https://new.fips.ru/registers-web/action?acName=clickRegister&regName=RUPAT.

[92] Решение Суда по интеллектуальным правам от 8 июня 2018 г. по делу № СИП-789/2016 // СПС «Гарант» [Decision of the Intellectual Property Rights Court of 8 June 2018 on Case No. SIP-789/2016, SPS "Garant"] (Dec. 28, 2020), available at https://www.garant.ru/products/ipo/prime/doc/71864692/.

In Brazil, Argentina and Mexico, the three states that represent Latin America, the legal models for patenting computer programs and algorithms are very similar. Computer programs are not considered inventions by virtue of the direct indication of Article 6 of the Argentine Law on Patents and Utility Models 1995,[93] Article 10 of the Brazilian Law "On Industrial Property" 1996,[94] Article 47 of the Mexican Federal Law on the Protection of Industrial Property 2018.[95] However, only the Law of Argentina lacks the clause that computer programs are not considered inventions as such.

The issue of the possibility of patenting inventions based on computer programs or containing computer programs is positively resolved in the acts of the patent offices of these states.[96] The technical effect or solution of a technical problem is considered as an additional criterion for the protection of such inventions: Article 33 of the Mexican Regulations, Section 2.1.3 of Chapter IV of the Argentine Guiding Principles, clause 4.1 of the Brazilian Examination Rules. For example, Argentina patented algorithm for detecting faults in environment zonal wells,[97] Brazil – Ultrasonic sealing algorithm with temperature control,[98] Mexico – computer program product for automatic inspection of a train.[99] It should be noted that Section 4 of the Brazilian Examination Rules provides an obvious and simple definition of an algorithm, which is "a logical sequence of actions that must be followed in order to correct a problem." What is curious, is that a similar definition was included in

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93 Law No. 24.481 of 30 March 1995, on Patents and Utility Models (as amended up to Decree No. 27/2018 of 10 January 2018) (Dec. 28, 2020), available at https://wipolex.wipo.int/en/legislation/details/17824.

94 Lei de propriedade industrial (Lei Nº 9.279, de 14 de maio de 1996) (Dec. 29, 2020), available at http://www.planalto.gov.br/ccivil_03/leis/L9279.htm.

95 Federal Law on the Protection of Industrial Property, published in the Official Journal of the Federation on 1 July 2020 (Jan. 15, 2021), available at https://wipolex.wipo.int/en/legislation/details/20034.

96 Rreglamento de la ley de la propiedad industrial. Nuevo Reglamento publicado en el Diario Oficial de la Federación (1994) [Regulation of the Industrial Property Law. New regulation published in the Official Journal of the Federation (1994)] (Jan. 15, 2021), available at http://www.diputados.gob.mx/LeyesBiblio/regley/Reg_LPI_161216.pdf; Directrices de examen en la administración nacional de patentes INPI (P 243/2003) [Examination Guidelines in the National Patent Administration INPI (P 243/2003)] (Jan. 15, 2021), available at http://www.cyta.com.ar/biblioteca/bddoc/bdlibros/patentamiento_directrices.pdf; Institui as Diretrizes de Exame de Pedidos de Patentes Envolvendo Invenções Implementadas por Programas de computador (Resolução INPI/PR No. 158, 2018) [Establishes the guidelines for examination of patent applications involving inventions implemented by computer programs (resolution INPI/PR No. 158, 2018)] (Jan. 15, 2021), available at https://wipolex.wipo.int/en/text/453419.

97 Algorithm for the Detection of Zone Faults in a Well Environment, No. AR098975A1 (Dec. 28, 2020), available at https://patents.google.com/patent/AR098975A1/en?q=algorithm&country=AR.

98 Ultrasonic sealing algorithm with temperature control, No. BR112020017876A2 (Dec. 28, 2020), available at https://patents.google.com/patent/BR112020017876A2/en?q=%22algorithm%22&country=BR&type=PATENT&oq=%22algorithm%22+country:BR+type:PATENT.

99 System, method, and computer program product for automatic inspection of a train, No. MX2018014655A (Dec. 28, 2020), available at https://patents.google.com/?q=(%22computer+program%22)&country=MX&type=PATENT&oq=(%22computer+program%22)+country:MX+type:PATENT&sort=new&page=2.

Article 19.1 of the Trade Agreement between the United States, Mexico and Canada concluded in 2020 (USMCA).[100]

India and South Africa are Representatives of the Anglo-American traditions of law in the BRICS. India is one of the leaders in the IT industry. In the 21st century, Indian Patent Law was influenced by TRIPS Agreement and EPC. Similar to the European Patent Convention, Indian law excludes computer programs from patentable subject matter, but only as such. Article 3 of the 1970 Patent Act presents an extensive list of unpatentable subject matter, among which are named: a mathematical or business method or a computer program per se or algorithms.[101]

The expression "computer program per se" is not clarified in the law and is considered a source of some uncertainty in both legal science and patent practice in India. In order to address this uncertainty, the Indian Patent Office in 2015 developed Guidelines for Examination of Computer Related Inventions.[102] This act prohibited the granting of patents for business methods, but computer programs could be patentable under certain conditions. Indian Open Source Activists criticized the 2015 Guidelines. They stated that this act would negatively influence the development of innovations in India. This criticism led to the withdrawal of the 2015 Guidelines, the new Guidelines were approved in February 2016,[103] and revised in 2017.[104] In the 2016 and 2017 Guidelines, the patentability requirements for computer programs were significantly tightened.

The 2017 revised Guidelines emphasize on the content of the application, it is stated:

> The Patent Law explicitly excludes computer programs as such from patentable subject matter, and this exclusion should not be avoided simply by masking the essence of the application with its wording. Even if a computer program is associated with computer hardware, but the essence of the

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100 Agreement between the United States of America, the United Mexican States, and Canada 7/1/20, Office of the United States Trade Representative (Jan. 23, 2020), available at https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between.

101 Indian Patents Act (Act No. 39, 1970) (Dec. 28, 2020), available at https://wipolex.wipo.int/en/legislation/details/20694.

102 Office of the Controller General of Patents, Designs & Trade Marks, Guidelines for Examination of Computer Related Inventions (CRIs) (2015) (Dec. 28, 2020), available at http://www.rc-iplaw.com/wordpress/wp-content/uploads/2015/10/CRI_Guidelines_21August2015.pdf.

103 Office of the Controller General of Patents, Designs & Trade Marks, Guidelines for Examination of Computer Related Inventions (CRIs) (2016) (Dec. 28, 2020), available at http://www.ipindia.nic.in/writereaddata/Portal/IPOGuidelinesManuals/1_83_1_Guidelines-for-Examination-of-CRIs-19-2-2016.pdf.

104 Office of the Controller General of Patents, Designs & Trade Marks, Guidelines for Examination of Computer Related Inventions (CRIs) (2017) (Dec. 28, 2020), available at http://ipindia.gov.in/writereaddata/Portal/IPOGuidelinesManuals/1_86_1_Revised__Guidelines_for_Examination_of_Computer-related_Inventions_CRI__.pdf.

invention lies in the program or algorithm itself, then such subject matter is not patentable.

Despite the tightening of rules for patenting computer programs, patents for these subject matters are still granted in India. For example, in 2009, "Facebook" filed an application for an invention that is a method of creating dynamic personalized content for a user of a social network. The applicant stated that the invention had a technical effect and further explained the complexity of his method. These arguments satisfied the Patent Office. Thus, in 2017 "Facebook" patent was granted.[105] In 2005, "Google" filed an application for the invention of "Identifying Phrases in an Information Retrieval System". In one of the claims, it was stated that this is a basic mathematical algorithm with logical steps. However, the applicant considered that his invention was not an algorithm or a computer program as such, but provided a solution to a technical problem (how to automatically identify phrases in a collection of documents). As a result, the patent office came to the conclusion that the declared subject matter is a technical solution and granted a patent in 2017.[106]

One of the most unusual computer software patenting regimes has developed in South Africa. On the one hand, clauses 2 and 3 of Article 25 of the Patent Act 1978 borrow the strict approach of Article 52 EPC: computer programs as such, cannot be considered as inventions. The scientific literature concludes that the prohibition of patenting computer programs is not absolute.[107] If a subject matter that meets the criteria of novelty, inventive step and industrial applicability will include an unpatentable element from the list of clause 2 of Article 25 of the 1978 Law, then such a subject matter will generally be considered patentable.[108]

On the other hand, the South Africa patent office does not examine an application for an invention on the merits, but only examines formal requirements. This circumstance is the reason that South Africa has one of the highest grant rates in the world.[109] In the database of patents granted by the South African Office, there is information about patenting and algorithms implemented by computers and computer programs: Algorithm for passive power factor compensation method with differential capacitor change and reduced line transient noise (ZA201508040B),

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105 Ajay Sharma, *Software Patentability: In Indian Context*, Legal Service India (Dec. 28, 2020), available at http://www.legalserviceindia.com/legal/article-9-software-patentability-in-indian-context-.html.

106 *Id.*

107 Thethiwe N. Mashinini, *The Computer Software Patent Debate: A Double-Edged Sword?*, University of Pretoria (November 2016), at 12 (Jan. 28, 2021), available at https://repository.up.ac.za/bitstream/handle/2263/60064/Mashinini_Computer_2016.pdf?sequence=1&isAllowed=y.

108 Philip Stoop, *Commercial and Economic Law in South Africa* 41 (2019).

109 Companies and Intellectual Property Commission, Submission by South Africa: Exceptions and Limitations (October 2017) (Jan. 28, 2021), available at https://www.wipo.int/export/sites/www/scp/en/meetings/session_27/3rdparty_comments/south_africa.pdf.

Method and computer program product for optimization of maintenance plans (ZA201305759B), Apparatus, method and computer program for providing medical advice based on self-reported symptoms of a user (ZA201906845B).

There is no doubt that the absence of examination of the claimed computer programs regarding the criteria for their patentability in South Africa is a favorable factor for those interested in easy obtaining patents. However, such simplicity leads to a collision of patents granted for the same subject matters, and it leads to unnecessary monopolization, which harms competition and technological development. Thus, the example of South Africa confirms our conclusion that even a strict legislative ban on patenting computer programs can be devalued by ill-considered practice of examining applications for inventions.

Conclusion

The constant growth of the software market associated with widespread digitalization determines the importance of the issue of effective legal protection of computer programs. Computer programs are primarily protected as subject matters of copyright law in international law and national legal systems. However, copyright law protection is not sufficient to effectively protect the interests of computer program developers because copyright law does not protect the algorithms underlying a computer program. Meanwhile, computer program algorithms often have a very high commercial value.

In fact, the dilemma of protecting computer programs as subject matters of copyright law or patent law was resolved at the international level in favor of copyright law in 1978, when WIPO published the Model Provisions on the Protection of Computer Software. In our opinion, the TRIPS Agreement (1994) formalized the existing consensus. At the same time, the TRIPS Agreement did not prohibit the protection of computer programs by patent law. It gave relative freedom to national legislations to decide on the patentability of their algorithms.

The research revealed that the G20 states and BRICS states have different legislative models concerning the patentability of computer programs and their algorithms. These states should be divided into three groups according to this criterion.

States that follow a neutral approach were included in the first group: the United States, Australia, Canada, the Republic of Korea, China, and Saudi Arabia. The legislation of these states does not explicitly prohibit the patenting of computer programs, but computer programs themselves are not mentioned among the subject matters of inventions.

The second group included states which legislation explicitly classified computer programs as patentable inventions: Japan and Indonesia. We call this approach "Positive."

The third approach, which we call "Negating," is followed by the majority of G20 and BRICS members: European Union, Germany, France, Italy, Great Britain, Turkey,

Russian Federation, Brazil, Argentina, Mexico, India, South Africa. The legislation of these states prohibits the patenting of computer programs as such.

Our most important conclusion is that patents on computer programs and algorithms are granted in all G20 states at present, regardless of the rules set out in the legislation. The results of the research demonstrate that there is no direct correlation between the way of solving the issue of patentability of computer program algorithms in different legal systems and the state's place in the global IT market. The leaders of the global IT market are the United States, Japan, the EU, India and China.[110] All three approaches are represented among these states.

It should be noted that the G20 states solve the issue of patentability of computer program algorithms with little reference to the deep Anglo-American and Continental traditions of copyright law and patent law that are still in place.

Nevertheless, there is some specificity in each of the three approaches to the patentability of computer program algorithms.

The neutral approach is the most flexible from the point of view of patent law policy because legislators prefer not to react to technological developments and leave the issue of patentability of computer programs to the courts and patent offices. In the United States, for example, the Supreme Court has traditionally dealt with this issue. Notably, the Supreme Court has distanced itself from formulating general rules that would distinguish between unpatentable ideas and patentable algorithms resolving specific disputes.

China is the only BRICS member that follows a neutral approach. China's national intellectual property policy has been fundamentally changed to permit the patenting of computer program algorithms over the past four years. In China, the instrument of this policy is the administrative rules on the examination of inventions rather than Supreme Court decisions, unlike in the United States.

The most liberal and consistent approach is the positive approach presented by the Japanese legal system. It corresponds to the fact that, in practice, Japan's intellectual property rights protection system is more protective of the interests of the rights holders, rather than of other participants in the turnover or of society as a whole. Japan has adopted Examination Guidelines for Patent, which explains in great detail (unlike other G20 states) the rules of patentability of computer programs.

The negating approach is the most controversial and at the same time the most common. Its popularity can be explained by the strong influence of the European Patent Convention on the legislation of Europe and other states. The contradiction of this approach is reflected in the fact that, on the one hand, Article 52 of the EPC and similar national laws prohibit the patentability of computer programs as such,

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[110] Global market share of the information and communication technology (ICT) market from 2013 to 2022, by selected country, Statista (Feb. 25, 2021), available at https://www.statista.com/statistics/263801/global-market-share-held-by-selected-countries-in-the-ict-market/.

and, on the other hand, guidelines for the examination of inventions and judicial practice allow the patenting of algorithms under certain conditions.

The practice of patenting computer program algorithms in states following the negating approach is more restrictive than that in Japan or the U.S. Firstly, in Japan, unlike the European states, India, Russia, Brazil, there are no requirements that running a program on a computer should produce an additional technical effect that goes beyond the usual or normal physical interaction between the program and the computer hardware. Secondly, for example in the United States "Amazon" was granted a patent for its one-click method of internet shopping. However, a similar application was rejected by the EPO.

In our opinion, the most unusual mode of patenting computer programs has developed in the legislation of the BRICS member – South Africa. On the one hand, the SA Patent Act borrows the negating approach of Article 52 EPC. On the other hand, the South Africa patent office does not examine an application for an invention on the merits. This circumstance is the reason that South Africa has one of the highest grant rates in the world. We believe that this practice of patenting computer programs is erroneous and it leads to a collision of patents granted for the same subject matters. It leads also to excessive monopolization, which harms competition and the development of technologies.

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COMMENTS

TERRITORIES WITH A SPECIAL REGIME FOR BUSINESS ACTIVITIES: LEGAL FRAMEWORKS OF SOCIAL POLICY

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The article focuses on the social dimension of territorial development and investments in Russian regions. The conducted research is devoted to territories with a special regime for business activities in Russia, their investment and innovation background and policy aiming at improving social environment and population well-being. Based on legal analysis and regulatory practices, the authors reveal drivers for strategic management of social and economic development, recommend some rules and underline possible benefits for territories' residents. The paper discusses the advantages and perspectives of developing territories with a special regime for business activities in Russia, alongside with constraining factors discouraging their development. Theoretical issues are exemplified by some priority social and economic development areas created in the Far East. Most attention is paid to the infrastructural development of priority social and economic development areas, while special emphasis is placed on the cluster approach to the development of such territories, a comparison is made with technoparks and industrial parks.

Keywords: priority development areas; investments; social policy; business activities; legal regime; cluster; technopark; industrial park.

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Introduction

During the Soviet era, a wide range of tools were used to support territories with unfavorable climatic and economic conditions, while the collapse of the Soviet Union and changes in the financial policy of Soviet regions led to the "degradation" of some of them.

The problems of Russian regional development in the post-perestroika period have repeatedly been mentioned in literature as a reliable tool for economic development.[1] M.B. Puchkin and N.T. Avramchikova believe that

> Russia faces serious problems of innovative development of regions and, first of all, regions of Siberia and the Far East, which are "lagging behind" in socio-economic indicators. These regions are characterized by lack of regional development institutions, budget deficits, poor experience in public-private partnership, the skilled labor shortage, underdeveloped infrastructure, a high level of "aggregate" costs, and low investment attractiveness.[2]

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[1] *Миронова И.Б.* Классификация и содержание факторов, обеспечивающих устойчивое и безопасное развитие территорий опережающего развития // Инновационное развитие экономики. 2019. № 4-2(52). С. 109 [Irina B. Mironova, *Classification and Content of Factors Ensuring Sustainable and Safe Development of Priority Development Areas*, 4-2(52) Innovative Development of Economy 109, 109 (2019)].

[2] *Пучкин М.Б., Аврамчикова Н.Т.* Классификация территорий опережающего социально-экономического развития в регионах Российской Федерации // Менеджмент социальных и экономических систем. 2017. № 2. С. 41 [Mikhail B. Puchkin & Nadezhda T. Avramchikova, *Classification of Priority Social and Economic Development Areas in the Regions of the Russian Federation*, 2 Management of Social and Economic Systems 41, 41 (2017)].

T.V. Letaeva sees the reason for the weak social support of such territories in the refusal of "industrial enterprises from their social facilities, the commercialization and municipalization of the service sector in the conditions of a decrease in the living standard of most of the population."[3]

Researches have a good understanding of reasons hindering the development of certain regions of Russia. Accordingly, the next step should be to implement measures for economic and social equalization of "weak" regions with the most successful, which is impossible without state support.

State support, according to A.V. Belitskaya, is a specific form of state regulation of the economy and businesses and can be carried out through legal, economic and organizational tools.[4] One of the organizational measures of state support is the establishment of a special legal regime for certain territories, which involves the introduction of special rules for business entities to carry out their economic activities, stimulates the growth of territories, sectors of the economy and attracts foreign investment in them.

Since the last century, various measures have been taken in Russia to maintain the regions that are not sufficiently attractive for residence. From 1996 to 1999, three federal laws were adopted: in relation to the Special Economic Zones in the Kaliningrad[5] and Magadan[6] regions and Ingushetia Center for International Business,[7] which established special regimes for business and investment activities (tax incentives, free customs zone regime, accelerated and simplified procedure for registering, investment contracts, etc.). Along with the development of investment legislation, framework Federal Law No. 116-FZ of 22 July 2005 "On Special Economic

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[3] *Летаева Т.В.* Проблемы социальных инвестиций на территориях с особым режимом функционирования // Вестник Уральского института экономики, управления и права. 2015. № 4(33). С. 60 [Tatyana V. Letaeva, *Problems of Social Investments in Territories with a Special Regime for Business Activities*, 4(33) Bulletin of the Ural Institute of Economics, Management and Law 60, 60 (2015)].

[4] *Белицкая А.В.* Комментарий к Федеральному закону от 29 декабря 2014 г. № 473-ФЗ «О территориях опережающего социально-экономического развития в Российской Федерации» (постатейный) [Anna V. Belitskaya, *Commentary to Federal Law No. 473-FZ of 29 December 2014 "On Priority Social and Economic Development Areas in the Russian Federation" (article-by-article)*] 9 (2016).

[5] Федеральный закон от 22 января 1996 г. № 13-ФЗ «Об Особой экономической зоне в Калининградской области» // Собрание законодательства РФ. 1996. № 4. Ст. 224 (утратил силу) [Federal Law No. 13-FZ of 22 January 1996. On the Special Economic Zone in the Kaliningrad Region, Legislation Bulletin of the Russian Federation, 1996, No. 4, Art. 224 (repealed)].

[6] Федеральный закон от 31 мая 1999 г. № 104-ФЗ «Об Особой экономической зоне в Магаданской области» // Собрание законодательства РФ. 1999. № 23. Ст. 2807 [Federal Law No. 104-FZ of 31 May 1999. On the Special Economic Zone in the Magadan Region, Legislation Bulletin of the Russian Federation, 1999, No. 23, Art. 2807].

[7] Федеральный закон от 30 января 1996 г. № 16-ФЗ «О Центре международного бизнеса «Ингушетия»» // Собрание законодательства РФ. 1996. № 6. Ст. 491 (утратил силу) [Federal Law No. 16-FZ of 30 January 1996. On Ingushetia Center for International Business, Legislation Bulletin of the Russian Federation, 1996, No. 6, Art. 491 (repealed)].

Zones in the Russian Federation" was adopted;[8] it provided for the possibility of creating four types of special economic zones in various sectors of the economy: industry and production, tourism and recreation, technology and innovation, and port zones. Federal Law No. 392-FZ of 3 December 2011 "On Territorial Development Zones in the Russian Federation and on Amendments to Certain Legislative Acts of the Russian Federation"[9] introduced one more form of territory with a special regime: a territorial development zone purporting to provide additional measures of state support to its residents.[10]

However, the experience of legal regulation of support measures cannot be considered particularly successful. O.Yu. Smyslova and P.V. Stroev believe that

> the scale of practical implementation of various instruments of territorial development in Russia indicates the willingness of the Russian Government to provide efficient conditions for effective investment climate for Russian and foreign investors, ensuring accelerated development and a favorable platform for improving the quality of life of the country's population.[11]

Investment is recognized as a key tool for supporting territories, for the development of which it is necessary to create special legal regimes for doing business within certain regions, which will allow directing investment flows to them and increasing their investment attractiveness.

In Russian territories, there are several legal regimes that use various tools for their accelerated social and economic development, in particular, special benefits and preferences are provided for business in order to attract investment, those are clusters, industrial parks, monotowns, etc.

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[8] Федеральный закон от 22 июля 2005 г. № 116-ФЗ «Об особых экономических зонах в Российской Федерации» // Собрание законодательства РФ. 2005. № 30 (ч. 2). Ст. 3127 [Federal Law No. 116-FZ of 22 July 2005. On Special Economic Zones in the Russian Federation, Legislation Bulletin of the Russian Federation, 2005, No. 30 (Part 2), Art. 3127].

[9] Федеральный закон от 3 декабря 2011 г. № 392-ФЗ «О зонах территориального развития в Российской Федерации и о внесении изменений в отдельные законодательные акты Российской Федерации» // Собрание законодательства РФ. 2011. № 49 (ч. 5). Ст. 7070 [Federal Law No. 392-FZ of 3 December 2011. On Territorial Development Zones in the Russian Federation and on Amendments to Certain Legislative Acts of the Russian Federation, Legislation Bulletin of the Russian Federation, 2011, No. 49 (Part 5), Art. 7070].

[10] Belitskaya 2016, at 7.

[11] *Смыслова О.Ю., Строев П.В.* Территории опережающего социально-экономического развития в России: особенности, тенденции и сдерживающие факторы // Вестник Омского Университета. Серия «Экономика». 2019. Т. 17. № 4. С. 64 [Olga Yu. Smyslova & Pavel V. Stroev, *Priority Social and Economic Development Areas in Russia: Features, Trends and Constraining Factors*, 17(4) Bulletin of Omsk University. Economics Series 63, 64 (2019)].

1. Legal Regime of Priority Social and Economic Development Areas (PSEDAs)

1.1. The Concept and Features of PSEDAs

First of all, we will consider the Priority Social and Economic Development Areas (hereinafter the PSEDA or the PDA), as the most successful example of a special legal regime for business activities in the Russian Federation, which have become one of the key mechanisms for territorial development.

According to Articles 1(1), 3(1) of Federal Law No. 473-FZ of 29 December 2014 "On Priority Social and Economic Development Areas in the Russian Federation,"[12] PSEDA is a part of the territory of any Russian region which is created by the decision of the Russian Government for seventy years and constructs a special legal regime favourable for business and investment activities, accelerated social and economic development, and human well-being.

Based on its legal definition PSEDA is characterized by basic features: 1) certain boundaries; 2) favorable conditions for attracting investments; 3) accelerated social and economic development and population well-being; 4) a special legal regime for business and investment activities.[13]

Determining the boundaries. The equivocality of the boundaries of various spatial-network formations, according to A.S. Mikhailov and A.A. Mikhailova, is

> an important practical task of territorial development policy. It is associated with monitoring and assessing the transformation of the nodes of territorial economic systems in geospace, which are the result of a purposeful concentration of resources in strategically important sectors and regions.[14]

Within three years, PSEDAs have been created only in very limited number of Russian regions, namely, in the Far Eastern Federal District and in monotowns with the most difficult social and economic situation; the List of PSEDAs has been approved by the Russian Government according to Article 35 of Law No. 473-FZ.

I.B. Mironova writes:

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[12] Федеральный закон от 29 декабря 2014 г. № 473-ФЗ «О территориях опережающего социально-экономического развития в Российской Федерации» // Собрание законодательства РФ. 2015. № 1 (ч. 1). Ст. 26 [Federal Law No. 473-FZ of 29 December 2014. On Priority Social and Economic Development Areas in the Russian Federation, Legislation Bulletin of the Russian Federation, 2015, No. 1 (Part 1), Art. 26].

[13] Belitskaya 2016, at 12.

[14] *Михайлов А.С., Михайлова А.А.* Проблема эквивокальности в идентификации границ кластера: на примере кластеров стран Балтии // Балтийский регион. 2018. Т. 10. № 2. С. 59 [Andrey A. Mikhailov & Anna A. Mikhailova, *Equivocality in Delineating the Borders of a Cluster: The Baltic's Case*, 10(2) Baltic Region 56, 59 (2018)].

> [I]t is important that the region in each scenario is considered as a system of interconnected elements, the interaction of which is influenced by external and internal challenges and limitations of spatial development, certain risks,[15]

knowing these factors is important for achievement of objectives provided for PSEDAs.

Special legal regime. Priority social and economic development areas can exist if the activities within their boundaries are regulated by special rules allowing to accelerate social and economic development.[16] These rules are established by Law No. 473-FZ which constitutes a comprehensive regulation for carrying out business and investment activities in the Russian Federation, as well as the basic frameworks not only for advanced economic, but also for social development. For example, the legal regime of PSEDA suggests tax benefits, special customs procedures, benefits for land lease, etc. Specific regulations of PSEDA activities can be enacted on subordinate legislation level (by the Russian regions).

Favorable conditions for attracting investments, provision of accelerated social and economic development and human well-being. Taking into account that PSEDAs are subsidized from the budget in order to stimulate development of "depressed" territories their most important objective is to attract socially oriented investments.

The current laws establish an environment for investment attractiveness in priority development areas. First, PSEDA infrastructures encourage effective investments. The Presidential Decree No. 13 of 16 January 2017 "On Fundamentals of State Policy for Regional Development of the Russian Federation for the Period up to 2025"[17] provides that the priority directions of state programs should be so as removal of infrastructural restrictions, especially in the priority development territories with a low level of social and economic development and high population density. Generally, the infrastructure is a set of land plots with buildings and constructions located thereon, including transport, energy, utilities, engineering, social, innovative infrastructures, seaport infrastructure facilities located within a PSEDA, as well as specific infrastructure facilities located outside such territory, but supporting its functioning.

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15 Mironova 2019, at 109.

16 *Белев С.Г., Ветеринаров В.В., Сучкова О.В.* Территории опережающего развития и производительность в российских городах // Экономические науки Высшей школы экономики. 2021. Т. 25. № 1. С. 13 [Sergei G. Belev et al., *Priority Development Areas and Productivity in Russian Cities*, 25(1) Economic Sciences of the Higher School of Economics 9, 13 (2021)].

17 Указ Президента Российской Федерации от 16 января 2017 г. № 13 «Об утверждении Основ государственной политики регионального развития Российской Федерации на период до 2025 года» // Собрание законодательства РФ. 2017. № 4. Ст. 637 [Decree of the President of the Russian Federation No. 13 of 16 January 2017. On Approval of the Fundamentals of State Policy for Regional Development of the Russian Federation for the Period up to 2025, Legislation Bulletin of the Russian Federation, 2017, No. 4, Art. 637].

PSEDAs are leaders in the development of the regional economy due to joint efforts of federal and regional authorities aimed at developing infrastructure described above. The legislator stipulates requirements for infrastructure that encourage comfortable conditions for citizens and investor activities. In addition, during the construction of infrastructure, small and medium-sized businesses are able to be engaged in territory development, which indicates the social significance of PSEDA.

Special features of such territories are that they can be a solution to market failures, stimulate economic growth, save resources. They can also be a source of agglomeration externalities by attracting new business companies or enhancing economic activities of existing enterprises.[18]

Second, according to M.B. Puchkin and N.T. Avramchikova,

> [it is crucial] in the process of PSEDA formation and functioning to maximize resource utilization in the region, a monotown or closed administrative territory, to correlate social and economic development with the criteria established by federal and regional laws and regulations. It is the degree of compliance that largely determines the future infrastructure of PSEDAs, their focus, import substitution and export potential, as well as the volume of investments and the number of new jobs (the main indicator of PSEDA's effectiveness).[19]

There are certain requirements for PSEDA residents' status, namely:

1) The minimum amount of capital investments of PSEDA residents in the implementation of relevant types of economic activity in the territory of the priority social and economic development area. It follows from the regulations of the Government of the Russian Federation that the minimum volume of capital investments shall be 500,000 rubles,[20] which makes activities in the territory of a PSEDA available for small and medium-sized businesses.

2) PSEDA residents shall be reimbursed for the loan servicing expenses. For example, in order to implement Resolution of the Russian Government No. 308 of 15 April 2014 "On Approval of 'Social and Economic Development of the Far Eastern Federal District' State Program of the Russian Federation,"[21] the conditions and procedure

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18 Belev et al. 2021, at 16.

19 Puchkin & Avramchikova 2017, at 43.

20 *See, e.g.*, Постановление Правительства Российской Федерации от 21 августа 2015 г. № 876 «О создании территории опережающего социально-экономического развития «Чукотка»» // Собрание законодательства РФ. 2015. № 35. Ст. 4994 [Resolution of the Government of the Russian Federation No. 876 of 21 August 2015. On the Creation of Chukotka Priority Social and Economic Development Area, Legislation Bulletin of the Russian Federation, 2015, No. 35, Art. 4994].

21 Постановление Правительства Российской Федерации от 15 апреля 2014 г. № 308 «Об утверждении государственной программы Российской Федерации «Социально-экономическое развитие

for the provision of subsidies from the federal budget to Russian credit institutions are developed for reimbursement of lost incomes on loans issued to residents of PSEDAs and the free port of Vladivostok for the implementation of investment projects within the constituent entities of the Russian Federation that are part of the Far Eastern Federal District, at a preferential rate.[22]

Subsidies on servicing expenses or loans attracted by infrastructure investors for the construction of facilities allow reasonable reimbursement of associated expenses (payment of interest on loans).

Third, various tax benefits have been established in priority development areas. As noted by O.Yu. Smyslova and P.V. Stroev,

> tax incentives in these territories serve a variety of purposes. First of all, direct support for business development is provided, and secondly, new businesses become more attractive and their potential is strengthened.[23]

Fourth, types of economic activities have been established in the governmental list compliance with which is required for carrying out business activities. When determining such business activities, the All-Russian Classifier of Types of Economic Activity is used. In the territory of the Far East, such activities are determined as forestry and logging, fishing and fish farming, water transport activities, metallurgical production, etc. At the same time, it is possible to develop mineral deposits in the PSEDA, which is prohibited in special economic zones. Thus, the legislator supports only those types of economic activities that are necessary for the development of

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Дальневосточного федерального округа»» // Собрание законодательства РФ. 2014. № 18 (ч. 1). Ст. 2154 [Resolution of the Government of the Russian Federation No. 308 of 15 April 2014. On Approval of "Social and Economic Development of the Far Eastern Federal District" State Program of the Russian Federation, Legislation Bulletin of the Russian Federation, 2014, No. 18 (Part 1), Art. 2154].

[22] Постановление Правительства Российской Федерации от 25 декабря 2019 г. № 1818 «Об утверждении Правил предоставления из федерального бюджета субсидий российским кредитным организациям на возмещение недополученных ими доходов по кредитам, выданным резидентам территорий опережающего социально-экономического развития и свободного порта Владивосток на реализацию инвестиционных проектов на территориях субъектов Российской Федерации, входящих в состав Дальневосточного федерального округа, по льготной ставке, и о внесении изменения в постановление Правительства Российской Федерации от 17 сентября 2013 г. № 810» // Собрание законодательства РФ. 2019. № 52 (ч. 2). Ст. 8038 [Resolution of the Government of the Russian Federation No. 1818 of 25 December 2019. On Approval of the Rules for Granting Subsidies to Russian Credit Institutions from the Federal Budget to Reimburse Their Lost Incomes on Loans Issued to Residents of the Priority Social and Economic Development Areas and the Free Port of Vladivostok for the Implementation of Investment Projects in the Territories of the Constituent Entities of the Russian Federation, Which are Part of the Far Eastern Federal District, at a Preferential Rate, and on Amending the Resolution of the Government of the Russian Federation No. 810 of 17 September 2013, Legislation Bulletin of the Russian Federation, 2019, No. 52 (Part 2), Art. 8038].

[23] Smyslova & Stroev 2019, at 66.

the region and provide jobs in traditional sectors. Thus, PSEDA mechanism, along with attracting investments, is supportive for the employment.[24]

Fifth, advanced technologies are used for accelerating activities in business, for example, technologies for automatic registration of customs declarations, which reduce time for registering a declaration for goods. Such technologies are especially actively used in PSEDAs of the Far East and are taken up by other PSEDAs. Centers for the electronic declaration of goods arriving at the warehouses of the PDA of the Primorsky Territory, as well as the Sakhalin Region and the Khabarovsk Territory are being created.[25]

Analysis of current laws makes it possible to single out main areas of preferences and benefits for PSEDA residents: 1) taxation (mineral extraction tax, income tax, property tax, land tax, VAT on imports, expedited VAT refund procedure for the exporter, etc.); 2) regime of a free customs area; 3) preferences to use various infrastructure facilities; 4) use of sanitary and technical regulations following the example of the most developed countries; 5) a special procedure for land use; 6) preferential rental rates; 7) special regime of state and municipal control; 8) provision of public services by the management company; 9) the one-stop-shop principle for investors, etc.

The implementation of Law No. 473-FZ is ensured by adoption of subordinate laws, one of which is Resolution of the Government of the Russian Federation No. 614 of 22 June 2015 "On the Specifics of Creating Priority Social and Economic Development Areas in the Territories of Single-Industry Municipalities of the Russian Federation (Monotowns)."[26] In accordance with this Resolution, monotowns are also included in PSEDAs. Order of the Government of the Russian Federation No. 1398-r of 29 July 2014 "On Approval of the List of Single-Industry Municipalities of the Russian Federation (Monotowns)"[27] provides for a list of monotowns. Monotowns are widespread mode in PSEDAs.

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[24] *Аблизина Н.Н.* Недостатки и преимущества ТОСЭР в условиях экономического кризиса в моногородах // КИУ Набережные Челны [Natalia N. Ablizina, *Disadvantages and Advantages of PSEDA in the Conditions of the Economic Crisis in Monotowns*, Kazan Innovation University Naberezhnye Chelny] (Jul. 10, 2021), available at https://chl.ieml.ru/files/u30/20170316Sbornik/Territorii_operezhayushchego_socialno-ekonomicheskogo razvitiya_voprosy_teorii_i_praktiki.pdf.

[25] Smyslova & Stroev 2019, at 70.

[26] Постановление Правительства Российской Федерации от 22 июня 2015 г. № 614 «Об особенностях создания территорий опережающего социально-экономического развития на территориях монопрофильных муниципальных образований Российской Федерации (моногородов)» // Собрание законодательства РФ. 2015. № 27. Ст. 4063 [Resolution of the Government of the Russian Federation No. 614 of 22 June 2015. On the Specifics of Creating Priority Social and Economic Development Areas in the Territories of Single-Industry Municipalities of the Russian Federation (Monotowns), Legislation Bulletin of the Russian Federation, 2015, No. 27, Art. 4063].

[27] Распоряжение Правительства Российской Федерации от 29 июля 2014 г. № 1398-р «Об утверждении перечня монопрофильных муниципальных образований Российской Федерации (моногородов)» // Собрание законодательства РФ. 2014. № 31. Ст. 4448 [Order of the Government of the Russian Federation No. 1398-r of 29 July 2014. On Approval of the List of Single-Industry Munici-

The Ministry of Economic Development of the Russian Federation has informed that 89 PDAs have been nationwide created in monotowns, including those in the Far East Republic of Buryatia and Krasnokamensk (Trans-Baikal Territory). The functioning PDAs in monotowns result in 922 residents, more than 40,000 jobs, over 100 billion rubles of investments attracted, revenue of residents amounted to more than 244 billion rubles.

Despite the existing measures to support the PSEDA activities, the literature suggests to strengthen the incentive functions for such territories. As O.Yu. Smyslova and P.V. Stroev write that entities with an operating business that have become residents, retain the general tax treatment, and all products (goods) are subjects to a preferential tax treatment. Here, amendments should be made to current laws, introducing tax benefits in respect to all income of PSEDA residents.[28]

One of PSEDA features is providing a management company by the Government of the Russian Federation. In accordance with Article 8 of Law No. 473-FZ, the company's responsibilities include: registering PSEDA residents, supporting application process to state authorities and local self-government authorities regarding the status of a PSEDA resident. The management company enters into an agreement with an individual entrepreneur or a legal entity, which the management company has decided to include in the register (Art. 14).

However, there is no unified approach to management companies operating in territories with a special regime for carrying out business and investment activities.

In recent years, the social development of business has been increasingly recognized, i.e. cases when, in addition to making a profit, business owners achieve socially oriented objectives. These goals can be achieved most effectively just within the priority development areas.

I.B. Mironova identifies three groups of regional factors mostly advantageous for priority development areas:

> Group 1: geographical factors. Territories with a favorable geographic location attract investors if there are good conditions for living and professional activities, which requires a solution to the complex problem of infrastructure development, including social and transport infrastructures. If there is no or weak infrastructure support, even if there is a significant resource base, the development of a PDA may be at risk. Group 2: organizational and legal factors, which are determined by a developed and stable institutional environment, the absence of administrative and bureaucratic barriers when creating new resident enterprises, including at the expense of foreign capital.

palities of the Russian Federation (Monotowns), Legislation Bulletin of the Russian Federation, 2014, No. 31, Art. 4448].

[28] Smyslova & Stroev 2019, at 72.

An important role is played by general political stability in the region(s), in the territory of which a PDA is being created and developed. Group 3: financial and economic factors, which include the whole range of preferences (tax, customs, financial and administrative and organizational) that are (or will be established) for PDA residents.[29]

1.2. PSEDAs in the Far East

According to Z.G. Mirzekhanova,

> for the development of the Far East, the priority development areas (PDAs) are of great importance. Their formation and functioning are predetermined by the need to move away from the raw material export model in the process of diversifying the territorial and sectoral structure of the economy. A special legal regime and good economic conditions create environment for attracting investments in a wide range of activities.[30]

Support measures that are used in the Far East include the following:

1. Electronic declaration is a basic information source. More than 95% of all customs declarations are issued in electronic form. In order to speed up customs operations and taking into account long distances, "digital technologies of remote release of goods" are already being introduced and widely distributed in the Far East. As part of the agreement with Rostelecom, it is planned to connect PDAs to fiber-optic communication networks and digital services, which will increase business efficiency. The active use of data processing centers by PDA residents makes it possible to store and process a large array of information. With the help of data centers, operational accounting and analysis of statistical data and economic indicators of enterprises' activities are carried out.[31]

2. Investment policy PSEDA is a key factor in their creation and operation. To attract investments in the region's economy and finance the PDA projects, the Far East and the Baikal Region Development Fund, the Russian-Chinese Fund for Agro-Industrial Development have been created, and specialized banking products have been developed. One of the effective mechanisms of financial support for projects in the Far East and a form of state project financing is the Far East and Baikal Region Development Fund (FEDF), which provides affordable repayable financing. The Fund

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[29] Mironova 2019, at 112.

[30] *Мирзеханова З.Г.* Экологические аспекты формирования и развития территорий опережающего развития на Дальнем востоке России // Известия Российской академии наук. Серия географическая. 2021. Т. 85. № 2. С. 263 [Zoya G. Mirzekhanova, *Ecological Aspects of the Formation and Development of Priority Development Areas in the Far East of Russia*, 85(2) Bulletin of the Russian Academy of Sciences. Geographical Series 263, 263 (2021)].

[31] Smyslova & Stroev 2019, at 70.

is a public financial institution with flexible approaches to structuring and financing projects. It invests in the creation of new enterprises and infrastructure facilities that have a significant social and economic effect for the development of the region's economy.[32]

The Joint Russian-Chinese Fund for Agro-Industrial Development (hereinafter the RCFAD) was established to finance agricultural projects, including projects implemented within the PDAs. RCFAD is an example of project financing with foreign capital. It was created with the participation of the FEDF and the management company of the Asia-Pacific Food Fund (PRC) as part of the agreement on the joint development of agricultural production in the Far East.

However, PSEDAs in the Far East are considered as ineffective legal regimes. As noted in the literature,

> the state budget is still the main investor in the Russian Far East. In regions with low industrial development, investments from the state budget account for about 50% of the total investment, and in per capita terms, the Far Eastern Federal District is still lagging behind the national average in terms of investments. There are several exceptions to this picture. This is Sakhalin with its 75% of all direct foreign investments in the Far Eastern Federal District, as well as Chukotka, Magadan region, and Yakutia, where, with a small population, the extractive industry is developed, and projects in this area are implemented.[33]

Several PSEDAs have been created in the Primorsky Territory: Nadezhdinsky, Mikhailovsky, Zarubino, Neftekhimichesky, Russky Island. Let us consider the main objectives of creating one of them, in particular, *Russky Island PSEDA*.

Priority social and economic development areas, following Article 1(2) of Federal Law No. 291-FZ of 3 August 2018 "On Special Administrative Regions in the Territories of the Kaliningrad Region and Primorsky Territory"[34] (hereinafter the Law No. 291-FZ), were set up to ensure the functioning of special administrative regions in the

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[32] *Андреева М.Ю., Вотинцева Л.И.* Проектное финансирование – ключ к становлению центров и осей развития территорий опережающего развития Дальнего Востока России // Финансы и кредит. 2017. № 23(17). С. 1020 [Marina Yu. Andreeva & Lyudmila I. Votintseva, *Project Financing Is the Key to the Formation of Centers and Axes of Development of the Priority Development Areas of the Russian Far East*, 23(17) Finance and Credit 1015, 1020 (2017)].

[33] *Степанов Н.С.* Территории опережающего развития и свободный порт Владивосток: проблемы и перспективы в рамках новой модели развития // Modern Economy Success. 2020. № 1. С. 39 [Nikita S. Stepanov, *Priority Development Areas and the Free Port of Vladivostok: Problems and Prospects Within the Framework of a New Development Model*, 1 Modern Economy Success 35, 39 (2020)].

[34] Федеральный закон от 3 августа 2018 г. № 291-ФЗ «О специальных административных районах на территориях Калининградской области и Приморского края» // Собрание законодательства РФ. 2018. № 32 (ч. 1). Ст. 5084 [Federal Law No. 291-FZ of 3 August 2018. On Special Administrative Regions in the Territories of the Kaliningrad Region and Primorsky Territory, Legislation Bulletin of the Russian Federation, 2018, No. 32 (Part 1), Art. 5084].

territories of Russky Island (Primorsky Territory) and Oktyabrsky Island (Kaliningrad Region) to create an investment-attractive environment for Russian and foreign investors. The legal regime of special administrative regions: the territory of Russky Island and the territory of Oktyabrsky Islands, received the status of PSEDA, in respect of which both General Law No. 473-FZ and special legislation are simultaneously applied.

In Order of the Government of the Russian Federation No. 1134-r of 30 May 2017 "On Approval of the Concept for the Development of Russky Island"[35] (hereinafter the Order No. 1134-r), the following additional factors to increase the investment attractiveness of Russky Island include: the activities of the Joint Stock Company the Far East and Baikal Region Development Fund, aimed, among other things, at providing investors with long-term and concessional financing for the implementation of investment projects; the creation of the Far East Development and implementation of High Technologies Fund, which finances technology companies at an early (seed) stage, manufacturing enterprises that produce high-tech and innovative products in such sectors as information technology, robotics, aviation, space activities, alternative energy, medicine and biotechnology; creation of special conditions for the implementation of medical activities in the territory of Russky Island.

According to Article 3(3)(1) of Law No. 473-FZ, the creation of a PSEDA should be accompanied by analytical information, including a forecast analysis of the social and economic consequences, a predictive assessment of the dynamics of growth in the volume of additional revenues coming to the respective budgets. In compliance with these requirements, among the expected results of the implementation of the Concept for the Development of Russky Island, Order No. 1134-r also provides for important social achievements, namely: the creation of scientific, educational and technological clusters on the basis of the Far Eastern Federal University; comfortable living environment; tourism and service; at least 7,000 jobs, excluding employees of the Far Eastern Federal University.

1.3. Obstacles to PSEDAs Development

Despite the advantages of PSEDA activities, there are a number of factors that hinder their development.

First, there is *excessive administrative control* over residents and an insufficiently effective distribution of powers between state bodies and management companies. According to Law No. 473-FZ, the activities of PSEDA residents are controlled by the

[35] Распоряжение Правительства Российской Федерации от 30 мая 2017 г. № 1134-р «Об утверждении Концепции развития острова Русский» // Собрание законодательства РФ. 2017. № 24. Ст. 3544 [Order of the Government of the Russian Federation No. 1134-r of 30 May 2017. On Approval of the Concept for the Development of Russky Island, Legislation Bulletin of the Russian Federation, 2017, No. 24, Art. 3544].

Supervisory Board of the PSEDA, which includes representatives of the authorized federal body, the highest executive body of state power in Russian regions, other public authorities and the executive and administrative bodies of municipalities, as well as management companies (Art. 6(1)).

Article 7 of this Law stipulates that federal executive body authorized by the Government of the Russian Federation exercises the powers to establish priority social and economic development areas in federal district. Almost all powers related to designing and planning of PSEDA are federal jurisdiction overlapping the powers of the Russian regions.

PSEDAs contain many administrative tools to enhance social and economic development. Preferential status (for example, a reduction in tax rates in the first years up to 0%) and the possibility to access infrastructure and facilities are contrasted to strict compliance measures towards PSEDA residents and their obligation to achieve certain economic indicators when they make commitments in the process of getting PSEDA resident status. Excessive administrative control seems to hinder the development of territories and the activities of their residents, including social investments.

It should be noted that there are different opinions regarding the distribution of powers between federal and regional authorities in regulating PSEDAs. O.Yu. Smyslova and P.V. Stroev note that

> current legal system restricts the regional authorities and local self-governments in their rights of supervision over the PSEDAs, transferring part of the control and supervisory functions to management companies.[36]

Other authors believe that

> it is necessary to work out a unified approach to power division in the creation and functioning of priority social and economic development areas, special economic zones and territorial development zones. For example, it is necessary to expand the powers of the Ministry for the Development of the Russian Far East and the Ministry of Economic Development.[37]

Second, *there is a lack of responsibility of public authorities for not providing state support measures*. Law No. 473-FZ establishes requirements regarding the content of

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[36] Smyslova & Stroev 2019, at 66.

[37] *Кузякин Ю.П., Кузякин С.В., Реунова Е.С.* Территории опережающего социально-экономического развития: становление эффективного механизма развития экономики // Россия и современный мир. 2020. № 1(106). С. 77 [Yurii P. Kuzyakin et al., *Priority Social and Economic Development Areas: The Formation of an Effective Mechanism for Economic Development*, 1(106) Russia and the Modern World 67, 78 (2020)].

state programs, but does fix neither deadlines for the fulfillment of those requirements nor responsibility of officials or parties to agreements. Consequently, state support of business in the Far East is not fully implemented due to the gaps in laws and regulations.[38]

Third, there are certain *risks for regions receiving the status of a PSEDA*. Alongside with economic and social growth of such territories, industrial development and consolidation of clusters in the regions the level of social and economic development of neighboring areas can decline. Therefore,

> the work on determining the priority development areas should not turn into a struggle of disparate economic interests of municipalities, regions and private investors. We need to prioritize interests of the country in general.[39]

Fourth, *the competitive immunity* provided to PSEDA residents arise problems. Participants in such competition are territories that more actively and convincingly declare themselves as an independent subject of global competition. After receiving a special status, PSEDAs actually acquire competitive immunity. Obtaining the status of PSEDA by a region or a monotown gives its residents competitive advantages over other enterprises of alike industry that are not included in this territory. Accordingly, the creation of a PSEDA discourages competitive environment, impacts existing enterprises, undermining their sales markets.

Fifth, *there are no necessary requirements for effectiveness indicators of PSEDA*. The regulation of territories is impossible without a balanced system of quantitative and qualitative indicators. PDAs presuppose not only the achievement of planned social and economic results, but also work ahead of the curve, which involves achievement in a timely manner of certain indicators. In this realm, a system of effectiveness indicators should be designed for enterprises and companies, for example, cooperation with academic organizations; quality of goods produced and services rendered; interaction with public authorities; other financial and economic results. Financial and economic indicators may include: amount of investments, taxes collected, public funds. Organizational indicators: time management, quality of transaction processing. Indicators that assess the quality of products and services may also include characteristics of population well-being within the PDA, and the share of the business sector in the development of the territory. Indicators of cooperation with academic organizations may include indicators of technological level of developments, and the contribution of science within a PDA. Law No. 473-FZ does not establish indicators for assessing the effectiveness of work, though the possibility of assessment is mentioned in the context of PDA Supervisory Board

[38] Kuzyakin et al. 2020, at 74.

[39] Ablizina 2017.

activities. We believe this is not sufficient, since such assessment should be carried out by relevant state authorities that control the functioning of the PDA.[40]

Therefore, to initiate amendments to Law No. 473-FZ is a prerequisite for achieving the goals of advanced development of both the PDAs themselves and the region as a whole.

2. Legal Regime of Clusters, Technoparks and Industrial Parks

Unlike PSEDAs, clusters, industrial and technological parks can be created not only in accordance with federal laws and regulations, but also under regional jurisdiction.

The activities within clusters, technoparks are coordinated by Association of Clusters, Technoparks and SEZs of Russia (hereinafter the ACTP RF), established in 2011, which is a leading public and business organization consolidating technological and industrial units. Currently, the Association unites more than 100 members from 50 regions of the Russian Federation, including industrial clusters, technoparks, special economic zones and other entities. More than 215,000 people work at the enterprises of the Association's members, and the total volume of production exceeds 853 billion rubles (0.8% of Russia's GDP). On 6 June 2019 the ACTP RF signed a Cooperation Agreement with the Ministry of Economic Development of the Russian Federation. Therefore, the ACTP RF is obliged to work out and submit proposals for the creation, development and support of technology parks to that Ministry; to monitor the activities of management companies and residents of technology parks and to provide the results to the Ministry of Economic Development; to annually rank technoparks and special economic zones; to participate in the implementation of educational programs for advanced training of technoparks' residents.

2.1. Cluster Policy in Russia

Currently, the cluster approach to territorial development is considered one of the most effective tools: this is evidenced by both international experience and the attention paid to it by Russian authorities.

The legal definition of a "cluster" appeared in Russia only after adoption of Federal Law No. 488-FZ of 31 December 2014 "On Industrial Policy in the Russian Federation"[41] and introduced its main characteristics:

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[40] *Каширская В.С., Комов В.Э.* Возможные пути развития и предложения по повышению эффективности территорий опережающего развития в России // Вестник Тульского филиала Финуниверситета. 2019. № 1-2. С. 129 [Valentina S. Kashirskaya & Valery E. Komov, *Possible Ways of Development and Proposals for Improving the Efficiency of Priority Development Areas in Russia*, 1-2 Bulletin of the Tula Branch of the Financial University 128, 129 (2019)].

[41] Федеральный закон от 31 декабря 2014 г. № 488-ФЗ «О промышленной политике в Российской Федерации» // Собрание законодательства РФ. 2015. № 1 (ч. 1). Ст. 41 [Federal Law No. 488-FZ of 31 December 2014. On Industrial Policy in the Russian Federation, Legislation Bulletin of the Russian Federation, 2015, No. 1 (Part 1), Art. 41].

• specific field of activity (industry, industrial production);
• territorial proximity of the entities included in the cluster;
• connectivity, functional dependence between the cluster entities.

In the Methodological Recommendations for Cluster Policy Implementation in the Regions of the Russian Federation, clusters are understood as associations of enterprises, suppliers of equipment, components, specialized production and maintenance services, research and educational organizations linked by territorial proximity and functional dependence in the production and sale of goods and services.[42]

T.S. Krasnikova highlights key features of a cluster: 1) geographical proximity of companies; 2) certain specialization; 3) the interconnectedness of companies and related organizations, their complementarity to each other; 4) joint improvement of competitiveness as a result of interaction between companies; 5) the interaction of companies based on a "horizontal principle" including information and knowledge exchange; 6) innovative nature of activities of the companies included in the cluster.[43]

The requirements for clusters in Russia are established at the subordinate legislation level by Resolution of the Government of the Russian Federation No. 779 of 31 July 2015 "On Industrial Clusters and Specialized Organizations of Industrial Clusters."[44] Currently, 51 industrial clusters from 37 regions of Russia are included in the Russian Register of industrial clusters that meet these requirements. The members of these industrial clusters are 600 industrial enterprises (technological leaders GAZ Group, Arnest JSC, Ulan-Ude Aviation Plant JSC, Monocrystal JSC, among others), many of them demonstrate close industrial cooperation.[45]

The researchers note that the synergy resulting from the unification of science, education and industry within the clusters serves as a driver for business growth, increasing its competitiveness, expanding access to innovative ideas and projects.

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[42] Методические рекомендации по реализации кластерной политики в субъектах Российской Федерации (утв. Минэкономразвития РФ 26 декабря 2008 г. № 20615-ак/д19) // СПС «КонсультантПлюс» [Methodological Recommendations for the Implementation of Cluster Policy in the Constituent Entities of the Russian Federation, approved by the Ministry of Economic Development of the Russian Federation under No. 20615-ak/d19 of 26 December 2008), SPS "ConsultantPlus"] (Jul. 10, 2021), available at http://www.consultant.ru/document/cons_doc_LAW_113283/.

[43] *Красникова Т.С.* Аналитический обзор подходов к определению понятия «кластер» и оценки роли кластеров в развитии территорий // Маркетинг MBA. Маркетинговое управление предприятием. 2016. № 1. С. 146 [Tatiana S. Krasnikova, *Analytical Review of Approaches to Defining the Concept of "Cluster" and Assessing the Role of Clusters in the Development of Territories*, 1 MBA Marketing. Enterprise Marketing Management 144, 146 (2016)].

[44] Постановление Правительства Российской Федерации от 31 июля 2015 г. № 779 «О промышленных кластерах и специализированных организациях промышленных кластеров» // Собрание законодательства РФ. 2015. № 32. Ст. 4768 [Resolution of the Government of the Russian Federation No. 779 of 31 July 2015. On Industrial Clusters and Specialized Organizations of Industrial Clusters, Legislation Bulletin of the Russian Federation, 2015, No. 32, Art. 4768].

[45] О кластерах // Ассоциация кластеров, технопарков и ОЭЗ России [On Clusters, Association of Clusters, Technoparks and SEZs of Russia] (Jul. 29, 2021), available at https://akitrf.ru/clusters/about/.

The cluster approach is becoming a key trend in the development of a priority social and economic development ensuring accelerated territorial development. The development of territorial clusters in Russia is one of the conditions for increasing competitiveness of the domestic economy and intensifying mechanisms of public-private partnership.

The concept of long-term social and economic development of the Russian Federation, approved by Order of the Government of the Russian Federation No. 1662-r of 17 November 2008[46] provides for the creation of a network of territorial production clusters that realize the competitive potential of territories, the formation of a number of innovative high-tech clusters in the European and Asian parts of Russia.

In its analytical note "Features of the Functioning and State Support of Industrial Clusters" the ACTP RF mentions possibilities of clusters such as:

- a source of new investment projects;
- import substitution;
- localization of component production;
- cost reduction and/or improvement of the characteristics of components;
- development of new types of products;
- expansion of the geography of product sales, access to foreign markets.[47]

Currently, a number of mechanisms for budget support of investment projects have been formed, as well as measures aimed at improving competitiveness of enterprises, which allows for implementation of cluster development projects without additional increase in federal budget expenditures. In addition, in order to support the development of clusters at the federal level, the Ministry of Economic Development of the Russian Federation will integrate the cluster approach into the developed and implemented industry-based and sector-based development strategies, as well as federal and departmental target programs. The main results of the cluster policy implementation envisage, among other things, securing the growth of non-resource and high-tech exports of goods and services; provision of incentives in order to increase the number of small and medium-sized enterprises; social and economic development of the regions where clusters are based, and attraction of investments.

The cluster form of production has a number of important features, such as: 1) leading enterprises determining a long-term economic, investment and innovative development strategy; territorial localization of cluster members; 2) stability of economic

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

[47] Аналитические материалы // Ассоциация кластеров, технопарков и ОЭЗ России [Analytical materials, Association of Clusters, Technoparks and SEZs of Russia] (Jul. 29, 2021), available at https://akitrf.ru/clusters/accreditation/.

ties of cluster members, with predominant significance of these ties for the majority of its members; 3) long-term coordination of members within the framework of production programs, innovation processes, management systems, quality control, etc.

Therefore, the cluster approach to territorial development can be recognized as an innovative and efficient method.

2.2. Technoparks and Industrial Parks in Russian Regions

Today, the legal regime of *technoparks* is considered to be an element of the innovation infrastructure. Technoparks are characterized by following features: 1) specialized management company; 2) innovation activities of technopark residents; 3) development, commercialization and implementation of the results of scientific and technological activities of technopark residents being the main purpose; 4) substantial state support to technoparks residents as well as to entities investing in the development of infrastructure of technoparks.[48]

The first science and technology parks (technoparks) were created in the late 80s–early 90s of the 20th century, mainly on the basis of leading universities in a number of Russian cities (Tomsk, St. Petersburg, Ufa, etc.). In the beginning, they focused, by analogy with foreign ones, on incubation and service support of small firms and did not have a developed infrastructure, real estate, trained management teams, thus their status was as university departments with no objective to initiate, create and support small innovative enterprises.[49]

Industrial park, in accordance with Article 3(12) of Law No. 488-FZ, is an association of industrial infrastructure facilities under supervision of a management company. Any entities that are not related to each other can operate within the framework of one industrial park.

A technopark and an industrial park are tools that differ from clusters in their content, but are similar in their goals being elements of innovation and industrial infrastructure and non-financial development institutions. It seems that the above characteristics bring the cluster, technopark and industrial park closer to territories with a special regime for carrying out business activities.[50]

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[48] *Серебряков А.А.* Правовое регулирование инновационной инфраструктурной среды в контексте формирования территорий опережающего научного и научно-технического развития // Российско-азиатский правовой журнал. 2019. № 2. С. 30 [Andrei A. Serebryakov, *Legal Regulation of the Innovative Infrastructure Environment in the Context of the Formation of Priority Science and Science and Technology Development Areas*, 2 Russian-Asian Legal Journal 29, 30 (2019)].

[49] *Куторго Н.А., Огородникова Е.И.* Становление и развитие научно-технических парков в России // КиберЛенинка [Natalia A. Kutorgo & Elena I. Ogorodnikova, *Formation and Development of Science and Technology Parks in Russia*, CyberLeninka] (Jul. 29, 2021), available at https://cyberleninka.ru/article/n/stanovlenie-i-razvitie-nauchno-tehnicheskih-parkov-v-rossii.

[50] *Егорова А.А.* Кластеры, технологические и индустриальные парки как особые правовые режимы привлечения инвестиций в экономику региона // Право и экономика. 2019. № 4(374). С. 63 [Anna A. Egorova, *Clusters, Technology and Industrial Parks as Special Legal Regimes for Attracting Investment in the Economy of the Region*, 4(374) Law and Economics 60, 63 (2019)].

Industrial parks can be created by state, municipal structures and private ones. Through the creation of industrial parks, investments are attracted, new jobs are created. Also, taxes received from the activities of enterprises operating at the park site are returned to the regions. Creation of these investment sites is attractive for municipalities in terms of additional conditions for municipal development.

Conclusion

The analysis of legislation regulating and literature justifying territories with a special regime for business activities in Russia has showed that, despite existing problems and unresolved issues in terms of their creation and strategic management, the development of these "growth points" in the regions of the Russian Federation seems to have potential for innovations and social and economic development.

The current laws provide a number of rules establishing preferences and benefits for residents, since there is no doubt that all types of special territories need support for the successful development and implementation of projects, primarily financial (benefits, loans, subsidies) and organizational (infrastructure facilities, premises), and both investment and social orientation is important.

However, some authors believe that there is a need to ensure better conditions for economic, industrial and innovative growth in the regions, and in this way to search for an integrated approach to development of Russian territories and the use of their competitive advantages, and to apply new methods for increasing innovative potential of territories within the framework of the cluster approach.[51]

In this connection, it is also necessary to pay more attention to the development of territorial clusters, technoparks and industrial parks, which are good tools for combining investment, science, education and socially-oriented state policy.

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[51] Smyslova & Stroev 2019, at 64.

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