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BRICS LAW JOURNAL (BRICS LJ)

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LEGAL REGULATION OF TECHNOLOGICALLY IMPROVED PEOPLE IN THE UNITED STATES AND CHINA

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As humanity improves its use of technologies that can replace parts of a biological organism with ones containing mechanical or electronic components, it raises important legal and political issues. For example, the successful implantation of devices in human bodies could lead to the emergence of new cognitive and motor abilities, thereby resulting in the creation of a new class of people. Undoubtedly, this new class of people with extraordinary abilities would require a legal and governmental response. However, the question that arises is what legal rights might be given to these people, considering that they are more similar to machines than to men or women. The following legal aspects are of the utmost importance: the legal rights and responsibilities of cyborgs; the regulation of access to neuroprosthetic devices by third parties; and the limitation of the illegal use of the damaging capabilities of cyborgs. This article examines a number of laws and regulations from various jurisdictions in the United States, the European Union, South Korea and China that apply to cyborg technologies, with a particular focus on a legal doctrine that applies to neuroprostheses.

Keywords: cyborg; improvement technology; neuroprosthesis; copyright; cognitive freedom.

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Introduction

As we currently experience yet another technological revolution, scientists around the world have turned their attention to the technical improvement of human beings to give them additional useful properties, qualities and capabilities that can be portable or embedded in the body. In the global community, the advent of the cyborg age is a topic of conversation.

Today, millions of people around the world are equipped with various forms of cyborg technology, ranging from prosthetic limbs and thought-activated prosthetic arms to brain-implanted neural prostheses, as well as pacemakers, defibrillators or cochlear implants. There are positive examples of scientists working on an artificial hippocampus to restore memory.[1]

Unfortunately, the prevalence of limb loss is expected to increase: the number of people living with limb loss is projected to rise to 3.6 million by 2050 in the United States.[2] As more people become equipped with cyborg devices or complex technological prosthetics, important legal issues arise that lead to a redefinition of the very concept of "human being." Problems may arise when cyborg people are

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[1] Nuffield Council on Bioethics, Novel Neurotechnologies: Intervening in the Brain (2016) (Sept. 15, 2022), available at http://nuffieldbioethics.org.

[2] Kathryn Ziegler-Graham et al., *Estimating the Prevalence of Limb Loss in the United States: 2005 to 2050*, 89(3) Arch. Phys. Med. Rehabil. 422 (2008).

encroached upon (for example, by tampering with an implanted medical device or by interfering with the wireless signals of devices worn by individuals equipped with cyborg devices), or, conversely, when their misconduct is enhanced by additional devices.[3]

Thus, in the age of cyborgs, there must be regulations governing the lawful manufacture, circulation and carrying of cyborg devices, as well as measures that are developed to counteract the unlawful actions of such people. As we continue to advance technologically, laws must be enacted to protect our identity as "homosapiens."

1. "Cyborg Technology": A New Term in a New Era

Scientists and policymakers are already working on the problem of legal regulation for cyborg technology. For example, in the United States, the White House Presidential Commission on Bioethics has produced a technical report that reflects the ethical, political and legal issues surrounding advances in neurobiology.[4] Similarly, in the United Kingdom, the Nuffield Council on Bioethics has produced an article discussing "brain-computer" interfaces.[5]

In a special issue of *Cyberphenemonology: Technominds Revolution*, Kevin Warwick, Woodrow Barfield and Alexander Williams identified the term "cyborg technology" as follows: technology that is integrated into the human body and that not only restores lost functions but also enhances the anatomical, physiological and informational capabilities of the body.[6] This includes everything from medical implants (e.g. pacemakers) to brain implants of the near future that can alter memory and cognitive abilities. In addition, the term "cyborg prosthesis" is provided – which is used to refer to the artificial body enhancements that provide computational capabilities that function as a feedback system. These enhancements can be upgraded, and in some cases, they can be controlled by thought or implanted directly into the body itself.

An ear device with a stimulator under the skin sending signals to the inner ear and a speech processing unit, a "cochlear" implant can be considered as an example of calculative abilities of man-machine combination with the function of cyborg prosthetic devices. Main advantage of such device is that its calculative ability is rather swift. The process of functioning of such device is the following: microphone is receiving the outer sound and change it into the electric signals by the processing unit which dispatches

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[3] Marc Goodman, *Future Crimes: Everything Is Connected, Everyone Is Vulnerable and What We Can Do About It* (2015).

[4] Amy Gutmann, *Gray Matters: Topics at the Intersection of Neuroscience, Ethics, and Society, Vol. 2*, Presidential Commission for the Study of Bioethical Issues (March 2015) (Sept. 15, 2022), available at https://bioethicsarchive.georgetown.edu/pcsbi/sites/default/files/GrayMatter_V2_508.pdf.

[5] Nuffield Council on Bioethics, *supra* note 1.

[6] Woodrow Barfield & Alexander Williams, *Cyborgs and Enhancement Technology*, 2(4) Philos. 4 (2017).

the results by way of skin using the transmitter. In addition, the receiver picks up sound signals and sends them to an electrode array, which is positioned so that it can transmit patterns of electrical activity to the auditory nerve, similar to those delivered by healthy human cells. In terms of increasing a person's ability to process information, these individuals are able to detect sounds they heard before the damage and, in some cases, even sounds outside of their normal range.

Another category of cyborgs are people with implanted artificial intelligence, who are more powerful and more of a concern than, for example, people with a prosthetic leg. Cyborgs with implanted artificial intelligence have significantly enhanced cognitive capabilities, and it is they who could potentially pose the greatest threat in the future when encroaching on protected interests.

Cyborgs of the modern age are equipped with prostheses attached to their bodies or even implanted in their bodies for a variety of purposes, ranging from medical necessity to voluntary self-improvement. In general, cyborgs choose not only to be equipped with implants and devices to restore lost functions but also, in some cases, to enhance their performance, abilities and skills – whether cognitive, sensory or physical.

2. Current Legal Issues of Cyborg Technology

2.1. Present Legislation in the United States of America, South Korea and the European Union

As more and more people are equipped with cyborg technology, there is a serious problem of regulating the legal rights and responsibilities of such people, as well as regulating and controlling the technologies that are used to repair, upgrade and improve the human body.

As an example, consider a prosthesis attached to the body and a neuroprosthesis implanted in the brain.

In the United States, such devices receive protection as intellectual property under patent law and the software receives the same protection as for copyrights. However, it may be illegal to interfere with the wireless communication of such devices, so defective (illegally attached) prosthetic devices are subject to the Product Liability Act, which provides for cases of design or manufacturing defects in the product. But, if a third party intentionally alters a product after it has been purchased, the manufacturer cannot be held liable for damages caused by a product that has been altered for body enhancement itself.

Similarly, the law applies to a neuroprosthetic device implanted in the brain, since the software controlling the device can be modified by others remotely, such as over a wireless network. In any case, once cyborg devices are treated by humans as parts of their bodies, the distinction between property rights and human rights becomes blurred, making the establishment of liability increasingly problematic.

In addition, with regard to the procedures used for attaching such devices to the body or implanting them into the body, medical malpractice can result in harm to the person.

For reasons of public safety, U.S. lawmakers are addressing not only the legal regulation of cyborg devices and discussing whether to classify them as either consumer products or medical devices, but also the resulting problems of applying provisions of constitutional law, such as the right to privacy and the Search and Seizure Act, in the event that law enforcement agencies monitor the life of a person without a proper warrant and gain access through their prosthetic devices to gather private information.

Consider the case of *Riley v. California*, a case in which the justices of the United States Supreme Court unanimously ruled that police officers could not conduct a data search on a suspect's seized cell phone without a warrant. The Cyborg Act was relevant to the case, and the Chief Justice said that

> modern cell phones today are so common and integral to everyday life that the proverbial visitor from Mars might think they are an important human anatomical feature.[7]

In the United States, this was the first time the Supreme Court had considered the concept of "cyborg" in case law.

The basic laws governing the legal rights and responsibilities of cyborgs in the United States are the same as those governing the legal issues of prosthetics and implants, that is, as medical devices, in particular for people with disabilities. For example, there is a federal law titled "On the Food and Drug Administration (FDA)," which governs authority over medical devices, including prosthetic devices and implants.[8] Under this law, devices are divided into classes based on the degree to which patients are likely to be exposed to any potential health risks and hazards. The less complex devices have far fewer regulatory provisions that do not require FDA approval, while the most complex ones require clinical safety studies before a product can be marketed.

For example, in South Korea, legislation regarding cyborg-like devices is similar to that of the United States in that it has an elaborate classification system for regulating medical devices and also addresses the issue of proper manufacturing. The Ministry of Health and Welfare, which acts in accordance with the rules stipulated for prosthetic devices under the Disabled Persons Welfare Act, is in charge of exercising oversight.

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7 *Riley v. California*, 573 U.S. 373 (2014).

8 21 U.S.C. Ch. 9: Federal Food, Drug and Cosmetic Act, Sec. 360c: Classification of Devices Intended for Human Use (Sept. 14, 2022), available at http://uscode.house.gov/view.xhtml?path=/prelim@title21/chapter9&edition=prelim.

In addition, South Korea's Ministry of Food and Drug Safety regulates pharmaceuticals and medical devices, including implants, under the Medical Device Act and the Pharmaceutical Act.[9] In Japan, the Pharmaceutical and Medical Device Agency classifies medical devices in a similar way: by risk level and by introducing manufacturing standards to protect public health.

In the European Union (EU), there is a directive on active implantable medical devices together with directives on machinery and medical devices and on the safety in relation to prosthetic devices.[10] In some countries, prostheses and implants that are not medically necessary are either prohibited or are considered reconstructive enhancements.

In certain cases, it would be useful to link legal regulation of cyborg technology to the advancements being made in robotics, which are constantly improving in terms of both intelligence and their increasingly human-like appearance. On the other hand, as robots become more intelligent, the law is bound to become more complex, for example, in terms of establishing liability against a robot for harming a human being. And as humans become increasingly similar to cyborgs, it becomes more difficult to distinguish between cyborgs and mechanically integrated body enhancements, as well as to separate them from biological ones. Nevertheless, it is important to make this distinction when establishing criminal liability in cases involving violations of property rights or infringements of bodily integrity.

2.2. Current Legislative Initiatives Related to Robotics Development

Governments around the world are attempting to regulate robotic technology, particularly cyborgs. The development of such devices offers hope for combating a number of incurable diseases. For example, improvements in the algorithms of computer cyborg technology could help those suffering from brain injury, Alzheimer's disease or vision loss.

Addressing the legal regulation of robotics requires financial, ethical and legal support. In the United States, for example, the Presidential Commission on Bioethics advises the executive branch on the ethics and current direction of biotechnology, artificial intelligence and neuroscience research.[11]

In 2014, the European Union finalized a law titled "Regulating Emerging Robotics in Europe: Robotics Facing Law and Ethics" (RoboLaw) in relation to emerging

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[9] South Korea – Welfare Laws for Persons with Disabilities, Disability Rights Education & Defense Fund (Sept. 15, 2022), available at https://dredf.org/legal-advocacy/international-disability-rights/international-laws/south-korea-welfare-law-for-persons-with-disabilities.

[10] Council Directive 90/385/EEC of 20 June 1990 on the approximation of the laws of the Member States relating to active implantable medical devices (Sept. 14, 2022), available at http://ec.europa.eu/growth/single-market/european-standards/harmonised-standards/implantable-medical-devices_en.

[11] Presidential Commission for the Study of Bioethical Issues, U.S. Department of Health and Human Services (Sept. 13, 2022), available at https://bioethicsarchive.georgetown.edu/pcsbi/node/851.html.

robotics.[12] This comprehensive document reflects the current legal status and ethical implications, as well as the impact of robotics and other technologies on the future of society.[13]

South Korea's legislators recently passed the Intelligent Robotics Development and Dissemination Act, which declared the creation of an intelligent robot industry[14] as a national strategic goal. Measures to achieve this goal include financial incentives for research and development, the establishment of the Robotics Promotion Institute and the development of a high-tech theme park focused on robots.

2.3. Copyright Regulation

The most controversial issue is the legal regulation of devices used to improve the quality of human minds, specifically, the circulation of chips and software for neuroprosthetic devices and other implants. Chips implanted in the brain and the software associated with such technology represent the latest advances in technology being developed to improve the cognitive abilities of a cyborg. As an example, consider the development of a neuroprothesis such as the artificial hippocampus, which is designed to restore and improve memory.

The neuroprosthesis has strong potential not only to repair brain damage from disease or injury but also to enhance brain abilities, such as downloading information from the Internet, engaging in mental communication and editing memories.

When computer chips are integrated into a neuroprosthesis, they become part of the cyborg brain architecture and contribute to the technological improvement of human mental capabilities. In this case, the United States employs the Copyright Act to protect the programs stored on the chips. This means that the programs stored on the chip implanted in the cyborg's advanced brain are protected under the Copyright Act. The software that controls the implant must also be protected, but under U.S. Intellectual Property Law, objects that are considered utilitarian are not subject to copyright protection, and microchips are utilitarian in function.

In the United States, the issue of copyright protection for software encoded on chips was resolved in the case *Apple Computer, Inc. v. Franklin Computer Corp.*,[15] in which the court rejected the argument that software encoded on chips should be considered utilitarian and therefore not copyrightable. The court noted that

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[12] RoboLaw Regulating Emerging Robotics in Europe: Robotics Facing Law and Ethics Regulating (Sept. 4, 2022), available at http://www.robolaw.eu.

[13] Regulating Emerging Robotic Technologies in Europe: Robotics Facing Law and Ethics, European Commission (Sept. 15, 2022), available at http://cordis.europa.eu/project/rcn/102044_en.html.

[14] Intelligent Robots Development and Distribution Promotion Act (2008), Korea Legislation Research Institute (Sept. 8, 2022), available at http://elaw.klri.re.kr/eng_mobile/viewer.do?hseq=17399&type=sogan&key=13.

[15] *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240 (3d Cir. 1983).

the medium on which the software is encoded should not determine whether the software itself would be protected by the Copyright Act.

This case is of great importance in the history of cyborg litigation because it was the first time an appellate court in the United States ruled that a computer operating system could be protected by copyright.

A second important aspect for cyborg rights regulation is the ruling's clarification that binary code, a machine-readable form of software, is also subject to copyright protection (as is the human-readable form of software). Thus, the software aspects of a neuroprosthetic device receive copyright protection. This ensures that legally protected thinking or ways of thinking are possible if thoughts pass through and are stored on these chips, since their programs have a significant impact on the brain's thought process.

There is another type of legal protection in the United States that applies directly to computer-enhanced brains. This is the Semiconductor Chip Protection Act.[16] Given the importance of protecting integrated circuits from piracy, several countries, including Japan and the EU, have followed the U.S. lead and adopted similar directives recognizing and protecting integrated circuit designs (also called semiconductor chip topography).

In 1989, a diplomatic conference was held between countries at which the Intellectual Property Treaty with respect to integrated circuits was partially implemented by reference in the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[17] TRIPS is an area of intellectual property law that covers: copyright and related rights (that is, the rights of performers, record producers and broadcasters); trademarks, including service marks; geographical indications, including appellations of origin; industrial design; patents, including protection of new plant varieties; integrated circuit topologies; and undisclosed information, such as trade secrets and test data.[18]

As previously noted, the primary purpose of semiconductor chip protection laws is to prohibit 'chip piracy', that is, the unauthorized copying and distribution of semiconductor chip-based products copied from the original creators of such works. The use of computer chips in pacemakers and neuroprosthetic devices makes it possible to direct computing resources to actions such as using thought to control prostheses, which will help to restore and improve memory as well as other cognitive functions.

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16 Semiconductor Chip Protection Act of 1984.

17 Overview: the TRIPS Agreement, World Trade Organization (Sept. 13, 2022), available at https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm.

18 Jan Busche et al., *Article 35. Relation to the IPIC Treaty* in *WTO – Trade-Related Aspects of Intellectual Property Rights* (Peter-Tobias Stoll et al. eds., 2008) (Sept. 14, 2022), available at http://booksandjournals.brillonline.com/content/books/10.1163/ej.9789004145672.i-910.229.

3. Cyber Hacking

Legal systems must also consider the problem of protecting the active memory of cyborgs as programs are stored and downloaded to various devices implanted in their brains. Memory chips such as EPROMs (erasable, reprogrammable, read-only permanent memory) can retain their data even when power is removed. Such chips are protected by the U.S. Semiconductor Chip Protection Act, but it does not cover information such as computer programs, which are protected by the Copyright Act. For example, the U.S. Court of Appeals for the Ninth Circuit in *MAI Systems Corp. v. Peak Computer, Inc.*[19] ruled that when software was loaded into a computer, its RAM (RAM-operative storage device) was created as a "copy," potentially infringing "reproduction" under the U.S. Copyright Act. This means that even if no hard copy was made, temporarily storing the program in RAM was still considered reproduction and potentially copyright infringement. Thus, turning on a computer constitutes reproduction of operating system programs because they are automatically stored in RAM whenever the computer is powered on or when a file is transferred from one user of a computer network to another.

The possibility that the implant technology in the human brain can be hacked raises the question of what rights people have over the reliability of the sensory information transmitted to their brains and the memories stored in their brain structures. Editing or altering memories are aspects of improved technology that await future cyborgs. If third parties are able to hack into brain implant technology, the possibility of a bleak future for humanity should not be underestimated. For example, a retinal prosthesis could be hacked to place images on the back of the retina that a person has never seen. Or, in the case of cochlear implants, previously unheard sounds may be transmitted to the auditory nerve. It is also possible to hack into the artificial hippocampus in order to implant memories in the brain of events the person has never encountered before. Thus, there is the potential technological ability to hack into the brain, which means it will not remain a bastion of privacy. That is, having access to a person's brain and gaining the ability to manipulate it creates an even greater danger, namely the loss of a person's identity as an individual.

When a third party gains access to neuroprostheses implanted in another person's brain, a number of negative consequences can arise, requiring an immediate legal prohibition. For example, if a person committed a crime because someone had remote access to their brain and affected their mind, this suggests that the person lacked the intent to carry out the crime (*mens rea*). Would they be exempt from liability? According to law professors Jeffrey Rosen and Owen Jones, who have scanned the brains of prison inmates, the neurological disorder prevents defendants from

[19] *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F. 2d 511 (9th Cir. 1993).

controlling their actions.[20] In this regard, it is necessary to create software to study the programming language and algorithms that control neuroprosthetic devices and identify the intentions of their wearers to commit crimes. If it is proved that the person wearing the neuroprosthetic device has no intention of committing a crime, we should talk about indirect infliction of harm and a new kind of perpetrator.

4. Right to Change Memories

The use of neuroprosthetic devices may lead to other problems, such as in the case of scanning a person's brain and recording his thoughts or changing the content of his memory. Recording unspoken thoughts or altering memory content is a violation of privacy, that is, an infringement of a person's basic rights.

It is currently impossible to directly reconstruct visual or auditory information stored in the human brain. However, this may become quite possible in the future given the capabilities of cyborg technology, because once cyborgs have the technology to sense the world, they will have an electronic (or digital) record of what they have seen and heard.

According to the findings of the U.S. President's Bioethics Commission and the Nuffield Report, the ability to record thoughts is possible in the foreseeable future. Hence, it would be possible to subpoena cyborgs equipped with neuroprostheses and to use the data stored on the prosthesis as evidence. However, here the legal difficulty arises in terms of testifying against oneself.

Cognitive freedom, or the "right to mental self-determination," is a vital part of human rights in international law and is especially relevant in the era of technologically advanced minds. For example, in the Universal Declaration of Human Rights, adopted by U.N. General Assembly Resolution 217A (III) of 10 December 1948 (as of 16 September 2016), freedom of thought is protected by Article 18, which states, "Everyone has the right to freedom of thought, conscience and religion."[21] Clearly, maintaining cognitive freedom in the age of brain implants must be a major social concern as humanity approaches a cyborg future and possible human-machine fusion. In fact, a growing number of legal theorists view cognitive freedom as an important basic human right and argue that cognitive freedom is a principle underlying a number of recognized rights in the constitutions of most developed countries.

The state's obligation to protect cognitive freedom applies directly to neuroprosthetic devices and should be aimed at protecting people from altering or

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[20] Jeffrey Rosen, *The Brain on the Stand*, The New York Times, 11 March 2007 (Sept. 14, 2022), available at http://www.nytimes.com/2007/03/11/magazine/11Neurolaw.t.html?pagewanted=all&_r=0.

[21] The Universal Declaration of Human Rights (1948) (Sept. 14, 2022), available at http://claiminghumanrights.org/udhr_article_18.html.

observing their mental processes without their consent.[22] In the wake of the new cyborg law, Jan Bublitz and Reinhard Merkel propose the introduction of a new type of punishing interventions for crimes that attack the mental integrity of another person by undermining mental control or exploiting pre-existing mental weaknesses, arguing that these are direct interventions that reduce or impair cognitive abilities such as memory, concentration and willpower; alter preferences, beliefs or behaviors; cause inappropriate emotions or invasive clinically identifiable mental.[23]

Wrye Sententia of the Center for Cognitive Freedom and Ethics also expressed concern that nongovernmental organizations could use new neurotechnologies to alter people's mental processes without their consent. For example, taking away people's ability to think the way they want to think. People have the freedom to change or improve their own minds. One way to do this, even if perhaps controversially, is to stimulate the pleasure centers of the brain with a neuroprosthetic device. This element of cognitive freedom is of great importance to the supporters of the transhumanist movement, the key principle of which is the improvement in human functions.[24]

Let us cite as an example a case on cognitive freedom that was brought before the U.S. Supreme Court. The defendant, Dr. Charles Sell, was accused by a U.S. federal court of making false claims to health insurance companies, which led to allegations of fraud and money laundering.[25] Sell had previously sought help from a psychiatrist and was voluntarily taking neuroleptics but found the side effects unbearable. After the initial charge, Dr. Sell was found to be insane but not socially dangerous. As a result, an administrative hearing was held during which it was concluded that Sell could be forcibly drugged to regain competency. The government's decision to force Sell to take drugs that would alter his mental processes raised serious legal issues. On this point, Harvard University Professor Laurence Tribe has been quoted as previously saying:

> The crime is ultimately the same-government intrusion and election abuse which together make up the human psyche.[26]

The court's conclusion that one can forcibly administer antipsychotic medication to a person who poses no danger to another in order to get him to stand trial is moot in this case.

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22 Wrye Sententia, *Neuroethical Considerations: Cognitive Liberty and Converging Technologies for Improving Human Cognition*, 1013(1) Ann. N.Y. Acad. Sci. 221 (2004).

23 Jan C. Bublitz & Reinhard Merkel, *Crime Against Minds: On Mental Manipulation, Harms, and a Human Right to Mental Self-Determination*, 8(1) Crim. L. Philos. 51 (2014).

24 Sententia 2004.

25 *Sell v. United States*, 539 U.S. 166 (2003).

26 Laurence Tribe, *Rights of Privacy and Personhood*, 8 Const. L. (1988).

Subsequently, courts will be able to "redact" the information from the prosthesis in order to restore the person's competency. In the case of Dr. Sell, the government sought to directly manipulate and alter his thought processes by forcing him to take mind-altering antipsychotic drugs. In generally, the courts can only force medication in exceptional cases.

A similar case, *R. v. Hardison,* was heard in Great Britain, which involved a defendant in violation of the 1971 Illegal Drug Use Act.[27] Hardison argued that his freedom was guaranteed by Article 9 of the European Convention on Human Rights. He also claimed that "individual sovereignty over his inner environment is the very essence of what it means to be free" and that, since psychotropic drugs are a method of changing a person's mental processes, their prohibition under the Misuse of Drugs Act was a violation of the convention. The court, however, disagreed with Hardison's arguments and denied him the right to appeal to the superior court.

According to Mark Blitz (University of Oklahoma City Law School), freedom of thought should not only protect our ability to reflect, but it should also encourage courts to identify and protect technologies and resources that support mental autonomy and outward thinking. In this respect, freedom of thought must run parallel to freedom of speech.[28]

5. Advancements in the Militarization of Nanotechnology

The opportunities associated with future advances in nanotechnology may well be overshadowed by new threats. One of the most serious threats may come from powerful new nanotechnologies, which could enable armed forces to access unprecedented forms of destructive capability for their application, seriously affecting the existing military balance.

The prospect of revolutionary advances in the military will stimulate competition, and given the opportunity, a nation that has achieved leadership in nanotechnology could completely disarm any potential competitors.

Thus, in 2020, Harvard professor Charles Lieber, one of the world's leading nanotechnology experts, was arrested for his involvement in China's Thousand Talents program and for helping China in its arms race with the United States. Since 2008, Dr. Lieber has led a Harvard University research group specializing in nanoscience and has received more than US$15 million in grants from the National Institutes of Health (NIH) and the U.S. Department of Defense (DOD). These grants require disclosure of significant financial conflicts of interest abroad, including financial support from foreign governments or foreign organizations. At the beginning of 2011, without

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27 *R. v. Hardison* [2006] E.W.C.A. Crim. 1502, [2007] 1 Cr. App. R. (S.) 37.

28 Marc J. Blitz, *Freedom of Thought for the Extended Mind: Cognitive Enhancement and the Constitution*, 4 Wis. L. Rev. 1049 (2010).

the knowledge of Harvard University, Lieber began working as a "strategic scientist" at Wuhan University of Technology (WUT) in China, and from approximately 2012 to 2017, he was a participant in China's Thousand Talents Plan, which is one of the most prominent talent recruitment plans to attract and develop high levels of scientific activity to benefit China, its economic prosperity and national security. The Thousand Talents program involves recruiting foreign specialists and experts to bring their knowledge and experience to China. Under the terms of Professor Lieber's three-year contract with Thousand Talents, WUT paid the professor $50,000 per month plus living expenses of up to 1 million Chinese yuan (about US$158,000 at the time) and provided him with more than US$1.5 million to set up a research laboratory at Wuhan University of Technology. In return, Lieber was obliged to work at the university for at least nine months a year, working on international cooperation projects and nurturing young doctoral students.[29]

During the course of the trial, it was discovered that Lieber had lied about his participation in the Thousand Talents plan and his affiliation with WUT. The U.S. government accused Professor Lieber of withholding information about his work in China, specifically the fact that in 2015 he had been elected a foreign member of the Chinese Academy of Sciences.

The same year that Lieber received a patent allowing nanotech implants for the human brain, Pentagon officials sounded the alarm that China was working on its own cyborg project. This project aims to create a new kind of soldier by connecting the human brain to machines, millions of sensors and the cloud of a computer. If successful, the capabilities of the human brain will expand exponentially, and the full integration of sensors with arrows and near-perfect situational awareness will create a formidable soldier who will be a very powerful opponent for the enemy. China is rapidly catching up with the U.S. Army, which is causing deep concern in Washington. Concerns have been raised in the United States about China's use of military nanotechnology solutions, including directly connecting soldiers' brains to computers. As an increasing number of military operations are planned using artificial intelligence (a field that the Chinese People's Liberation Army is actively pursuing), the line between man and machine is beginning to blur. Connecting the human brain directly to computers and systems that perform critical calculations will cause the character of a soldier to change forever. Ray Kurzweil, one of the world's leading inventors and scientists, believes that the mind-machine interface will be in place by 2030. He also suggests that the 300 million "recognizers" in the human brain could be expanded by creating synthetic neocortices that link the brain to the cloud and integrate artificial and human intelligence together. Achieving this is

[29] Harvard University Professor and Two Chinese Nationals Charged in Three Separate China Related Cases, U.S. Department of Justice, 28 January 2020 (July 11, 2022), available at https://www.justice.gov/opa/pr/harvard-university-professor-and-two-chinese-nationals-charged-three-separate-china-related.

possible with nanoscale brain implants. Thus, by 2030 or 2050, or even within the next few years, the first cyborg warrior may indeed emerge.

It is common knowledge that cyborg technology is being commercialized. For example, Elon Musk's company, Neuralink, which has now entered the animal testing phase, has announced that it will begin experimenting on humans in 2020. Professor Lieber is one of the consulting scientists at Neuralink. Musk has invested $100 million in the startup and continues to raise additional funds.

A team of researchers from Zhejiang University in China has developed a brain-to-brain interface (BBI) that links the human brain with a rat in which microelectrodes are implanted, thereby creating what is known as a "rat cyborg."

According to the study, published in Nature's Scientific Reports, control instructions issued by the human brain were transmitted to the rat by microelectrical stimulation. The rats were implanted with electrodes in their brains before they were trained to associate the delivered stimulation with certain movements. The stimulation was transmitted through a wireless microstimulator mounted on the animal's back. The human controller wore a device to measure brain signals using an electroencephalogram (EEG) and thought about steering the rat to the left or right or blinking to steer it forward. The movement information was sent to a nearby host computer, which relayed instructions to a stimulator mounted on the rat's back and told it to move through the maze. The researchers noted that the test was deemed successful when the rat made the correct turns and reached the end of the target arm.[30]

Thus, we can say that China is the most advanced in terms of the creation and development of nanotechnology, artificial intelligence and robotics. In 2016, sales of industrial robots in China reached 87000 units, accounting for approximately 30 percent of the global market. In comparison, sales of robots throughout Europe and America in 2016 amounted to 97,300 units (according to the International Federation of Robotics). In the period from 2005 to 2019, the operational fleet of industrial robots in China increased by an average of 38 percent per year.[31] The rapid development of the robotics industry in China has opened up new opportunities. Zhang Jin, vice president of Siasun Robot & Automation Co. Ltd., said that because of the COVID-19 pandemic, overseas demand for industrial robots continued to grow and the company's exports more than tripled.

However, the legal framework of China does not contain separate rules governing nanotechnology. China's Ministry of Science and Technology has issued a set of ethical principles for artificial intelligence (AI), emphasizing increased user autonomy

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[30] Shaomin Zhang et al., *Human Mind Control of Rat Cyborg's Continuous Locomotion with Wireless Brain-to-Brain Interface*, 9(1) Sci. Rep. (2021) (Sept. 15, 2022), available at https://www.nature.com/articles/s41598-018-36885.

[31] Hong Cheng et al., *The Rise of Robots in China*, 33(2) J. Econ. Perspect. 71 (2019).

and privacy protection. In July 2017, the State Council of China released the country's strategy for developing artificial intelligence, titled "Next Generation Artificial Intelligence Development Plan" (新代一 人工智能 发展 规划). This strategy outlines China's goals, which include becoming the world leader in AI by 2030; turning AI into a trillion yuan (about US$150 billion) industry and being a driving force in defining ethics and standards for AI. Several reports analyze specific aspects of China's AI policy or assess the country's technical capabilities.[32]

Since 2013, China has published a number of national policy documents that reflect the intention to develop and deploy AI programs across various sectors. For example, in 2015, the State Council issued China's "Internet Plus" action guidelines, with the goal of integrating the Internet into all elements of the economy and society. The document states the importance of developing new artificial intelligence industries and investing in research and development. In the same year, the 10-year "Made in China 2025" plan was approved with the goal of making China a dominant player in the global market of high-tech industries, including artificial intelligence.[33] Another important document is the 13th Five-Year Plan of the Central Committee of the Communist Party of China,[34] which was published in March 2016. This document identifies artificial intelligence as one of the six most important areas of the country's emerging industries as well as an important driver of economic growth. Furthermore, these documents show that for some time now, even before the advent of satellites, there has been a conscious effort in China to develop and use artificial intelligence. However, up until the year 2016, it was presented simply as one of many other technologies that could be useful for achieving a number of political goals.

Conclusion

The research and discussion of the Cyborg Act presented in this article suggests that existing laws in the United States are insufficient to regulate and develop cyborg technology and that further legislative work is needed. Some countries have taken a proactive stance and developed a strategy for a technological future, while others are still debating the ethical issues raised by altering the human body and its capabilities. Existing structures of intellectual property law and constitutional law provide the basis upon which new norms concerning cyborg technology can develop. However, when such technologies affect the human brain, it becomes

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32 Huw Roberts et al., *The Chinese Approach to Artificial Intelligence: An Analysis of Policy, Ethics, and Regulation*, 36(1) AI Soc. 59 (2021).

33 James McBride & Andrew Chatzky, *Is "Made in China 2025" a Threat to Global Trade?*, Council on Foreign Relations, 13 March 2019 (Sept. 15, 2022), available at https://www.cfr.org/backgrounder/made-china-2025-threat-global-trade.

34 Sebastian Hellman & Oliver Melton, *The Reinvention of Development Planning in China, 1993–2012*, 39(6) Mod. China 580 (2013).

important to consider it from both an ethical and civic perspective. For example, neuroprosthesis, a body-integrated technology, can alter the functioning of the brain, which is the basis of human mental functioning and therefore has significant legal implications.

As we move deeper into the twenty-first century, the rate of technological progress is undoubtedly increasing. Attempts to reconstruct the brain's neural circuitry are opening the door to the development of cyborg devices that can be used to extend the brain's capabilities. In fact, neuroprostheses that can serve to restore lost human cognitive function are now being developed.

The legal systems in the United States and China for regulating liability with respect to nanotechnology and artificial intelligence are currently underdeveloped.

This development will undoubtedly challenge existing legal doctrine and established public policy. The global community needs to develop forward-looking laws regarding the production of cyborgs, trafficking of cyborgs, protection against encroachment by cyborgs and safeguarding against attacks by cyborgs.

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THE CONSTRUCTION OF AN ASSESSMENT INDEX SYSTEM OF LAW-BASED GOVERNANCE OF A CITY IN CHINA

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Constructing an assessment index system of law-based governance of a city provides a data basis and an empirical basis for China's urban construction of the rule of law and highlights its characteristics in the era of big data. A thorough understanding of the theory of the rule of law is required in order to establish this index system. The establishment of the index system needs to be based on a deep understanding of the theory of the rule of law. In particular, it is important to understand the relationship between the core content of the rule of law and the law-based governance of a city, and then to determine the connotation of law-based governance of a city. This serves as the starting point for constructing the index system. At the same time, it is necessary to have a solid grasp of the index theory, adhere to the method of index setting, break down the concept of law-based governance of a city into different levels of indicators according to the types and attributes of the indicators and continue to visualize and operationalize them until the content can be measured. As a whole, this forms a complete assessment index system. Of course, the content of the index system is not fixed and needs to be constantly tested and adjusted in practice.

Keywords: theory of the rule of law; law-based governance of a city; method of index setting; assessment index system; China's urban construction of rule of law.

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Introduction

The concept of the rule of law index first emerged in the West, and it has since accumulated a wealth of rich experience in theory, methodology and implementation. Some examples of this include the rule of law index in the World Justice Project (WJP), World Governance Indicators (WGI), Index of Economic Freedom (IEF), Bertelsmann Transformation Index (BTI) and the United Nations Rule of Law Indicators Project. In these studies on the rule of law index, careful consideration is given to the selection of representative indicators that will be used to measure the quality of the rule of law. These indicators aim to reflect the core connotation of the rule of law as well as to cover its basic content. The most representative of these indices is the "World Justice Project" (WJP) Rule of Law Index, which has consistently measured the rule of law in more than 100 countries around the world since 2008. The WJP Rule of Law Index has developed a set of systematic and mature assessment and measurement methods that have become a benchmark for assessing the rule of law. Its measurement scale and results of those assessments have generated

demonstrable effects and international influence around the world. It is regarded as the most influential research on measuring the degree of the rule of law in a country on a global scale, and it has indeed played a strategic feedback role in improving the global rule of law.[1] However, these international rule of law indexes themselves still have some drawbacks, such as in the conceptualization of indicators, the objectivity (validity, reliability and error) of the indicator measurement, time measurement, scale, process, means, measurement results and their orientation. For example, in the conceptualization of indicators, on the one hand some indicators do not fully cover all aspects of the formal rule of law, but on the one hand those same indicators go beyond the scope of the substantive rule of law resulting in either narrowing or expanding the measured concept of the rule of law. The measurement scale of each rule of law index is different; some barely cover the majority of countries and regions in the world, while others are glaringly insufficient in scale, only focusing on large economic countries and ignoring small countries and other factors. In terms of measurement methods, most index systems use subjective methods in which the evaluation experts provide the main points, such as the rule of law index in WGI, BTI among others. Only a small number of index systems, such as the WJP Rule of Law Index, use objective methods. In addition, the focus of these rule of law indices is to measure and compare the rule of law situation in different countries in the world through the common index content, while ignoring the particularities of each country to a certain extent.

In recent years, many places in China have carried out practical activities for the assessment of the rule of law and accumulated a wealth of experience, showing different characteristics. Some of these characteristics are as follows:

• These indexes cover a wide range of regions at different levels, involving provinces, municipalities, cities, districts of cities and special administrative regions. For example, the rule of law index at the provincial and municipal levels includes the Jiangsu Province, Zhejiang Province, Yunnan Province, Hunan Province, Fujian Province, Beijing, Shanghai, Tianjin etc. The rule of law index at the city-level includes Kunming and Chengdu among others. There is also a separate rule of law index for the Yuhang District of Hangzhou and some other districts. The rule of law index of Hong Kong is in the special administrative region.

• The content of the assessment includes both a comprehensive assessment involving all aspects of the rule of law construction, such as the rule of law index in Hong Kong and in Yuhang District, and a partial assessment involving only a few aspects of rule of law construction, such as the rule of law government index in Shenzhen and the rule of law society construction index in Jiangsu among others.

• The majority of the evaluation methods are internal government evaluations, and the results are not disclosed to the public. Hence, the credibility and utilization

[1] Qian Hongdao et al., *Experiments in the Evaluation of the Rule of Law – The Case of Yuhang* 41 (2012).

rate would be questioned. Only a few places use a combination of internal and external assessments.

• In terms of evaluation effectiveness, certain rule of law evaluations have achieved good results and have become an effective means of fostering local economic growth and rule of law development, serving as a model for local governance and reform. Even so, some evaluations are not functioning to their full potential.

However, there are more or less problems in the theoretical and methodological aspects of these local rule-of-law assessments, which affect the objectivity and effectiveness of the assessments.

At the theoretical level, the interpretation and conceptualization of the connotation of the rule of law are not sufficiently in-depth. This may lead to the fact that the measured content is not directly related to the rule of law, which violates the goal of "What you measure is what you get." For example, some index systems involve significant material investment in the construction of the rule of law and the level of economic development, which deviate from the basic connotation of the rule of law, but do not provide a convincing explanation for the relationship between these indicators and the core connotation of the rule of law. Some index systems are regarded as performance appraisal tools, despite the fact that they do not fully meet the requirements of the rule of law assessment indicators.

At the methodological level, the lack of a thorough understanding of indicator attributes and measurement requirements may lead to problems in measurement methods, data collection and use, and weighting settings. For example, one problem is the one-sided application of measurement methods. The vast majority of the local rule of law index systems are designed and implemented using subjective methods (such as expert and internal staff scoring methods) and less objective methods (such as questionnaire surveys). Even if the questionnaire method is used in some places, it is mainly used for the evaluation of public satisfaction rather than the evaluation of the entire indicator system. Another example is the issue of indicator weight settings. In some index systems, the weights of indicators are set unequally, but there is no reasonable and sufficient demonstration and explanation, which violates the basic requirements of social science research methods. Yet another example would be the improper use of data. In the process of implementing certain indicator systems, some objective data collected are directly equivalent to the rule of law data, but they do not explain the correlation between the objective data and the rule of law data.

Although the establishment and implementation of the rule of law assessment index system will always have shortcomings in terms of scientific, comprehensiveness, objectivity and so on, it is an indispensable and effective way to measure the level of local rule of law construction and promote local rule of law practice in this digital age.[2]

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[2] Zhou Shangjun & Wang Yugen, *Theoretical Reflection and Prospect of the Evaluation of the Rule of Law Index*, 3 Journal of Guangzhou University (2015).

On the basis of a comprehensive understanding and conceptualizing of the connotation of the rule of law, this article accurately grasps the basic requirements and attributes of indicator quantification, scientifically sets core indicators and then refines them layer by layer to ensure that the entire index system is representative, operable and objective.

1. The Significance of Constructing the Assessment Index System of Law-Based Governance of a City

After experiencing an unprecedented rapid urbanization process, China has now entered a stage in which an urban society serves as the main body and cities have become the focus of economic, social and political forces.[3] The construction of the rule of law in a city is related to the level of the construction of the rule of law throughout China as a whole. The establishment of a scientific assessment index system of law-based governance of a city, as well as the objective and effective measurement of the city's rule of law, are conducive to summarizing experience, discovering problems and providing solutions. By assessing the development of the rule of law in cities, it is possible to highlight the characteristics of the construction of the rule of law, provide an institutionalized database for the rule of law, as well as enhance the soft power of urban development and its influence in the overall assessment of the international rule of law.

To begin with, a quantitative evaluation provides a data basis. By constructing an assessment index system for the law-based governance of a city and using scientific methods, an effective, continuous and high-quality objective quantitative evaluation of the development of the urban rule of law can be conducted. On the basis of an evaluation that intuitively reflects the degree to which the city is governed in accordance with the law, constructing such an assessment index system is helpful for the timely discovery of problems, weak spots and their root causes, so that appropriate countermeasures and recommendations can be put forward in a timely manner. Moreover, it also provides useful information for urban governance, reform and decision-making.

Secondly, the assessment index system of law-based governance of a city highlights the characteristics and enhances the soft power of urban development. Taking into account the commonalities of the relevant index systems for the evaluation of the rule of law construction in other places, this assessment index system emphasizes its own particularity, reshapes the direction of the urban rule of law construction and then enhances the soft power of urban development.

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[3] Wu Xiaolin & Hou Yujia, *The "Double Evolution" and Integration Trend of Urban Governance Theory*, 1 Tianjin Social Sciences (2017); Shen Ti Yan, *Frontiers of Urban Governance Research: Theory, Method and Practice* (12th ed. 2021) (Aug. 12, 2022), available at https://www.bjd.com.cn/index.shtml.

Thirdly, the assessment index system for the law-based governance of a city should be in line with international standards and innovative when it comes to the way of construction of the rule of law. By drawing on and referring to the international rule of law index, the assessment index system will not only serve as a starting point for the construction of the rule of law in Chinese cities, but it can also be in line with the international rule of law index, enhance the space for international exchanges and cooperation and properly grasp the right to be heard in the international evaluation of the rule of law. It will, to a certain extent, resolve the embarrassing situation of China's lack of representation in the international rule of law evaluation,[4] make up for the misunderstanding caused by the lag and one-sided data and information in the international rule of law assessment, improve the ranking of Chinese cities and the nation as a whole in the international rule of law index and provide a new pathway for the construction and development of the rule of law.

2. Theoretical Basis of the Assessment Index System of Law-Based Governance of a City

The construction of the assessment index system of law-based governance of a city is a systematic project, which carries out an overall evaluation and indexation of the urban rule of law in a scientific and quantitative way. Because it is relatively complex, this assessment index system needs to be constructed on the basis of a correct understanding of the relevant theories, namely the rule of law theory and the index theory, which provide a solid theoretical basis for it.

2.1. Theory of the Rule of Law

The assessment index system of law-based governance of a city should be based on a full understanding of the connotation and theory of the rule of law, which affects the direction and operation of the construction of the index system. On the basis of clarifying the core connotation of the rule of law and the quantification of the rule of law, the assessment index system should expound the theory of socialist rule of law with Chinese characteristics. Additionally, the assessment index system should clarify the relationship between the rule of law and the law-based governance of China, as well as between the law-based governance of China and the law-based governance of a city.

[4] China has always lacked its own right to speak for the rule of law, and has been in a contradictory state when it comes to international assessments involving China. On the one hand, we often rate our low-scoring assessments by international institutions as "attacks" and "accusations." On the other hand, we actually care a lot about China's rankings and scores. While China is gradually forming a unique development path for the rule of law, it should have its own say in the evaluation of the rule of law.

2.1.1. The Richness and Measurability of the Connotation of the Rule of Law

At present, the understanding of the connotation of the rule of law can be divided into two categories, namely, the formal theories of the rule of law and the substantive theories of the rule of law. Nevertheless, it is important to note that this division is not absolute. As far as the formal versions of the rule of law are concerned, the specific connotations associated with them include: (a) the formal legality requirements of the law include that the law must be prospective, general, clear, public and relatively stable; (b) the conditions for the effective implementation of the law are an independent judiciary, open and fair hearings without bias, review of legislative and administrative officials and limitations on the discretion of police to ensure conformity to the requirements of the rule of law; and (c) laws should be made through democratic procedures, since rational democratic mechanisms give everyone affected by the law an equal opportunity to participate and obtain the consent and compliance of everyone; otherwise the law will lose its legitimacy. However, formal theories of the rule of law are morally neutral and have the potential to lead to authoritarianism of formal legitimacy and may promote or enforce unjust laws; hence the implications of the substantive rule of law are also required. The substantive versions of the rule of law incorporate elements of the formal rule of law and go even further.[5] As far as the substantive rule of law is concerned, the specific connotation of the rule of law refers to: (a) the law respects and protects individual rights, including social welfare rights; (b) the government's power is restricted; and (c) the guiding principle is to respect and protect human rights.

Despite its richness and diversity, the rule of law can still be assessed and measured. The rule of law assessment is the product of the combination of assessment research and the theory of the rule of law,[6] which evaluates the level of the rule of law in a quantitative way and expresses it by either an absolute value or a ratio (relative value).[7]

2.1.2. The Theory of Socialist Rule of Law with Chinese Characteristics

In the process of building socialism with Chinese characteristics, the important role of the rule of law is especially emphasized.

> The rule of law is an important symbol of the progress of human civilization, the basic way of governing the country and the unremitting pursuit of the Communist Party of China and the Chinese people. The prosperity of the

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5 Brain Z. Tamanaha, *On the Rule of Law: History, Politics and Theory* 120–130 (Li Guilin trans., 2010).

6 Meng Tao, *Rule of Law Assessment and Rule of Law Big Data* 24–30 (2020).

7 Qiad Hongdao, *The Practice of Evaluation of the Rule of Law – The Case of Yuhang* 291 (2012) (Aug. 12, 2022), available at http://www.lawlib.zju.edu.cn/redir.php?catalog_id=441&page=2&author=%C7%AE%BA%EB%B5%C0.

> rule of law is the prosperity of the country. When the rule of law is strong, the country is strong.[8]

The "Overall Goal" that is proposed in the "Plan for the Construction of the Rule of Law in China (2020–2025)" not only reflects the requirements of the formal rule of law but also conforms to the concept of the substantive rule of law:

> To build a rule-of-law China, it is necessary to realize scientific, complete and unified legal norms; fair, efficient and authoritative law enforcement and judicial administration; effective restraint and supervision on the exercise of power; full respect and protection of the people's legitimate rights and interests; universal establishment of belief in the rule of law and comprehensive establishment of a law-based country, government and society.

Governing the country under the rule of law (law-based governance of China) is the basic way to achieve this general goal and provide a strong legal guarantee for its achievement. The embodiment of governing the country under the rule of law is governing the city under the rule of law (law-based governance of a city), which is a local concrete practice and an important addition to the basic strategy of law-based governance of China.

The law-based governance of a city falls under the macro framework of the law-based governance of China as a whole. It proceeds from the reality of the city, giving full play to the creative spirit of the city, and on the premise of ensuring the unity of the national legal system, forming a city with characteristics to ensure the public participation in the management of various affairs, bringing the political, economic, cultural and social life of the city into the track of the rule of law, gradually realizing the rule of law in the city, so as to ensure the healthy and orderly development of the city.[9] Therefore, the specific connotation of law-based governance of a city should mainly include the following aspects: local legislation must be scientific, democratic and carried out in accordance with the law; the government and its officials abide by the law and their powers are restricted; basic rights, including personal safety and property safety, are guaranteed; law enforcement and enforcement procedures are accessible, fair and efficient; and judicial procedures are accessible, just and effective.

The construction of an assessment index system for the law-based governance of a city needs to be based on a deep understanding of the connotation of law-based governance of a city. It not only reflects the diversity of formal rule of law requirements but also contains the value objectives of the substantive rule of law. At the same

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[8] Plan for the Construction of the Rule of Law in China (2020–2025) (Aug. 12, 2022), available at https://www.chinalawtranslate.com/en.

[9] Bai Yubo, *On the Concept of Governing the City Under the Rule of Law*, 6 China Judicial (2004) (Aug. 12, 2022), available at http://www.pucheng.gov.cn/wcm.files/upload/CMSpc/202003/202003231126042.pdf.

time, it is necessary to combine the particularities of urban development in order to highlight the characteristics of urban rule of law construction and its effects.

2.2. Theory of the Index

The construction of the assessment index system of law-based governance of a city is closely related to the concept, type and attributes of the index theory. An effective assessment index system needs to clarify the concept of indicators, determine the types and attributes of indicators, select indicators of homogeneity and the same type and enhance the scientific correlation between indicators.

Indicators and index system. Indicators are conceptual carriers that characterize and convey certain aspects of information about a research object. They are essentially the carriers of people's understanding of things or phenomena, and they are used to reflect the scale, degree, proportion and structure of the research object at a certain time and condition. The term "index system" refers to a set of indicators that, when taken together, relatively comprehensively reflect the characteristics of the research object. These indicators are constructed by observing and measuring the same research object from different angles of the same aspect or from different aspects. It is an organic combination of a single index rather than a simple stack.[10]

The assessment index system of law-based governance of a city observes and evaluates the state of the city's rule of law from different perspectives, and then develops an indicator group that is relatively comprehensive and reflects the system's effect.

Classification of indicators. There are many categories of indicators, three of which are the most important.[11] One category of indicators is objective and subjective indicators. Objective indicators directly reflect an objective fact, such as the crime rate, the number of lawyers, the amount of legislation and so forth. Subjective indicators, also known as sensory indicators, reflect people's feelings about objective social phenomena, such as happiness, satisfaction and gain. The second category of indicators includes the input, process, output and effect indicators, which reflect the different stages of the operation of the social system. It should be noted that output does not equal effect. For example, the output of parliament is a law, but it does not necessarily indicate whether the law has a social effect. The third category of indicators is comprised of aggregate and non-aggregate indicators. The former is a composite product of many indicators, which can only be obtained after processing. For example, the crime rate is the aggregate of all crime statistics, whereas the number of intentional injury crimes is a non-aggregate indicator.

The assessment index system for law-based governance of a city is a combination of objective and subjective indicators. It not only directly reflects the objective situation of governing the city under the rule of law but also reflects people's feelings

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[10] Wu Yefeng, *The Concept, Role and Abstraction of Statistical Indicators*, 5 Jinan Journal (2012).

[11] Tao 2020, at 24.

regarding its effects. At the same time, the index system focuses on output indicators and effect indicators, which mainly measure the output and effect of each link in governing the city under the rule of law rather than the input and process. Finally, the index system is a typical aggregation index, which is the result of the synthesis and calculation of many indicators.

Attributes of the indicators. Indicators should be mutually exclusive, exhaustive and uni-dimensional. Mutual exclusivity implies that there can be no mutually inclusive or overlapping relationships between the various indicators; otherwise the weight of the overlapping part in the index system would be indirectly increased. The term 'exhaustion' implies that the indicator has the capability to measure the target in all possible scenarios. Uni-dimensionality requires that the indicators be properly matched to ensure that the same thing is being measured.[12]

The construction of an assessment index system for the law-based governance of a city should try to ensure that the indicators do not overlap, cover all the connotations of law-based governance of a city and are properly matched to ensure that each indicator measures the same thing. Of course, the design of the index system cannot fully meet all of the above requirements for the attributes; hence, there will inevitably be defects and deficiencies, which will need to be continuously adjusted and improved in the implementation.

3. The Content of the Assessment Index System of Law-Based Governance of a City

The assessment index system of law-based governance of a city, on the basis of an accurate understanding of the connotation of law-based governance of a city, breaks down the concept into 9 indicators, which are further broken down into forty-six sub-indicators. This index system is formed through the use of analogy, and as it progresses, the objects that are being referenced become increasingly specific until they can be directly measured. The construction of this index system draws on the design concept and related content of the 'World Justice Project' Rule of Law Index. Additionally, it compares, analyzes and summarizes the experience of some representative local rule of law assessment index systems in China,[13] as

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[12] W. Lawrence Neuman & Larry W. Kreuger, *Social Work Research Methods: Qualitative and Quantitative Applications* 230–31 (Liu Meng trans., 2008); Tom K. Sberg, *Misunderstandings in the Measurement of the Rule of Law* (Yan Xingjian comp.), 2 Learning and Exploration (2016).

[13] It mainly includes "China's Rule of Law Assessment Index System,""Shanghai Rule of Law Construction Index System,""Law-Based Hunan Construction Assessment Index System,""Suzhou City's Law-Based Business Environment Construction Index System,""Assessment Index System for the Construction of Law-Based Government in Zhejiang Province,""Index System (Trial) Self-Assessment Form of Law-Based Government Construction in Jiangsu,""Measures for the Evaluation of the Construction of the Rule of Law in Guangdong,""Shenzhen Law-Based Government Index System,""Sichuan Law-Based Governance of Province Index System,""Yuhang Rule of Law Index,""Hong Kong Rule of Law Index," etc.

well as conducts a comprehensive assessment of the overall effect of governing the city under the rule of law, involving multiple links such as law formulation and implementation and so on.

3.1. Indicator 1: Lawful, Scientific and Democratic Municipal Legislation

This indicator assesses the normative basis of law-based governance in a city as well as whether or not municipal legislation is consistent with higher-level laws and the scientific and democratic nature of local legislation.

Municipal legislation is carried out in accordance with the law, requiring the legislation of the Municipal People's Congress and government to be consistent with higher-level laws. In order to be considered scientific, municipal legislation must meet basic formal requirements, follow due process, meet the needs of urban development, reflect urban characteristics and have the involvement of experts. The requirements of the legislative process should reflect the participation of the public in legislative activities. The corresponding sub-indicators are roughly as follows:

Municipal legislation is consistent with higher-level laws. This means the municipal legislation must be consistent with the central legislation, including: the legislation of the Municipal People's Congress cannot violate the central legislation, but with special authorization, it has the right to modify the central legislation to suit the special needs of local development; the legislation of the municipal government cannot contradict the central legislation and the Municipal People's Congress legislation, therefore it must be reviewed for consistency.

Municipal legislation complies with the basic formal requirements. This sub-indicator reflects whether the municipal legislation meets the formal requirements of the norm for clarity, openness and stability. This is the most basic prerequisite for the public to understand and apply the law.

Municipal legislation follows due process. This sub-indicator measures whether municipal legislation follows due process during the three stages of legislative preparation: bill to law, legislative improvement and legislative implementation.

Municipal legislation is enacted in response to the needs of urban development. This sub-indicator measures the degree to which municipal legislation is realistic. It can be measured using metrics such as proposal rate, legislation rate in key areas post-legislation evaluation and others.

The participation of experts in municipal legislation. This measures the level of participation of experts in the legislative process, including whether experts have participated in all legislation, whether their opinions have been adopted and so forth.

Public participation in municipal legislation. This measures the state of public participation in the legislative process, such as whether the public have participated in all legislation, whether public opinions have been adopted and so on.

3.2. Indicator 2: Constraints on Municipal Government Powers

This indicator assesses the status of municipal government power exercised in accordance with the law, which is the basic requirement of law-based governance of a city. Municipal government power should be bound by laws, commissions for disciplinary inspection, supervisory organs, the People's Congress, courts and procuratorates, as well as be restricted by government organs (audit organs and higher-level organs). Furthermore, power held by municipal governments should be monitored by non-governmental organizations. If the municipal government violates the law, the government and its officials and agencies should be held accountable under the law. The corresponding sub-indicators are roughly as follows:

Municipal government powers are defined by law. This means that government power comes from the provisions of the law. The government cannot acquire power without legal provisions. For example, the source and specific content of government power can be determined by looking through the "Powers List."

Municipal government powers are effectively limited by the commission for discipline inspection and supervisory organs. This means that municipal government behavior is subject to the scrutiny of the commission for discipline inspection and supervisory organs. For example, statistics on party discipline and the rate of government sanctions can be used to assess the extent to which municipal government powers are supervised by the Communist Party and the supervisory organs.

Municipal government powers are effectively limited by the Municipal People's Congress. This reflects the effective supervision of the Municipal People's Congress and its Standing Committee over the administrative organs, which can be measured by the publicity and response of the administrative organs to the proposals of the Municipal People's Congress deputies as well as the deliberation reports of the administrative organs by the Municipal People's Congress.

Municipal government powers are effectively limited by judicial organs. This means that courts and procuratorates supervise the municipal government and its officials and agencies, that can be measured by checking the crime rate of civil servants.

Municipal government powers are effectively limited by the audit organs. The audit organs conduct audit supervision over the implementation of the financial budget and other financial revenues and expenditures of the administrative agency, the implementation of major policies and measures, as well as the implementation of people's livelihood projects. Then audit organs should disclose the results of the supervision with audit work reports or audit correction reports and such.

Municipal government powers are effectively limited by higher administrative organs. This means that the exercise of administrative power is subject to review by higher administrative organs by way of administrative reconsideration, law enforcement inspections etc.

Municipal government powers are effectively limited by non-governmental organizations. This means that NGOs participate in major government administrative

decisions, such as education, environmental protection, poverty alleviation and development, major engineering construction and other major decisions.

Municipal government and its officials are sanctioned for their illegal acts. This indicator measures whether administrative organs and their officials face sanctions for illegal or improper conduct. It can be measured by using factors such as the rate of government sanctions on civil servants and the rate of official crime, among others.

3.3. Indicator 3: Open Municipal Government

This indicator assesses the degree of municipal government openness and reflects the level of communication and cooperation between the municipal government and citizens. Open municipal government is first defined as a government that shares information, which means the government information is open to the public and that the public can obtain and use that government information upon application. At the same time, it is also defined as a government that encourages citizen participation in government decision-making and allows citizens to bring complaints to the government, all of which are ways for the public to supervise government behavior and promote the development of government accountability. The corresponding sub-indicators are roughly as follows:

Publicized municipal government information. This measures the degree and quality of government information disclosure, which mainly refers to the fact that government information is published in a concise and easy-to-understand official language and is disclosed through various channels.

Right to information. This measures whether requests for information held by a government agency are properly granted. This means that some citizens can obtain government information by application to meet their special needs. This is an important way for citizens to express their concerns and hold the government responsible.

Civic participation. This assesses the effectiveness of civic participation mechanisms, namely whether citizens participate in major administrative decisions and the extent to which their opinions are adopted.

Complaint mechanisms. This evaluates the effectiveness of the mechanisms available to the public for expressing their dissatisfaction with the government and bringing specific complaints to the government. These mechanisms include the possibility and convenience of filing complaints and petitions, as well as the response rate of the government to such complaints and petitions.

3.4. Indicator 4: Effective Municipal Government Enforcement

This indicator assesses the extent to which regulations are fairly and effectively implemented and enforced by the municipal government, whether the government follows due process and whether there is deliberate delay in implementing and enforcing the regulations etc. In addition to the general enforcement of the regulations, the ability and effect of government emergency law enforcement can

highlight the characteristics of urban rule of law construction. The corresponding sub-indicators are roughly as follows:

Regulations are effectively enforced. This mainly refers to the effective implementation of laws; regulations; government provisions in key areas closely related to public interests, such as transportation, environmental protection, market management, food safety and social security and so forth. Additionally, it measures whether illegal acts in those key areas are effectively sanctioned.

Due process is respected in proceedings that are conducted without unreasonable delay. This assesses whether enforcement follows due process and is completed in a timely manner, through records of the entire process of administrative enforcement and legal review of major administrative enforcement decisions. Additionally, it measures whether administrative licenses and administrative penalties follow due process and are conducted without unreasonable delay.

Emergency laws are effectively enforced. This assesses the effectiveness of the government's management measures for public emergencies, such as public health emergencies, major industrial accidents and major traffic accidents among others.

3.5. Indicator 5: Fundamental Rights of Citizens

This indicator assesses the protection of fundamental human rights, which is the core content of the substantive rule of law and is also an important goal and content of the law-based governance of a city. Since the scope of fundamental rights is extensive and still controversial, and because it would be impossible for the index system to assess adherence to the full range of rights, this indicator focuses on a relatively modest menu of rights in accordance with the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Declaration of the International Labour Organization on Fundamental Principles and Rights at Work among others. Accordingly, this indicator encompasses adherence to the following fundamental rights: equality rights; life and personal safety; property rights; privacy rights; labor rights; the right to vote and stand for election; freedom of speech and freedom of the press, all of which have been widely recognized under international law and are considered to be the scope of rights most closely related to the rule of law. The corresponding sub-indicators are roughly as follows:

Equal treatment and the absence of discrimination are effectively guaranteed.[14] This mainly evaluates whether or not the government treats the public equally, that is, whether it treats all people the same under similar circumstances or whether it treats vulnerable groups reasonably differently.

The right to life and personal security is effectively guaranteed. This can be measured by the poverty rate, the percentage of people receiving the minimum living security

[14] The public's immunity from unequal treatment by the judiciary is not measured here, as it would be measured in the civil and criminal justice sections.

allowance, the rate of crimes against personal safety and the rate of personal safety guaranteed to media personnel.

Property rights are effectively guaranteed. It is possible to evaluate two primary factors: protection of property rights from infringement by others; and protection of property rights from government infringement, which means there is no expropriation of private property without adequate compensation.

Freedom from arbitrary interference with respect to privacy is effectively guaranteed. This indicator mainly assesses two aspects: whether the peace of citizens' private lives is disturbed and whether or not their right to privacy is violated.[15]

Fundamental labor rights are effectively guaranteed. This includes the right to collective bargaining, the prohibition of forced and child labor, and the elimination of discrimination.

Political rights are effectively guaranteed. This mainly measures whether the right to vote and stand for election, freedom of opinion and expression, and freedom of assembly and association are effectively guaranteed.

3.6. Indicator 6: Order and Security

This indicator assesses how effectively the city assures the security of persons and property. Order and security are fundamental functions of the city as well as important defining aspects of law-based governance of a city. In addition, they are preconditions for the realization of the rights and freedoms that the rule of law seeks to advance. This indicator includes three dimensions that cover various threats to order and security: crime, political violence, and violence as a socially acceptable means of redressing personal grievances. Violence not only undermines order and security but also hinders the realization of other goals (such as freedom, rights and justice), as well as the enforcement of existing laws. As a result, violence must be effectively controlled. The corresponding sub-indicators are roughly as follows:

Crime is effectively controlled. This mainly measures the frequency of major criminal offenses (such as homicide, kidnapping and robbery) and the rate of frequently-occurring criminal cases (such as theft, extortion and illegal business operations) being detected.

Civil conflict is effectively controlled. This mainly evaluates whether the municipal government effectively protects people from terrorist activities and social unrest.

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[15] In China, the scope of privacy is still controversial in theoretical and practical circles. Combining the provisions of the Civil Code and the views of some authoritative scholars, the scope of privacy can be determined into two categories: the tranquility of private life and the privacy of private life. Tranquility of private life refers to the right of a natural person to not be disturbed or hindered by others in his normal life. That is, it cannot be intruded upon by means of phone calls, text messages, instant messaging tools, e-mails, leaflets, etc. Private life secrets means that private information is kept secret and cannot be illegally collected, spied on, disclosed and processed by others, including private spaces that are unwilling to be known by others (like residential spaces or hotels), private activities (behavior, venue and activities), and private information (letters, emails, marital history, family status, property status, physical characteristics, sexual life).

Personal conflicts are not resolved through violence. This assesses whether and by what legal means people resolve civil disputes with each other.

3.7. Indicator 7: Civil Justice

This indicator assesses the civil justice system, focusing on whether ordinary people can use it to resolve their civil disputes peacefully, effectively and justly through the civil justice system while also safeguarding their own civil rights. It first requires that the court be accessible and affordable and that judges should treat the parties equally; secondly, the court's trial of civil cases should conform to the basic principles of judicial activities, namely independence, impartiality, timeliness and effectiveness; and thirdly, judgments should be effectively enforced, which is an important aspect to consider in determining whether or not justice has been achieved. In addition, considering that diversified dispute resolution mechanisms are an important alternative to civil justice, it is also necessary to assess the accessibility and efficiency of mediation and arbitration. The corresponding sub-indicators are roughly as follows:

Civil justice is accessible and affordable for all. This assesses whether people can resolve civil disputes through the courts and afford the costs of litigation.

Civil justice is free of discrimination. This assesses whether people are treated equally in the settlement of civil disputes through the courts, that is, whether the courts apply the law to the parties equally, impartially and neutrally.

Civil justice is free of improper government influence. In other words, the Municipal People's Congress, government and other administrative organs shall not illegally interfere with civil judicial activities and the internal leaders of the courts shall not illegally interfere with civil judicial activities.

Civil justice is open, timely and effective. This assesses whether the court proceedings and final trials are open to the public, whether the court proceedings are conducted in a timely manner and not subject to unreasonable delays, and whether they can effectively resolve civil disputes.

Civil justice is impartial. This mainly refers to the fact that civil trials should meet the requirements of substantive justice, which means that the court's judgments are fair.

Civil justice is effectively enforced. This reflects the authority and effectiveness of civil effective adjudications. It is a particularly important indicator to measure the extent to which the rights of the injured parties have been restored, which can be assessed by looking at the enforcement rate of civil cases.

ADR (alternative dispute resolution) mechanisms are accessible, impartial and effective. Two aspects are assessed: whether people can resolve civil disputes through mediation and arbitration systems and afford the associated costs; and also whether mediation agreements and arbitration agreements can be implemented effectively.

3.8. Indicator 8: Criminal Justice

This indicator assesses the criminal justice system. An effective criminal justice system is a key aspect of the rule of law and law-based governance of a city, as it constitutes the conventional mechanism to redress grievances and take action against individuals for offenses against society.[16] It entails promptly and successfully investigating criminal offenses as well as trying criminal offenses independently, impartially, promptly and effectively, while safeguarding the rights of victims, offenders, suspects and defendants. In addition, the effective reduction of criminal behavior through the correctional system is also an important part of it. Accordingly, an assessment of the delivery of justice of the criminal justice system should take into consideration the entire system, including the police, prosecutors, judges and prison officers. The corresponding sub-indicators of this indicator are roughly as follows:

The criminal investigation, review and prosecution are effective. This sub-indicator includes three dimensions: the investigation of crimes is carried out effectively, which means the criminal investigation and arrest activities of the police and the procuratorate are conducted successfully and in a timely manner; the review and prosecution of criminal offenses is carried out effectively; and there are enough personnel to conduct investigation and arrest activities.

The criminal adjudication system is open, timely and effective. This assesses whether the court proceedings and final trials are open to the public, whether the court proceedings are conducted in a timely manner and not subject to unreasonable delays, and whether criminal convictions are effective.

The criminal justice system is impartial. This mainly comprises assessing whether the outcome of an investigation, review and prosecution of crimes is impartial, and whether the trial of crimes is fair.

The criminal justice system is free of improper influence. In other words, neither the Municipal People's Congress, government and other administrative organs nor the internal leaders of the courts shall illegally interfere with criminal judicial activities (investigation, prosecution and adjudication). Additionally, public opinion shall not have an improper influence on criminal judicial activities.

Rights of the suspects and the accused are effectively protected. This is an important indicator of human rights protection in the criminal justice process, including in *dubio pro reo*, non-discrimination, protection of the right to know, personal rights, the right to defense and so on.

Correctional systems are effective in reducing criminal behavior. The delivery of effective criminal justice also necessitates correctional systems that effectively reduce criminal behavior.[17] The function of correctional systems can be measured by the recidivism rate of offenders released after serving their sentences.

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[16] The 2022 WJP Rule of Law Index, World Justice Project (Aug. 12, 2022), available at https://worldjusticeproject.org/rule-of-law-index.

[17] *Id*.

3.9. Indicator 9: Restraint of Corruption

This indicator assesses the restraint of corruption in a number of executive organs and judicial organs, which is an integral part of assessing the rule of law. Corruption, which is typically defined as the use of public authority for private gain, can directly reflect the extent to which officials abuse their power or perform their statutory duties. China's determination, measures and achievements in the field of anti-corruption in recent years are clear to all. The "restraint of corruption" index, which primarily takes into account three forms of corruption: embezzlement and bribery, misappropriation of public funds or other resources and improper influence by private interests, is set up as part of the assessment index system of law-based governance of a city. These three distinct forms of corruption are examined with respect to officers in the executive organs and judicial organs, both of which are susceptible to instances of corruption. The corresponding sub-indicators are roughly as follows:

Officials in the executive organs do not use public office for private gain. This means that government officials do not embezzle, take bribes or misappropriate public funds or other resources. It can be measured by calculating the ratio of the number of government officials punished or held criminally responsible for corruption, bribery and embezzlement to the total number of government officials.

Officials in the judicial organs do not use public office for private gain. This means that judicial officials (judges, prosecutors and police officers) do not embezzle or accept bribes and are not improperly influenced by criminal organizations. It can be measured by calculating the ratio between the number of judicial officials that are punished or criminally responsible for embezzlement and bribery and the total number of judicial officials. This indicator can also assess whether judicial officials use their positions to facilitate or benefit from criminal organizations.

Conclusion

In general, the construction of the assessment index system of law-based governance of a city is intended to assess the effect of governing the city under the rule of law as a whole. These effects can be roughly divided into two levels: the effects and limits of the exercise of power by various municipal organs and the effect of guaranteeing the fundamental rights of citizens. Indicator 1 assesses the extent to which municipal legislatures abide by the law and exercise power. Indicator 2 assesses the extent to which municipal governments abide by the law and exercise power. Indicator 3 assesses the degree of interaction and cooperation between citizens and the government. Indicators 4, 5 and 6 are positive indicators to measure the extent to which rights are guaranteed and the effect of law enforcement. Indicators 7 and 8 focus on measuring, from a negative perspective, the extent to which rights and laws are guaranteed when they are violated. Indicator 9 measures the abuse of power by municipal executive and judicial organs. These indicators encompass the most

important legal subjects in the process of governing the city under the rule of law: municipal legislative, executive; judicial and supervisory organs; commissions for discipline inspection and their public officials; citizens and other social organizations and so on. These indicators cover the main links of law-based governance of a city, as well as meet the scientific requirements for indicators.

The assessment index system of law-based governance of a city is a system based on the concept and connotation of the rule of law. It conducts an overall quantitative evaluation of the construction of the urban rule of law in China through a series of indicators and data, but its scientific nature is relative. In theory, the index system should include all of the connotations associated with the concept of law-based governance of a city. However, due to the richness and multi-dimensionality of the concept of law-based governance of a city, blindly pursuing exhaustiveness may lead to disputes, inaccurate measurements or deviations. Therefore, in the design of the index system, only appropriate and representative indicators can be selected for assessment, which means that the system will not be able to cover all aspects of law-based governance of a city. It goes without saying that, the indicators in the assessment index system of law-based governance of a city are not fixed and need to be constantly adjusted and corrected in the measurement process as well as repeatedly tested in practice.

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TAX CHALLENGES ARISING FROM THE DIGITALISATION OF THE ECONOMY: THE DEVELOPMENT OF THE OECD PROJECT AND POSSIBLE IMPLEMENTATION IN RUSSIA

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The digitalisation of the economy has created a number of complex problems in the area of taxation. A majority of these problems relate to the issue of the distribution of taxing rights between states in the context of taxing income received as a result of cross-border activities. This article discusses the initiatives of the Organisation for Economic Cooperation and Development (OECD) regarding the taxation of international groups of companies in the era of the digital economy. It considers methodological approaches to taxation of the digital economy and highlights the features of the digitalisation of the economy that play an important role in tax policy. The study undertaken is based on a comparative legal method that allows for the examination of similar legal problems found in legislation and international treaties, as well as the identification of optimal ways to solve them. The following main problem with taxation of the digital economy is highlighted: tax systems laid down in the 1920s traditionally take into account the principles of the source of income and residency. In the new world of globalization and the digital economy, these principles have become significant obstacles to international trade. It is on this ground that the issues of the new nexus as well as the new model of allocation of taxing rights should be established. The article provides an analysis of the OECD's two-pillar approach to these issues. Pillar 1 deals with the reallocation of profits of multinational enterprises to market jurisdictions. Pillar 2 deals with the issue of a global minimum tax. Additionally, the article discusses the various ways in which the new OECD concept could potentially be implemented in Russia.

Keywords: tax law; taxation of the digital economy; OECD; BEPS Action Plan; European Union; digital services tax; tax administration; corporate taxation; permanent establishment.

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Introduction

An important issue on the agenda of the international community is the development of the digital economy, which has significantly altered tax regulations around the world. The digitalisation of the economy has created a number of complex problems in the area of taxation, the majority of which relate to the issue of the distribution of taxing rights between states in the context of taxing income received as a result of cross-border activities. In this context, we are speaking not only about countering tax base erosion and profit shifting but, more importantly, about the new distribution of taxing rights.

The main characteristic of the digital economy is the diminished importance of the necessity for businesses to maintain a physical presence in market jurisdictions. Value is created through user engagement and is concentrated in intangible assets

that can be easily transferred to tax havens in order to minimize taxable profits. At the same time, corporate taxation systems continue to be based on the economic reality of the 1920s, when the rules of taxation were laid down according to territorial and resident principles. The conclusion of this brief discussion is that a tax in the origin country is unlikely to satisfy the criteria for a good tax on business profit.[1] In the absence of a consensus, many states have begun to formulate unilateral rules for the taxation of the digital economy. Inconsistencies in these rules will increase the tax burden of multinational enterprises (MNEs), given the fact that each state seeks to protect its own interests.

On 16 March 2018, the Organisation for Economic Cooperation and Development (OECD) presented an interim report on tax challenges arising from digitalisation (hereinafter the "OECD Interim Report").[2] On 21 March 2018, the European Commission published draft directives on taxation of the digital economy.[3]

As of October 2021, 137 countries have joined a new two-pillar approach to reform international tax rules and ensure that multinational enterprises pay their fair share of tax wherever they operate.[4]

The OECD's work on tax issues arising in connection with the digitalisation of the economy is divided into two distinct categories: Pillar 1 and Pillar 2. Pillar 1 deals with the reallocation of profit made by MNEs to market jurisdictions. Pillar 2 deals with the issue of a global minimum tax.

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1 Michael P. Devereux, *How Should Business Profit Be Taxed? Some Thoughts on Conceptual Developments During the Lifetime of the IFS*, 40(4) Fisc. Stud. 591, 608 (2019).

2 OECD, Tax Challenges Arising from Digitalisation – Interim Report 2018: Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project (March 2018) (Aug. 10, 2022), available at https://www.oecd.org/ctp/tax-challenges-arising-from-digitalisation-interim-report-9789264293083-en.htm.

3 European Commission, Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence, COM (2018) 147 final, 21 March 2018 (Aug. 10, 2022), available at https://taxation-customs.ec.europa.eu/system/files/2018-03/proposal_significant_digital_presence_21032018_en.pdf; European Commission, Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, COM (2018) 148 final, 21 March 2018 (Aug. 10, 2022), available at https://taxation-customs.ec.europa.eu/system/files/2018-03/proposal_common_system_digital_services_tax_21032018_en.pdf; European Commission, Communication from the Commission to the European Parliament and the Council – Time to establish a modern, fair and efficient taxation standard for the digital economy, COM (2018) 146 final, 21 March 2018 (Aug. 10, 2022), available at https://eur-lex.europa.eu/resource.html?uri=cellar:2bafa0d9-2dde-11e8-b5fe-01aa75ed71a1.0017.02/DOC_1&format=PDF.

4 OECD, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, OECD/G20 Base Erosion and Profit Shifting Project, 8 October 2021 (Aug. 10, 2022), available at https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf.

1. The Main Concepts of Taxation in the Era of the Digital Economy

1.1. The Challenges of Taxation of the Digital Economy

It is important to point out that the rules that were initially developed for digital companies are now established for MNEs in different industries. Starting with the fact that it is impossible to ring-fence the digital economy, it is far from easy to develop a framework within the context of corporate income tax that can capture profits derived by cross-border digital transactions in an orderly way.[5] Many MNEs have already restructured their production chains in order to separate basic manufacturing, which can be allocated a "routine" profit, from functions such as research and development (R&D) and design, which may be considered high-value-adding and can be located in areas where they will be lightly taxed at a lower rate.[6] Moreover, the sale of traditional products and the sale of digital ones are so closely connected that it is often effectively impossible to separate the integral parts that make up the complete service.[7]

The solutions proposed so far include tax measures that specify the jurisdiction of the source or the destination. Additionally, until a globally agreed solution is reached, the taxation options for digital companies discussed at the OECD, United Nations (U.N.) and European Union (EU) levels include short-term solutions aimed at adapting the existing international tax system to digital reality.

Historically, the methodology of international taxation was formed in the co-society of the states that are members of the OECD, as well as under the auspices of the U.N. The aim of the measures proposed by the OECD and the U.N. to solve the tax problems of the digital economy is to determine the "nexus" (this term will be defined below). These measures include a revision of the concept of a permanent establishment (PE), as well as an assessment of whether or not the collection and monetization of data leads to value creation for the purposes of transfer pricing. At the same time, digital enterprises should not be isolated from traditional ones, since the ultimate goal of forming new rules of taxation of digital companies is to create a global tax mechanism and an effective tax system.

Let us now focus our attention on the problems related to the taxation of a permanent establishment. This is a complex category of tax law, the purpose of which is to establish a fair taxation procedure for the activities of a foreign

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5 Wolfgang Schön, *Ten Questions About Why and How to Tax the Digitalized Economy*, Max Planck Institute for Tax Law and Public Finance Working Paper 2017-11 (December 2017) (Feb. 2, 2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3091496.

6 The BEPS Monitoring Group, Overall Evaluation of the G20/OECD Base Erosion and Profit Shifting (BEPS) Project (2018), at 9 (Feb. 2, 2022), available at https://bepsmonitoringgroup.files.wordpress.com/2015/10/general-evaluation.pdf.

7 Karina Ponomareva, *Comparison of Proposals to Adjust the Permanent Establishment Concept to the Digital Economy*, 73 Bull. Int'l Taxn. 581 (2019).

organisation on the territory of the source state. It is one of the conditions under which a foreign organisation becomes obliged to pay tax.

The issue of the legal nature of a PE is closely related to categories that are basic in international and European doctrine and practice but have no analogues in the Russian language or Russian tax legislation. These are the nexus and the threshold.

The term "nexus" refers to a situation in which an enterprise is subject to taxation in the territory of a state because of its connection with that state. It is traditionally noted that the list of tax bindings that provide the necessary nexus of a subject with the state includes: citizenship (nationality); domicile or residence; presence or doing business in the country; finding property in the country or carrying out transactions in the country or transactions resulting in income in the country.[8]

1.2. Timeline of the Projects of International Organisations Devoted to Taxation of the Digital Economy

The OECD acknowledged in its Interim Report that the changing global economy calls into question the adequacy of the two main concepts underlying the taxation system. These are the profit allocation problem and the nexus problem. In its Action 1 Final Report, the OECD focuses on the fact that:

> New ways of doing business may result in a relocation of core business functions and, consequently, a different distribution of taxing rights which may lead to low taxation is not per se an indicator of defects in the existing system. It is important to examine closely how enterprises of the digital economy add value and make their profits in order to determine whether and to what extent it may be necessary to adapt the current rules in order to take into account the specific features of that industry and to prevent base erosion and profit shifting (BEPS).[9]

It was clear that the emphasis of the BEPS (base erosion profit shifting) Action 1 Plan was placed on constantly improving tax minimization tools within multinational corporations, with profit shifting to low-tax jurisdictions being only one of the elements. Gaps (differences) in the legislative bases of various countries, especially in the field of e-commerce and intangible assets, were particularly noted.[10]

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[8] *See* Charles H. Gustafson et al., *Taxation of International Transactions: Materials, Texts and Problems* 15 (2006).

[9] OECD, Addressing the Tax Challenges of the Digital Economy: Action 1 – 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project (2015) (Feb. 2, 2022), available at https://www.oecd-ilibrary.org/docserver/9789264241046-en.pdf?expires=1667812117&id=id&accname=guest&checksum=801BD101E030BA4C5E2608249B75B76A.

[10] *Котляров М.А., Рыкова И.Н.* Противодействие переносу налоговой базы в низконалоговые юрисдикции: опыт ОЭСР и приоритеты для России // Финансовый журнал. 2014. № 4. С. 51 [Maxim A. Kotliarov & Inna A. Rykova, *Prevention of Tax Base Shifting to Low-Tax Jurisdictions: OECD Experience and Priorities for Russia*, 4 Financial Journal 47, 51 (2014)].

The OECD has considered the following taxation options for the digital economy: (a) a new nexus rule in the form of a "significant economic presence" test, (b) a withholding tax which could be applied to certain types of digital transactions and (c) an equalisation levy, intended to address a disparity in tax treatment between foreign and domestic businesses in situations where the foreign business has a sufficient economic presence in the jurisdiction.[11]

The criterion of significant economic presence takes into account the following factors:

- Income-based factors;
- Digital factors;
- User factors.[12]

Thus, indicators for establishing a significant economic presence may include the following: the presence of a user base; the amount of digital content received from the jurisdiction; invoicing in local currency or using a local form of payment; maintaining a website in the local language; responsibility for the final delivery of goods to users (customers) or the provision of ancillary services, such as after-sales service or repair and maintenance; and sustained sales activity.

In 2018, the European Commission submitted a Proposal for a Council Directive Laying Down Rules Relating to the Corporate Taxation of a Significant Digital Presence (hereinafter the "Proposal") in which it considers the taxation of the digital economy within the framework of the Single Digital Market initiative and intends to regulate this area unilaterally at the EU level unilaterally.[13]

The Proposal presents both long-term and short-term measures. The most important long-term goals are to determine the assignment of the added value created and to adjust the international taxation rules of the permanent establishment.

In addition, the Commission proposes short-term solutions similar to those adopted by the OECD, such as an equalization payment from the turnover of digital companies, an income tax on digital transactions and a tax on income received from the provision of digital services or advertising activities.

A "significant digital presence" shall be considered to exist in a Member State in a tax period if the business carried on through it consists wholly or partly of the supply of digital services through a digital interface and one or more of the following conditions is met with respect to the supply of those services by the entity carrying on that business, taken together with the supply of any such services through a digital interface by each of that entity's associated enterprises in aggregate:

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11 OECD, *supra* note 2, para. 20.

12 OECD, *supra* note 9, sec. 7.6.1.

13 European Commission, Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence, *supra* note 3.

(a) the proportion of total revenues obtained in that tax period and resulting from the supply of those digital services to users located in that Member State in that tax period exceeds EUR 7,000,000;

(b) the number of users of one or more of those digital services who are located in that Member State in that tax period exceeds 100,000;

(c) the number of business contracts for the supply of any such digital service that are concluded in that tax period by users located in that Member State exceeds 3,000.[14]

The profit will be distributed to such a PE on the basis of economically significant functions, namely its activities that it carries out through a digital interface that is connected with data and users. This activity is considered economically significant and includes the collection, processing and sale of user data; the collection, processing and display of user content; the sale of advertising space on the Internet; and the provision of content created by third parties for sale on the Internet market (Arts. 5(3) and 5(5) of the Proposal).

According to European scholars, the decision to focus the offer on users and the data they provide as factors in determining costs for most highly differentiated business models is a positive step, but this should be followed by a thorough study of the value creation process within these business models as well as an analysis of the location of significant economic activity.[15] However, enterprises are increasingly using multiple business models within the same legal entity. For example, there is no single universal model for the taxation of online platforms. Because these platforms are frequently built on the "principal-agent" model, the platform itself is not engaged in the provision of goods or services; rather, they serve only as an intermediary between the seller and the buyer. As a result, the platform is unable to establish a taxable presence in the state. Even if such a presence does exist, many traditional cost factors (for example, intellectual property) may exist outside of this jurisdiction. As a result, the total amount of income tax for such a company in countries where the firm has a large user base could end up being significantly small.

This approach is appealing for addressing the peculiarities of taxation of foreign digital companies in Russian tax legislation, for example, by using the structural elements of a PE agency.

The introduction of the concept of a digital permanent establishment is, in our opinion, the preferred method of taxation of digital companies engaged in conducting cross-border activities for the sale of goods or the provision of services via the Internet to users located in various jurisdictions. The main problem associated

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[14] European Commission, Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence, *supra* note 3, Art. 4.

[15] *See* Johannes Becker & Joachim Englisch, *Taxing Where Value Is Created: What's 'User Involvement' Got to Do with It?*, 47(2) Intertax 161 (2019); Lisa Spinosa, *A Long-Term Solution for Taxing Digitalized Business Models: Should the Permanent Establishment Definition Be Modified to Resolve the Issue or Should the Focus Be on a Shared Taxing Rights Mechanism?*, 46(6/7) Intertax 476 (2018); Julia Sinnig, *The Reflection of Data-Driven Value Creation in the 2018 OECD and EU Proposals*, 27(6) EC Tax Rev. 325 (2018).

with the implementation of this concept is that it requires changes to double tax treaties (DTT). However, this is beyond the scope of this study.

Another problem is that, taking into account the differences in the positions of the countries reflected in the OECD Interim Report, the EU is attempting to impose a solution on the countries that are members of the OECD and the BEPS Inclusive Framework. At the same time, the tax systems of the EU Member States will continue to be vulnerable to BEPS from payments for services and royalties made to non-resident states. An alternative to the revision of all existing DTTs could be the adoption at the EU level of a multilateral document similar to the OECDs Multilateral Instrument (MLI),[16] according to which the existing DTTs between Member States would be modified to implement the digital PE definition.

In 2020, the course of reforms was affected by the crisis caused by the COVID-19 pandemic. As tax revenues from traditional industries decline due to the economic downturn, additional taxation of the digital sector can potentially compensate for this loss of fiscal revenue. However, considering the current growth in the volume of world-wide digital transactions, no country has yet been able to efficiently tax the local share of income that foreign digital businesses obtain from their markets. This problem can be solved either unilaterally or multilaterally.[17]

The current situation, in which people are increasingly using digital services for remote work and leisure, underlines the relevance of the OECD/G20 digital taxation project. Governments are mobilizing their tax systems to combat the economic crisis by putting pressure on national budgets. This may lead to a dilemma for governments as they negotiate the taxation of digital companies. States will not have the ability to arbitrarily raise national taxes (which will almost certainly be the result of any G20/OECD agreement), either during or after the economic crisis.

In the post-crisis period, therefore, it would be impractical to take a one-sided approach and enact new taxes, such as a tax on digital services. Therefore, we believe that the best approach for states would be to try to reach an agreement on a multilateral basis.

2. The OECD/G20 Two-Pillar Approach

On 8 October 2021, 137 countries and jurisdictions joined a new two-pillar approach[18] to reform international taxation rules and ensure that multinational enterprises pay a fair share of tax wherever they operate.

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[16] Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) (Aug. 10, 2022), available at https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf.

[17] Nikolai S. Milogolov & Azamat B. Berberov, *Russia in Global Digital Tax Reform: Together or Apart?*, 14(11) J. Sib. Fed. Univ. Humanit. Soc. Sci. 1731, 1733 (2021).

[18] OECD, *supra* note 4.

Here are the agreed components of each Pillar of the OECD's statement on a two-pillar solution.

2.1. Pillar One: The Key Points of the Concept of New Profit Allocation Rules

Pillar 1 provides for new profit allocation and nexus rules for MNEs that are in scope. These rules are embodied in "Amount A." According to the OECD Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy "in-scope companies are the multinational enterprises (MNEs) with global turnover above 20 billion euros and profitability above 10% (i.e. profit before tax/revenue) calculated using an averaging mechanism with the turnover threshold to be reduced to 10 billion euros, contingent on successful implementation including of tax certainty on Amount A, with the relevant review beginning 7 years after the agreement comes into force, and the review being completed in no more than one year. Extractives and Regulated Financial Services are excluded."[19]

Amount A requires the development of sourcing rules and a revenue-based allocation key. Details of these rules are not contained in the statement although the statement confirms that jurisdictions from which revenue of €1m or more is earned by an in-scope MNE will receive an allocation. This allocation is reduced to €250,000 for jurisdictions with a GDP of less than €40 billion.

Where the residual profits of an in-scope group are already taxed in a market jurisdiction, a marketing and distribution profits safe harbor will cap the residual profits allocated to the market jurisdiction through Amount A.

Furthermore, the statement confirms that all jurisdictions will be subject to mandatory binding arbitration with only a limited number of less developed countries being permitted to use an elective mechanism.

It also makes the commitment that no new Digital Services Taxes or other relevant similar measures will be enacted and imposed on any company from 8 October 2021 and until the earlier of 31 December 2023 or the coming into force of the Multilateral Convention (MLC), whichever comes first. The MLC will require all parties to remove all existing Digital Services Taxes and any other relevant similar measures with respect to all companies, and to commit not introduce such measures in the future.

Extractive industries and regulated financial services remain outside of Amount A.

Double taxation of profit allocated to market jurisdictions will be relieved using either the exemption or credit method.

The entity (or entities) that will bear the tax liability will be drawn from those that earn residual profit.

In-scope MNEs will benefit from dispute prevention and resolution mechanisms, which will avoid double taxation for Amount A, including all issues related to Amount A (e.g. transfer pricing and business profits disputes), in a mandatory and

[19] OECD, *supra* note 4.

binding manner. Disputes on whether issues may relate to Amount A will be solved in a mandatory and binding manner, without delaying the substantive dispute prevention and resolution mechanism. An elective binding dispute resolution mechanism will be available only for issues related to Amount A for developing economies that are eligible for deferral of their BEPS Action 14 peer review and have no or low levels of MAP disputes. The eligibility of a jurisdiction for this elective mechanism will be reviewed regularly; jurisdictions found ineligible by a review will remain ineligible in all subsequent years.

The application of the arm's length principle to in-country baseline marketing and distribution activities will be simplified and streamlined, with a particular focus on the needs of low-capacity countries (*Amount B*). This work will be completed by the end of 2022.

2.2. Pillar Two: The Global Anti-Base Erosion Rules (GloBE) Rules

According to the OECD Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy,

> Pillar Two consists of two interlocking domestic rules (together the Global anti-Base Erosion Rules (GloBE) rules):
>
> • Income Inclusion Rule (IIR), which imposes a top-up tax on a parent entity in respect of the low taxed income of a constituent entity; and
>
> • Undertaxed Payment Rule (UTPR), which denies deductions or requires an equivalent adjustment to the extent the low tax income of a constituent entity is not subject to tax under an IIR; as well as
>
> • Subject to Tax Rule (STTR) that allows source jurisdictions to impose limited source taxation on certain related party payments subject to tax below a minimum rate. The STTR will be creditable as a covered tax under the GloBE rules. The taxing right will be limited to the difference between the minimum rate and the tax rate on the payment. The minimum rate for the STTR will be 9%.[20]

The GloBE rules will operate to impose a top-up tax using an effective tax rate test that is calculated on a jurisdictional basis and that uses a common definition of covered taxes and a tax base determined by reference to financial accounting income (with agreed adjustments consistent with the tax policy objectives of Pillar Two and mechanisms to address timing differences).

The minimum tax rate used for purposes of the IIR and UTPR will be 15%.[21]

The GloBE rules will apply to MNEs that meet the 750 million euro threshold as determined under BEPS Action 13 (country by country reporting). Countries are free

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[20] OECD, *supra* note 4.

[21] *Id*.

to apply the IIR to MNEs headquartered in their country even if they do not meet the threshold.

Government entities, international organisations, non-profit organisations, pension funds or investment funds that are Ultimate Parent Entities of an MNE Group or any holding vehicles used by such entities, organisations or funds are not subject to the GloBE rules.

2.3. Implementation and Timelines

The detailed implementation plan sets out key milestones that need to be reached for the finalization of the detailed rules, as well as the target timelines for legislation or treaties to be implemented or ratified and for the rules to be in effect.

• The GloBE model rules and commentary and the STTR model treaty provision and commentary will be developed by the end of November 2021.

• The multilateral convention (MLC) containing the Amount A rules and its explanatory statement, as well as model domestic legislation and commentary, are to be concluded by early 2022.

• The MLC signing ceremony is scheduled for mid-2022.

• The STTR multilateral instrument (MLI) is to be developed by mid-2022.

• The GloBE rules implementation framework will be completed at the latest by the end of 2022 (possibly including a multilateral convention for GloBE).

• The Amount B deliverables are scheduled to be released by the end of 2022. While the implementation plan refers to the need for consultation with stakeholders, it is not clear whether there will also be public release of the above documents at the times indicated.[22]

There are also a large number of open issues in the two-pillar approach that include the definition of MNE group, foreign de minimis revenue exclusion, Amount B rules (including status as mandatory or voluntary), design of mandatory and binding dispute resolution mechanism, safe harbour design, scope of the STTR and circumstances in which treaty upgrades are needed, technical design features such as losses, deferred tax, UTPR allocation mechanism and joint venture rules.[23]

3. Recommendations and Practical Proposals for Improving the Mechanisms of Taxation in the Era of the Digital Economy in Russia

3.1. Examples of International Tax Cooperation

Currently, work is actively underway on the implementation of reforms to international profit taxation (Pillar 1 and Pillar 2). Are there risks for Russia in this situation, or should we expect positive dynamics?

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[22] KPMG Update on October 2021 BEPS agreement on Pillar 1 and Pillar 2 (Aug. 10, 2022), available at https://assets.kpmg/content/dam/kpmg/ru/pdf/2021/10/ru-en-update-on-beps-agreement.pdf.

[23] *Id.*

The purpose of the current study is also to highlight issues of the OECD Action 1 Final Report which are relevant to Russian tax legislation. Some of the other BEPS actions have already been studied by scholars.[24]

International cooperation in tax administration is a new reality, at least with regard to the taxation of profit of the largest digital MNEs, provided that an international consensus is more or less reached within Pillar 1. It should be noted that international cooperation in the area of taxation is not a qualitatively new phenomenon and has been actively developing in recent years in many countries, including Russia. The following are three examples of such cooperative efforts:

1) the mechanism of VAT payment in the EU when importing digital services into the Single Market;

2) the mechanism for the provision and exchange of country reports of the CRS (country-by-country report) within the framework of Action 13 of the BEPS Project;

3) the International Compliance Assurance Program (ICAP) of the OECD. ICAP[25] is a voluntary program that allows multinational corporations to eliminate uncertainty and ensure predictability regarding the taxation of transactions and business activities in the participating states of the program.[26]

It should be noted that Russia participates in two of the three cooperation programs mentioned above, which indicates that the very idea of international cooperation in the field of administration is not new for Russia.

3.2. Possible Risks of Implementation of the New Rules

Despite the relatively high degree of detail of the dispute prevention and resolution mechanisms proposed by the OECD Pillar 1, there are still unresolved issues about how such an international cooperation mechanism will work in practice. A key source of tax risks for taxpayers and potential tax disputes between countries is associated with the inability to isolate Amount A from other CRS tax obligations (related to the application of transfer pricing rules, the determination of Amount B, etc.). It will require an unprecedented level of international cooperation as well as quick decision-making from the tax authorities of different countries in order for the mechanism for the distribution of global profits of the MNE to work in practice.

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[24] *See Берберов А.Б., Милоголов Н.С.* Оценка масштабов проблемы размывания налоговой базы в России // Финансовый журнал. 2018. № 6. С. 47–58 [Azamat B. Berberov & Nikolai S. Milogolov, *Assessment of the Scope of Tax Base Erosion in Russia*, 6 Financial Journal 47 (2018)]

[25] OECD, International Compliance Assurance Programme – Handbook for tax administrations and MNE groups (2021) (Aug. 10, 2022), available at https://www.oecd.org/tax/forum-on-tax-administration/publications-and-products/international-compliance-assurance-programme-handbook-for-tax-administrations-and-mne-groups.pdf.

[26] *Милоголов Н.С., Пономарева К.А.* Международная кооперация налоговых администраций при налогообложении цифровых бизнес-моделей: миф или реальность? // Налоги. 2021. № 3. С. 29–33 [Nikolai S. Milogolov & Karina A. Ponomareva, *International Cooperation of Tax Administrations in Taxing Digital Business Models: Myth or Reality?*, 3 Taxes 29 (2021)].

The proposed Pillar 1 mechanism for dispute resolution through international arbitration does not correspond to the position that Russia holds. Thus, none of the tax agreements in Russia contain provisions on mandatory dispute resolution. In addition, Russia did not accept the relevant provisions of the BEPS MLI when joining it. This position of Russia is connected with the fact that in the current political conditions and in the current conditions of intense international competition, the authorities of the Russian Federation do not consider it possible to transfer part of the national tax sovereignty to the supranational level. It is this factor (rejection of the mandatory dispute resolution mechanism) that may cause Russia to refuse to adopt the Pillar 1 approach discussed in the framework of the BEPS Project.

The mechanism of international cooperation of tax administrations in the taxation of digital business models as proposed by the OECD under Pillar 1 includes the following mechanisms:

1) a mechanism for self-declaration at the level of the ultimate parent entity of the group;

2) a mechanism for preventing disputes regarding Amount A and the instruments for involving the company in this mechanism;

3) a mechanism or legally-binding resolution of disputes that are affected by Pillar 1's rules;

4) the simplification and unification of the rules for attributing profits to basic marketing operations and resale operations (Amount B).

The key idea of the proposed rules is to provide the possibility of a "single window" through which the MNE can access all relevant tax administrations at once. We consider it expedient to implement this idea regardless of the success of the Pillar 1 initiative.

As for the proposed mechanism for mandatory dispute resolution, it has the following features. Firstly, a new multilateral mechanism for binding dispute resolution is proposed, which will be used if the existing mechanisms fail to resolve the dispute; and secondly, a wider range of issues than the determination of Amount A are expected to be covered by this mechanism (including Amount B, transfer pricing and the availability of PP). The main elements of the mechanism are the international panel discussions and a decision-making process based on the analysis of the proposals of the parties. The OECD justifies its proposals by the fact that the company located in the perimeter of Sum A bears a higher level of compliance burden and, as a result, should be entitled to better conditions in dispute resolution (the quid pro quo principle is a service for a service).[27]

[27] Milogolov & Ponomareva 2021.

3.3. Advantages of Possible Implementation of the New Rules

In addition to the obstacle outlined above (the mechanism of mandatory dispute resolution) to Russia's accepting the proposed Pillar 1 administration mechanism, some advantages of this mechanism should also be noted, including for Russia.

International cooperation in the field of tax administration in general is not an inconceivable phenomenon for Russia. Moreover, the Federal Tax Service of Russia is a world leader in the field of digitalisation of tax administration. The Russian tax monitoring system is recognized as the "best practice" of cooperation and collaboration of tax authorities with taxpayers in the OECD 2020 report, which summarizes trends in the digitalisation of tax administration.[28] Starting in 2018, the largest taxpayers have the right to apply to the Federal Tax Service of Russia with an application for the conclusion of a pricing agreement with the participation of a foreign competent authority. In addition, it should be noted that the payment of customs duties on the import of goods into the territory of the EAEU is carried out between the budgets of the EAEU Member States, based on their formula distribution and in accordance with established principles. Thus, the very idea of in-depth cooperation with the authorities of foreign countries on a variety of fiscal issues has already been reflected in the existing tax administration practices applied in Russia.

In this regard, our key recommendation for the development of tax administration in Russia is to expand and adapt the approaches proposed by the OECD under Pillar 1 to international cooperation in the field of digital business tax administration, while at the same time, taking into account national specifics and fiscal interests.

In addition, we agree with esteemed authors Milogolov and Berberov, who propose amending the corporate tax residence criteria in Russia with the aim of safeguarding its taxation rights as a state of residence in the context of virtual businesses. Scholars propose two ideas for such a reform. First, an assessment of the economic functions performed by a company in each state, as well as an analysis of the places of permanent residence (or places of vital interests) of key executives, would serve as useful extensions to the existing criteria for corporate residence under Russian domestic law. Second, the formalisation of corporate tax residence standards could also ensure tax certainty. The analysis of the geographical distribution of a company's assets and employees could serve as valuable evidence to support the conclusion that the company has an economic nexus with Russia as its state of residence.[29]

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[28] OECD, OECD Secretary-General Tax Report to G20 Leaders (November 2020) (Aug. 10, 2022), available at https://www.oecd.org/tax/oecd-secretary-general-tax-report-g20-leaders-november-2020.pdf.

[29] Milogolov & Berberov 2021.

3.4. Specifics of the Russian Tax Framework in Terms of Taxation of Digital Services

We believe that the necessity to respond to the challenges of the digital economy in the current conditions at the level of Russian legislation is beyond doubt. In addition, the effectiveness of the new rules can be ensured only if the measures implemented in the legislation of as many states as possible are harmonized. Otherwise, it will be impossible to ensure uniform regulation of cross-border tax relations.

Russia is unique in that it serves as both a market for consumers of digital services as well as a market for providers of these services. Russia is home to globally competitive information technology (IT) companies such as Yandex, VKontakte and others. However, Russian tax legislation has a number of features that allow foreign Internet companies to receive tax advantages in relation to Russian Internet companies.

Foreign companies, on the other hand, do not function as tax agents for personal income tax. Additionally, they do not pay insurance premiums when paying remuneration to individuals, and they apply income tax rates that are set by the countries in which they were incorporated. As a result, Russian technology companies bear a heavy tax burden and are unable to provide a competitive financial offer to content producers and service providers who find it more cost-effective to work with foreign platforms.

In this regard, we believe it may be appropriate to consider assigning foreign digital companies (in particular, Facebook, Twitter and Apple) the functions of tax agents when paying income to individuals for services rendered by them.

Currently, Russian legislation establishes the specifics of calculating and paying taxes when foreign organisations provide services in electronic form (Art. 174.2 of the Tax Code of the Russian Federation). However, there are still difficulties with how the Russian tax authorities are able to control the delivery of cross-border services, even with the implementation of this legislation.

In terms of personal income tax administration, our recommendation is to consider a mechanism for registering foreign technology companies for taxes. When foreign organisations provide services electronically (pt. 4.6 of Art. 83 and Art. 174.2 of the Tax Code of the Russian Federation), this mechanism is used to collect VAT payments in addition to the self-declaration and payment of personal income tax by those companies.

Furthermore, foreign companies do not pay corporate income tax in the territory of the Russian Federation on profits earned at the expense of users located in Russia. Due to the fact that this profit is generated by Russian users, it has an economic connection with the Russian market. Additionally, foreign companies customize their services for the Russian market by providing Russian-language translations of their services and user agreements adapted for users from the Russian Federation.

Thus, the current regulation does not allow taxes to be fully levied on the income that digital MNEs make from services relating to Russian users. At the same time,

Russian organisations engaged in similar business bear the tax burden by paying income tax, VAT, as well as other taxes and fees mandated by the Tax Code of the Russian Federation.

This increases the profitability of foreign companies providing digital services relating to Russian users compared with the profitability of Russian companies providing the same services. In this regard, we can talk about the violation of the conditions of fair competition between Russian and foreign digital companies.

In this regard, we believe that it is necessary to establish special rules for calculating and paying income tax on foreign digital companies while simultaneously expanding tax incentives for Russian companies. The increase in the share of the digital economy in relation to the volume of the traditional economy raises questions about the need to revise approaches to taxation of a permanent establishment both in the doctrine of tax law and in tax legislation.

As noted in the main directions of the budget, tax and customs tariff policy for 2020 and for the planning periods of 2021 and 2022, it is necessary to carefully work out the provisions of tax legislation that would allow declaring profits for tax purposes in those jurisdictions where users (customers) of digital companies are located, where profits are generated as a result of attracting, interacting and user contributions, as well as to develop new rules for the distribution of profits in countries using intangible marketing assets.[30]

3.5. Key Challenges of Regulating the Taxation of Digital Companies in the Russian Federation

We believe that the following are key challenges in regulating the taxation of digital companies in the Russian Federation:

- Protection of competition;
- Ensuring equal conditions for all market participants, regardless of the source of capital and the underlying jurisdiction;
- The presence of clear criteria for determining the range of regulated entities;
- The availability of effective enforcement mechanisms;
- The establishment of a tax regime that promotes the development of the Russian market and national digital companies.

We are talking about the implementation of state sovereignty in the form of new legal frameworks that encourage foreign companies providing services on the territory of the Russian Federation to comply with the requirements of national legislation not only in selectively (for example, in terms of taxation), but also in a broader sense.

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[30] Основные направления бюджетной, налоговой и таможенно-тарифной политики на 2020 год и на плановый период 2021 и 2022 годов // Министерство финансов Российской Федерации [Main Directions of the budget, tax and customs tariff policy for 2020 and for the planning period of 2021 and 2022, Ministry of Finance of the Russian Federation] (Feb. 2, 2022), available at https://www.minfin.ru/common/upload/library/2019/10/main/ONBNiTTP_2020-2022.pdf.

We propose using the experience already implemented in some EU countries of legalizing the activities of foreign companies and enshrining in legislation the obligation to conduct business through a specially created representative office in the jurisdiction of the actual provision of services or a national partner. In order to accomplish this, it is also necessary to introduce requirements for registering with tax authorities or for making payments through payment agents located within the jurisdiction of the Russian Federation, as well as to provide for the implementation of a representative office based on the personal account model in the information system.

Furthermore, we believe it is necessary to define the general criteria of the permanent establishment, which is a significant economic presence in the Russian Federation. These criteria can be summed up as follows:

1) implementation of activities related to digital services;

2) reaching the threshold number of users from the Russian Federation for the site, application, or resource;

3) registration of an electronic resource and systematic distribution of advertising in Russian;

4) achieving the minimum threshold of revenue from sales of digital services to consumers in the Russian Federation.

The existing rules of taxation of a permanent establishment require changes in the following areas:

1) recognize user participation as a key driver of value creation for digital enterprises;

2) identify the companies within the group with which users should be associated and those that should be taxed on profits related to the value created by the user;

3) allow jurisdictions in which users are located the right to tax these companies, even if they are non-resident companies that do not have a permanent establishment in accordance with traditional definitions;

4) select a method for the allocation of profit received by these companies as a result of user activity.

In addition, the internationalization of tax law inevitably entails the expansion of the conceptual apparatus of the doctrine of tax law. A comparative legal analysis of international and European practice has revealed that a permanent establishment is the minimum degree of presence that a non-resident should have in the country as a requirement for tax collection.

In this regard, it is proposed to introduce into scientific circulation the concept of nexus, which characterizes the relationship between the state and the subject (object) of taxation, on the basis of which the taxpayer is subject to taxation in this state. The proposed definition determines the validity of taxation either according to the presidential (if the relationship is based on the subject of taxation), or the territorial principle (if the relationship is based on the source of income on the territory of the state).

We propose the introduction into tax legislation (in Art. 306 of the Tax Code of the Russian Federation) of the expanded definition of a permanent establishment containing rules aimed at countering abuses developed within the framework of BEPS Action 7 and reflected in the position of the Russian Federation upon accession to the MLI. These norms comply with the provisions of Part IV (Avoidance of Permanent Establishment Status) of the BEPS Multilateral Convention (Art. 12 – Artificial Avoidance of Permanent Establishment Status through Commissionaire Arrangements and Similar Strategies, Art. 13 – Artificial Avoidance of Permanent Establishment Status through the Specific Activity Exemptions, Art. 14 – Splitting-up of Contracts, Art. 15 – Definition of a Person Closely Related to an Enterprise).

These provisions have a broader scope than the taxation of digital international trade in goods and services, digital services and intangible assets. However, they are also related to e-commerce business models. For example, when applying the expanded definition of a permanent establishment, profits from the activities of non-residents when selling goods to local buyers from warehouses rented in the country and carried out through an Internet site whose work is fully supported from abroad will fall into the taxation perimeter.

Conclusion

It is clear that Russia has much to gain by adopting the measures proposed by the OECD. In particular, it will be able to rely on a part of the profits of digital multinational enterprises as one of the sales markets in which they operate. At the same time, Russia will be able to set its own thresholds for the revenue of digital giants in order to recognize those companies that are obliged to pay additional taxes in Russia because Russia is not an OECD Member State.

It is worth noting that digitalisation is the area of work in the OECD in which Russia excels the most. One example of this can be seen in the achievements of the Federal Tax Service in the field of digitalisation of control. For example, in the framework of tax monitoring, the use of online cash registers, among others.

The Ministry of Finance of the Russian Federation closely monitors trends in the taxation of multinational corporations, despite the fact that Russia is not a member of the Organisation for Economic Cooperation and Development and therefore should not introduce new rules based on its own decisions. Additionally, Russia plans to develop new rules for the distribution of profits in countries where intangible marketing assets are used.

As for the issue of taxation in the context of digitalisation, we recall that since 2013 it has been designated as one of the priorities of the BEPS Action Plan. In particular, within the framework of Action 1 of the BEPS Plan, it was possible to approach the resolution of a number of issues related to taxation in the context of digitalisation, including payment of VAT in digital commerce at the location of

the consumer (the so-called "Google tax"), digital PE and so on. These are some of the decisions that were defined and agreed upon at the international level in 2015. However, they did not fully contribute to the solution of the global problem, which is that digital companies do not have permanent establishments in the countries in which they sell their services to consumers, and as a result, they do not actually pay taxes in those countries.

Solutions that were outlined in the BEPS Action Plan can no longer save the situation. Rapid changes have begun to occur in this regard. For example, numerous European countries have begun to impose unilateral taxes on digital services (such as France, Italy etc.). Countries began to impose DSTs ranging from 2%–3% on income received from online mediation services and online advertising in the country. In fact, a new barrier in international trade has begun to form.

As mentioned above, the two-pillar approach will require countries to remove all digital services taxes and other relevant similar measures, as well as to commit to not introduce such measures in the future. No newly enacted digital services taxes or other relevant similar measures will be imposed on any company from 8 October 2021 and the earlier of 31 December 2023 or the coming into force of the MLC. Thus, the OECD has come to the conclusion that taxes placed on digital services disrupt the global tax landscape.

International digital companies have to comply with reporting requirements that differ according to jurisdiction. This did not contribute to improving the fairness of the global tax system. In this regard, serious disputes and conflicts have begun to arise between countries, for example, between France and the United States over the implemented tax regimes in the field of digital services.[31] Of course, this is not the outcome the international community wanted: new barriers to trade and increased difficulties with tax administration. The world community has come to the realization that the further introduction of such taxes will lead to new trade conflicts and even trade wars between countries as they compete for the revenues of digital companies. On the other hand, the absence of a consensus-based solution could lead to a proliferation of unilateral digital services taxes and an increase in damaging tax and trade disputes, which would undermine tax certainty and investment, according to the OECD. In the worst-case scenario, which involves a global trade war triggered by unilateral digital services taxes worldwide, the failure to reach an agreement could reduce global GDP by more than 1% annually.[32]

As a result of these unilateral decisions, the goal was outlined – to choose a unified approach to solve the problem.

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[31] *See* Macron and Trump Declare Truce in Digital Tax Dispute, Reuters, 20 January 2020 (Feb. 2 2022), available at https://www.reuters.com/article/us-france-usa-tax-idUSKBN1ZJ24D.

[32] International community renews commitment to address tax challenges from digitalisation of the economy, OECD, 12 October 2020 (Feb. 2, 2022), available at https://www.oecd.org/tax/international-community-renews-commitment-to-address-tax-challenges-from-digitalisation-of-the-economy.htm.

The initiative of unilateral decisions limits the tax sovereignty of countries. The digital economy lacks clear boundaries, making it impossible to tax it within one jurisdiction. Taking into account today's realities, an internationally agreed definition of the solution to the problem is required. This is a new approach that is being developed on the international platform of the OECD. The digitalisation of business significantly affects the income of states from corporate taxes. These are the decisions that the competing market jurisdictions must fight for. The OECD has set itself the task of developing some approaches for the fair taxation of profits of digital companies (Google, Facebook, etc.), taking into account their presence in the market. Because it is obvious, for example, that Facebook's principal source of revenue comes is earned primarily on the potential of advertising, which is directed at users in various countries, including Russia.

In summarizing the topic of the new two-pillar solution the following observations can be mentioned.

Pillar 1 of the OECD is focused on the establishment of new rules of profit allocation. These rules are not limited solely to the physical presence of the company. The countries were attempting to figure out how they could change the existing provisions in order to introduce a new tax law for market jurisdictions, which previously did not exist in international tax law. Taking into account the fact that a significant number of users of the company are located in the jurisdiction and generate revenue for it, the new law should enable market jurisdictions, including Russia, to tax the profits of companies. This is an example of the new kind of notion that is reflected in Pillar 1.

Pillar 2 of the OECD is designated as a kind of direction that involves solving the remaining problems in the field of taxation. These were the issues that were not fully resolved during the implementation of the BEPS Plan. Thus, this could be regarded as a kind of 'spin-off' of the BEPS Action Plan in the context of further digitalisation of the economy.

The essence of Pillar 2 is the establishment of a minimum corporate tax rate for international companies, regardless of their location. Thus, if a company is located in a "tax haven," other countries will be able to collect tax from it at the minimum established rate, which will reduce the incentive for businesses to transfer profits to jurisdictions with lower tax rates. In the second direction, it is proposed to equalize the tax burden for multinational companies to the lowest possible level by the implementation of cross-border taxation. As a result, countries that have a reasonable tax rate and which are also locations in which multinational corporations operate will be able to claim an additional portion of the income tax, if that tax is kept to a minimal level in any other country. In addition to that, it provides for a review of the tax rates that are applied to paid income received in the form of interest and royalties.

In 2019–2021, countries held discussions on proposals pertaining to Pillar 1, within the framework of which it was proposed to determine three different categories of

taxable profit. The greatest interest is undoubtedly caused by Amount A, which describes the share of residual profit distributed between market jurisdictions. The majority of the questions that arose were regarding the definition of the coverage of companies to which the new rules were to apply. According to the OECD, the rules should be applied to multinational enterprises that can actively and sustainably participate in the economic life of a market jurisdiction without necessarily having a proportionate level of taxable presence in this market. Additionally, it was proposed that the rules should be applied to two categories of companies: firstly, to companies that provide digital automated services (online advertising services; online search engines; social networks; digital content services, etc.); and secondly, to consumer-oriented businesses. When it came to the first category, everything was more or less clear. However, it was more difficult to justify the boundaries of coverage of a consumer-oriented business for the application of the new rules. The OECD also proposed that the rules only apply to sufficiently large MNEs whose revenues exceed 750 million euros (by analogy with the coverage of cross-country reporting requirements under the CbC MCAA).

In 2021, the approach to the coverage of MNEs has been significantly changed compared to the previous year. The OECD's statement on the two-pillar solution no longer addresses the categories of digital automated services and consumer-oriented businesses. The new rules will apply to MNEs with a global turnover of more than 20 billion euros and profitability above 10%. The extractive sector and financial services will be excluded from coverage. As a result, the OECD identified two new goals: a multilateral instrument that will be used to implement Amount A (to be developed and opened for signatures in 2022) and that Amount A should enter into force in 2023.

Pillar 2, which consists of the Global Rules for Combating Base Erosion (GloBE) as well as the Rules on Taxation (STTR), allows the parent company to impose an additional tax on low taxable income. Additionally, these rules allow source jurisdictions to impose a limited source tax on certain payments of related parties that are taxed below the minimum rate. Pillar 2 aims to limit competition in terms of income tax by introducing a global minimum corporate tax rate that countries can use to protect their tax base. According to the statement, this rate should be at least 15%. This raises the question of the future prospects of the existence of preferential tax regimes in countries with respect to income tax. The Ministry of Finance of the Russian Federation has already expressed concern about the risks arising from the Pillar 2 proposal for Russian preferential tax regimes (for example, in the IT industry). Everything needs to be weighed and worked out.

It is already evident that the planned changes will have a large-scale impact on the activities of the MNEs. Given how quickly the reforms will go into effect, it is important that groups potentially affected by the reforms can make adequate preparations for the prospective changes to their legal frameworks.

Changes in the international tax and legal fields will require changes in national regulation and the ratification of multilateral documents by the relevant states. It will be crucial for companies to make use of the appropriate tools to assess the impact of regimes on their activities, assess interdependence and prevent double taxation or other unintended impacts. In the future, countries will be required to implement each component of the global tax reform, which will create additional difficulties.

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TRANSFORMATION OF THE CONCEPT OF ADMINISTRATIVE LIABILITY IN THE PROTECTION OF THE RIGHTS, LEGITIMATE INTERESTS AND SECURITY OF CITIZENS

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This article discusses key areas of harmonization of administrative legislation and administrative responsibility between the Russian Federation and the Eurasian Economic Union (EAEU) countries. The most important issue in modern law is understanding that the uniform practical application of consistent administrative liability will enable the creation of a customs, tax, technological, and environmental space in the EAEU and BRICS. The author, on the basis of the findings of other researchers, gives an original definition of legal and administrative liability, which can be used in the harmonization of Russian legislation with the legislation of other BRICS and EAEU countries. The author also determines the regulation of the administrative process and the difference between administrative liability and other types of legal liability in accordance with modern Russian legislation.

Keywords: administrative procedures; administrative responsibility; unification of legislation; BRICS; EAEU.

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Table of Contents

Introduction

With the ongoing administrative reform in Russia, the formation of a single economic space in the Russian Federation, Belarus, Kazakhstan, Armenia, Kyrgyzstan, and Tajikistan, as well as in a number of other member states of the Eurasian Economic Union (EAEU), BRICS, and other political and economic interstate associations and unions, it is more important than ever to reach a common understanding of legal terms and their application in the practical activities of public authorities, the business community, and citizens. Since public administration is primarily governed by the norms of administrative law, it is the harmonization and integration of administrative legislation that should contribute to more effective economic development and stability in the political and social spheres.

When discussing the application of administrative law to the protection of rights, legitimate interests, safety of life and health, property of citizens, public, economic, industrial (technological), biological, food, information, environmental, and other types of security, it is necessary to emphasize the importance of resorting to administrative coercion in general and administrative liability as its subsystem for such ends.

Common understanding and uniform practical application of consistent administrative liability will enable the countries in these regions to create a customs, tax, technological, and environmental space and to ensure legal regulation of diverse public relations concerned with the protection of rights and legitimate interests and security of citizens, as well as to ensure the unification of the legislation of these countries. Furthermore, it also defines the establishment of ESG standards as a mechanism for protecting the rights, freedoms, and security of citizens from unlawful encroachments.

1. Transformation of the Concept of Administrative Liability

It should be noted that the functions of administrative liability should be determined by their purposes, since by its very nature such a social phenomenon as legal liability protects the society from unlawful encroachments. This goal also determines the basis for distinguishing between functions of liability: the punitive (penal) function identifies the offender and penalize them for what they have done; the restorative (compensatory) function restores the violated right and compensates for the pecuniary and non-pecuniary damage caused by the offender; and the deterrent (preventive) function prevents future offenses by both the offender (private prevention) and society (general prevention).

However, administrative liability aims not only to punish the offender but also to correct their behavior, which, pursuant to Article 2.1 of the Administrative Offense Code of the Russian Federation (hereinafter the "AdmOC RF"), is one of the purposes

of administrative punishment (its educational function). First of all, administrative liability is applied in order to protect and safeguard life, rights, and legitimate interests; health; property of citizens; public; food; economic; biological; industrial (technological); environmental; information; and other types of national security (its protective function). It should be emphasized that administrative liability is organically included in the process of administrative law regulation and, thus, it is part of its mechanism through which the regulatory function of law is carried out.

Examining the institute of administrative liability, we noted[1] that it was the most important part of police law, followed by administrative law, and that it was regarded as a mechanism of public administration to ensure public, economic, food, sanitary, and epidemiological security as well as other types of security in the political, economic, and social spheres. Our analysis of police law demonstrated that the majority of its norms concerned issues such as legal liability for violations of weights and measures; soaring food prices; the sale of low quality and unhealthy food products; protection of "people's health"; sanitary and epidemiological welfare; and so on. In particular, this conclusion is confirmed by A.B. Agapov, who thoroughly examines the genesis of the institute of administrative liability, analyzing works on police and administrative law by such famous scholars as I.T. Tarasov, V.V. Ivanovsky, I.E. Andrievsky, V.N. Leshkov, and E.N. Berendts. Exploring the development of police and administrative law in Russia, Yu.A. Tikhomirov underlines the importance of developing administrative law regulation and state management of the national economy, the normal functioning of industrial, trade, and other objects, as well as administrative law protection of the vital needs and interests of the population of the country.[2]

It should be noted that issues related to legal research conducted by the institute of legal liability established for violations of the law are debatable. First of all, it concerns the definition of legal liability in the theory of law. Thus, S.S. Alekseev emphasized that "the essence of legal liability means that a person shall face state coercive measures for an offense committed by him." Later, while examining the system of state coercive measures, S.S. Alekseev gives the definition of legal liability as the application of state coercive measures to the guilty person for the committed offense and the offense itself as the ground for legal liability characterized by four elements (aspects) that make up the elements of the offense (the object, *mens rea*, *actus reus*, and the subject). At the same time, speaking about administrative liability, he emphasizes that all elements of the offense shall be obligatory and unconditional, and we will rely on this statement in subsequent sections when qualifying administrative offenses.

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[1] *Пантелеев В.Ю.* Государственно-правовое регулирование в сфере потребительского рынка в Российской Федерации [Vadim Yu. Panteleev. *State Law Regulation in the Sphere of the Consumer Market in the Russian Federation*] 9–83 (2015).

[2] *Тихомиров Ю.А.* Курс административного права и процесса [Yuri A. Tikhomirov, *A Course of Administrative Law and Procedure*] 9–38 (1998).

S.S. Alekseev distinguishes legal liability from preventive measures established by law and defensive measures (legal restorative measures) by linking it "with the public condemnation of the offender and their socially and morally reproachable behavior."[3] This statement is extremely important for us when determining measures of administrative law protection of the rights and interests of citizens. Exploring the problems of the theory of law, S.S. Alekseev studies the system of application of law and reveals its interconnection with legal liability, pointing out that

> legal liability expressed in the form of punitive action against a person can be put into effect only on the basis of an act of application of law in the procedural forms established by law and in compliance with all democratic procedural guarantees, while protective relations begin to develop from the moment of the offense, and the act of application of law completes the elements necessary for legal liability.

Thus, we see the application of administrative law norms to committed offenses, as well as the peculiarities of its structure, stages, participants, and the interrelations of substantive and procedural norms. In addition, this definition emphasizes the need for law enforcement, but not the protection of citizens' rights from the emergence of public relations to the final stage of bringing to justice those who violate these rights.

Examining the institute of legal liability, V.D. Perevalov notes that legal liability is "the application of state coercive measures to the offender, expressed for him in deprivations provided for by legal norms." He also emphasizes that legal liability is "a negative reaction of society and the state to offenses, a kind of form of protecting society from violations." What is important is that this definition establishes the interrelationship between state and public protection of the safety of life and health of citizens, their legitimate interests and rights, property, national security and its types of public, economic, industrial (technological), food, and environmental security, among others, with a negative reaction in the form of legal liability (criminal, administrative, or civil), which is applied to offenders.

Furthermore, when discussing legal liability, V.D. Perevalov emphasizes its complex nature, which confirms our position that it is necessary to comprehensively consider both legal regulation and issues of liability for violations against citizens. In defining administrative liability, which "is imposed for the commission of an administrative offense by various administrative and supervisory authorities, mainly in the form of a fine, deprivation of a special right, etc.," he draws attention to its relationship with state coercive measures, which he classifies as compulsory measures of an educational nature, compulsory measures of a medical nature, protective measures, requisition,

[3] Tikhomirov 1998, at 155–156.

and restrictive measures. S.N. Bratus, on the other hand, takes a different position. He states that characterizing liability as a punishment is one-sided and it concerns other public relations regulated by civil law and other branches of law. However, as noted by V.A. Yusupov, M.F. Zelenov, A.V. Kirin, E.G. Krylova, N.I. Pobezhimova, V.G. Tataryan, in the content of legal liability, such an approach emphasizes the "negative" aspect, which is associated with the concept of coercion and sanctions, as well as the "positive" aspect, which is manifested through the concepts of "duty," "obligations," and responsible behavior.

Concerning the need for positive administrative liability, we are inclined to support the position of N.V. Vitruk, who underlines "the multilateral relations of society and its subjects" in terms of established norms (rules, standards) of behavior and requirements that determine the conscious and socially responsible behavior of an individual. In this case, the offender does not experience deprivations (as in the case of legal liability), because the purpose of coercion is not to punish the offender but to make the offender fulfill his or her legal obligation, through which the subjective right of the authorized party is ensured.

Article 2.1 of AdmOC RF (Chapter 2 "Administrative Offense and Administrative Liability") does not define the concept of administrative liability; rather it only establishes the relationship between an administrative offense and administrative liability. It does, however, give the concept of an administrative offense, under which an illegal, culpable action (inaction) of an individual or legal entity is recognized and for which administrative liability is imposed by the Code or by the laws of the subjects of the Russian Federation on administrative offenses (AdmOC RF Art. 2.1, pt. 1). In addition, there is administrative liability of officials (AdmOC RF Art. 2.4), administrative liability of military personnel and other persons subject to disciplinary statutes (AdmOC RF Art. 2.5), administrative liability of foreign citizens, stateless persons, and foreign legal entities (AdmOC RF Art. 2.6), administrative liability of legal entities (AdmOC RF Art. 2.10), as well as a possibility of exemption from administrative liability if an administrative offense is insignificant (AdmOC RF Art. 2.9) and the age at which administrative liability begins (AdmOC RF Art. 2.3). And with this in mind, we need to study the various approaches that administrative scholars have taken to the definition of administrative liability and then apply it to the legal relations we are investigating.

According to L.L. Popov, administrative liability is the implementation of administrative law sanctions as well as the application of administrative penalties by an authorized body or official to citizens and legal entities who have committed an administrative offense. At the same time, A.B. Agapov describes administrative liability as "one of the types of public legal liability established when committing misdemeanors (administrative offenses) entailing insignificant, real or potential harm or damage to the protected property and non-pecuniary interests" and is provided by "preventive enforcement measures (administrative restraint measures),

public sanctions, administrative penalties, and procedural measures concerning the jurisdictional activities of public bodies, organizations, and their officials."

Yu.N. Starilov defines administrative liability as the application of administrative measures to offenders in a specific procedural order established in punitive and restorative sanctions of administrative law norms containing state and public condemnation of both the person guilty of committing an administrative offense and the act committed by them, which is expressed in negative consequences of a personal, property, and organizational nature: the offender has to face them. O.S. Rogacheva defines the essence of administrative liability as the application of administrative coercive (punishment) measures provided for by administrative law to the offender (whether an individual or a legal entity). A.V. Sladkova considers administrative liability to be based on the relationship between an administrative offense and administrative punishment pursuant to Articles 2.1, 2.7, 2.9, and other articles of the Administrative Offense Code of the Russian Federation.

Examining administrative proceedings, Yu.A. Tikhomirov defines administrative liability in relation to the concept of administrative relations in accordance with the Administrative Offense Code of the Russian Federation and underlines the importance of developing such principles as accessibility, publicity, adversariality, public law assessment of acts and actions of administrative bodies, and the right to be heard, among others, in order to ensure proper protection of the legitimate interests and rights of citizens.[4]

Emphasizing the increasing role of administrative liability in the fight against offenses, N.F. Popova defines administrative liability as one of the ways of "legal protection of public relations in the field of public administration." Examining the general aspects of legal liability, Popova transforms them into administrative liability, which is a means of law enforcement; it involves state coercion and is aimed at those violating administrative law norms; it entails negative consequences for the violator in the form of deprivation of a personal, organizational, or property nature; and it is implemented in a strict procedural manner established by law.

Defining the general features of administrative liability, we emphasize its peculiar features: the ground for its application is an administrative offense, which is an illegal act in the field of public administration, for example, violations of various rules such as EAEU technical regulations; public authorities, including executive authorities and their officials, as well as individuals and legal entities who always participate in these legal relations; it has its own separate regulatory legal framework (the Administrative Offense Code of the Russian Federation and the laws of the RF subjects on administrative liability, the administrative legislation of the EAEU countries); its application is carried out following the procedure established by the AdmOC RF; it includes application of a special kind of sanctions to the guilty persons –

[4] Tikhomirov 1998, at 739, 743.

administrative penalties stated in AdmOC RF Article 3.2, which entails administrative liability for the violator (AdmOC RF Art. 4.6); it is applied to violators who are not within the administrative jurisdiction of subjects and mainly for committing offenses in the sphere of national, not private legal interests.

In this regard, it is worth looking at the scientific conclusions made by P.P. Serkov, who gives his own definition of administrative liability based on the theoretical analysis of the definitions of legal liability given by researchers of various branches of law, such as state coercion (S.S. Alekseev, S.N. Bratus, N.V. Vitruk), legal relations (Yu.A. Tikhomirov, B.T. Bazylev), sanctions (O.S. Ioffe), the state of coercion (A.P. Chirkov), equation of administrative liability with administrative coercion (V.M. Manokhin), the ability to face adverse consequences (L.L. Popov, M.S. Studenikina), with coercive measures (A.B. Agapov), with administrative punishment (B.V. Rossinsky), among others. He understands administrative liability as

> a complex legal reaction of the state to administrative illegality, containing the substantive law grounds and procedural order for initiating and considering cases of administrative offenses, imposing and enforcing administrative penalties in order to impose on the offender the obligation to face adverse consequences established by the legislator, or terminate proceedings in cases established by law.

It is important for us that this definition of administrative liability integrates "all existing methods of affecting the offender – punitive, restorative, compensatory and preventive," allows for state coercive measures if necessary, is consistent with the conclusions of the general theory of law, and allows taking into account different peculiarities of all types of legal liability. In fact, this definition confirms our position on the need for a comprehensive review of legal relations, identifying all the necessary elements of the mechanism to ensure uniform application of the RF legislation norms and of the legislation of the RF subjects on administrative liability, and based on the generalized theoretical studies, we can determine the different types, their structure, and the peculiarities of the process for bringing offenders to administrative liability.

Having analyzed various approaches, we can define administrative liability as a complex legal reaction of the state (by authorized public authorities and their officials) to the violation of rights and legitimate interests of citizens, formalized by a set of substantive norms as well as the procedural order for initiating and considering relevant cases of administrative offenses, imposing and enforcing administrative penalties in order to impose the obligation to face adverse consequences on the offender, established by the legislator through administrative punishment, or terminating proceedings in cases defined by law, which can be carried out at all stages of legal regulation.

2. Features of Bringing to Administrative Responsibility

Exploring the issues of public law protection, we have already underlined the relationship between administrative coercion and administrative liability, since administrative legislation also establishes preventive measures, in other words, measures of state coercion, in order to prevent and put an end to possible offenses. However, the difference lies in the fact that, in the case of preventive measures, there are alternative approaches to public intervention as well as a distinct purpose. It is of a short-term, situational nature and is aimed at correcting the behavior of a person or preventing the risk of illegal behavior. Given that the concept of administrative liability is defined through state coercive measures, let us focus on their definition. For example, AdmOC RF Chapter 27 provides for a number of coercive measures related to measures to ensure proceedings in the case of an administrative offense: delivery; administrative detention; personal inspection; inspection of things, inspection of a vehicle of an individual, inspection of premises belonging to a legal entity, its territories, things, and documents located there; seizure of things and documents; suspension from driving a vehicle of the appropriate type; examination of an individual for intoxication; medical examination for intoxication; detention of a vehicle; seizure of goods and vehicles; temporary prohibition of an activity; deposit for an arrested vessel; placement of foreign citizens or stateless persons subject to administrative expulsion from the Russian Federation in the form of forced expulsion with special institutions provided for by Federal Law No. 115-FZ of 25 July 2002 "On the Legal Status of Foreign Citizens in the Russian Federation" (AdmOC RF Art. 27.1). In this case, there is no offense on the part of the subjects at all, but coercive measures are applied to them in order to prevent a potential offense, ensure compliance with the laws, and so on.

Finally, the legislation also contains such a coercive measure as requisition which is the forced non-gratuitous seizure of the owner's property in the event of contingencies or extraordinary circumstances, such as natural disasters, accidents, mass diseases, poisoning of people, epidemics, epizootics, and so forth, or the seizure of things pursuant to AdmOC RF Article 27.10 and their destruction under AdmOC RF Article 27.10(11) following the procedure established by the Government of the Russian Federation to protect public health from poor quality and dangerous food stock materials and foodstuffs and to prevent their turnover.

When it comes to defining administrative liability, we noted that there must be certain grounds in order for there to be administrative liability. Based on this criterion, the legal grounds for administrative liability are divided into: the rule of law prohibiting an illegal act and providing for liability (the normative ground); the offense (the elements of the offense) as a legal fact (the actual ground); and a law enforcement act defining a specific measure of state coercion (the specific ground). In addition, there is a ground providing for exemption from liability and exemption from administrative punishment pursuant to AdmOC RF Article 29.9, part 1.

It is also important to distinguish between administrative liability and disciplinary liability, which under AdmOC RF Article 2.5 "Administrative Liability of Military Personnel, Citizens Called Up for Military Training, and Persons with Special Ranks" is understood as a responsibility, according to which relevant individuals of the military and law enforcement service are held liable for administrative offenses in accordance with disciplinary regulations. In these cases, military personnel, citizens called up for military training, employees of the internal affairs bodies, the Investigative Committee of the Russian Federation, the National Guard troops of the Russian Federation, bodies of the penal enforcement system of the Russian Federation, the State Fire Service, and customs authorities, when they commit administrative offenses, bear disciplinary liability in accordance with regulatory legal acts prescribing the procedure for serving in these bodies. However, for administrative offenses provided for by Articles 5.1–5.26, 5.45–5.52, 5.56, 6.3, 7.29–7.32, 7.32.1, Chapter 8, Chapter 12, Article 14.9, part 7 of Article 14.32, Chapters 15 and 16, Articles 17.3, 17.7–17.9, parts 1 and 3 of Article 17.14, Articles 17.15, 18.1–18.4, parts 2.1, 2.6 of Article 19.5, Articles 19.5.7, 19.7.2, part 5 of Article 19.8, and Article 11.16, Article 20.4 (in terms of violating certain requirements) and part 1 of Article 20.25 of the Administrative Offense Code of the Russian Federation, persons bear administrative liability on general grounds. Thus, it is in the sphere of protection of the rights and freedoms of citizens and their security (Chs. 5, 6, 14, etc.) that liability is imposed on general grounds.

In addition, disciplinary liability includes liability of the employee and the employer provided for by the RF Labor Code and other normative legal acts of labor legislation (for example, liability for committing disciplinary offenses) and a number of other grounds for imposing disciplinary liability. These features of bringing offenders to liability for violating the rights, legitimate interests, and security of citizens must be taken into account in the administrative law regulation we are focusing on.

When discussing offenses in connection with administrative liability, we emphasize that they are a subsystem of the general scope of legal relations and, at the same time, an independent (separate) part of administrative relations. What makes relations connected with administrative liability different from "general administrative relations" is the ground for their occurrence. In the first case, it is a legal act by virtue of which relevant subjects are granted rights and obligations, but in the case of bringing a person to administrative liability in accordance with the Administrative Offense Code of the Russian Federation; the ground is a special legal fact, that is, the commission of an administrative offense. At the same time, one subject of the legal relationship, an official, by virtue of the public character of the legal relationship, is obliged to establish sufficient evidence proving an administrative offense committed (AdmOC RF Art. 28.1) and initiate proceedings on the administrative offense committed, while the offender (AdmOC RF Art. 28.2)

shall obey the rules established by administrative legislation, despite the fact that there is an imperative interference of the state in their private interests. Moreover, pursuant to AdmOC RF Article 28.8, an administrative punishment can be imposed without drawing up a protocol on an administrative offense.

Legal relations subject to administrative liability, with the presence of a special event, namely an incident of a non-ordinary (extraordinary) character that has signs of illegality, presuppose a state law position and specific legal ways of regulating these relations, which are contained in the concept of an administrative offense, while signs of illegal behavior are defined by the norms of the special part of the AdmOC RF and the laws of the RF subject to administrative liability. The law clearly establishes different stages of administrative proceedings, which include initiation of administrative proceedings (AdmOC RF Arts. 28.1–28.9); preparation for the case (AdmOC RF Art. 29.1); consideration of an administrative offense case (AdmOC RF Arts. 29.2–29.13); and revision of rulings and decisions made after consideration of the case (AdmOC RF Arts. 30.1–30.10). The peculiarity of establishing such stages is that they are regulated only by the norms of federal legislation, namely by the Administrative Offense Code of the Russian Federation and the Administrative Procedure Code of the Russian Federation. It should be said that the administrative procedure also has such stages as the execution of resolutions concerning the imposition of administrative punishment (AdmOC RF Arts. 32.1–32.12) or the issuance of a decision on the termination of administrative proceedings (AdmOC RF Art. 29.9, pt. 1).

In our opinion, another peculiarity of bringing a person to administrative liability for violating citizens' rights is that administrative proceedings, which have been transferred to the competence of judges, include the so-called "pre-trial" stage, but it is considered to be over when the protocol on an administrative offense is drawn up (sometimes after an administrative investigation) and the case is sent to court. At the same time, under the AdmOC RF, administrative offenses are also considered by officials of executive authorities who, in fact, carry out quasi-judicial activities. And it is worth noting here that the consideration of administrative offenses involves qualifying an administrative offense and imposing administrative punishment or terminating the proceedings, depending on whether or not there are circumstances precluding the need for proceedings in the case (AdmOC RF Art. 24.5). The difference between administrative-law and civil-law relations here is that the resolution of a dispute does not require legal qualification in the sense that there are no elements of an offense or any signs of *actus reus* established by the legislator. A legal relationship arising from various disputes reaches its object without consideration of these issues since neither the court nor other subjects of such a legal relationship have any rights or obligations concerning, for example, signs of *actus reus* of an administrative offense. Our statement is also confirmed by the analysis of both the theoretical provisions already noted by us and the practice of considering

these categories of cases.[5] On the other hand, the consideration of administrative offenses in essence should not be equated with managerial functions of executive authorities. Instead, it is necessary to define them as quasi-judicial, for example, in cases where such offenses are tried by administrative courts, administrative tribunals, and other administrative justice bodies in the United Kingdom, France, and other countries concerning violations of the rights and legitimate interests of citizens in the spheres of transport, housing, and utilities and other areas of the consumer market. These are conclusions supported by our research of these processes.[6]

From the above, we can draw the following conclusions: administrative liability is imposed not for any violation of administrative law norms (illegal actions (or inaction)), but only for the violation of such norms provided for by the dispositive legal norms of the AdmOC RF special part.[7] Secondly, an administrative offense may be recognized as a violation not only of the norms of administrative law directly, but also of the norms of other branches of law, for example, constitutional, financial, and so forth. This means that legal relations subject to administrative liability are of an intersectoral nature. Thirdly, an administrative offense cannot be punished through the application of the norms of civil liability and, consequently, we cannot speak of the emergence and development of legal relations typical for it.

3. Participants of Administrative Response

An administrative offense serves as the ground for the emergence of administrative relations and their subsequent development. In cases of administrative offenses, authorized executive authorities as subjects of legal relations regulate the emergence of the relevant legal relationship; and their aim is to develop and achieve their object, which is the safeguarding and protection of the legitimate interests of citizens. Subjects of legal relations connected with administrative liability are public authorities and their officials, individuals, and legal entities. However, the peculiarity is that there are different state body subjects at different stages of administrative case proceedings. At the stage of initiating proceedings, the subjects of legal relations are represented, as a rule, by officials of executive authorities (AdmOC RF Art. 28.3). But it is important to note that not all officials of executive authorities have such a right,

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[5] Постановление Пленума Верховного Суда Российской Федерации от 28 июня 2012 г. № 17 «О рассмотрении судами гражданских дел по спорам о защите прав потребителей» // СПС «КонсультантПлюс» [Resolution of the Plenum of the Supreme Court of the Russian Federation of No. 17 of 28 June 2012. On Considering Civil Cases on the Protection of Consumers Rights in Courts, SPS "ConsultantPlus"] (Aug. 4, 2022), available at http://www.consultant.ru/document/cons_doc_LAW_131885/.

[6] Panteleev 2015, at 9–118, 553–568.

[7] *Пантелеев В.Ю.* Проблемы государственной и общественной охраны и защиты потребителей [Vadim Yu. Panteleev, *Problems of State and Public Safeguard and Protection of Consumers*] 243–244 (2007).

but only specifically authorized ones. This is explained by the fact that the initiation of a case of an administrative offense, as well as the collection of necessary evidence, including during the administrative investigation, requires procedural powers that an official should be vested with in accordance with the established procedure. The powers of such an official represent a system of their procedural rights and obligations necessary to establish the presence or absence of circumstances to be proved in the case of an administrative offense. Officials authorized to initiate administrative proceedings, regardless of their departmental jurisdiction, have equal procedural rights and perform the same duties. When considering administrative offenses under the Administrative Offense Code of the Russian Federation, the subjects of legal relations on the part of the state are judges, commissions for minors and protection of their rights, and officials enlisted in AdmOC RF Article 22.2. At the same time, the fact that the authorized subjects of legal relations arising and developing in connection with administrative liability are changed is explained by the specific content of legal relations at each stage of administrative proceedings. However, in AdmOC RF Chapter 25, the above-mentioned representatives of the state are not named as participants in administrative proceedings. Legal relations subject to administrative liability arise and develop, while subjects representing the state undertake legally significant actions, but they are not recognized as participants in the proceedings. This lack of administrative law regulation must be addressed, and the authorized officials of executive authorities should be recognized as participants in administrative proceedings and, in this regard, we should make appropriate changes to the Administrative Offense Code of the Russian Federation. Under the AdmOC RF, an individual as a subject of legal relations subject to administrative liability can act as a person brought to administrative liability (Art. 25.1), a victim (Art. 25.32), and other persons listed in Chapter 25.

At the same time, it seems possible to classify legal relations subject to administrative liability into two types: (a) substantive, aimed at the implementation of the legal qualification of illegal actions (inaction), the imposition and execution of administrative punishment, and (b) procedural, aimed at defining the rights and obligations of all subjects in achieving these desired goals. These types of legal relations are interrelated and interdependent, and this is one of the reasons for the joint analysis of the substantive and procedural aspects of administrative liability. Procedural legal relations are classified according to their functional content. Substantive legal relations are also subject to dynamics, but to a lesser extent than procedural ones. First, they arise and develop based on the evidence of the event and on the elements of an administrative offense, the guilt of the person against whom administrative proceedings are initiated, and the legal definition of illegal actions (or inactions). Substantive legal relations subject to administrative liability are largely static; however, they can be changed to some extent depending on the imposition of administrative punishment. Thus, substantive legal relations arise

with respect to specific aspects of an administrative offense related to the legal qualification, the imposition of administrative punishment, and the execution of each of the types of administrative punishment provided for in AdmOC RF Article 3.2. The content of procedural legal relations subject to administrative liability is aimed at disciplining all participants in administrative proceedings; thus after initiating administrative proceedings, each of them has both procedural rights and procedural obligations throughout the course of the proceedings. Depending on the stage of proceedings and the specific situation, their combination is continuously changed and supplemented throughout the proceedings, so each legal relationship can arise only in its own time.

The main objectives of the emergence and development of legal relations subject to administrative liability are the protection and safeguarding of the rights and legitimate interests of citizens; their health and safety; sanitary and epidemiological welfare; protection of public morality; environmental protection; the established procedure for the exercise of state power; public order and public safety; property; the legitimate economic interests of individuals and legal entities; society, and the state from administrative offenses; and the prevention of administrative offenses by bringing the guilty person to administrative liability, all of which are achieved through the imposition and execution of administrative punishment.

It should be emphasized that legal relations subject to administrative liability have a significant impact on preventing the commission of new administrative offenses. During the execution of the decision concerning the imposition of administrative punishment, the person against whom it is imposed faces certain discomfort and various adverse consequences (temporary deprivation of liberty upon arrest, inability to drive a motor vehicle when deprived of the right to do so, and so forth.). These legal restrictions not only affect the person in question, but also preventatively affect an indefinite number of other persons, deterring them from future misconduct. Moreover, focusing solely on administrative offenses unjustifiably narrows the preventive potential of legal relations subject to administrative liability, for example, deterring from committing crimes (in the fields of tax, budget, financial, customs, environmental legislation, etc.).[8]

On these grounds, it seems necessary to identify other participants in administrative proceedings along with any common and special features in their legal relations with the participation of citizens. Thus, pursuant to AdmOC RF Article 25.1, a person in respect of whom administrative proceedings are initiated has the right to get acquainted with all the case materials, give explanations, present evidence, file petitions, and claims, be legally assisted by a defender, as well as enjoy other procedural rights in accordance with the Administrative Offense Code of the

[8] *Пантелеев В.Ю.* Проблемы повышения эффективности применения административного законодательства в профилактике правонарушений [Vadim Yu. Panteleev, *Problems of Increasing Efficiency of Administrative Law Application in Preventing Offenses*] 18–46, 211–249 (2018).

Russian Federation. The Code establishes that the victim, pursuant to Article 25.2, is an individual or a legal entity who has suffered physical, property, or moral damage caused by an administrative offense. And as we have proved by examining the provisions of the Code and the RF Law "On Consumer's Rights Protection," even though there are different types of protection, such as special state, municipal, and public protection as well as protection of citizens as "weak" or "particularly weak" and "particularly vulnerable" subjects of relations with entrepreneurs engaged in the production and sale of goods, works, and services, the victim can be both a consumer and an entrepreneur. Pursuant to AdmOC RF Article 25.3, protection of the rights and legitimate interests of an individual against whom administrative proceedings are being initiated or victims, who are "particularly weak" or "particularly vulnerable" subjects of legal relations (minors or those who are physically or mentally deprived of the opportunity to exercise their rights independently) is carried out by their legal representatives. The legal representatives of such an individual are their parents, adoptive parents, guardians, or trustees. The legal representatives of an individual against whom administrative proceedings are initiated and of the victim have the rights and obligations provided for by the Administrative Offense Code of the Russian Federation in respect of the persons they represent. Protection of the rights and legitimate interests of a legal entity against which administrative proceedings are being conducted, or a legal entity that is a victim, is also carried out by its legal representatives. The legal representatives of a legal entity in accordance with the Code are its head, as well as any other person recognized in accordance with the law or constituent documents as a body of such a legal entity, and their powers are confirmed by documents certifying the official position (AdmOC RF Art. 25.4).

To provide legal assistance to a person against whom administrative proceedings are being conducted, such proceedings may engage a defender; and a representative may participate in providing legal assistance to a victim. A lawyer or any other person (AdmOC RF Art. 25.5), or Commissioner for Entrepreneurs' Rights at the President of the Russian Federation under AdmOC RF Article 25.5.1, is authorized to act as a defender or representative in administrative proceedings at the request of a person against whom proceedings are being conducted because of an administrative offense committed in the field of entrepreneurial activity.

Pursuant to AdmOC RF Article 25.6, a person who may be aware of the circumstances of the case to be established may be summoned as a witness in administrative proceedings; and pursuant to AdmOC RF Article 25.8, any adult person who is disinterested in the outcome of the case, who has the knowledge necessary to assist in the detection, consolidation, and seizure of evidence, as well as in the use of technical means, may be involved as an expert. Under the Code, any adult person who is disinterested in the outcome of the case and who has special knowledge in science, technology, art, or craft, sufficient to conduct an expert examination and give an expert opinion, may be involved as an expert (AdmOC RF Art. 25.9). And this

is especially important, since the consumer, unlike the entrepreneur, does not have this knowledge. Moreover, there are significant restrictions on their involvement when identifying, documenting, and considering cases related to administrative liability pursuant to Articles 18, 40, 45, and 46 of the RF Law "On the Protection of Citizens' Rights."

Taking into account these features of the administrative procedure, it is important to classify the persons authorized to consider administrative offenses. Such persons include judges (AdmOC RF Art. 23.1), commissions for minors and protection of their rights (AdmOC RF Art. 23.2), bodies of internal affairs (police) (AdmOC RF Art. 23.3), tax authorities (AdmOC RF Art. 23.5), customs authorities (AdmOC RF Art. 23.8), bodies carrying out federal state sanitary and epidemiological supervision (AdmOC RF Art. 23.13), bodies exercising control over the release of genetically engineered organisms into the environment (AdmOC RF Art. 23.13.1), bodies exercising state environmental supervision (AdmOC RF Art. 23.29), federal executive authority exercising federal state energy supervision (AdmOC RF Art. 23.30), federal executive authority exercising federal state transport supervision (AdmOC RF Art. 23.36), executive authorities of the subjects of the Russian Federation exercising regional state control in the field of passenger and baggage transportation by passenger taxi (AdmOC RF Art. 23.26.1), executive authorities of the subjects of the Russian Federation exercising state control in the field of passenger and baggage transportation by road and urban ground electric transport (AdmOC RF Art. 23.26.2), bodies exercising functions of control and supervision in the field of communications, information technologies, and mass communications (AdmOC RF Art. 23.44), federal antimonopoly authority, its territorial bodies (AdmOC RF Art. 23.48), federal executive authority exercising federal state supervision in the field of protection of citizens' rights (AdmOC RF Art. 23.49), bodies exercising state control (supervision) in the field of production and turnover of ethyl alcohol, alcoholic, and alcohol-containing products (AdmOC RF Art. 23.50), bodies exercising state control (supervision) in the field of state-regulated prices (tariffs) (AdmOC RF Art. 23.51), federal executive authorities exercising state control (supervision) over compliance with mandatory requirements for products and/or federal state metrological supervision (AdmOC RF Art. 23.52), executive authorities of the subjects of the Russian Federation exercising regional state housing supervision (AdmOC RF Art. 23.55), bodies exercising state construction supervision (AdmOC RF Art. 23.56), bodies exercising state supervision over the condition, maintenance, preservation, use, popularization, and state protection of cultural heritage objects (AdmOC RF Art. 23.57), bodies exercising state control (supervision) in the field of natural monopolies (AdmOC RF Art. 23.59), the Bank of Russia (AdmOC RF Art. 23.74), executive authorities of the subjects of the Russian Federation, for example, cities of federal significance such as Moscow and St. Petersburg (AdmOC RF Art. 23.79), federal executive authority exercising functions of control and supervision in the field of healthcare (AdmOC RF Art. 23.81), and

others. Pursuant to Article 40 of the RF Law "On Consumer's Rights Protection," federal executive authorities exercising federal state supervision in the field of protection of citizens' rights, as well as federal executive authorities exercising state control (supervision) over compliance with mandatory requirements for products and/or federal state metrological supervision, and courts have special powers in this area.

In particular, we have already noted the specifics of the participation of public authorities and their officials in this process and have taken into account the advanced Russian, international, and foreign experience. The prosecutor has special powers, and, in accordance with the Administrative Offense Code of the Russian Federation, within the limits of his powers, has the right to: initiate administrative proceedings; participate in the consideration of an administrative offense; present evidence; file petitions; give opinions on issues arising during the consideration of the case; bring a protest against the decision on the case of an administrative offense, regardless of participation in the case, and perform other actions provided for by federal law. In order to exercise these powers, the prosecutor is notified of the place and time of administrative proceedings for an offense committed by a minor, as well as in the case of an administrative offense initiated by the prosecutor (AdmOC RF Art. 25.11).

There are both common and essential features associated with proceedings when bringing a person to administrative liability for violating the rights and legitimate interests of citizens, their safety and health, property, and environmental protection. They are primarily related to the procedural actions used to establish the fact of an administrative offense. Taking into account this feature, we propose to determine such a stage as the stage that comes before the initiation of an administrative offense case in connection with the control purchase, research, and so on. In addition, the following stages also have special features: initiating administrative proceedings (AdmOC RF Arts. 28.1–28.9), preparing for consideration of the said case (AdmOC RF Art. 29.1), considering an administrative offense case (AdmOC RF Arts. 29.2–23.13), and reviewing rulings and decisions issued after considering the case (AdmOC RF Arts. 30.1–30.10). Unlike constitutional, criminal, and civil proceedings, jurisdictional proceedings fall within the jurisdiction of various law enforcement agencies, including executive authorities and their officials, judges of district courts, garrison military courts, arbitration courts, and justices of the peace, including the stage of executing the decision on the imposition of administrative punishment (AdmOC RF Arts. 32.1–32.12) or the decision to terminate proceedings on an administrative offense (AdmOC RF Art. 29.9, pts. 1, 11).

Administrative liability depends on the object of encroachment: (a) safety of life and health of citizens (AdmOC RF Chs. 6, 7, 8, 10, 11, 12, 13, 14), (b) rights and legitimate interests of citizens (AdmOC Arts. 5.43, 7.3,7.11, 7.12, 7.13, 7.14, 7.18, 7.19, 7.20, 7.21, 7.22, 7.23, 12.23, 13.6, 13.8, 14.3, 14.5, 14.6, 14.8), (c) property of citizens (AdmOC Arts. 7.17, 7.27, 12.27, 14.6, 14.7), (d) public, economic, food, biological,

environmental, and information production (technological) security (AdmOC Arts. 6.14, 9.1, 9.2, 9.3, 9.4, 9.5, 9.9, 9.10, 11.26, 11.28, 12.1,14.4).

Conclusion

Thus, we formulate the concept of administrative liability based on the goals of protecting and safeguarding life, rights, and legitimate interests, health, property of citizens and the public, food, economic, industrial (technological), biological, environmental, information, and other types of security (protective function), as a comprehensive legal response of the state (represented by authorized public authorities and their officials) for violation of the rights and legitimate interests of citizens. This is formalized by a set of substantive norms, as well as the procedural order for initiating and considering relevant administrative offenses, imposing and executing administrative penalties expressed in the fact that the offender is under the obligation to face adverse consequences established by the legislator through administrative punishment, or terminating proceedings in cases determined by law.

This definition integrates the majority of the existing theoretical approaches to understanding the legal nature of administrative liability, fully meets the modern needs of public law regulation of the safeguard and protection of the rights and legitimate interests and security of citizens, and serves as a scientifically sound basis to further improve both the terminology used in the legal doctrine and standardize the administrative legislation of the EAEU countries.

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MANDATORY CSR IN INDIA – A TRAILBLAZER FROM THE EAST

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The paper attempts to trace the evolution of the concept of Corporate Social Responsibility (CSR) and seeks to gather how it turned out to be a boon for the developing nations of the world, particularly countries like India. By the path-breaking promulgation of the Companies Act, 2013, CSR was made mandatory in India, for companies meeting the financial thresholds mentioned in Section 135 of the Act. The author seeks to study the journey of CSR in India, the present law, and the latest amendments made to the same in recent times. The paper evaluates the rationale behind the mandatory CSR law and how it can be a game-changer in India Inc.'s commitment to social causes. The author has also suggested how the mandatory CSR regime in India can be further strengthened to contribute meaningfully, particularly in the fields of education and healthcare, through better project identification, stronger execution linkages, an overhaul of the board committees, flexible and pragmatic government rules, and synchronization of the corporate CSR activities with the lead programmes of the Government of India. These reinforcements can go a long way in making the CSR approach much more effective and value accretive.

Keywords: Corporate Social Responsibility; Companies Act 2013; Indian corporate law; Corporate Governance; COVID-19.

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Introduction

At the Responsible Business Summit, held on 7 and 8 May 2013 in London,[1] after hours of deliberations on the future of sustainability of business in the world, the most distinctive resolve of the participants was inspired by a Chinese proverb "*When the wind blows, there are those that build walls and then there are those that build windmills*." This was not only a powerful acknowledgement by the global business leaders about the extraordinary social role played by modern-day companies but more importantly, about the direction and form of their contribution.

Present-day corporations are political, economic, environmental, and cultural powerhouses without which today's increasingly globalised and commercially connected world cannot be visualized. They no longer work in isolation and their activities influence consumers, shareholders, suppliers, employees, and society at large. They have an impact on over a billion lives every day, a large number directly and many more in imperceptible ways. Hence, the modern perspective about corporations recognizes them as responsible corporate citizens and enjoins them to not only be financially secure but also function in line with societal expectations like equity, climate control, labour standards, human rights, and good governance, ensuring minimal negative impact on the external environment. This concept of corporate citizenship constitutes the central thesis of corporate social responsibility (CSR), which aims to align businesses with the objective of sustainable global development and not just profit.

Having broken the shackles of a controlled economy and buoyed by a highly liberalized economic regime since the early 1990s, India is presently not only one of the fastest-growing global economies, but also the fifth largest in the world.[2] However, it was the mandatory CSR mechanism introduced in India by the new

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[1] The 12th annual Responsible Business Summit (7–8th May 2013, London), EuroCert Auditing & Certification Services (Sept. 1, 2022), available at https://www.eurocertglobal.eu/Pages/view.aspx?PostID=707.

[2] India pips the UK to become world's 5th biggest economy, Times of India, 2 September 2022 (Sept. 1, 2022), available at http://timesofindia.indiatimes.com/articleshow/93955841.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

Companies Act, 2013, which has stood out as a most pioneering step and stunned the whole world. In a single stroke, India has become the first country globally to create a sizeable impact in the field of social sector and in mobilizing funds for social development. More than the merits of such a move by a country which still has a fifth of its population below the poverty line, it was the boldness in the decision which left the world community stupefied.

The paper seeks to trace the evolution of the CSR concept and examine how over time it occupied the corporate landscape worldwide. It then goes on to build how CSR turned out to be a panacea for developing countries, particularly a country like India. An attempt is made to fathom the rationale behind such a path-breaking corporate move of a mandatory CSR law in India and the progress and credentials recorded under this regime till now. The paper also talks about the various amendments made to the law relating to CSR in the last few years and how these amendments address the concerns raised about the new law. It explains how a successful implementation of mandatory CSR can lead to sustained social upliftment. It also offers many novel suggestions to turn CSR activities into agents for social change. Some execution gaps in the ongoing CSR projects have also been analysed and suggestions have been offered to plug them. The paper also explores possibilities of greater synergy between governmental efforts and the CSR activities of the companies. The judicial scrutiny undergone by the new CSR regime is also discussed to evaluate how the court verdicts and directions have benefited the growth of CSR in its initial phase. A mention is also made of the crucial role played by the new CSR regime in providing the necessary impetus to the government's fight against the COVID-19 pandemic. The contribution made by the companies shall certainly help the new regime consolidate its position in India.

1. Concept and Evolution of CSR

On the global front, philanthropic activities by the industrialists can be traced back to the industrial revolution. By the mid-to-late 1800s there were growing concerns about the well-being of the workers.[3] Business leaders like Andrew Carnegie and John D. Rockefeller not only gave the first real glimpses of the social responsibility actions of the businesses but also made solid contributions. However, all these efforts were informal and it was the American economist Howard Bowen who, in 1953, coined the term CSR in his publication titled "Social Responsibilities of the Businessman."[4] After a surprising lull for a couple of decades, CSR truly began to gain ground in the U.S.

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[3] America at Work, America at Leisure: Motion Pictures from 1894 to 1915, Library of Congress (Sept. 1, 2022), available at https://www.loc.gov/collections/america-at-work-and-leisure-1894-to-1915/articles-and-essays/america-at-work/.

[4] Howard R. Bowen, *Social Responsibilities of the Businessman* (2013).

in the 1970s when the concept of "social contract" was declared by the Committee for Economic Development in 1971.[5] The social contract was based on the idea that a business functions because of the public 'consent' and, therefore, the business has an obligation to constructively serve the needs of society. Corporations started accepting that their stakeholders went beyond the board room and that when their customers and communities were healthy and vibrant, their companies would be as well.[6] Later, the concept of CSR became central to the research of hordes of leading scholars of the 1990s and it started gaining acceptance as well as eminence.

A major thrust to the CSR movement came with the views of R. Edward Freeman who, in 2010, proposed his "stakeholder theory,"[7] according to which corporates should not remain limited to the interest of the shareholders only, but also of other stakeholders like employees, customers, suppliers, community, government, environment etc. who directly get affected by the actions of the corporation. This theory changed the perspective of managing modern businesses. Though the growth of these corporations is typically measured in economic terms – sales numbers, profits, profit margins, revenue, etc., in reality, their impact extends well beyond the bottom line. While the traditional approach focused on the idea of value creation and capture by the firm with shareholder primacy being an accepted norm, the stakeholder perspective obligated the business managers to manage the firms while taking into consideration the interests of all concerned stakeholders. The natural outcome of the stakeholder theory was the recognition of CSR as a value creator.[8] Gradually but certainly, CSR has become a new paradigm of inclusive development and businesses are fast accepting CSR spending as investments and not expenditure.[9]

Companies at large now realise that they extract resources from society, in the form of human resources, minerals, raw materials, etc. By way of CSR activities, the companies endeavour to pay back to society. Besides, a well-implemented CSR programme can lead to a bouquet of positives like enhanced customer engagement and loyalty, commitment to investors, spirited human resources and a much-improved brand image, clearly making the community an important and crucial

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5 Corporate Social Responsibility: A Brief History, Association of Corporate Citizenship Professionals (Sept. 1, 2022), available at https://accp.org/resources/csr-resources/accp-insights-blog/corporate-social-responsibility-brief-history/.

6 *Id.*

7 R. Edward Freeman, *Strategic Management: A Stakeholder Approach* (2010).

8 Birte Freudenreich et al., *A Stakeholder Theory Perspective on Business Models: Value Creation for Sustainability*, 166(1) J. Bus. Ethics 3 (2020).

9 Forest L. Reinhardt et al., *Corporate Social Responsibility Through an Economic Lens*, 2(2) Rev. Envtl. Econ. Pol'y 219 (2008).

stakeholder for the growth and sustainability of a company.[10] Though many CSR projects may look small in the beginning, but is it not true that polio got eradicated from the world because every two drops given to an infant counted? This way CSR is fast becoming a steady commitment by businesses to integrate social and environmental concerns in their operations.

Thus, across geographies, businesses have evolved with the primary purpose of serving the interests of their stakeholders, consumers, workers, vendors, the board of directors, shareholders, government agencies, trade unions, political factions, and the media, among others. Together such actions constituted the core of the global CSR movement. Yet, the geographical progression of the CSR concept also called the "*green consciousness*," did not follow a predicted course. No wonder, in the first few decades, CSR as a concept gained more ground in Europe than in the US, while the latter was responsible for its early induction into business literature. The presentation of the Green Paper by the European Commission in 2001 was a landmark moment and laid the groundwork for CSR in Europe.[11] A levelling off took place in recent years, with the US government acknowledging the need for companies to be held accountable and to take action to regain the lost ground.[12] The subsequent mainstreaming of the concept of CSR, fuelled by the efforts of leading campaigners like Greenpeace and many others, has now contributed to its acceptance as a business imperative in the West.[13]

2. CSR – A Panacea for Developing Countries

The significance of CSR in the developing countries vis-à-vis the developed world is higher because many developing countries are not only the most rapidly growing economies of the world today but also the places where social inequity and crises are rampant, and the CSR activities are most potentially placed to make a lasting impact. Unfortunately, since these countries have significant segments of the population, which is at the *bottom of the pyramid*, the economic growth reported by them has often struggled to be inclusive and widespread. As Bill Gates, the charismatic business leader expressed in his famous 2008 speech at the Davos World Economic Forum,

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[10] Asif Mahmood & Jamshed Bashir, *How Does Corporate Social Responsibility Transform Brand Reputation into Brand Equity? Economic and Noneconomic Perspectives of CSR*, 12 Int'l J. Eng. Bus. Mgmt. (2020).

[11] Almerinda Forte, *Corporate Social Responsibility in the United States and Europe: How Important Is It? The Future of Corporate Social Responsibility*, 12(7) Int'l Bus. Econ. Res. J. 815 (2013).

[12] *Id.*

[13] Prachi Juneja, *The Practice of Corporate Social Responsibility (CSR) Around the World*, Management Study Guide (2015) (Sept. 1, 2022), available at https://www.managementstudyguide.com/csr-practice-around-the-world.htm.

> The world is getting better, but it is not getting better fast enough, and it's not getting better for everyone. The great advances in the world have often aggravated the inequities in the world. The least needy see the most improvement, and the most needy get the least – in particular, the billion people who live on less than a dollar a day.[14]

The desirability of robust CSR programmes in developing countries, with an inclusive development focus, could not have been stated better.

During the initial phase of the CSR movement, continents like Asia, South America and Africa remained laggards in the adoption of CSR as a compelling concept; some commentators from those areas even called this concept an imperialist construct[15] or an avoidable fad coming from the rich countries. Yet, in recent years, CSR efforts in developing countries have also registered traction, with inclusive development as the cherished goal. The green shoots started emerging from across the fraternity of developing countries in the last about a decade or more. As a result, Indonesia, Vietnam, India, the Philippines, Zambia, Brazil, Mexico, and Colombia have emerged as the bright spots of CSR.

A CSR marvel based in Mexico, *Fundacion del Empresariado Chihuahuense* (FECHAC), is worth mentioning. FECHAC is an independent, not-for-profit, and autonomous grant-making foundation. Its goal is to meet the vital needs of the community in three spheres – quality basic education, preventive health, and social capital. It is a platform, founded in 1984, practically populated by all the corporations of the state of Chihuahua, the biggest state in Mexico. It has implemented over 4200 projects in Chihuahua for the human and social advancement of the people of Chihuahua and has successfully addressed the problems of marginalisation and social exclusion.[16]

Some signal events and announcements at the global level have also catalysed the CSR movement tremendously. The announcement of the U.N. Global Compact at the World Economic Forum in January 1999 paved the way for promoting responsible practices among the global business community.[17] With more than 12000 signatories in over 160 countries already, the CSR landscape is now very well represented, and the ten principles of the Global Compact are fast becoming the norm across businesses, large as well as small.

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[14] Caroline Van Zile, *India's Mandatory Corporate Social Responsibility Proposal: Creative Capitalism Meets Creative Regulation in the Global Market*, 13(2) Asian Pac. L. & Pol'y J. 269 (2012).

[15] Juneja, *supra* note 13.

[16] Fundacion del Empresariado Chihuahuense (FECHAC) (Sept. 9, 2022), available at http://os.fechac.org.mx/acceso#.

[17] World Economic Forum, The U.N. Global Compact (Sept. 1, 2022), available at https://widgets.weforum.org/history/1999.html.

On 25 September 2015, 193 United Nations Member States embraced the Sustainable Development Goals (SDGs) to put an end to global poverty, protect the planet and safeguard the wellbeing of everyone as a part of a new sustainable development agenda. The seventeen goals, related to poverty eradication, gender equality, zero hunger, quality education and good health etc., which consist of one-hundred and sixty-nine targets, need to be achieved by the year 2030. The success of this fifteen-year programme primarily hinges on the participation of the developing countries in pulling millions out of the socio-economic miseries. Successfully implemented CSR programmes can provide the necessary fillip to the efforts of the member states. India has played an integral part in the establishment and evolution of SDGs and is committed to their attainment. NITI Aayog, the apex public policy think tank of the Government of India, is spearheading the execution of SDGs in India.[18] In order to achieve its SDGs targets, India needs the mobilization of USD 0.6 trillion per year, which in present times, means a financing gap of about USD 550 billion per year. In this context, CSR has a very vital role to play in India, especially in bridging the said financing gap through the fast-expanding canvas of projects undertaken by various companies.

3. Mandatory CSR and its Journey in India

In the ancient Indian tradition, charity always had a place of eminence. The concept of *Daana* in Buddhism, *Zakat* in Islam and innumerable references to compassion and assistance to others in Hindu texts like the Vedas, the Upanishads etc. are testimonies to the same.[19] The overpowering thought was that those endowed with the bounties of nature owe a duty towards the needy, leading to a belief that Indian business leaders shall carry this responsibility to their companies, which are still mostly individual, or family driven.[20]

From being predominantly a family value, culture, charity, and philanthropy driven in the 18th and 19th centuries, the growth of CSR was strongly influenced by Mahatma Gandhi's concept of trusteeship for societal benefits in the 20th century.[21] Yet, post the independence of India, from 1947 to the early 1980s, the corporate sector was under the sway of state controls and dominance of public sector undertakings, leaving little space for the private sector.

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[18] Sudershan Kuntluru, *Corporate Social Responsibility and Firm Performance: Indian Evidence*, Working Paper 317, Indian Institute of Management Kozhikode (2019) (Jul. 10, 2022), available at https://ideas.repec.org/p/iik/wpaper/317.html.

[19] Arjya B. Majumdar, *India's Journey with Corporate Social Responsibility: What Next?*, 33(2) J. L. & Com. 165 (2015).

[20] *Id.*

[21] Aruna Jha, *Auditing and Corporate Governance* (4th ed. 2021).

Since 1980s, and thereafter post the economic liberalization unleashed in the 1990s, a new paradigm of CSR concept started developing in the country, abandoning the tradition, and positioning CSR as a sustainable business strategy. A globalized economy and much-energised business chambers made the air abuzz with terms like responsive corporates, shared values, and strategic CSR. In this earlier phase of the CSR practice, the country witnessed exemplary work by leading business groups like Tatas, ITC and Mahindra and Mahindra in the fields of health, education, women empowerment, and environment protection.

The first mention of inclusive growth, the central concept of strategic CSR, appeared in India as a policy objective of the Eleventh Five Year Plan in 2007.[22] The next major change was the Corporate Governance Voluntary Guidelines, 2009, released by the Government hinting at the imperative of CSR activities. This was followed by the year 2010 announcement of a mandatory CSR for the Public Sector Undertakings (PSUs), above a given threshold. The framing and issuance of the guidelines of this first attempt at mandatory CSR for the PSUs was led by Dr Bhaskar Chatterjee. Later, he also played a major role in the inclusion of section 135 of the Companies Act, 2013 and in the establishment of the National Foundation for Corporate Social Responsibility, an apex national institution in the field of CSR.[23]

The Ministry of Corporate Affairs (MCA) released the National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business in the year 2011 after extensive consultations with business, academia, and civil society organizations and based on the feedback received about the 2009 CSR Guidelines. Finally, in July 2011, a "*comply or explain*" CSR obligation was included in a comprehensive Companies Bill introduced in the Parliament which ultimately led to the new and pragmatic Companies Act, 2013, which comprised a mandatory CSR regime, making this the first such all-encompassing legislation globally. In view of the fact that the rapid economic growth of recent decades only exacerbated socio-economic inequity and the major corporations of the country contributed precious little, this legislation can prove to be a game changer.

The declaration of mandatory CSR drew loads of praise from across the cross-section of economists and political commentators, but it had to contend with unsparing critics also. So, while *The Economist*, called it the "*coerced do-goodery*,"[24] leading local business leader Mr Ratan Tata likened it to another tax on business. Some

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[22] Amit Lahiri & Pratik Phadkule, *Purpose of CSR in Current Social and Economic Context of India*, CSR Mandate (2018) (Sept. 9, 2022), available at http://www.csrmandate.org/purpose-of-csr-in-current-social-and-economic-context-of-india/.

[23] National Foundation for CSR, Ministry of Corporate Affairs (Sept. 1, 2022), available at https://www.mca.gov.in/content/mca/global/en/about-us/affiliated-offices/nfcsr.html.

[24] Indian firms make the best of coerced do-goodery, The Economist, 16 November 2017 (Sept. 1, 2022), available at https://www.economist.com/business/2017/11/16/indian-firms-make-the-best-of-coerced-do-goodery.

critics termed it as an exercise in outsourcing government social responsibility to the private sector to cover up its own failures.[25] At this juncture, it would be worthwhile to look into the architecture of the new mandatory CSR law and understand the nuances of the new regime.

Section 135 and Schedule VII of the Companies Act, 2013 and the provisions of the Companies (Corporate Social Responsibility Policy) Rules, 2014 are the relevant provisions pertaining to the mandatory CSR introduced by the new act. The act came into force with effect from 1 April 2014 and required companies meeting certain financial thresholds[26] were required to constitute a CSR Committee and devise a CSR Policy. These provisions were not only applicable to Indian companies but also to project offices of a foreign company in India. Every qualifying company is required to spend at least 2 per cent of its average net profit for the immediately preceding three financial years on CSR activities in India.[27]

The qualifying companies shall be required to constitute a CSR committee, consisting of three or more directors, including at least one independent director. Those companies which are not required to appoint an independent director shall constitute their CSR Committees to include two or more directors.[28] The CSR committee shall formulate a CSR policy, recommend the expenditure to be incurred on the activities referred and monitor the CSR policy.[29]

Schedule VII of the Companies Act, 2013 provides for twelve activities that could be taken up by the companies to achieve their CSR obligations. Such activities comprise the ones aimed at eradicating poverty, hunger, and malnutrition or those related to education, educational research, healthcare, and environmental protection. CSR projects can also be for promoting art, culture and sports, particularly rural sports. The list also includes activities like rural development, urban slum area development and disaster management. It is pertinent to note that the CSR projects or activities conducted by the companies which benefit only the employees of the company, and their families are not to be included in the CSR activities of the company.[30]

The Board of Directors of every company is required to disclose the contents of the CSR Policy of the company in the Board Report prepared annually. It is

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25 Kuntluru, *supra* note 18.

26 Section 135(1) of the Companies Act, 2013 provides for the following threshold limits for the applicability of CSR to a company:

a. Net worth of the company to be INR 5000 Crores or more; or

b. Turnover of the company to be INR 1000 Crores or more; or

c. Net profit of the company to be INR 5 Crores or more.

27 *Id*. Sec. 135(5).

28 *Id*. Sec. 135(1).

29 *Id*. Sec. 135(3).

30 Rule 2(d) of the Companies (Corporate Social Responsibility Policy) Rules, 2014.

incumbent on the Board to include details on activities undertaken, allocation of funds, destination state and place, etc.[31] The same is also required to be uploaded on the Company's website.[32] The company is obliged to communicate with its different stakeholders through this reporting and thereby demonstrate its commitment to its CSR obligations.

4. Amendments to the Mandatory CSR Provisions

The salience and appositeness of mandatory CSR cannot be overstated. Yet, after this pioneering legislation came into existence, concerns were raised about its provisions. The government also showed a lot of receptiveness and pragmatism and carried out appropriate amendments to the CSR law, majorly in the years 2019 and 2021, to make it not only more effective and robust but also more realistic.

Salient features of the 2019 Amendment:

a. In sub-section (5) of section 135, after the words "*three immediately preceding financial years*," the words "or where the company has not completed the period of three financial years since its incorporation, during such immediately preceding financial years" were added. As is evident, this was carried out keeping in mind many companies that may not have completed three years from their incorporation.

b. In continuation of sub-section (5) of section 135 of the Companies Act, 2013, a new sub-section (6) was added with the arrangement that any unspent amount of an ongoing project was to be kept in a separate bank account. The amount so carried forward must be spent in consonance with the CSR policy within three financial years from the date of such transfer. In case of failure to do the same, the company has to transfer this unspent amount to a fund specified under Schedule VII of the Act. This amendment was necessary to ward off any confusion regarding the parking of the unspent funds of an ongoing CSR project.

c. In the sub-section (5) of section 135 of the Companies Act, 2013, in the second provison, after the words "*reasons for not spending the amount*," the words "and, unless the unspent amount relates to any ongoing project referred to in subsection (6), transfer such unspent amount to a fund specified in Schedule VII, within a period of six months of the expiry of the financial year" were inserted. This amendment cleared the air about how the funds related to a non-ongoing CSR project were to be dealt with.

d. The provision offering recourse of explaining reasons for not spending CSR funds had diluted the mandatory CSR law substantially and the insertion of Sec. 135 (7) which brought in the penal provisions in the mandatory CSR law, was the first sign of the mandatory CSR regime moving from a "*comply or explain*" to "*comply or suffer*" approach.

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[31] Rule 8 of the Companies (Corporate Social Responsibility Policy) Rules, 2014.

[32] *Id*. Rule 9.

Salient features of the 2021 Amendment:

The amendments effected in the year 2021 included several changes that were mooted in the latter half of the year 2019 and the year 2020, but their legislative clearance got considerably delayed due to the pandemic. The following were the salient amendments:

a. Non-compliance with CSR obligations was decriminalized by treating it as a civil wrong instead of a criminal offence, giving great relief to the companies. But, while the sword of imprisonment in case of non-compliance vanished, the penalties were made more stringent. Presently, a company's failure to comply with CSR requirements shall make it liable for a penalty of twice the amount needed to be transferred by the company to the fund referred to in Schedule VII or to the Unspent CSR Account, as the case may be, or to INR 1 Crore, whichever is lesser. Further, every officer of the company in default shall be liable to a penalty of one-tenth of the amount required to be transferred by the company to such Fund specified in Schedule VII, or the Unspent CSR Account or INR 2 Lakhs, whichever is lesser.[33]

b. Companies with CSR obligations below 50 Lakh rupees were exempted from the need to form a CSR committee. The board of such companies needs to act as the CSR committee.[34]

c. While retaining the earlier list of permitted activities, a negative list of six activities was outlined for which no CSR projects can be undertaken. The excluded activities include those undertaken by the company in its normal course of business (barring a three-year exemption for COVID-19-related research and development activities), activities undertaken abroad, any political contributions, activities to benefit the company employees, activities for marketing benefits and for fulfilling any other statutory obligations.[35]

d. Another noteworthy addition by way of the amendment was defining an "Ongoing Project," as a project executed by a company over a few years, not exceeding three years (excluding the year of its inception).[36] The expanded meaning of this definition shall include projects not originally conceived to extend beyond one year for completion but, later approved by the board to so extend. This will help all those companies who may like to convert a short-term project into an ongoing project to avail themselves of the benefits that such projects enjoy.

e. The 2021 Amendment Rules allow companies to select CSR engagements that are in conformity with their CSR policies and carry out the activities independently

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33 Sec. 135(7) of the Companies Act, 2013.

34 *Id*. Sec. 135(9).

35 Rule 2(d) of the Companies (Corporate Social Responsibility Policy) Rules, 2014.

36 Sec. 135(6) of the Companies Act, 2013.

or through an outsourced implementing agency.[37] However, an outsourced entity will be able to operate only after completing a registration process made mandatory from 1 April 2021, wherein the Registrar of Companies shall ensure that the project implementation is entrusted only to agencies having the necessary wherewithal.[38] The board of the company may decide to entrust the CSR activities to a registered society or trust or Section 8 company with an established track record. Even two or more such companies can be assigned work, provided they report individually.

f. The amendment rules have capped the expense chargeable against the administrative overheads at 5 per cent of the total CSR spend.[39] This move would arrest the tendency of companies to book unlimited expenditure against this head. Additionally, any surplus arising out of the CSR activities undertaken by the company shall not constitute the business profit of the company.[40]

g. The most ground-breaking change introduced by the Amendment Rules is the requirement for the company to conduct an impact assessment through an independent agency and present the assessment report before the company board. However, this obligation applies only to companies with an average CSR obligation of Rs. 10 crores or more in the three immediately preceding financial years and to projects with financial outlays of Rs. 1 crore or more.[41]

The amendments to the CSR law symbolize a paradigm shift in the role of CSR projects, from an explanation-based approach to a consequence-based one and aimed at:

(i) Enhancing clarity about various CSR provisions and dispelling the prevalent confusion;

(ii) Controlling excessive discretion at the disposal of the companies; and

(iii) Striking uniformity in the application of the legal procedure.

5. Analysis of the Mandatory CSR Regime in India

Eight years of mandatory CSR regime may not be too long period to permit an opinion about its success, yet this has given enough opportunity to the private sector to collaborate with the larger objectives of the government for greater and lasting good. There are some visible signs of strength emerging from the working of the mandatory CSR regime, but there are some flaws too.

Strengths:

a. Corporations, backed by their large knowledge base and managerial skills, are better equipped to promote social goods than the government. For example, their

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37 Rule 4(1) of the Companies (Corporate Social Responsibility Policy) Rules, 2014.

38 *Id*. Rule 4(2).

39 *Id*. Rule 7(1).

40 *Id*. Rule 7(2).

41 *Id*. Rule 8(b).

understanding of the skill set and the training needs of the local youth for different kinds of jobs would be more than that of the government.

b. India, having one of the highest concentrations of poverty, mere tax-revenue-driven welfare programmes of the government may fall short in accomplishing the cherished goals of lifting the masses out of severe privation. Through successfully executed CSR projects businesses and private wealth can shoulder a part of this burden. Given the inefficiency in most public programmes, the companies can generate more efficient public goods at a lower cost.[42]

c. India faces a severe dilemma wherein despite nearly dysfunctional education and health systems and over one-fifth of its population living in acute poverty, its manoeuvring capability through excessive taxation or regulations is limited.[43] It is in this context that the collaboration sought through mandatory CSR can be viewed as India's most innovative response to the complex set of economic pressures and challenges.

d. Ever since CSR spending became a mandatory provision in India, CSR became a buzzword across the corporate world. There have been seminars, conferences, and newspaper articles galore on the subject.[44] This augurs very well for the future growth of the CSR revolution in India.

e. The numbers clocked under the mandatory CSR regime are also very inspiring. Whereas the total CSR spend registered in the year 2014-15, the first year of the mandatory CSR, was INR 6388 crore, through 1790 projects run by 460 companies, the total spend reached INR 24689 crore by the end of the year 2019-20. The COVID-19 pandemic played havoc during the year 2020-21 and the total spend slipped down to INR 8828 crore, a dip of 64% compared to the preceding year. However, the CSR spending shot back in the year 2021-22 and registered a figure of INR 20539 crore, with 8632 companies successfully executing over 25000 projects. The current year is also poised to net strong numbers.[45]

f. Decades of experimentation with corporate governance have given India a hybrid system where owing to the adoption of the liberalized economy regime in the 1990s, the Indian economy has made rapid strides. As a result, though our Constitution remains socialist, the economy is now functionally capitalist. The mandated CSR is, therefore, aimed at securing the best consequences out of this divide. Because of the extraordinary circumstances prevailing in India, this law is not

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42 Van Zile 2012.

43 *Id.*

44 Pushpa Sundar, *Five Years After CSR Became Mandatory, What Has It Really Achieved?*, The Wire, 21 August 2018 (Sept. 15, 2022), available at https://thewire.in/business/five-years-after-csr-became-mandatory-what-has-it-really-achieved.

45 India Ministry of Corporate Affairs, CSR Expenditure: Summary, National CSR Portal (Sept. 15, 2022), available at https://www.csr.gov.in/content/csr/global/master/home/home.html.

only a bold step but a pragmatic one also. Hence, the accusation of mandatory CSR being a "legal transplant from a dissimilar economic context" holds no ground.[46]

g. In its beginning, the mandatory CSR regime faced criticism for being bureaucratic and more of a marketing or tick-box activity to meet compliance standards with no lasting sustainable impact. The amendments of the CSR law in the years 2019 and 2021 were a serious step toward bringing in the *pay what it takes* philanthropy approach where the social impact of CSR activities is reckoned as a yardstick for appraising Indian companies' social contribution. For example, impact assessment can be a game-changer as it would help the company boards secure optimum utilisation of funds by segregating the projects offering the most significant impact from those with limited impact. In this way, greater insights into the social rate of return on its investment towards CSR activities can enable it to contribute meaningfully to the nation's sustainable development goals.

Possible concerns:

a. Historically India suffers from a lack of inclusive growth as the benefits of its socio-economic policies have not trickled down to the needy. The new CSR law offers no robust solution for the same.

b. Companies are neither equipped nor trained to be agents of welfare.[47] The new CSR law could turn out to be neoliberal thoughts locking horns with democratic demands. By forcing unprepared and often unwilling companies into the social sector, we may rather be making a place for malfeasance and wrong practices.

c. The new law could potentially patronise greenwashing where CSR credits could be sought on already existing efficient business models or practices. An example could be energy-efficient machines installed as a prudent financial decision but proclaimed as ensuring environmental sustainability.

d. The new law permits companies to engage with third parties in the execution of their CSR programmes. Although this opens huge opportunities for over 3 million NGOs to look for new partners and new funds, it also exposes them to a potential loss of moral legitimacy as most companies shall be skewed towards more quantifiable and result-oriented projects rather than longer-term transformational ones. Lack of transparency in CSR reporting is another area of concern. There is no fool proof mechanism yet to keep a vigil over this.

e. Identifying suitable projects for CSR obligations remains a challenge and companies, perforce, are biased to fund projects in their neighbourhood and that too into only a few fields. No wonder, the growth of CSR till now has been skewed, with only a few developed states like Maharashtra, Gujarat, Karnataka, Tamil Nadu, and

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[46] Van Zile 2012.

[47] Nandini Deo, *Why CSR does more harm than good*, The Hindu Business Line, 3 December 2019 (Sept. 15, 2022), available at https://www.thehindubusinessline.com/opinion/columns/why-csr-does-more-harm-than-good/article30151614.ece.

Andhra cornering the bulk of the CSR projects, while poorer and more populous states like Uttar Pradesh, Bihar, Jharkhand, and Chhattisgarh as well as the whole of north-east facing acute geographic inequity with negligible CSR footprints. The projects have been concentrated on education, health, and rural development only.

f. Section 135 of the Act and the corresponding rules seem rather prescriptive and fail to provide much flexibility to companies. The inclusion of the impact assessment requirement is a brilliant move, but the Amendment Rules prescribe no standard procedure or format. This fantastic tool may not yield desired outcomes unless the government clarifies the method to be followed for carrying out an impact assessment. The five per cent cap on the administrative overheads may be seen as an impediment by most companies as this could be too restrictive in the case of many CSR projects.

g. There is a concern that a mandatory CSR expenditure shall put India at a competitive disadvantage and retard its near-miraculous recent growth and turn it into a not-so-attractive destination for foreign investors.[48]

h. Some critics feel that mandatory CSR is inherently contradictory as it has legislated upon something which is characteristically inspirational. They call it a back-door attempt to tax companies.[49]

6. Bright Stars in the Mandatory CSR Regime

Despite the fact that the experience so far with the mandated CSR law is peppered with mixed results, some companies have exhibited tremendous success in their ongoing CSR projects in the last few years. The following are a few such shining examples:

Education: The *Nanhi Kali* project launched in the year 1996 by the Mahindra and Mahindra group, a leading automobile company in India, to educate underprivileged girls for a minimum of 10 years, is a shining example of the success of CSR programs. The core objective of the project is to address the challenges like low female literacy and workforce participation levels and thereby check the spread of evils like child marriages and child labour. Compared to supporting nearly 100,000 girl children countrywide in the year 2012, the project has at present reached out to over 500,000 underprivileged girls in 14 states of India. The project has opened its offices in the U.S. and the UK to garner support for the activities underway in India. Another initiative of this group, since 2005, which it runs in partnership with the Naandi Foundation,

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[48] Aneel Karnani, *Mandatory CSR in India: A Bad Proposal*, Stanford Social Innovation Review, 20 May 2013 (Sept. 6, 2022), available at https://ssir.org/articles/entry/mandatory_csr_in_india_a_bad_proposal.

[49] CSR spending obligation on companies needs to be jettisoned in its entirety, The Hindu Business Line, 6 December 2021 (Sept. 15, 2022), available at https://www.thehindubusinessline.com/opinion/editorial/csr-spending-obligation-on-companies-needs-to-be-jettisoned-in-its-entirety/article29291440.ece.

is the Mahindra Pride Schools empowering the less privileged youth (18–25 years) from socially disadvantaged sections like Scheduled Castes, Scheduled Tribes, Other Backward Classes and the Notified as well as De-notified tribes, with job skills. With 9 such schools operational across India, the group aims to train 1 million youth by 2025, with 100% placement assurance.

Healthcare: Tata Steel, the bellwether company of the renowned Tata Group and a global steel giant, launched a very significant project called the Maternal and New-born Survival Initiative (MANSI) in the year 2009 in the Seraikela block of the state of Jharkhand. Buoyed by the stellar success registered in the parameters like Neo-natal Mortality Rate and the Infant Mortality Rate in the last about a decade, MANSI has been scaled up from the 167 pilot villages to now over 1700 villages in the states of Jharkhand and Orissa. By May 2026, the programme plans to cover 5000 villages with a primarily marginalised tribal population of over 4 million. In its first 5 years, the programme was able to reduce the neonatal mortality rate by 61.2% and the infant mortality rate by 63.1%. The company is moving full steam ahead with this stellar performance of the project.

Eradication of Hunger: India's most reputed IT company Infosys Ltd. has joined hands with the Akshaya Patra Foundation and together they spearhead the world's largest (not-for-profit run) and a path-breaking mid-day meal programme serving wholesome food every school day to over 1.8 million children from over 19000 schools across 14 states and 2 Union Territories of India. The programme made a very humble beginning in the year 2000 for just 1500 school children in 5 schools in Bengaluru, in the state of Karnataka.

7. Judicial Scrutiny Faced by the Mandatory CSR

Although section 135 of the Companies Act, 2013 made a robust provision for mandatory CSR and the various subsequent amendments to the CSR law in 2019 and 2021 were aimed at further consolidating its position, the new regime had to face judicial scrutiny. Though the case law related to mandatory CSR is still in its infancy, some cases merit mention for better appreciation of the new law and its provisions.

a. *S. Cyril Alexander v. Union of India*[50] – This case involved a writ petition filed at the Madras High Court with a prayer for the issuance of a writ of mandamus to authorities to exclude the tobacco industry from the purview of the CSR scheme to prevent the tobacco industry from earning goodwill through direct/indirect advertisement of tobacco products. The court held that it was a policy matter and directed the concerned authorities to devise an appropriate policy in this regard within four months.

[50] *S. Cyril Alexander v. Union of India*, Writ Petition No. 9955 of 2014, High Court of Madras.

b. *MOIL Ltd. v. Commissioner of Income Tax*[51] – In this case, the appeal was against the orders of the Income Tax commissioner and the Income Tax Appellate Tribunal, remanding the assessment of the petitioner firm back to the Assessment Officer because of lack of sufficient information about the CSR expenditure. The court allowed the appeal with the observations that the record suggested that the Assessment Officer made enough efforts to secure the information about the CSR expenditure and took a reasoned decision in allowing the CSR expenditure.

c. *Parikh Enterprises Private Ltd., In Re*[52] – In this case, though the petitioner company, owing to its financials, was obliged to form a CSR committee and take up projects for CSR expenditure, it failed to do the same nor did it explain its failure in the financial statements. The petitioner firm pleaded that this being a new law, it failed to do the needful during the financial year 2013-14, but that it had constituted a CSR committee later on and that the compliance of its CSR obligations was being done continuously thereafter. The NCLT, Ahmedabad allowed the compounding of the violation and imposed a fine of INR 100,000.

d. *NTPC-SAIL Power Co. Ltd. v. Deputy Commissioner of Income Tax*[53] – The petitioner company, in this case, was obliged as per law to spend INR 2.37 Crore on CSR activities. It pleaded in front of the Income Tax Appellate Tribunal, New Delhi, that though it spent the above amount on tree plantation/environment protection, construction of a zoology laboratory, medical camps at various places, construction of a bus stop shed and an awareness campaign against drug abuse, the expenditure was disallowed by the Assessment Officer on the ground that the expenditure was incurred voluntarily and not because it was mandatory. The Income Tax Appellate Tribunal did not agree with the position taken by Assessment Officer and allowed the CSR expenditure of the petitioner.

e. *M/S Technicolor India Private Ltd. v. The Registrar of Companies, Karnataka*[54] – In this case the CSR spend incurred by the petitioner company was wrongly mentioned by its relevant department and the Board of Directors of the company issued its reports basis that information. Through this petition, the company pleaded in front of the NCLT, Bengaluru Bench, for permission to revise the Board of Directors' report on CSR spending. It admitted that the original report of the company was wrongly submitted owing to human lapse. The NCLT Bench allowed the petition and at the same time made its order without any prejudice to the right of the statutory authorities to initiate action against the company for any lapse as regards the requirements of section 135 of the Companies Act, 2013.

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51 *MOIL Ltd. v. Commissioner of Income Tax*, Income Tax Appeal No. 67/2016, Bombay High Court.

52 *Parikh Enterprises Private Ltd., In Re*, CP No. 4/441/NCLT/AHM/2017.

53 *NTPC-SAIL Power Co. Ltd. v. Deputy Commissioner of Income Tax*, ITA No. 2146/Del/2017.

54 *M/S Technicolor India Private Ltd. v. The Registrar of Companies, Karnataka*, CP No. 124/BB/2019.

Aside from the judgments of various courts and tribunals, the best endorsement for the mandatory CSR came from Justice Madan Lokur, a judge of the Supreme Court of India who called the mandatory CSR regime a step towards the realisation of directive principles of state policy enshrined in the Indian Constitution. He famously remarked:

> The state cannot merely rely on societal actions and responses of corporates' philanthropy, therefore practically and feasibly there is nothing wrong in the legislative mandate of the CSR. The concept has tremendous potential to bring out positive changes in society's major concerns.[55]

8. Way Forward: The Imperative of Constant Chiselling

India is in an unassailable position with its mandatory CSR programme. In a country where a large part of its 1.35 billion population is beset with perpetual problems like geographic inequity and a very poor record on the human development index, a mandatory CSR regime, if effectively implemented, can be a game-changer. It is, therefore, of paramount importance that this legislation is not allowed to remain just another legislation, devoid of a focussed implementation and result-orientation as is the case with many government schemes. The Government shall need to develop a strong collaborative partnership with the corporate world to meet the targets of sustainable and inclusive growth. This calls for a constant vigil and a proactive stance at the government level to affect all legislative and executive actions whenever required for the unhindered growth of the new CSR ecosystem.

A collaboration between the government and the business sector calls for a long-term view, not simply a meeting-the-numbers approach. For CSR practices to emerge as an alternative method for sustainable development, the primary prerequisite is to provide innovative solutions to make CSR sharper, wiser and more focused on what counts, and yes, it may often involve some dirtying of hands. Corporates have the experience, intellect, vision, strategic thinking, manpower and resources to promote wide-ranging social reform. What they require is a favourable environment for channelling their strengths in the realisation of the profound objectives of mandatory CSR.

Some strategic changes in the CSR approach of the companies can bring about lasting benefits as follows:

Education: The core objective behind a robust education system is to bring up the youth, armed with the necessary skills and empowered to carve a career

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[55] Supreme Court judge defends mandatory CSR provision, The Economic Times, 27 July 2015 (Sept. 15, 2022), available at https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-judge-defends-mandatory-csr-provision/articleshow/48218958.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

for themselves. Also, education for girls is more like a vaccination against child marriage, and bad maternal and child welfare and is the foundation of their economic freedom.

India has one of the largest student populations, nearly 200 million, in the K-12 segment. This segment, therefore, remains the most salient area where a focused CSR approach can bring about the most value accretive results. While this sector, together with skill development, receives about 38% of the total annual CSR expenditure, many CSR projects in the education sector are limited to raising school buildings, getting all the schools in an area painted, or arranging for books, study material, furniture, or fans etc., which is akin to raising a body without a soul. The focus areas should be trained teachers, leadership at the school level, great academic hygiene to keep students attracted to the schools, emphasis on skill development and linkages with vocational institutes.

In their CSR approach in the education sector, the companies shall be well advised to introduce the following strategic changes:

a. Teacher's training is an area where not much is presently being done. There have been 3 education policies introduced in India till now: 1968, 1986 and 2020. Simultaneously and otherwise, there have been innumerable changes in the subjects, curriculum, content, and pedagogical infrastructure. Yet, a very high percentage of teachers have never attended a formal teachers' training programme which is so crucial for aligning their profiles to the pressing requirements of the times. CSR programmes on teacher training can bring much greater value to the table as a trained teacher is going to be an asset for the school.

b. Vocational training projects in the CSR field need to migrate towards an apprenticeship-based model wherein the host companies may look at the twin benefits of fulfilling CSR obligations as well as finding resources for themselves. In India, sectors like retail and e-commerce, tourism, logistics, beauty and wellness and construction are examples of skill deficits. An apprenticeship-oriented CSR project can do wonders in such sectors.

c. Inspiration can be drawn from the 'Teach India' initiative of the Times of India group. This social programme connects children from the underprivileged sections of society to those who are willing to devote time to teaching them. A variant of the above initiative can be taken up as a CSR project wherein retired teachers at various schools could be approached to spearhead teaching programmes. Thousands of such retired teachers are scattered in various states and taking 60 years as the average retirement age, most such teachers can devote time, at least till they turn 70. With over 35 years of teaching career behind them, such teachers can bring a wealth of experience to the projects.

Education is an area where results do not come instantly and years of hard work and unstinted concentration lead to sustainable success. Therefore, companies need to have a long-term approach while formulating their CSR projects in the education

sector. The Government also needs to have an accommodating stance as regards the application of its policy framework.

Healthcare: This is another high-priority sector from the CSR spend point of view and along with sanitation and Swachh Bharat Abhiyan, receives nearly 28% of the annual CSR expenditure. Much of this expenditure goes into health camps or building hospitals or donating funds for the upkeep of hospital facilities. While health camps create short-term ripples and are majorly number driven, the raising of hospitals is also often poorly targeted.

Some calibrations in the present approach can give much better results as follows:

a. Focus on primary care, not tertiary care. Train youth in the villages as a para-medical force in rural India. Develop pharmacies in the hinterland and train them to provide medications for common illnesses. They may also assist with primary diagnostics such as blood pressure, pulse, and sugar monitoring. This could emerge as a cheap and efficient health service at the cutting-edge level of our society. Strong primary health infrastructure in villages can also reduce the burden on the large urban hospitals.

b. Corporations may subsidise the provision of medical education to bright students. They can collaborate with established medical colleges to extend their services and update their teaching methodologies. Let us not forget that the per capita availability of doctors in India, particularly in rural areas, is abysmally low.

c. Given the high cost of medical treatment, companies can promote health insurance for the poor in a brand-agnostic way.

d. Companies can promote the traditional medicine system under the umbrella of the AYUSH system, for which there is a separate ministry at the Union level. Such medicines have natural acceptance in many segments of the Indian population and at the same time, the traditional medical system can be ancillary to the mainstream healthcare system.

e. Health check-up camps have been a focus area for many companies. The need is to track the follow-up treatment as suggested during such camps, which alone shall deliver lasting results.

f. There is a great need for supporting non-mainstream illnesses like mental health and autism, etc. Such facilities are nearly absent in major parts of the country.

Competencies of companies: Companies can leverage their specialized competencies for better results in their CSR projects. This qualifies as smart spending also as the value accretion out of such activities is much more. Some examples could be telecom companies setting up facilities in areas lacking such services or FMCG companies leading projects involving food processing or food preservation.

Project identification based on expert data: There are many excellent research platforms in India. Companies can rely on expert data while selecting projects for the purpose of their CSR obligations. An example could be the annual wastage

of food recorded in India. Indians lose as much food annually as the whole of the United Kingdom consumes. According to the UNDP, up to 40% of food produced in India gets wasted. 194 million Indians go hungry every day according to the United Nation's FAO despite India wasting 67 million tonnes of food worth USD 14 Billion a year, which translates to more than INR 110000 Crore annually. This wastage has a knock-on effect also on the environment as the effort made to produce the wasted food generates greenhouse gases, uses water, and adds to deforestation.

Transportation in India needs to be improved, and so does the storage facilities, including cold storage chains. Food processing needs to be promoted as processed food has a much longer life than raw food articles.

CSR Projects covering themes like crop protection, higher yield realization, improved and modern warehousing infrastructure, food processing projects in most backward parts of the country and most importantly, development of linkages between containment of wastage and management of hunger, can bring about a world of difference in the efficacy of such projects. Successful execution of such projects shall do much more than the meeting of the CSR obligations by the companies; they could potentially be the best examples of nation-building and administrative efficiency. As a bonus, this unabated self-destruction shall also be arrested.

The boardrooms redux: Boardrooms need to rise to the occasion and lead a two-way transformation. Firstly, a shift in its approach – CSR must turn from a legislative requirement to a core constituent of the company's business plan. A clear vision of the long-term benefits of a CSR programme, driven principally by the top management of the company, can certainly secure smooth assimilation of this concept into the everyday functioning of the company. Secondly, the above approach needs to be reinforced by the constitution of a dedicated CSR cell within the company and the entrustment of its functioning to personnel with relevant profiles. The CSR cell needs to be accorded due importance by the top brass of the company to allow it to make a space for itself.

Though the data since the inception of the new law suggests that the CSR projects, to the tune of two out of three, are being run through outsourced agencies, an ideal way is for the companies to run them through their home-grown teams. The benefits are going to be many and lasting. A project run by the company itself instils exuberance in the team, brings efficiency to operations, makes supervision intense and meaningful and last but not least, develops a motivated and experienced team to run such programmes with greater success in future and consistently also.

In this respect, it is pertinent to highlight that for companies, not only selecting a suitable CSR project is a challenge, but even implementing a CSR project is a gargantuan task. It includes a myriad of aspects, such as evaluating regulatory enforcement, managing the organisation's budget, and performing frequent project audits. Over time, CSR implementation is going to get more complex. The good news

is over the last few years, several online platforms have emerged in India, to aid businesses to strategize, define, execute, and monitor their CSR initiatives through data-driven knowledge and action. A few prominent agencies are Samhita GoodCSR, SociallyGood and Goodera.

Flexible and pragmatic government rules: There is a strong need to move away from the straight-jacketed rules and regulations and allow the companies some breathing space while they are raising sustainable social assets, like a school, a health centre, a skill training institute, etc. The companies need the flexibility of, for example, spending a major amount, to begin with, while raising physical assets, followed by a phase wherein greater focus shifts to developing the hygiene to make the system run. There are many projects in which the consistency of annual financial expenditure may not be possible. Some financial goals could be missed in a couple of years but if over a larger period the financial commitments are being met along with the successful execution of the project, the rules should grant that leverage to the companies. Remember, we are raising sustainable assets, not merely statistics.

Synchronization with the lead programmes of the Government of India: There is a strong need to align CSR initiatives of the companies with the major governmental programmes like Swachh Bharat Abhiyan, Beti Bachao Beti Padhao, Digital India, PM Ujjwala Yojana, Skill India and Make in India. These programmes are principally aimed at women empowerment, skill development, all-around cleanliness in the country, energy conservation etc. and can be highly value accretive in the social transformation of the country. CSR programmes can immensely benefit from the strong constituency around these flagship projects which the Government can build through awareness campaigns.

For instance, a brilliant programme like Swachh Bharat Abhiyan needs two very important follow-up projects – (a) Maintenance of millions of toilets built across the country. Keeping them clean and functional shall motivate people to adopt them completely; and (b) Behavioural orientation of the people for cleanliness through the banishment of the archaic habits. CSR projects involving the adoption of specific areas and programmes on the above two themes can be a huge fillip to the success already accomplished in this field.

All these programmes have the potential to change the very landscape of the country. For CSR projects built around such schemes, the company's focused execution and the Government's outreach can combine well to secure better results. The monetary sources are there, and the purpose is there; the right platforms need to be reached.

The Greenply CSR – A case in point: The skill development project of Greenply Industries, the leading wood panel manufacturer in the country, is a trendsetter. The company's adoption of new technologies and product innovation is changing the way furniture and wood fixtures are designed. The company runs programmes to extend opportunities to carpenters and contractors to upgrade their skills regularly.

It organizes training workshops for carpenters to familiarise them with the latest tools, techniques, and products in wood panelling.

The company has developed an Android App "Carpenter Guru" which hosts video tutorials, gives tips and shares best practices. Besides Hindi and English, this App is available in 7 more Indian languages.

Along the lines of the Greenply Industries CSR project, there is a critical need for projects for raising trained plumbers, electricians, and bricklayers. Urban India has seen a mushrooming of high-rise housing condominiums in the last two decades, but there is a dearth of trained personnel to contribute to the construction phase and then provide seamless housekeeping assistance to such settlements. In the absence of trained resources, the infrastructure sector, particularly the housing industry, is dependent on migratory labour from specific regions of the country. In the recent past, we witnessed how the reverse migration of such labour due to the pandemic threat, brought the infrastructure sector to its knees.

9. The COVID-19 Pandemic: A Test of the Resilience of CSR Activities

The efficacy and relevance of the mandatory CSR regime was put to its first big test in fighting the battle against COVID-19 as a partner with the Government. Needless to overstate, the companies in India, through their CSR efforts, provided the necessary fillip to the Government's actions to fight this evil. The government of India in March 2020 confirmed the novel coronavirus outbreak in India as a "notified disaster." Through the notification, the MCA declared that the expenditure of funds for COVID-19 relief is an eligible activity under CSR. The Government had referred to this change as "a special one-time dispensation," which would cause the money from each State's Disaster Response Fund (SDRF) to be made available for temporary housing and provision of food, water and medical services for patients and residents in quarantine camps.[56]

The Government also set up the "Prime Minister's Citizen Assistance and Relief in Emergency Situations Fund" (PM CARES Fund) to combat the COVID-19 crisis and extend support and relief to those affected. Further, Schedule VII of the Companies Act, 2013, was amended to include donations and contributions made to PM Cares Fund as CSR spending.

In August 2020, the Government further updated the CSR regime to include research and development investments by companies in the development of novel vaccines, drugs, and medical devices related to COVID-19 and extended this arrangement till the year 2022-23. Such an arrangement is bound to encourage a private pharmaceutical firm, for example, to conduct research in the field of

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[56] Chandrashekar Srinivasan, *India Declares Coronavirus a Notified Disaster*, NDTV, 14 March 2020 (Sept. 2, 2022), available at https://www.ndtv.com/india-news/india-declares-coronavirus-a-notified-disaster-lists-compensation-2194915.

pharmaceuticals in association with institutions like the Indian Institutes of Technology or the Indian Council of Medical Research and obtain assistance from them.

While the Government proactively put in place a robust CSR infrastructure to strengthen its efforts, the corporate world also responded positively. The following are some examples:

(a) Leading corporate entities like Reliance Industries, Jindal Group, Hero Group, Mahindra and Mahindra, Bajaj Group, Tata Group, Infosys, Wipro, Adani Group, HDFC, etc. contributed sizeable amounts, ranging from INR 100 crore to 1500 crore, for fighting COVID-19, including separate contributions towards the PM CARES Fund. Many companies contributed or committed supplies like masks, sanitisers, PPE kits and ventilators.

(b) Some companies offered entirely novel services. Reliance group came up with a 100-bed hospital, in collaboration with the Brihanmumbai Municipal Corporation, for corona patients in Mumbai and also gave free fuel for all emergency service vehicles on COVID-19 duty.[57] Mahindra and Mahindra group had put all its resorts in line for being converted into temporary care centres and had offered to use its manufacturing units to make ventilators.[58] Infosys Foundation helped establish smart classes in 1,000 government higher primary schools in Karnataka in an INR 20 Crore project. India's largest carmaker Maruti Suzuki had tied up with AgVa Healthcare to manufacture 10,000 ventilators per month to bridge the shortfall of this life-saving medical device.[59] Hindustan Unilever Limited, Godrej group and biscuits major Parle supplied soaps, sanitisers, and biscuits respectively, to the vulnerable sections of society.

(c) The foreign companies were not far behind and made significant contributions. Companies like Xiaomi and Hyundai committed lakhs of masks and diagnostic kits. Google partnered with the Prime Minister's Office (PMO) to facilitate contributions to the PM CARES fund through Google Pay and also worked very closely with MyGov in helping dislocated migrant workers.[60] Companies like 3M and Uber also made significant contributions.

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[57] Reliance sets up dedicated Covid-19 medical centre with BMC, The Hindu Business Line, 23 March 2020 (Sept. 2, 2022), available at https://www.thehindubusinessline.com/news/reliance-sets-up-dedicated-covid-19-medical-centre-with-bmc/article31143591.ece.

[58] Piyush Pandey, *Anand Mahindra offers to convert Mahindra resorts to temporary care facilities*, The Hindu, 22 March 2020 (Sept. 2, 2022), available at https://www.thehindu.com/news/national/coronavirus-anand-mahindra-offers-to-convert-mahindra-resorts-to-temporary-care-facilities/article31134490.ece#:~:text=Industrialist Anand Mahindra%2C chairman of,fight the deadly coronavirus pandemic.

[59] Sumant Banerji, *Battle against coronavirus: Maruti ties up with AgVA Healthcare to produce 10,000 ventilators per month*, Business Today, 28 March 2020 (Sept. 2, 2022), available at https://www.businesstoday.in/sectors/auto/battle-against-coronavirus-maruti-ties-up-with-agva-healthcare-to-produce-10000-ventilators-per-month/story/399487.html.

[60] Shubham Verma, *Google reveals Google Pay users contributed over Rs 124 crore to PM Cares Fund*, India Today, 13 July 2020 (Sept. 2, 2022), available at https://www.indiatoday.in/technology/news/story/google-reveals-google-pay-users-contributed-over-rs-124-crore-to-pm-cares-fund-1700053-2020-07-13.

In this regard, three path-breaking policy reforms of the Government of India gave CSR a new persona. These included allowing the spending of CSR funds on COVID-related operations, making all donations for COVID-related initiatives eligible for a 100 per cent tax deduction and making all donations to the PM CARES Fund beyond a company's minimum specified CSR qualify for an offset against the future CSR liability.[61]

The tough pandemic time gave the corporates a few lessons also. It showed how interrelated the present world is and how critical is to prioritise innovation and raise resilient business entities. For India, the pandemic period can certainly be termed as the high point of CSR as the capital generated by this movement during the crisis shall propel it to its future success.

Conclusion

CSR, as a concept, has undoubtedly evolved from its modest beginnings in the 1950s to a full-fledged business imperative in the present times. It has traversed quite a distance between what Milton Friedman had to say more than four decades back:

> There is one and only one responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game

to what the founder of Virgin Group, Richard Branson, had to say in April 2017:

> It should no longer be just about typical "corporate social responsibility" where the "responsibility" bit is usually the realm of a small team buried in a basement office – now it should be about every single person in a business taking responsibility to make a difference in everything they do, at work and in their personal lives.

Undoubtedly, the most powerful acknowledgement of CSR's arrival is coming from a top business leader of the contemporary times.

As for India, since independence, the government has been the sole agency for executing social welfare programmes. Though civil society has also contributed and given some bright examples of social upliftment, it has been majorly a government effort. But it is a truism that, the achievements of the government-run welfare schemes till now, are heavily outnumbered by their failures to meet the expectations of the

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[61] Pushpa Sundar, *Covid has pushed CSR deeper into corporate consciousness*, The Hindu Business Line, 9 September 2020 (Sept. 2, 2022), available at https://www.thehindubusinessline.com/opinion/indias-csr-a-work-in-progress/article32561479.ece.

masses. And it is a saga of not only mediocre government performance but much more than that the tragedy of having missed so many opportunities. No wonder, in the Human Development Index (HDI) report for the year 2022, India ranks a poor 131 among 188 countries, manifesting how much catching up it needs to address the deficit of social development goals. What disappoints more is the paradoxical situation one notices in India – India declared itself a food-grains surplus many years back and is self-sufficient with respect to products like milk, vegetables, fruits, and poultry. Why does India then rank so poorly in the World hunger index and the HDI? Most certainly, a case of lack of crucial linkages in the successful implementation of the various welfare programmes of the government.

Against the above backdrop the arrival of the new Companies Act, 2013 with a mandatory CSR provision, has heralded a new and comprehensive corporate law regime in India. The uniqueness of the new regime does not lie so much in making India the first county of this size to introduce such an all-encompassing mandatory CSR law, as in proclaiming, in no uncertain terms, its intent of entrusting the Indian corporate fraternity with a decisive social role.

We are still in the initial phase of the new CSR regime in India. The skew in favour of schools and hospitals in the CSR projects is understandable as it may simply lead to more appreciation, reciprocity, and goodwill in society since they are far more noticeable. The heightened awareness about CSR calls for initiatives to check regional disparity and usher in a new regime of inclusive social development with a transparent reporting mechanism. The strengthening of the law of mandatory CSR can prove more effective if the evaluation of the CSR activities is carried out by an outside autonomous agency. At the same time, the Government may be well advised to have a recognition platform for celebrating well-executed CSR programmes. Public recognition of the India Inc. and the NGOs can develop the required groundswell for mandatory CSR and enhance the participating companies' brand equity. Aside from the above, a stricter monitoring and evaluation regime with greater emphasis on accountability is the demand of the time.

Undoubtedly, by deploying mandatory CSR as an agent for inclusive development, India finds itself catapulted to the pole position in this field. The exemplary role played by India Inc. in the fight against COVID-19 is a case in point. As the popularity of CSR rises, more and more countries may embrace the Indian model and may seek to harness the power of corporate-funded investments in spearheading social welfare projects. In this way, India's mandatory CSR legislation may well represent the launch of a new wave of growth in the sphere of CSR and a novel solution to an increasingly crucial global conundrum. Come on India! This is your moment.

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REINFORCING INDIGENOUS PEOPLES' RIGHT TO HEALTH IN THE WAKE OF THE COVID-19 PANDEMIC: A PANACEA FOR SUSTAINABLE HUMAN RIGHTS PROTECTION

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The rights of indigenous peoples have become an important issue of international law and policy over the past three decades as a result of movements led by indigenous peoples, civil society, international mechanisms and states at the domestic, regional and international levels. Indigenous peoples are widely recognized as being among the world's most vulnerable, disadvantaged and marginalized peoples. In order to identify, recognize and protect the rights of indigenous peoples, it is necessary to have a clear understanding of who the indigenous people are. Moreover, the definition that is derived cannot be static, but must change with the times and from place to place as well as adapt to the changing circumstances and environments. This paper analyses the statutory definitions of indigenous peoples and their rights as provided under the United Nations legal framework and other regional frameworks. Furthermore, it examines the unique perspectives on health held by indigenous peoples as well as their vulnerability to the COVID-19 pandemic. The question that was posed in this paper, however, was whether the right to health extends to indigenous peoples, thereby making it binding on a far greater number of actors. And what are the issues that pertain to the human rights of indigenous peoples. Nevertheless, this paper noted that the United Nations Human Rights System, as well as its mechanisms, laws and policies have been at the heart of these developments. This paper takes an analytical and qualitative approach to its research and builds its argument on existing literature, which is achieved through a synthesis of ideas. The paper concludes that the rights of indigenous peoples are increasingly being formally incorporated into the domestic legal systems of various countries.

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Introduction

In general, indigenous peoples each have unique and distinctive cultures, languages, legal systems and histories. The notion of indigenous peoples' rights has been formally recognized by the United Nations (U.N.).[1] However, it does so in a way that applies human rights to indigenous peoples and their specific situations, thereby helping to reverse their historical exclusion from the international legal system. Furthermore, it must be emphasized that the rights of indigenous peoples, which are considered part of international human rights law, are *sui generis* because of their inclination towards the customs and traditions of the people concerned rather

[1] *See* U.N. General Assembly, Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/47/1, 13 September 2007 (May 21, 2022), available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/512/07/PDF/N0651207.pdf?OpenElement.

than an established corpus of positive law.[2] In addition, it is important to understand that international activity on indigenous peoples' issues has been expanding also in regional human rights bodies, such as the African and the Inter-American human rights systems, as well as in International law and policy areas as diverse as the environment, including climate change, intellectual property and trade.

In the same vein, it should be noted that the United Nations system has established a number of mechanisms with specific mandates to address the rights of indigenous peoples. One such mechanism is an advisory body of the Economic and Social Council that has the mandate to discuss indigenous issues relating to economic and social development, culture, environment, education, health and human rights.[3] In sum, the purpose of this paper is to examine and analyze indigenous peoples' right to health under international human rights law in the wake of the COVID-19 pandemic. These rights are widely recognized under the International Covenant on Economic, Social and Cultural Rights.[4] Additionally, this paper will examine the COVID-19 pandemic, the attendant World Health Organization (WHO) regulations and their effect on the fundamental right to health of indigenous peoples. It may be argued that even when there are no such extraordinary circumstances like the COVID-19 pandemic, indigenous peoples' right to health are rarely respected globally. These views are justified considering the chequered history of rejection of the rights of indigenous peoples, but the scope of this paper will be limited to indigenous peoples' right to health under the COVID-19 pandemic.

Thus, this paper will commence by providing an overview of indigenous peoples' rights in order to demonstrate the importance of the right to health to indigenous peoples. Subsequently, a conceptual clarification of key terms pertaining to the human rights of indigenous peoples will be presented in line with recognized international and regional human rights frameworks. Furthermore, this paper will examine the COVID-19 pandemic and its effects on indigenous peoples' right to health. Lastly, this paper will examine the right to health in accordance with the international human rights law and other international legal instruments. In this regard, this paper will summarize with a conclusion.

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[2] *Aurelio Cal et al. v. Attorney General of Belize*, Supreme Court of Belize, Claims Nos. 171 and 172 of 2007, 18 October 2007, at 101 (May 21, 2022), available at https://www.elaw.org/es/content/belize-aurelio-cal-et-al-v-attorney-general-belize-supreme-court-belize-claims-no-171-and-17.

[3] U.N. Permanent Forum on Indigenous Issues, General Comment on Economic and Social Council Resolution 2000, Art. 22 (May 21, 2022), available at https://www.un.org/esa/socdev/unpfii/index.html.

[4] U.N. General Assembly, International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), A/RES/21/2200, 16 December 1966, Art. 12 (May 21, 2022), available at https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_2200A(XXI)_civil.pdf.

1. Conceptual Clarification

1.1. Who Are Indigenous Peoples?

The term "indigenous peoples" has no single authoritative definition under international law and policy, nor is the term defined in the U.N. Declaration on the Rights of Indigenous Peoples. Different persons may define the concept on different platforms depending on their cultural, religious, social and economic backgrounds. These definitions of the concept are sometimes based on the concept's own self-definition or even on the concept's functions. Be that as it may, an indigenous person may be defined as follows:

> One who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group). This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference.[5]

Evidently, no formal definition has been adopted in international law. On the other hand, a strict definition is seen as unnecessary and undesirable. For instance, it is essential to emphasize that the U.N. Declaration on the Rights of Indigenous Peoples[6] states:

> Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. [Art. 9]
>
> Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. [Art. 33]

In this sense, in order to have a better understanding of the definition of the term "indigenous people," the Martínez Cobo study[7] provided the most widely cited working definition of indigenous peoples as follows:

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5 Erica-Irene A. Daes (Chairperson-Rapporteur), *On the Concept of "Indigenous People,"* U.N. Doc. E/CN.4/Sub.2/AC.4/1996/2, 10 June 1996, para. 38 (May 21, 2022), available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G96/129/80/PDF/G9612980.pdf?OpenElement.

6 Declaration on the Rights of Indigenous Peoples, *supra* note 1.

7 José R. Martínez Cobo (Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities), *Study of the Problems of Discrimination Against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4, March 1987, para. 379 (May 21, 2022), available at https://digitallibrary.un.org/record/133666.

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them they form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identify, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institution and legal system.

In a similar vein, efforts to gain accurate insight into who indigenous peoples are led the International Labour Organization (ILO) Convention No. 169[8] to set the following objective criteria for identifying them:

> Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

In all contexts, there seemed to be efforts made to understand the concept of "indigenous people" by the ILO Convention, such as:

i) Priority in time, with respect to the occupation and use of a specific territory,

ii) The voluntary permutation of cultural distinctiveness, which may include language social organization, religion and spiritual values,

iii) Self-identification,

iv) Experience of subjugation, marginalization, dispossession, exclusion or discrimination.

The analysis above makes it clear that the term "indigenous peoples" in the Asian context is generally understood to refer to distinct cultural groups, such as "Adivasis," "tribal peoples," "hill tribes," or "scheduled tribes," while, on the other hand, indigenous peoples in Africa are referred to as "pastoralists," "vulnerable groups" or "hunter-gatherers." It should be noted that based on the analysis presented, the Asian context of the term "indigenous peoples" is attributed to the positive element of the indigenous peoples' definition, even if it satisfies the criteria of the indigenous peoples' definition, while the negative element of the definition of "indigenous peoples" is attributed to the African context of the definition. However, in order to understand and correctly appreciate who the indigenous people, a modern approach

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[8] International Labour Organisation, Indigenous and Tribal Peoples Convention, 1989 (No. 169), 27 June 1989, Art. 1(1)(b) (May 21, 2022), available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::NO::P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:REV,en,C169,/Document.

should place less emphasis on the early definitions that focus on aboriginality and instead focus on self-definition as indigenous and distinctly different from other groups within a state. Again, the emphasis should be on a special attachment to and use of their traditional land, whereby their ancestral land and territory has a fundamental importance for their collective physical and cultural survival, or an experience of subjugation, marginalization, dispossession and discrimination because of their different cultures, ways of life or modes of production than the dominant model.[9]

Broadly speaking, the benefits of this integrated approach are clearly evident in the definition of indigenous peoples since there is no universally agreed upon definition. Thus, the authors of this paper note that despite the lack of an authoritative definition, there are three criteria that help to define indigenous peoples. Furthermore, while this may be desirable in a modern approach, the authors noted that among the three criteria, the criteria of self-identification as the expression of the right to self-determination of indigenous peoples appears widely recognized today.

Given this scenario, Article 33 of the Convention No. 169[10] states that,

> indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions.

Similarly, the ILO Convention No. 169 also asserts that self-identification as indigenous is a "fundamental criterion for determining the groups" that are indigenous.[11]

1.2. What Is the Right to Health?

Conceptually, the right to health is an inclusive right[12] that is frequently associated with access to healthcare and the building of hospitals. This description is correct in some ways, but the right to health appears to have gone beyond that. In a similar fashion, the Committee on Economic, Social and Cultural Rights, a body responsible for monitoring the International Covenant on Economic, Social and Cultural Rights (ICESCR)[13] refers to the right to health as "an underlying determinant

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9 *See* Report of the African Commission's Working Group on Indigenous Populations/Communities, adopted by the African Commission on Human and Peoples' Rights at its 28th ordinary session (2005), at 92–93 (May 21, 2022), available at https://www.iwgia.org/images/publications/African_Commission_book.pdf.

10 Indigenous and Tribal Peoples Convention, *supra* note 8.

11 *Id.* Art. 1(2).

12 U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000): The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/2000/4, 11 August 2000 (May 21, 2022), available at https://digitallibrary.un.org/record/425041.

13 International Covenant on Economic, Social and Cultural Rights, *supra* note 4.

of health." Additionally, the question as to what constitutes the right to health is dependent on the satisfaction of the following definitional requirements: first, the right to health must be inclusive; second, the right to health must contain freedom; third, the right to health must contain entitlements; fourth, health services, goods and facilities must be provided to all without any discrimination and fifth, all services, goods and facilities must be easily available, accessible, acceptable and of good quality.

It is worth noting that, despite the understanding of the right to health, there are still common misconceptions about the right to health. However, it has been misconstrued on the following grounds: firstly, the right to health is not the same as the right to be healthy. A common misconception in this regard is that the state has to guarantee good health. However, good health is influenced by several factors that are outside the direct control of states, such as an individual's biological make-up and socio-economic conditions. In this context, instead of describing the right to health as the right to the highest attainable standard of physical and mental health, it was described as an unconditional right to be healthy. Secondly, the right to health is not only a programmatic goal to be attained in the long term. In this sense, it may be argued that the fact that the right to health should be a tangible programmatic goal does not mean that no immediate obligations on states arise from it. Thirdly, a country's difficult financial situation does not absolve it from having to take action to realize the right to health. Furthermore, it is frequently argued that states that cannot afford to do so are not obliged to take steps to realize this right or may delay their obligations indefinitely. Nonetheless, no state can justify a failure to respect its obligations because of a lack of resources. Keeping in view these three misconceptions, it must be borne in mind that the importance given to the "underlying determinants of health," that is, the factors and conditions which protect and promote the right to health beyond health services, goods and facilities, shows that the right to health is dependent on and may even contribute to the realization of many other human rights. From the above discourse, it is relevant to mention that an individual's right to health cannot be realized without the individual's realization of their other rights, violations of which are at the root of poverty. These rights include the right to work, the right to food, the right to housing and the right to education, as well as the principle of non-discrimination.

1.3. Principle of Non-discrimination and Equality

In order to provide clarity as to the application of the principle of non-discrimination to the right to health, the principles of non-discrimination and equality are fundamental human rights principles and critical components of the right to health. In other words, the International Covenant on Economic, Social and Cultural Rights[14] and

[14] International Covenant on Economic, Social and Cultural Rights, *supra* note 4, Art. 2(2).

the Convention on the Rights of the Child[15] identified the following non-exhaustive grounds of discrimination: race, colour, sex, language, religion, social origin, disability, birth or other status such as HIV/AIDS.

In a similar manner, the International Convention on the Elimination of All Forms of Racial Discrimination[16] also stressed that states must prohibit and eliminate racial discrimination and guarantee the right of every person to public health and medical care. It is argued here that there is no justification for the lack of protection of vulnerable members of society from health-related discrimination, be it in law or in practice. In this regard, it is pertinent to note that even in times of disaster like the COVID-19 pandemic, vulnerable members of society must be protected.

1.4. Indigenous Peoples' Rights

Indigenous peoples' rights under international law have evolved from preexisting international laws, including human rights treaties, to address the unique challenges indigenous peoples face as well as their priorities, such as rights to their lands, territories, resources and self-determination. It must be emphasized that despite the evolution of indigenous peoples' rights from the existing international law, many indigenous peoples continue to face a wide range of human rights issues. In particular, the implementation of the rights of indigenous peoples has remained far from perfect. Aside from the U.N. Declaration on the Rights of Indigenous Peoples,[17] there have been a series of violations of their rights ranging from pressures on their lands, territories and resources as a result of activities associated with development and extraction of resources. In addition, their cultures continued to be threatened, and the protection and promotion of their rights were met with resistance. These have remained a human rights issue today.

Moreover, it is important to point out the fact that while the U.N. Declaration is the most comprehensive instrument detailing the rights of indigenous peoples in international law and policy, it appears to contain minimum standards for the recognition, protection and promotion of these rights. However, in terms of the obligation to fulfill the rights of indigenous peoples, the question that remains pertinent is why these declarations that guide states and indigenous peoples in developing laws and policies that will have an impact on indigenous peoples as well as devising means that will best address their claims are not uniformly or consistently implemented. In light of the foregoing, it is imperative to emphasize that the U.N. Declaration contained some of the most important substantive rights, such as:

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[15] U.N. General Assembly, Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/44/49, 20 November 1989, Art. 2(1) (May 21, 2022), available at https://www.ohchr.org/sites/default/files/crc.pdf.

[16] U.N. General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), U.N. Doc. A/6014, 21 December 1965, Art. 5 (May 21, 2022), available at https://www.ohchr.org/sites/default/files/cerd.pdf.

[17] Declaration on the Rights of Indigenous Peoples, *supra* note 1.

The Right to Self-Determination, Autonomy, Self-Government and Indigenous Institutions

Indigenous peoples, as people who have long-standing traditions of self-government, independent decision-making and institutional self-reliance, have historically exercised what is now referred to as the right to self-determination, which is an inherent right derived from their political, economic, social structures, as well as their cultures, spiritual traditions, histories and philosophies.[18]

By implication, a key point to note is that the lack of meaningful involvement of indigenous peoples in decision-making processes, which has resulted in detrimental impacts, marginalization and a legacy of economic, social, cultural and physical challenges, has raised the question of what can indigenous peoples do to promote and exercise their right to self-determination? And why is the right to self-determination important to indigenous peoples?

Similar concerns have already been expressed about what procedures should be used for consultations with indigenous peoples. What does free, prior and informed consent mean? In answering the above questions, it is relevant to examine the statutory provisions that also explicitly prohibited restrictions of their rights within the international human rights systems. According to Articles 3 and 4 of the U.N. Declaration,

> indigenous peoples have the right to self-determination, they have the right to autonomy and self-government in matters relating to their internal and local affairs.[19]

In the same vein, Article 3 of the U.N. Declaration mirrors Common Article 1 of the International Covenant on Civil and Political Rights[20] and the International Covenant on Economic, Social and Cultural Rights and condemns all forms of restrictions that negatively affect their human rights and which are contrary to recognized international standards.[21] It must be emphasized that the above overview of the U.N. Declaration highlights that indigenous peoples see self-determination as a fundamental right recognized at the international level. In this context, the implementation of the right to self-determination also complements the implementation of other rights.

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18 *See* Declaration on the Rights of Indigenous Peoples, Seventh Preambular paragraph.

19 *Id*. Arts. 3 & 4.

20 U.N. General Assembly, International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316, 16 December 1966, Art. 1 (May 21, 2022), available at https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_2200A(XXI)_civil.pdf.

21 International Covenant on Economic, Social and Cultural Rights, *supra* note 4.

Consequently, given the growing importance of indigenous peoples' right to determine their own economic, social and cultural development, and management, it has become necessary to consult with indigenous peoples and obtain their free, prior and informed consent, which is a crucial element of the right to self-determination.[22] It is commonly said that the committees that oversee the implementation of Common Article 1 of the covenants have confirmed that the right applies to indigenous peoples, among others. This statement does have an essential kernel of truth. In this regard, the Committee on Economic, Social and Cultural Rights expressed its concern as follows:

> The Committee is concerned about the precarious situation of indigenous communities in the State party, affecting their right to self-determination under article 1 of the Covenant … The Committee … urges the State party to intensify its efforts to improve the situation of the indigenous peoples and to ensure that they are not deprived of their means of subsistence.[23]

Another important point to note with regard to the right to self-determination is that the right to self-determination is a collective right held by all members of the indigenous community or nation as a group and must be exercised in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.[24] In a similar fashion, and with regard to all rights in the U.N. Declaration, the authors of this paper noted that the right to self-determination is universal, inalienable and indivisible. In addition to this, it is interdependent and interrelated with all of the other rights stated in the U.N. Declaration.[25] Arguably, while all rights in the U.N. Declaration are understood to have equal states, the right to self-determination has been seen as a fundamental right, without which the other human rights of indigenous peoples, both collective and individual, cannot be fully enjoyed.[26]

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22 *See* Final Study on Indigenous Peoples and the Right to Participate in Decision-Making: Report of the Expert Mechanism on the Rights of Indigenous Peoples, U.N. Doc. A/HRC/EMRIP/2011/2, 26 May 2011 (May 21, 2022), available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/134/58/PDF/G1113458.pdf?OpenElement.

23 U.N. Committee on Economic, Social and Cultural Rights, Concluding Observations on the Russian Federation, U.N. Doc. E/C.12/1/Add.94, 12 December 2003, paras. 11 & 39 (May 21, 2022), available at https://www.refworld.org/docid/403f21e34.html.

24 Declaration on the Rights of Indigenous Peoples, *supra* note 1, Art. 46(3).

25 *See* U.N. Development Group, Guidelines on Indigenous Peoples' Issues (2009), at 27 (May 21, 2022), available at https://digitallibrary.un.org/record/653673?ln=ru.

26 James Anaya (Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people), *Report on the Situation of Human Rights of Indigenous Peoples in Brazil*, U.N. Doc. A/HRC/12/34//Add.2, 26 August 2009, para. 22 (May 21, 2022), available at https://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A.HRC.12.34.Add.2.pdf.

According to Article 27 of the Covenant,[27] it had been generally perceived that individual rights would be sufficient to ensure adequate protection and promotion of rights with a collective dimension, such as the right to culture. Nevertheless, it should come as no surprise that the U.N. Declaration recognizes the right of indigenous peoples to autonomy or self-government in matters relating to their internal and local affairs,[28] as well as the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.[29] Furthermore, the U.N. Declaration recognizes that indigenous peoples have the right to promote, develop and maintain their institutional structure, as well as their distinctiveness, customs, spirituality, traditions, procedures, practices and where applicable, judicial systems or customs, in accordance with international human rights standards.[30]

Given the preceding developments, as well as the significant challenges to the rights to self-determination of indigenous peoples, it can be argued that indigenous peoples are distinct from, yet joined to, larger units of social and political interaction.[31] However, it should be pointed out that the issue of self-determination is extremely important to indigenous peoples, especially when it serves as a basis for social interactions and meaningful participation in effective dialogue. Indeed, it was also argued in this paper that there are many approaches to achieving effective implementation of the right to self-determination within the state context, the most effective of which are those that are developed in cooperation with indigenous peoples. Nevertheless, it should be noted that the exercise of the right to self-determination is often expressed through the development of treaties, agreements and constructive arrangements based on the mutual agreement of indigenous peoples and states.[32]

The Right to Equality and Non-Discrimination

Interestingly, equality and non-discrimination are significant objectives of and underpin both the U.N. Declaration and the ILO Convention No. 169 on Indigenous and Tribal Peoples. According to Articles 1 and 2 of the U.N. Declaration,[33] it is relevant

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27 International Covenant on Civil and Political Rights, *supra* note 20.

28 Declaration on the Rights of Indigenous Peoples, *supra* note 1, Art. 4.

29 *Id.* Art. 5.

30 *Id*. Art. 34.

31 James Anaya, *The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era* in *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* 184, 193 (Claire Chartres & Rodolfo Stavenhagen eds., 2009).

32 Declaration on the Rights of Indigenous Peoples, *supra* note 1, Art. 37; U.N. Expert Mechanism on the Rights of Indigenous Peoples, Expert Mechanism Advice No. 2 (2011): Indigenous Peoples and the Right to Participate in Decision-Making, U.N. Doc. A/HRC/18/42, 17 August 2011, para. 34 (May 21, 2022), available at https://www.ohchr.org/sites/default/files/Documents/Issues/IPeoples/EMRIP/Advice2_Oct2011.pdf.

33 Declaration on the Rights of Indigenous Peoples, *supra* note 1.

to mention that both articles articulate the right of indigenous peoples, as a collective or as individuals, to all human rights.

In the strictest sense, it means that the recognition of their rights as a whole is fully justified from an equality and non-discrimination perspective, taking into cognizance the discrimination they have experienced historically as peoples and individuals. It is necessary to mention here, albeit briefly, that an approach based on equality and non-discrimination also supports the recognition of their collective rights to their lands, territories and resources as being equivalent to the rights of non-indigenous individuals to their property, as the Inter-American Court of Human Rights[34] has held. The important aspect in this regard is that the U.N. Declaration[35] provides that:

> Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights.

In response to the above development and taking into account the real or actual causes of discrimination and inequality as well as the social and economic conditions of indigenous peoples, the United Nations has specifically called on states through the U.N. Declaration to take measures to combat prejudices and eliminate discrimination; promote good relations between indigenous and non-indigenous peoples; and provide prevention of and redress for any form of propaganda designed to promote or incite racial or ethnic discrimination directed against indigenous peoples.[36]

In view of the above, it is worthwhile to ask whether states are prepared to eliminate both formal and substantive defects and forms of discrimination: and secondly, why is it necessary to adopt special measures for indigenous peoples? In this sense, the elimination of formal discrimination may suggest that a state's constitution, legislation, regulations or policies do not discriminate against indigenous peoples. Furthermore, the elimination of *de facto* discrimination requires states to implement laws and policies that facilitate substantive equality for indigenous peoples in the enjoyment of their rights. The above position is based, among other things, on the belief that the obligation to eliminate discrimination and provide for equality requires states to regulate the conduct of both public and private actors, as well as implement policies that provide for substantive equality.[37]

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[34] *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgement, 31 August 2001, Series C, No. 79 (May 21, 2022), available at https://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf; *Sawhoyamaxa Indigenous Community v. Paraguay*, Judgement, 29 March 2006, Series C, No. 146 (May 21, 2022), available at https://www.corteidh.or.cr/docs/casos/articulos/seriec_146_ing.pdf.

[35] Declaration on the Rights of Indigenous Peoples, *supra* note 1, Art. 2.

[36] *Id*. Art. 15(2).

[37] *See* U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights (Art. 2, Para. 2, of the International Covenant on Eco-

In the context of indigenous peoples, it may be worth bringing attention to the right to equality and non-discrimination when it comes to indigenous peoples' rights. However, these two concepts are viewed as offering dual protection. It would also mean that, on the one hand, it focuses on the conditions inherently required to sustain indigenous peoples' way of life, while on the other hand, it focuses on attitudes and behaviours that exclude or marginalize indigenous peoples from the wider society. Indeed, while it is true that some states maintain that the principle of equality prohibits states from treating any group differently from the other, it should be stressed that in order to achieve substantive equality, it is necessary to treat indigenous people as a distinct group experiencing unique circumstances that deserve the right to equality and non-discrimination. According to the Committee on the Elimination of Racial Discrimination:[38]

> To treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons whose situations are objectively the same.

In other words, the Committee on Economic, Social and Cultural Rights, in its own view, held that,

> Where discrimination of a particular group has been pervasive, states should take adequate measures to eliminate such discrimination that are not governed by the principle of international law.[39]

Thus, while some of the more specific content of the Committee on the Elimination of Racial Discrimination and the Committee on Economic, Social and Cultural Rights may address the specifities of discrimination, there is a good argument to be made that policies that discriminate against indigenous peoples cannot entirely exempt indigenous women given their gender status.[40] However, since there is disagreement over this position, it is essential that states be able to empower indigenous women and ensure their participation in the design, delivery and monitoring of programmes that will affect their collective interest. Furthermore, it can be argued that indigenous traditions and customs are often discriminatory, particularly towards women. This

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nomic, Social and Cultural Rights), U.N. Doc. E/C.12/GC/20, 2 July 2009 (May 21, 2022), available at https://digitallibrary.un.org/record/659980?ln=.

38 U.N. Committee on the Elimination of Racial Discrimination, General Recommendation No. 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms Racial Discrimination, U.N. Doc. CERD/C/GC/32, 24 September 2009 (May 21, 2022), available at https://digitallibrary.un.org/record/667786?ln=en.

39 General Comment No. 20, *supra* note 37.

40 *See Id*. para. 12.

view is predicated on the provisions of Article 46(2) of the U.N. Declaration on the Rights of Indigenous Peoples,[41] which states:

> Any limitation must be in accordance with international human rights obligations. It must also be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirement of a democratic society.

The Right of Indigenous Peoples to Participate in Decision-Making

According to Article 18 of the U.N. Declaration,[42] indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making. As expressly stated in Article 19 of the U.N. Declaration, states are to consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect their general well being.[43] In this context, it is relevant to mention that the institutions of decision-making should be designed to enable indigenous peoples to make decisions related to their internal affairs, as well as to participate collectively in external decision-making processes.

Free, Prior and Informed Consent

It could be argued that free, prior and informed consent is more than consultation. However, the same conclusion is not necessarily valid with respect to the states' obligation to obtain the prior consent of indigenous peoples before adopting any legislation or administrative policies that affect indigenous peoples,[44] undertaking of projects that affect indigenous peoples' rights to land, territory and resources, including mineral extraction or exploitation of resources,[45] relocation of indigenous peoples from their lands or territories,[46] and the storage or disposal of hazardous materials on indigenous peoples' land or territories.[47] Here again, an argument to the

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41 U.N. Committee on the Elimination of Racial Discrimination, General Recommendation No. 25 on Gender Related Dimensions of Racial Discrimination, U.N. Doc. A/55/18, 20 March 2000, para. 69 (May 21, 2022), available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/76a293e49a88bd23802568bd00538d83.

42 Declaration on the Rights of Indigenous Peoples, *supra* note 1.

43 *Id.*

44 *Id.*

45 *Id.* Art. 32.

46 *Id.* Art. 10.

47 *Id.* Art. 29.

contrary may be made. It is posited that indigenous peoples who have unwillingly lost possession of their lands, when those lands have been confiscated, taken, occupied or damaged without their free, prior and informed consent are entitled to restitution or other appropriate redress that can include lands equal in size and quality or just fair and equitable compensation.[48]

For analytical reasons, an obvious and fundamental, but sometimes overlooked threshold issue in relation to the principle of free, prior and informed consent generally is the practical application of the principle. According to the United Nations Permanent Forum on Indigenous Issues:[49]

> Free should imply that there is no coercion, intimidation or manipulation, and prior should imply consent has been sought sufficiently in advance of any authorization of commencement of activities and respective requirements of indigenous consultation processes, while informed should imply that information is provided that covers a range of aspects.

It is then necessary to state that in order to achieve the practical application of this principle, the process should include the option of withholding consent.

1.5. COVID-19 Pandemic

To understand the term "COVID-19" as used in this paper, it is important to understand that the above term is commonly referred to as "coronavirus disease 2019." In other words, COVID-19 is a new disease, and the details of its spread are still under investigation.[50] It must be emphasized that the ongoing coronavirus pandemic is caused by the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2).[51] The authors of this paper noted that the outbreak of this pandemic was first identified in Wuhan, China, in December 2019.[52] The World Health Organization (WHO) took the first step in this regard by declaring the outbreak a Public Health Emergency of International Concern on 29 January 2020

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48 Declaration on the Rights of Indigenous Peoples, *supra* note 1, Art. 28.

49 U.N. Permanent Forum on Indigenous Issues, Report of the International Workshop on Methodologies Regarding Free, Prior and Informed Consent and Indigenous People, New York, 17–19 January 2005, paras. 46–49 (2005) (May 21, 2022), available at https://www.un.org/development/desa/indigenouspeoples/meetings-and-workshops/international-workshop-on-methodologies-regarding-free-prior-and-informed-consent-and-indigenous-peoples.html.

50 Coronavirus very likely of animal origin, no sign of lab manipulation, Reuters, 21 April 2020 (May 21, 2022), available at https://www.reuters.com/article/us-health-coronavirus-who-virus/coronavirus-very-likely-of-animal-origin-no-sign-of-lab-manipulation-who-idUSKCN223180.

51 Novel Coronavirus – China, World Health Organization, 12 January 2020 (May 21, 2022), available at https://www.who.int/emergencies/disease-outbreak-news/item/2020-DON233.

52 *See* WHO Director-General's opening remarks at the media briefing on COVID-19, World Health Organization, 11 March 2020 (May 21, 2022), available at https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020.

and officially a pandemic on 11 March 2020.[53] However, available research shows that by 17 May, 2020 over 4.66 million cases of COVID-19 had been reported in more than 188 countries and territories, resulting in more than 312,000 deaths. Over one million to seven million people have recovered. It should be noted that the virus is primarily spread between people during close contact, most commonly through the transmission of small droplets produced by coughing, sneezing and talking.[54] It is most contagious during the first three days after the onset of symptoms, although transmission is also possible before symptoms appear and from people who do not show symptoms.[55] Of course, common symptoms include fever, cough, fatigue, shortness of breath, and loss of smell.[56] In addition, complications such as pneumonia and acute respiratory distress syndrome may occur.[57] In this context, it is worth noting that the time from exposure to the onset of symptoms is typically around five days but may range from two to fourteen days.[58] More importantly, there is no known vaccine or specific antiviral treatment. Thus, primary treatment is symptomatic and supportive therapy.[59]

As seen above, it is clear that the pandemic has caused severe global economic disruption,[60] including the largest global recession, which has led to the postponement or cancellation of sporting, religious, political and cultural events,[61] wide-spread shortages exacerbated by panic buying,[62] and decreased emissions of pollutants

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53 *See* COVID-19 Dashboard by the Center for Systems Science and Engineering, Johns Hopkins University (JHU), Public Health Update (May 21, 2022), available at https://publichealthupdate.com/jhu/.

54 Claire Hopkins, *Loss of Sense of Smell as Marker of COVID-19 Infection*, Ear, Nose & Throat Surgery Body of the United Kingdom (2020) (May 21, 2022), available at https://www.entuk.org.

55 Coronavirus Disease 2019 (COVID-19) Symptoms, United States Centers for Disease Control and Prevention, 20 March 2020 (May 21, 2022), available at https://www.cdc.gov.

56 *See* Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19), United States Centers for Disease Control and Prevention, 4 April 2020 (May 21, 2022), available at https://www.cdc.gov.

57 Symptoms of Novel Coronavirus (2019-NCOV), United States Centers for Disease Control and Prevention, 10 February 2020 (May 21, 2022), available at https://www.cdc.gov.

58 Thirumalaisamy P. Velavan & Christian G. Meyer, *The COVID-19 Epidemic*, 25(3) Trop. Med. Int'l Health 278 (2020).

59 Gita Gopinath, *The Great Lockdown: Worst Economic Downturn Since the Great Depression*, International Momentary Fund, 14 April 2020 (May 21, 2022), available at https://www.imf.org/en/Blogs/Articles/2020/04/14/blog-weo-the-great-lockdown-worst-economic-downturn-since-the-great-depression.

60 A List of What's Been Canceled Because of the Coronavirus, The New York Times, 21 January 2021 (May 21, 2022), available at https://www.nytimes.com/article/cancelled-events-coronavirus.html.

61 Jade Scipioni, *Why There Will Soon Be Tons of Toilet Paper, and What Food May Be Scarce, According to Supply Chain Experts*, CNBC, 18 March 2020 (May 21, 2022), available at https://www.cnbc.com/2020/03/18/supply-chain-experts-foods-that-could-be-less-available-in-pandemic.html.

62 Jonathan Watts & Niko Kommenda, *Coronavirus Pandemic Leading to Huge Drop in Air Pollution*, The Guardian, 23 March 2020 (May 21, 2022), available at https://www.theguardian.com/environment/2020/mar/23/coronavirus-pandemic-leading-to-huge-drop-in-air-pollution.

and greenhouse gases.[63] The further implications of this pandemic included the closure of schools, universities, colleges, and churches, either on a nationwide or local basis in 186 countries, affecting approximately 98.5 percent of the world's student population.[64] It is important to emphasize that the general notion about this virus has spread online,[65] and there have been incidences of xenophobia and discrimination against Chinese people and those perceived to be from areas with high infection rates. It is also significant to note that the pandemic has resulted in a number of conspiracy theories and misinformation about the scale of the pandemic and the origin, prevention, diagnosis and treatment of disease.

2. COVID-19 Pandemic and Indigenous Peoples' Right to Health

Clearly, indigenous peoples in many regions have a long history of devastation caused by epidemics introduced by their colonial masters upon their arrival in their host countries. Furthermore, it should be noted that the first Europeans and Americans brought small pox and other communicable diseases to the Yanonami of Brazil and southern Venezuela in the 1950s and 1960s that nearly wiped out the tribes.[66] Recently, the World Health Organization designated the novel coronavirus, otherwise known as COVID-19, as a pandemic. This pandemic has therefore led to the suspension or restriction of some of the otherwise guaranteed fundamental human rights of indigenous peoples. First and foremost among these rights that have been violated is the right to health. The right to health is an inclusive right.[67] However, it should be noted that prior to this pandemic, the right to health was perhaps the least respected right by state actors towards indigenous people. This perspective is particularly significant for an understanding of the COVID-19 pandemic which has presented a new threat to the health and survival of indigenous peoples within the global emergency zone as well as in society at large. In this regard, it must be emphasized that indigenous populations in nearly all countries fall into the most "vulnerable health category."

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63 COVID-19 Educational Disruption and Response, United Nations Educational, Scientific and Cultural Organization (UNESCO), 24 March 2020 (May 21, 2022), available at https://www.unesco.org/en/articles/covid-19-educational-disruption-and-response.

64 Rachel Clamp, *Coronavirus and the Black Death: Spread of Misinformation and Xenophobia Shows We Haven't Learned from Our Past*, The Conversation, 5 March 2020 (May 21, 2022), available at https://theconversation.com/coronavirus-and-the-black-death-spread-of-misinformation-and-xenophobia-shows-we-havent-learned-from-our-past-132802.

65 Sabrina Tavernise & Richard A. Oppel, Jr., *Spit on, Yelled at, Attacked: Chinese Americans Fear for Their Safety*, The New York Times, 23 March 2020 (May 21, 2022), available at https://www.nytimes.com/2020/03/23/us/chinese-coronavirus-racist-attacks.html.

66 Heather Pringle, *How Europeans Brought Sickness to the New World*, Science, 4 June 2015 (July 18, 2020) (May 21, 2022), available at https://www.sciencemag.org/news/2015/06/how-europeans-brought-sickness-new-world.

67 General Comment No. 14 (2000), *supra* note 12.

At the same time, the COVID-19 pandemic is disproportionately affecting indigenous peoples, exacerbating underlying structural inequalities and pervasive discrimination. Additionally, they have significantly higher rates of communicable and non-communicable diseases than their non-indigenous counterparts, as well as high mortality rates and lower life expectancies. Other contributing factors that increase the potential for high mortality rates caused by COVID-19 in indigenous communities include malnutrition, poor access to sanitation, lack of clean water and inadequate medical services.

Admittedly, indigenous peoples, like all individuals, are entitled to all human rights. Human rights are interdependent, indivisible and interrelated.[68] This means that violating the right to health may often impair the enjoyment of other human rights. It should be borne in mind that the importance given to the "underlying determinants of health," that is, the factors and conditions which protect and promote the right to health, is dependent on, and contributes to, the realization of many other human rights. It has often been argued that an individual's right to health cannot be realized without realizing their other rights, the violations of which are at the root of poverty, such as the rights to work, food, housing and education, and the principle of non-discrimination. Essentially, specific rights that are of particular relevance to indigenous peoples during this crisis, both individual and collective in nature, include the right to self-determination;[69] the right of indigenous peoples to participate in and be consulted on measures that affect them in both general and specific forms;[70] and, of course, the requirement to seek their free, prior and informed consent.[71]

However, the implementation of the COVID-19 restrictions has left much to be desired as it relates to the right to health of indigenous peoples. The impact of the COVID-19 pandemic has posed a significant risk to indigenous peoples living remotely or in voluntary isolation and who lack immunity to a wide range of infectious diseases. Indeed, it has been argued that the health rights of indigenous peoples were already at risk prior to the pandemic, and the vulnerable situation they are in has been exacerbated by the COVID-19 pandemic, as the underlying challenges have not been addressed by state actors.[72] Furthermore, it is claimed that indigenous communities are frequently located in remote regions, leaving them with limited

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68 U.N. General Assembly, Vienna Declaration and Programme of Action, U.N. Doc. A/CONF.157/23, 12 July 1993 (May 21, 2022), available at https://digitallibrary.un.org/record/183139.

69 Declaration on the Rights of Indigenous Peoples, *supra* note 1, Arts. 3 & 4.

70 U.N. General Assembly, Progress Report on the Study on Indigenous Peoples and the Right to Participate in Decision-Making, U.N. Doc. A/HRC/15/35, 23 August 2010 (May 21, 2022), available at https://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.35_en.pdf.

71 Declaration on the Rights of Indigenous Peoples, *supra* note 1, Arts. 10, 19, 21, 23, 24, 28 & 29.

72 *See* U.N. Expert Mechanism on the Rights of Indigenous Peoples, COVID-19 yet another challenge for indigenous peoples, 6 July 2020 (May 21, 2022), available at https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2020/04/EMPRIP-English.pdf.

or no access to healthcare and medical support. In this regard, it is also relevant to mention that the elderly in indigenous populations and those with underlying medical conditions are more likely to require urgent and intensive respiratory care and may have difficulty accessing medical care in these areas. However, it is debatable whether the principles of non-discrimination apply to the right to health of indigenous peoples. Firstly, an understanding of the term "discrimination" is fundamental. In this context, discrimination is defined as any distinction, exclusion or restriction made on the basis of various grounds which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise of human rights and fundamental freedoms. Thus, it is linked to the marginalization of specific population groups and is generally at the root of fundamental structural inequalities in society. This, in turn, may make these groups more vulnerable to illness.

According to the International Covenant on Economic, Social and Cultural Rights[73] and the Convention on the Rights of the Child,[74] non-discrimination and equality are fundamental human rights principles and critical components of the right to health. As a result, it is argued here that Article 2(2) of the International Covenant on Economic, Social and Cultural Rights, Article 2(1) of the Convention on the Rights of the Child, as well as Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination have thus created an inseparable connection between non-discrimination and equality, which presupposes that the obligation to ensure non-discrimination requires specific health standards to be applied to particular population groups, such as indigenous peoples.

This position was endorsed by the Committee on Economic, Social and Cultural Rights, which agreed that there is no justification for the lack of protection of these vulnerable members of society from health-related discrimination, be it in law or fact.[75] However, the authors of this paper noted that this position does not necessarily reflect current practice today. In a similar vein, it is argued that the failure of states to comply with their duty to consult with indigenous peoples on matters affecting them is a deeply rooted challenge that has been an area of concern in recent years.[76] Therefore, it is argued here that the lack of appropriate mechanisms for the consultation and participation of indigenous peoples in designing, implementing and evaluating measures which may affect them often leads to responses that are not culturally appropriate and that may not be in conformity with indigenous peoples' rights in international law, which, of course, include the requirement to seek their free, prior and informed consent. As a result, in order to guarantee their participation in adopting measures to combat the COVID-19 health crisis that directly affects them, it must be established that consent in this context has to be genuine, valid and explicit.

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[73] International Covenant on Economic, Social and Cultural Rights, *supra* note 4, Art. 2(2).

[74] Convention on the Rights of the Child, *supra* note 15, Art. 2(1).

[75] General Comment No. 14 (2000), *supra* note 12.

[76] *Id.*

However, it can also be argued that the consent that counts is that which takes into account indigenous peoples' distinctive concepts of health, which are inextricably linked with the realization of other rights, including the rights to self-determination, development, culture, land, language and the natural environment. It can therefore be said that free consent can be given only when both parties possess some measure of independence.

2.1. Right to Health Under International Human Rights Law

In light of what has been discussed above, one may be tempted to ask whether the right to health is an integral part of human rights law. However, it must be emphasized that any right to the highest attainable standard of health is regarded as an integral part of human rights recognized in international human rights law. According to the International Covenant on Economic, Social and Cultural Rights, which is widely considered to be the central instrument of protection for the right to health, it recognizes "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[77]

However, today, there are many United Nations human rights treaties relevant to the right to health of indigenous women and men. These treaties are as follows: the International Covenant on Economic, Social and Cultural Rights (ICESCR),[78] the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),[79] the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[80] and the International Covenant on Civil and Political Rights (ICCPR).[81] In addition to core human rights treaties, the health rights of indigenous peoples are covered by a number of other international instruments, most notably the International Labour Organization Convention No. 169 on Indigenous and Tribal Peoples.[82]

2.2. International Covenant on Economic, Social and Cultural Rights

In response to the right to adequate healthcare of indigenous peoples and taking into account their vulnerability to pandemics, which tend to deepen existing inequalities and discrimination, the International Covenant on Economic, Social and Cultural Rights has developed the corresponding rights in the Universal Declaration of Human Rights in considerable detail, specifying the steps required for the full realization of the right to health of indigenous peoples. In light of the above, it

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77 International Covenant on Economic, Social and Cultural Rights, *supra* note 4, Art. 12.

78 International Covenant on Economic, Social and Cultural Rights, *supra* note 4.

79 International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 16.

80 U.N. General Assembly, Convention on the Elimination of All Forms Discrimination against Women, G.A. Res. 34/180, U.N. Doc. A/RES/34/180, 18 December 1979 (May 21, 2022), available at https://www.refworld.org/docid/3ae6b3970.html.

81 International Covenant on Civil and Political Rights, *supra* note 20.

82 Indigenous and Tribal Peoples Convention, *supra* note 8.

can be asserted that the right to health, which the Declaration covers as part of an adequate standard of living, has a separate article in the covenant. Thus, Article 12 of the Covenant[83] recognizes the right to the highest attainable standard of physical and mental health as well as specific health-related issues such as environmental hygiene and epidemic and occupational disease. Moreover, it should also be noted that this covenant has codified the right to health as a constituent element of the right to an adequate standard of living.

The above analysis of the legal framework on the right to health for indigenous peoples under the covenant also reveals that all the rights in the international Covenant on Economic, Social and Cultural Rights must be exercised in accordance with Article 2(2)[84] and Article 3[85] of the Covenant. To be more specific, this indicates that indigenous peoples have the right to enjoy the right to adequate health during the COVID-19 pandemic without being subjected to discrimination and on an equal level with the population that constitutes the majority. Similarly, indigenous women have the same right to health without discrimination and on an equal basis with indigenous men and the majority population. In sum, having due regard to the provisions of the covenant which recognize the right to the highest attainable standard of physical and mental health, it is thus important to note that the actions of the security agents in enforcing the lockdown orders orchestrated by the COVID-19 pandemic can lead to the derogation of these rights, particularly where such persons or groups of persons are suffering from infectious or contagious disease, as is currently the case. However, the question that remains pertinent is whether these rights can be restricted without necessarily subjecting indigenous peoples to inhumane and degrading treatment. The obvious answer to the question is in the affirmative.

2.3. International Covenant on the Elimination of All Forms of Racial Discrimination

By virtue of Articles 1 and 5(e)(iv) of the International Convention on the Elimination of All Forms of Racial Discrimination,[86] States parties are required to prohibit racial discrimination and to guarantee the right to equality in the enjoyment of economic and social rights, including the right to health.[87] In other words, the Convention has adequate provisions for the protection of indigenous peoples' health rights. Furthermore, while the Convention makes no explicit guarantee of equality between men and women within racial groups, the Convention's

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83 International Covenant on Economic, Social and Cultural Rights, *supra* note 4.

84 *Id.*

85 *Id.*

86 International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 16.

87 *Id*.

General Recommendation No. 25 deals with gender-related dimensions of racial discrimination, noting that:

> There are circumstances in which racial discrimination only or primarily affects women, or affects women in a different way, or to a different degree than men.[88]

It has been argued that while the right to adequate health services for indigenous peoples has gone beyond a mere humanitarian service in the wake of the COVID-19 pandemic, the Convention states that except for reasonable cause, the right to health shall not be denied.

2.4. Convention on the Elimination of All Forms of Discrimination against Women

According to the provisions of Article 12 of the Convention,[89]

> States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

This implies that in cases where it is reasonable to do so, the right to health of women shall not be infringed upon. However, it should be noted that several restriction orders across the globe have affected the aforementioned rights of indigenous women. In practice, one may therefore ask the question, is this not a derogation from the Convention? The answer must be in the affirmative. It is widely accepted that the language formulation used by the United Nations in the Convention is aimed at protecting women against discrimination and ensuring women's equality in political, economic, social and cultural realms. However, it should be emphasized that the denial of the right to health or discrimination against women in healthcare services takes place under the guise of COVID-19 restriction orders.

2.5. International Covenant on Civil and Political Rights

Pursuant to Article 1 of the Covenant,[90] all persons have the right of self-determination. By virtue of this right, they are freely able to determine their political status and freely pursue their economic, social and cultural development. Conversely, it is arguable that in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, states parties may take measures

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88 *See* General Recommendation No. 25, *supra* note 41, para. 1.

89 Convention on the Elimination of All Forms Discrimination against Women, *supra* note 80.

90 International Covenant on Civil and Political Rights, *supra* note 20.

derogating from their obligations under the present covenant to the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Ironically, the central theme of the government regulation on COVID-19 is the restriction of freedom of assembly and association, and not the restriction or denial of the right to health of indigenous peoples. Again one may ask the question, is this not a derogation from the Covenant? And again the answer must be in the affirmative. Beyond the immediate impact this can have on indigenous peoples, it is evident that the International Covenant on Civil and Political Rights contains five provisions of particular relevance to this paper which are as follows:

• Article 3 calls for equality between men and women.

• Article 1 recognizes the right of all persons to self-determination and to freely determine their political status and freely pursue their Economic, Social and Cultural Development.

• Article 26 prohibits any discrimination on a variety of grounds including race, national and social origin, property or birth or other status.

• Article 17 protects everyone from arbitrary or unlawful interference with their privacy, family, or home.

• Article 27 states that ethnic, religious or linguistic minorities should not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

To be fair, one should recognize that, theoretically at least, the five provisions listed above are particularly relevant to indigenous peoples. However, in a particular scenario such as the COVID-19 pandemic, there is, therefore, a conflict between the right to health of indigenous peoples and the rights of the government at all levels to protect indigenous peoples against infectious diseases like the COVID-19 pandemic.

2.6. International Labour Organization Convention No. 169 on Indigenous and Tribal Peoples

Despite the relatively conservative language used in the text of the ILO Convention,[91] it is increasingly seen and presented within the United Nations system as one of the most comprehensive and up-to-date international instruments on the living and working conditions of indigenous and tribal peoples. However, under Article 25 of the ILO Convention,[92] health services shall be the sole responsibility of the government and should be provided in such a way that all indigenous peoples may enjoy the highest attainable standard of physical and mental health. By a perusal of this article, it becomes clear that the first two clauses (1) and (2) of Article 25

[91] Indigenous and Tribal Peoples Convention, *supra* note 8, Art. 25(1-4).

[92] *Id.* Art. 2(2)(c).

refer to the government's responsibility to ensure that adequate health services are made available to the people concerned so that they may enjoy the highest attainable standard of physical and mental health, and also that health services shall be community-based to the greatest extent possible. These suggest, in both clauses, that the government should assist indigenous peoples in eliminating socio-economic gaps that may exist between indigenous and other members of the national community, in a manner compatible with their aspirations and ways of life.[93]

On the other hand, clauses (3) and (4) of Article 25 provide that the healthcare system shall give preference to training and employment of local community health workers and focus on primary healthcare services. In addition, the provision of such health services shall be coordinated with other social, economic and cultural measures in the country. It is clear from the above provisions that the ILO Convention contains non-discrimination clauses which shall be applied without discrimination to male and female members of these population groups.[94] The ILO Convention also places an emphasis on the right of indigenous and tribal peoples to decide their own priorities for the process of development and to exercise control, to the greatest extent possible, over their own economic, social and cultural development. However, it remains questionable whether the aforementioned frameworks would really make a difference when medical practitioners sometimes treat indigenous peoples as objects of treatment rather than rights-holders and do not always seek their free and informed consent when it comes to treatments. In this context, it seems reasonable to argue that such a situation is not only degrading, but also a violation of the human right to health under the conventions. This position is also reflected in the current COVID-19 pandemic, which led to the suspension or restriction of some of the otherwise guaranteed fundamental human rights of indigenous peoples, particularly the right to health.

Lastly, it is relevant to mention that the right to health is not only recognized in international instruments, as was noted above, but also in a number of regional instruments, such as the African Charter on Human and Peoples' Rights,[95] the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, also known as the Protocol of San Salvador,[96] and the European Social Charter.[97] Furthermore, the American Convention on

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93 Indigenous and Tribal Peoples Convention, *supra* note 8, Art. 3.

94 *Id*. Art. 7(1).

95 Organization of African Unity, African Charter on Human and Peoples' Rights ("Banjul Charter"), CAB/LEG/67/3 rev. 5, 27 June 1981 (May 21, 20220), available at https://www.refworld.org/docid/3ae6b3630.html.

96 Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), A-52, 16 November 1999 (May 21, 2022), available at https://www.refworld.org/docid/3ae6b3b90.html.

97 Council of Europe, European Social Charter (Revised), 3 May 1996, E.T.S. 163 (May 21, 2022), available https://www.refworld.org/docid/3ae6b3678.html.

Human Rights[98] and the European Convention for the Protection of Human Rights and Fundamental Freedoms[99] both contain provisions related to health, such as the right to life, the prohibition on torture and other cruel, inhumane or degrading treatment, and the right to family and private life.

Conclusion

This paper has largely dealt with the ongoing COVID-19 pandemic and its corresponding health implications for the constitutionally guaranteed right to health of indigenous peoples, which is recognized in several international and regional instruments. The COVID-19 phenomenon is a new infectious disease that perhaps requires strategic interest and protection desired by indigenous peoples beyond the humanitarian paradigm. This is particularly true with the existing legislation and regulatory agencies that are in place so as to ascertain its functionality in terms of the protection of indigenous peoples' right to health. What this paper has done, therefore, is to examine whether the existing legal frameworks and policies are tailored towards providing adequate healthcare to indigenous peoples rather than passively allowing seemingly neutral laws and policies to benefit mainly the majority groups. This paper has equally examined the concept of "indigenous peoples" from different perspectives, and it has been noted, as a matter of course, that there are three criteria, that serve as the criteria for self-identification, as an expression of the right to self-determination of indigenous peoples, which appear to be widely recognized today.

Furthermore, it can be concluded that the COVID-19 pandemic experience of indigenous peoples highlights the fact that their right to adequate healthcare is more than just an abstract code or ideological commitment. The health rights of indigenous peoples were already at risk prior to the COVID-19 pandemic, and the vulnerable situation they are in has only been exacerbated by the crisis as the underlying challenges have not been addressed.

Despite the significance of the fundamental principles of non-discrimination and equality applicable to the right to health and its long-term effectiveness as an operational tool, it is surprising to note that indigenous peoples, who have historically been discriminated against and marginalized, often bear a disproportionate share of health problems even today. The principles of non-discrimination and equality are fundamental human rights components of the right to health. On occasion, questions are raised as to the impact of the COVID-19 pandemic on indigenous peoples' rights

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[98] Organization of American States, American Convention on Human Rights, 22 November 1969, Treaty Series, No. 36 (May 21, 2022), available at https://www.refworld.org/docid/3ae6b36510.html.

[99] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, E.T.S. 5 (May 21, 2022), available at https://www.refworld.org/docid/3ae6b3b04.html.

to participation and consultation. However, the lack of appropriate mechanisms for the consultation and participation of indigenous peoples in designing, implementing and evaluating measures that may affect them frequently results in responses that are not culturally appropriate and that may not be in conformity with the rights of indigenous peoples under international law, including with the requirement to seek their free, prior and informed consent.

What follows from the foregoing, therefore, is that states should adopt specific measures to combat the COVID-19 health crisis that directly affects indigenous peoples since the pandemic has presented an even greater risk for indigenous peoples in the absence of public information on prevention and access to healthcare in indigenous languages.

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COMMENTS

ACADEMIC RESEARCHER WORK AND THE CONFUSION OF PUBLIC AUTHORITIES. A BLEAK OUTLOOK FOR THE CONSEQUENCES OF THE HIGHER EDUCATION REFORM IN POLAND – COMPARATIVE APPROACH

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From the very beginning, it was assumed that the new regulation – Law on Higher Education and Science (LHES) would mark the implementation of a ground-breaking, comprehensive reform – "Constitution for Science." It was emphasised that the project constituted the most extensive reform implemented within the framework adopted by the EC as the model for all large-scale systemic changes since the last thirty years. Unfortunately, the efforts made to date by the Minister of Finance and Minister of Science and Higher Education in the face of the many difficulties emerging at the meeting point between copyright, tax and education laws have to be deemed ineffective. Against the background of the analysed solutions in BRICS countries, the Polish solutions are the most far-reaching in terms of protecting the interests of academic teachers. They lead to a reduction of the tax burden (by applying 50% tax deductible costs) by exactly half. While the very idea adopted on the grounds of Polish legal solutions deserves a high assessment and may constitute an interesting model to be copied in the BRICS countries (as far-reaching benefits for university researchers), the manner of its introduction deserves criticism. The adopted legal basis, as shown in the study, is not internally coherent at the junction of tax law, copyright law and higher education law. In fact, they are even mutually exclusive. For this reason, the manner of proceeding with this legitimate regulation cannot be recommended in the BRICS countries.

Keywords: academic teacher; Copyright Law; tax-deductible expenses; creative activity.

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Introduction

As of 1 October 2018, the new Law on Higher Education and Science came into force in Poland.[1] From the very beginning, it was assumed that the regulation would mark the implementation of a ground-breaking, comprehensive reform of the higher education system introduced by the Polish government under the motto of "Constitution for Science." The new legislation was clearly identified as one the three pillars of the highly prioritised changes planned in this context.[2] It was emphasised that the project constituted the most extensive reform implemented within the framework adopted by the European Commission as the model for all large-scale systemic changes since 1989. The process entailed both a dialogue between the government and the academia, and a widespread debate within the academic circles themselves. Did the government reach the goal mentioned above?

The Constitution for Science replaced a number of earlier laws related to higher education and comprehensively encompassed the academic system and science in

[1] Act of 20 July 2018 – Law on Higher Education and Science (Dz. U. [Journal of Laws] of 2018, item 1668, as amended) (hereinafter the "LHES") is applicable under the terms and conditions stipulated in the Act of 3 July 2018 – Regulations implementing the Act – Law on Higher Education and Science (Dz. U. [Journal of Laws] of 2018, item 1669) (hereinafter the "Implementing Regulations").

[2] Three pillars of the government's activity – the so-called Gowin strategy – were identified as: Constitution for Science, Innovation for the Economy, Science for You. *See* Website of the Republic of Poland (Aug. 2, 2022), available at https://konstytucjadlanauki.gov.pl/co-zrobilismy-przez-4-lata-w-mnisw/.

Poland. The goal of the regulation was to establish optimum conditions to facilitate scientific and didactic excellence, ensure sustainable development of academic centres throughout Poland, and provide universities with effective management tools.[3] The reform of higher education was motivated primarily by a relatively poor evaluation of the quality of academic research in Poland. Among many reasons identified as responsible for this state of affairs, a number of systemic factors were mentioned. In the government's assessment, the same included, e.g., flawed organisation and overall system of academic institutions as well as insufficient levels of available financial support.[4] It was emphasised that the latter necessitated not only expanding the pool of financing available to universities but also improving the efficacy of regulatory measures aimed at supporting the effective development of higher education.[5]

Inevitably, the higher education and science financing model should have been changed. Funds for maintaining the teaching potential (education of students, maintenance, professional development of the staff), and research potential (including research activity, purchase of equipment or infrastructure below PLN 500,000, doctoral studies, commercialisation) were to be granted in the form of subsidies. This meant that the money would not be arbitrarily divided into separate funds. Universities should have had greater flexibility in deciding what their funds would be spent on. Funds not spent in a given year should have been retained for the following year. Therefore, it was decided to increase the annual minimum state budget expenditure on science and higher education. In 2019 it was 1.2 percent GDP, and it is expected to grow by 0.1% per year until 2025, when it reaches 1.8 percent GDP.[6] In comparison, South Africa is spending 0.75% of its gross domestic product (GDP) on higher education, the United States and the United Kingdom spend 0.9% of GDP on higher education and Germany spends 1.1%. It should be agreed with the recommendation that government should aim to increase the level of spending on higher education. In doctrine it was mentioned that increasing government's spending from 0.75% of GDP to 2% of GDP will relieve the burden on students to

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[3] Opinion of the Minister of Science and Higher Education, Website of the Republic of Poland (Aug. 2, 2022), available at https://www.gov.pl/web/nauka/konstytucja-dla-nauki-2.

[4] *Id.*

[5] Similar concerns were also voiced by Adam Szot in *Diagnoza szkolnictwa wyższego. Program rozwoju szkolnictwa wyższego do 2020 r. Część III* [*Diagnosis of Higher Education. Higher Education Development Program Until 2020. Part III*] 52 (Jarosław Górniak ed., 2015). *See* Strategy for the Development of Higher Education in Poland by 2020, partial report prepared by the consortium of Ernst & Young Business Advisory and the Institute for Market Economy Research (February 2010), at 38 (Aug. 2, 2022), available at http://cpp.amu.edu.pl/pdf/SSW2020_strategia.pdf.

[6] Ludwika Tomala, *New version of the Constitution for Science – key solutions*, Website of the Republic of Poland, 29 January 2018 (Aug. 2, 2022), available at https://www.archiwum.nauka.gov.pl/en/polish-science-news/new-version-of-the-constitution-for-science-key-solutions.html.

fund their own education.[7] As reports show, low academic teachers' salaries still are on the unsatisfactory level. It concerns BRICS countries as well.[8]

Undoubtedly, a significant role in the wide range of regulations affecting university financing is played by tax legislation. By its nature, the same directly impacts not only the organisational capacity of universities but also, to a considerable extent, the legal situation of their employees. Unfortunately, the currently employed solutions are characterised by considerable complexity and lack of consistency. This fact has a negative impact on the applicability of the government's envisioned preferential tax regulations dedicated to the group of academic teachers. It is unfortunately difficult to avoid the conclusion that although the idea of preferential treatment of researchers (taxpayers) is highly laudable as such, the manner in which it is being introduced contradicts the very purpose of the implemented reform.

1. Primary Premise of the Reform

The Constitution for Science (LHES) was to organise the entire system of higher education and science in Poland. It was assumed that it would create the conditions for scientific and didactic excellence, ensure sustainable development of academic centres across the country, introduce doctoral schools and give universities appropriate tools necessary for effective management. For a very long time it was pointed that the Polish system is not competitive enough and the new reform should strengthen the real autonomy of the university, including financial autonomy, because it enables flexible management of financial resources. It also would enable the university authorities to shape the organizational structure of the university more freely. As another crucial point, students' position on the market was mentioned. It was underlined that students should be educated coherently with the needs of employers. Some students pursue academic careers, but a vast majority of students graduate and go to work. Universities should cooperate with businesses, with the economy and the labour market. Therefore, a strict cooperation between entrepreneurs and scientists is needed. Any entrepreneur who is able to establish cooperation with scientists would pay lower taxes and at the same time build their competences in the field of technology. Such solution was pointed, e.g. in the Chinese higher education.[9] The state follows a tax reduction policy to save universities money

[7] Funding of public higher education institutions in South Africa, PwC South Africa (Aug. 2, 2022), available at https://www.pwc.co.za/en/publications/funding-public-higher-education-institutions-sa.html.

[8] How much money teachers get paid in South Africa vs other countries, BusinessTech, 13 November 2018 (Aug. 2, 2022), available at https://businesstech.co.za/news/finance/283768/how-much-money-teachers-get-paid-in-south-africa-vs-other-countries/.

[9] How Does Education in China Compare with Other Countries?, ChinaPower Project (Aug. 2, 2022), available at https://chinapower.csis.org/education-in-china/.

for hi-tech development.[10] It is mentioned, that Chinese higher education is now in the phase of stable development, with a focus on quality, equity and rebalance between the provision of graduates and the demand from the labour market. The National Outline for Medium- and Long-term Educational Reform and Development (2010–2020) identified four strategic goals, including enhancing higher education quality, promoting innovation, and encouraging optimal structure and institutional uniqueness, and enhancing internationalization. As it has been shown, the goals, such as enhancing higher education quality, promoting innovation, encouraging optimal structure are the same for medium – higher education systems (Poland), and big structures (China). The sharp rise in student numbers indicates a major improvement in access to higher education. It is a global tendence. It concerns not only Poland higher education system. BRICS countries meet the same trends.[11] Nevertheless, as it is pointed in the doctrine, still higher education, e.g. in South Africa is an elite system, although the emergence of a private higher education sector has made it possible for students who could not enter public universities and colleges, to enrol in mainly small, private institutions.[12] There is wide agreement, anchored in growing evidence, that higher education matters for development. As any country's core knowledge institution, it plays a central role in the delivery of highly qualified graduates (the future "knowledge workers"), in the production of knowledge of relevance for economic growth and social development, and in the improved understanding of the nature of the major challenges confronting our societies, as well as in identifying ways for handling these challenges. Aforementioned should be underlined in governmental strategies and policies, related to the under-appreciation among scholars, policy-makers, and donor agencies of different countries, especially in Africa.

In Poland, for over two years, there were consultations and conferences organized as part of the National Congress of Science. The directions of change were discussed then. The aforementioned was the reason why numerous groups of academicians supported the Constitution for Science. Finally, three independent research teams that had received grants to develop the principles of the new LHES submitted their projects to the Ministry of Science. The Ministry of Science prepared a new bill based on the results of their work. The new regulations were prepared by three groups: the team of Prof. Marek Kwiek – associated with Adam Mickiewicz University in Poznań, the group led by Arkadiusz Radwan, Ph.D. associated professor – formed at the Allerhand Institute in Kraków; and the team of Prof. Hubert Izdebski, affiliated

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[10] China's Higher Education System, Encyclopedia.com (Aug. 2, 2022), available at https://www.encyclopedia.com/international/news-and-education-magazines/chinas-higher-education-system.

[11] E.g., Elling N. Tjønneland, *Crisis at South Africa's Universities – What Are the Implications for Future Cooperation with Norway?*, 16(3) Chr. Michelsen Institute Brief 1 (2017); Anna Smolentseva, *Challenges to the Russian Academic Profession*, 45(4) High. Educ. 391 (2003).

[12] *See* Nico Cloete, *The South African Higher Education System: Performance and Policy*, 39(8) Stud. High. Educ. 1355 (2014).

with the University of Social Sciences and Humanities in Warsaw. It was pointed unequivocally – Polish law on higher education required a comprehensive reform. The current legislation was based on principles that would only perpetuate the status quo. The reform required new guidelines, which would allow universities to introduce new solutions and to modernize the academia. Therefore, the focus was on new quality of higher education, new requirements for academics, and on modern management and financing of universities and research. It was crucial that the new statutory act (LHES) would meet the goals: creating special career path for academic teachers, raising minimum salaries for academic teachers, introducing more equitable evaluation of scientific achievements, focused on quality not on the number of scientific publications, reducing bureaucracy and increasing organisational autonomy of universities with a mechanism that increases expenditures on higher education and science (organised law in the area of higher education and science and reduces the number of executive acts).[13]

The aforementioned values are crucial for many other countries, all over the world. For example, the process of transformation of higher education in South Africa (NCHE Report and following the White Paper and Act of 1997) also sets out several principles for the new framework: equity in the allocation of resources and opportunities; redress of historical inequities; democratic, representative, and participatory governance; balanced development of material and human resources; high standards of quality; academic freedom; institutional autonomy; and increased efficiency and productivity.[14]

The adoption of the LHES in Poland stemmed from the premise, which its Authors believe to be justified, that "improving the efficiency of higher education and science necessitates improvement in terms of the quality of human and social capital." It was further emphasised that the foundation of an efficient system is rooted in the "freedom of teaching, artistic activity, scientific research (and publication of the results thereof), as well as academic autonomy."[15] It was stated that the project was discussed with the academic community and it would bring development not only to large, but also to regional universities "by ensuring the diversity of the Polish academic community." The statute would introduce the regional initiative of excellence that would provide a separate funding stream for research in the "islands of excellence," smaller universities. Referring to the evaluation of universities, it was stated that the provisions contained in the LHES were a departure from the "scoring disease mechanisms inherited from the previous law" would allow scientists to focus

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[13] *See* Constitution for Science, Website of the Republic of Poland (Aug. 2, 2022), available at https://www.gov.pl/web/science/constitution-for-science.

[14] Baken J. Lefa, *History of Higher Education in South Africa*, 1(1) Hist. Educ. 45 (2014).

[15] Comment by the Minister of Science and Higher Education, Jarosław Gowin, after the adoption of the new act on higher education and science, Website of the Republic of Poland (Aug. 2, 2022), available at https://konstytucjadlanauki.gov.pl/o-ustawie.

on real research and realize their ambitions instead of collecting points."[16] It was clearly indicated based on expert reports that the side effects of maintaining the existing status quo would entail: increasing difficulty of any attempts to modernise universities, failure to keep up with changes taking place in science, technology and general academic milieu, and consequently further deterioration of the universities' international significance. It was posited that the apparent autonomy of state universities is in fact limited by a variety of regulations, while the substantive freedom of the academia, particularly in terms of developing curricula, is lower in Poland than in many other EU and OECD countries.[17]

The LHES was drafted primarily under the premise of implementing a new model of university management with the aim of increasing its overall effectiveness.[18] The role of the rector was strengthened and rectors, not faculties or institutes, would be in charge of university finances. Not only rectors will enjoy a stronger position, but universities will have greater autonomy to shape their own structures. It is now up to the university senate to decide, by adopting a statute, if the university will be divided into faculties or choose another internal structure. The reform has a strong human aspect. Academic staff falls into three categories: those who concentrate on research, a group that combines research with teaching and a group that will just do teaching. A special professorship of didactics has been created in recognition of academics who do not do research but are outstandingly talented teachers so they can progress their careers. The first results of the evaluations conducted by the Science Evaluation Committee (*Komitet Ewaluacji Nauki* in Polish) will be announced in 2022. The evaluation will mainly be based on hard bibliometric data coming from the databases of Elsevier and Clarivate Analytics. Preference will be given to publications in the leading international journals. A new model of preparing academic staff will be introduced alongside doctoral schools. At the same time, the old system of the intermediate habilitation degree between a doctorate and professorship that led to academics not getting to the top until they were much older, has been tweaked. It will now be possible to go from a doctorate directly to a professorship.[19]

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[16] Ludwika Tomala, *The Sejm passed the Law on Higher Education and Science, the so-called Law 2.0*, Science in Poland, 8 July 2018 (Aug. 2, 2022), available at https://scienceinpoland.pap.pl/en/news/news%2C30185%2Csejm-passed-law-higher-education-and-science-so-called-law-20.html.

[17] *See* Strategy for the Development of Higher Education in Poland by 2020, *supra* note 5.

[18] Similar observations were voiced by Jarosław Górniak in *Diagnosis of Higher Education*, *supra* note 5, at 235, where the need for institutional, organisational and managemental changes was also emphasised.

[19] Waldemar Siwinski, *The Quest to Promote Quality over Mediocrity in HE*, University World News, 1 March 2019 (Aug. 2, 2022), available at https://www.universityworldnews.com/post.php?story=20190225100517806.

2. Key Regulations of the LHES

The introduction to the LHES stipulated that the pursuit of truth and the transmission of knowledge from generation to generation were recognised as a particularly noble human activity. What is more, the fundamental role of science in the creation of civilisation, the rules for the functioning of higher education and the conduct of scientific activities were established on the following principles:

> 1) It is the duty of the public authorities to create optimal conditions for the freedom of scientific research and artistic creation, freedom of teaching and autonomy of the academic community, 2) every scientist is responsible for the quality and reliability of research and for the education of the young generation, 3) higher education institutions and other research institutions carry out a mission of particular importance for the country and the nation: they make a key contribution to the innovativeness of the economy, contribute to the development of culture as well as to the establishment of moral standards in public life.

It was underlined that the basis of the system of higher education and science is the freedom of teaching, artistic creation, research and publication of its results as well as the autonomy of higher education institutions. The system of higher education and science shall respect international standards, ethical principles and good practice in education and research activities as well as take into account the particular importance of the social responsibility of science. Scientific activities include scientific research, development works and artistic creation. Specially, the scientific research is an activity that includes: 1) basic research understood as empirical or theoretical works aimed primarily at gaining new knowledge about the foundations of phenomena and observable facts without focusing on any direct commercial application; 2) applied research, understood as works aimed at acquiring new knowledge and skills, focused on developing new products, processes or services or introducing significant improvements in them. It was added that development works are an activity involving the acquisition, combining, shaping and use of existing knowledge and skills, including those relating to IT tools or software, for production planning and the design and creation of altered, improved or new products, processes or services, excluding activities involving routine or periodic changes thereto, even if such changes constitute improvements.[20]

In the financial context, the aspect of academic autonomy was strongly emphasised. Related to the above, one should highlight the considerable substantive status of intra-academic acts adopted by the competent bodies of a given institution, e.g. the senate,

[20] Arts. 3–5 of the LHES.

the rector. The same are also significant to the problem of preferable fiscal treatment of academic teachers discussed in this paper.[21] In particular, one should consider the new regulation's approach to so called *tax-deductible costs* with regard to taxation of the remunerations received by academic researchers (authors) which, if applied, would significantly reduce the level of the due personal income tax (PIT).

Under the current law, performance of the tasks of an academic teacher constitutes an individual creative activity within the meaning of copyright legislation.[22] Such wording of the regulation could suggest that *all* professional duties performed by academic teachers are eligible for the preferential treatment, i.e. included in the scope of the 50% tax-deductible expenditures. Indeed, this interpretation was endorsed by the Minister of Science and Higher Education who publicly declared that, in his assessment, the ministry had been able to develop a solution that would lay to rest any doubts as to the possibility of applying the increased rate of deductible expenditures with respect to the remuneration received by university staff performing the roles of academic teachers.[23] In the minister's opinion, the LHES takes into due account the actual circumstances of universities' overall functioning and the specificity of academic teachers' work by recognising their tasks as creative activity eligible for the 50% cost deduction.[24]

Unfortunately, upon a closer analysis of legal provisions pertaining to the creative activity of academic teachers, one inevitably arrives at considerably less optimistic conclusions. The questionable effectiveness of the regulation is in fact so apparent that it is difficult to avoid the impression of a general confusion experienced subsequently by all the actors involved: university boards, fiscal authorities, academic teachers, and even, apparently, members of the cabinet from whom we have heard a deafening silence with regard to the interpretation provided by tax authorities, which hardly bodes well for the overall success of the newly introduced legislation.[25]

Faced with a deluge of requests for official interpretation of the LHES submitted to the Ministry of Science and Higher Education by concerned academic authorities, officials consistently replied that the 50% tax-deductible expenditures will be applicable

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21 *See* the explanatory memorandum to the Act of 20 July 2018 – Law on Higher Education and Science (Dz. U. [Journal of Laws] of 2018, item 1668) (hereinafter the "Explanatory Memorandum").

22 Art. 116.7 of the LHES in conjunction with Art. 1.1 of the Act of 4 February 1994 on Copyright and Related Rights (Dz. U. [Journal of Laws] of 2018, items 1191 and 1293) (hereinafter the "Copyright Law").

23 *See, e.g.*, information provided at the website dedicated to the Constitution for Science, Website of the Republic of Poland (Aug. 2, 2022), available at https://konstytucjadlanauki.gov.pl/sprawy-pracownicze-najczesciej-zadawane-pytania.

24 *See, e.g.*, communication of the Ministry of Science and Higher Education of 25 May 2018 – "*Koszty uzyskania przychodu – MNiSW za jednolitymi zasadami*", unpubl. and communication of 8 June 2018– "*Koszty uzyskania przychodu – stanowisko MNiSW i MF*", unpubl.

25 *See* Letter from the Director of National Tax Information Office of 13 March 2019, no. 0112-KDIL3-3 .4011.14.2019.1.MM, LEX no. 489750. *See* also Jarosław Ostrowski, *Nowe autorskie koszty uzyskania przychodu* [*New Proprietary Tax Deductible Costs*], 6 Przegląd Podatkowy [Tax Review] 30 (2018).

to the *entire remuneration* of an academic teacher.[26] At the same time, however, the Ministry of Finance issued a statement about ongoing (prolonged) works on the general interpretation of tax law. Regretfully, one has to conclude that many months of consultations held between the respective ministries failed to yield satisfactory results. Given the growing uncertainty, the Minister of Science and Higher Education presented the Minister of Finance with a letter wherein he once again presented his own interpretation of the controversial law, in expectation that the same would be adopted as standard practice by tax authorities.[27] However, although the Minister of Finance reassured him that the general tax law interpretation long awaited by the academic circles would be promptly published, the Minister of Science and Higher Education's interpretation of the provisions was not corroborated.[28] In light of the above, it seems evident that the Minister of Science and Higher Education acted too rashly when confirming, in reply to the position of the Ministry of Finance, his opinion that the 50% cost deduction would apply to the entirety of an academic teacher's remuneration.[29] Furthermore, the statement in no way influenced the actual fiscal practice, even after the Ministry of Science and Higher Education officially voiced its concerns with regard to the interpretations provided by tax authorities and the extreme discrepancies observed in terms of the response of respective universities to the situation at hand.[30]

When analysing the discussed problem, one should not neglect to consider the amount of controversy arising from the provisions of personal income tax law itself.[31] What further exacerbates the situation is the fact that the same are in fact only secondary to numerous fundamental problems related to Copyright Law as such. Contrary to the claims of the Minister of Science and Higher Education, the introduced regulation is not conducive to clarity and uniformity in the application of law.[32] In this context, the provisions of the LHES refer to Copyright Law and its definition of a work, rather than directly to tax-related legislation.[33]

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[26] *See* reply issued on 23 October 2019, unpubl.

[27] Letter from the Minister of Science and Higher Education of 18 January 2019, ref. no.: DBF.WFSN. 5013.1.2019.KK.

[28] Letter from the Minister of Finance of 25 February 2019, ref. no.: DD3.8223.31.2019, unpubl.

[29] Notification entitled "*Nauczyciele akademiccy mogą stosować 50% kosztów uzyskania przychodów od całości wynagrodzenia*," Website of the Republic of Poland (Aug. 2, 2022), available at https://konstytucjadlanauki.gov.pl/nauczyciele-akademiccy-moga-stosowac-50-kosztow-uzyskania-przychodow-od-calosci-wynagrodzenia.

[30] Letter from the Minister of Science and Higher Educations of 9 May 2019, University of Wrocław (Aug. 2, 2022), available at https://uni.wroc.pl/wp-content/uploads/2019/02/50proc_KUP_pismo_MNiSW_190118.pdf.

[31] Arts. 5a.38–40, 22.9.3) and 22.9b.8) of the Act of 26 July 1991 on Personal Income Tax (consolidated text, Dz. U. [Journal of Laws] of 2021, item 1128, as amended) (hereinafter the "PIT Act").

[32] Letter from the Minister of Science and Higher Education of 23 November 2018, ref. no.: DBF. WFSN.74.135.2018.HŻ.

[33] Art. 116.7 of the LHES in conjunction with Art. 1.1 of the Copyright Law.

A juxtaposition of systemic regulations pertaining to higher education, fiscal and copyright concerns reveal the full scope and considerable significance of the observed disharmony. It is therefore unsurprising that the situation lends itself to a growing confusion of both the authors of the reform themselves, tax authorities, and consequently also the respective boards of Polish universities. When attempting to unravel the complex network of relationships touched upon by the LHES, one should begin by determining the actual subjective and objective scope of the newly introduced solutions for higher education.

The importance of tax solutions in the context of academic teachers' income should be emphasised here. While attempting to illustrate the general significance of the tax institution in question, it is worth referring to the level of taxation in Poland (tax scale) – *Table 1*.

Table 1

Tax assessment basis in PLN		**Tax (PIT)**
Over	**To**	
	120 000	17% (minus tax-free amount 5100 zł)
120 000		15 300 zł + 32% over 120 000 zł

Source: Article 27 of the PIT Act.

Applying 50% tax deductible costs means that only half of the income is subject to 17% or 32% tax rate. In general, it can be stated that this solution may lead to the reduction of the amount of tax due by half. In this sense, the introduced solution has a very significant, economic meaning for academic teachers in Poland.

3. Legal Status of an Academic Teacher

The Law on Higher Education and Science distinguishes between two groups of university employees, namely academic teachers and staff members who are not academic teachers.[34]

Academic teachers may be employed as members of the: 1) didactic staff; 2) research staff; or research and didactic staff.[35] The primary tasks of academic teachers entail conducting research and educating students. However, this hardly

[34] The new regulation retained previous dichotomic distinction between university staff members based on the specifics of their professional tasks, originally introduced in the Act – Law on Higher Education of 2005. *See* also Jan M. Zieliński, *Komentarz do art. 112 p.s.w.n.* [*Commentary on Art. 112 p.s.w.n.*] in *Prawo o szkolnictwie wyższym i nauce. Komentarz* [*Law on Higher Education and Science. Comment*] (Hubert Izdebski ed., 2019).

[35] *See* Arts. 112–115 of the LHES.

represents the entirety of work they perform. They are also obliged to contribute to organisational work at their universities and continuously increase their professional competences. It should be noted at this point that the remuneration received under the relevant employment relationship covers also those types of duties. Given the specific wording of the LHES, the aforementioned formula greatly hinders the applicability of the provisions on 50% tax-deductible expenses. Specifically, it simply is not compatible with the new regulation[36] which defines the performance of an academic teacher's tasks as individual creative activity within the meaning of Article 1.1 of the Copyright Law. Naturally, one cannot argue with the fact that, as such, the idea behind the regulation is reasonable and touches upon the very gist of the matter, however, already at this stage it becomes clearly evident that from the substantive and strictly practical perspective, the same is far from sufficient. Even though the provision includes all statutory tasks of academic teachers (i.e. members of research, didactic, or research and didactic staff) within the scope of its applicability, its actual wording does not facilitate the development of a uniform interpretation in terms of the extent to which the 50% tax-deductible expenditures are in fact applicable.

Numerous additional doubts arise from the specific structure of an academic teacher's remuneration. One has to ask whether, in light of the LHES provisions,[37] it is correct to assume that the basic remuneration received by a research, research and didactic, or didactic staff member should be eligible for copyright protection and therefore fall within the scope of the 50% expenditure deduction stipulated by the PIT Act?[38] Although we fully approve of the adopted direction of legislative changes, it is our considered opinion that without an explicit solution to the mounting unclarity, the correct application of the LHES will be burdened with a high risk of erroneous interpretation of its provisions. For even should we assume that the increased 50% cost deduction can be applied to the full basic remuneration of a faculty member, one cannot forget that the salary received by a university employee actually consists of two elements: the *basic remuneration* and the *length of service allowance*. Furthermore, a university employee may also be eligible for so-called *variable remuneration components*: 1) special duty allowance, 2) performance allowance, 3) overtime pay, 4) allowance for working in onerous or hazardous conditions, 5) bonuses – in the case of employees who are not academic teachers, 6) other allowances, if specified in the internal collective labour agreement or remuneration policy.[39] This leads to another problem: are variable remuneration components also eligible for inclusion in the 50% tax-deductible expenditures framework stipulated by the LHES?[40] This does not seem

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36 Art. 116.7 of the LHES.

37 Art. 116.7 in conjunction with Art. 115.1–2 of the LHES.

38 Art. 22.9b.8) in conjunction with para. 9.3) of the PIT Act.

39 Art. 136 of the LHES.

40 Art. 136.2.2)–3) and 6) in conjunction with Art. 138.3 of the LHES.

to be corroborated by the position adopted in administrative case law which concludes that such remuneration components do not constitute income from work subject to copyright as no cause-and-effect relationship can be identified in this case between the remuneration and actual creative work.[41] Adopting this interpretative direction in fiscal practice, however, would stand in blatant contradiction to both the intentions of the legislators and the ministerial interpretation of the relevant regulation.[42]

Additional limitations to the applicability of the LHES stem from the numerous doubts related to the method of taxation with regard to the remuneration of staff members on paid sabbaticals. It is difficult to explicitly determine whether the increased level of tax-deductible expenditures ought to be applied immediately (when paying the salary due to a faculty member on a sabbatical) or rather only once the relevant copyrights are transferred to the employer (the current copyright and fiscal legislation and the provisions of the LHES prove decidedly inconsistent in this respect). Notably, also identifying the correct moment of payment as such is significant in this context.

A separate problem relates to the method of *documenting* the income received in return for the work performed by an academic teacher. Should a faculty member submit a statement to declare the percentage of royalties included in their overall basic renumeration? Since the provisions of the LHES came into force, should faculty members be required to keep a register and settlement of the tasks performed to produce a creative work which, in their opinion, falls under the relevant definition stipulated by Copyright Law? Should it be necessary, at the end of the fiscal year, for the employer to take over the copyrights with respect to works to which the 50% cost deduction was applied?[43] Under the current legislation, it is impossible to unambiguously answer these questions based on sufficient and compelling substantive arguments.

Given the extent of the emerging dilemmas, it is impossible not to mention copyright-specific regulations that determine the perception of academic teacher's work and its character.

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41 It is worth citing an excerpt from a ruling of the Voivodeship Administrative Court in Poznań of 24 January 2018, ref. no. I SA/Po 831/17, LEX no. 2446370, whose statement of reasons reads "a payer will be eligible for 50% expenditure deduction in the month when employees receive remuneration in return for the use of disposal of copyrights, but excluding statutory bonus (and other bonuses, e.g. performance bonus) and service allowance, i.e. only with respect to the given employee's basic remuneration (…), because they do not constitute revenue generated from work subject to copyright as there is no cause and effect relationship between the remuneration and creative work." It should be added that additional controversy emerges in the event of temporary suspension of basic remuneration due to receipt of financing from sources other than the subsidy.

42 *See* Letter from the Minister of Science and Higher Education of 23 November 2018 to rectors of state universities, ref. no.: DBF.WFSN.74.135.2018.HŻ.

43 Article 12.1 of the Copyright Law reads: "Unless this Act or a contract of employment states otherwise, the employer, whose employee has created a piece of work within the scope of his/her duties resulting from the employment relationship, shall, upon acceptance of the work, acquire the author's economic rights within the limits resulting from the purpose of the employment contract and the congruent intention of the parties."

4. Concerns Arising from Copyright Law

Under the provisions of the LHES, the performance of professional tasks by an academic teacher constitutes creative activity within the meaning of Copyright Law. But for the results of an academic teacher's research to be eligible for copyright protection, they ought to possess the specific attributes of a creative work.[44] What qualities must result of an activity possess to be classified as a creative work within the meaning of Copyright Law? Pursuant to its provisions, the object of copyright is any *manifestation of creative activity* of individual nature, established in any form, irrespective of its value, purpose or form of expression.[45] Protection may apply to the form of expression only and no protection is granted to discoveries, ideas, procedures, methods, operating principles, or mathematical concepts.[46] A work is in copyright since being established, even if its form is incomplete.[47]

The provisions of Copyright Law do not specify whether a work can be established solely under a *specific work contract*. The above conclusion stems both from Copyright Law and the provisions of the civil code.[48] A work within the meaning of Copyright Law can also be established within the framework of an employment relationship[49] or a service contract.[50] This leads to the conclusion that there are no evident legal obstacles to qualifying the work of an academic teacher as creative activity.[51] At this point, however, the point of gravity in the discussed problem shifts to another aspect of the same. It becomes necessary to determine the actual scope of an academic teacher's activity that is eligible for copyright protection and can therefore be subject to the increased tax-deductible expenditures.

A work is, above all, an intangible asset constituting the *result* of the author's intellectual activity. Hence, the definition of a work as a "manifestation" of a particular activity refers the same to an external result existing outside of the author's mind. As indicated in the doctrine, granting protection to a given result of human activity depends on several conditions. It must constitute a manifestation of creative activity

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44 Art. 1.1 of the Copyright Law.

45 *Id*.

46 *Id*. Art. 1.2[1].

47 *Id*. Art. 1.3.

48 Art. 1.1 of the Copyright Law in conjunction with Art. 627 of the Act of 23 April 1964 – the Civil Code (consolidated text Dz. U. [Journal of Laws] of 2019, item 1145) (hereinafter the "C.C.").

49 Arts. 12 & 14 of the Copyright Law.

50 Supreme Court ruling of 22 March 2018, II UK 262/17, LEX no. 2499800.

51 *See* also MF: nowe przepisy PIT o 50 proc. kosztach nie zmieniają sytuacji nauczycieli akademickich [MF: new PIT regulations by 50% costs do not change the situation of academic teachers], Rzeczpospolita, 18 January 2018 (Aug. 2, 2022), available at https://www.rp.pl/podatki/art9978351-mf-nowe-przepisy-pit-o-50-proc-kosztach-nie-zmieniaja-sytuacji-nauczycieli-akademickich.

(creativity condition), have an individual character (individuality condition), and be established in some form.[52]

A key aspect for our present deliberations stems from the part of the definition which refers to a work as a "*manifestation of creative activity*." The creative aspect must therefore be somehow expressed as a result of such activity.[53] This reference to a "manifestation (result, product) of creative activity" means that a thought or concept as such, regardless of how original, is not sufficient to warrant legal protection unless it is somehow manifested in a way that establishes its form and content. *A work must be the result of creative activity*, i.e. constitute a subjectively new product of the intellect. This quality of a work is typically referred to as "originality"[54] or "novelty."[55] Furthermore, it must also have an "individual character,"[56] i.e. it ought to be possible to associate the work with a specific author, thus establishing a certain "bond" that is subject to legal protection.[57] One should therefore ask oneself whether the work has been created by someone else before and if it is likely for it to be created by someone else in the future with the same result. If the answer to the latter is affirmative, the work should be deemed as a repeatable, routine activity whose results are reproducible. If the answer is negative, on the other hand, this fact attests to the individual character of the work (product, result).[58]

Practical concerns arising in the context of taxing the creative activity of academic teachers stem from the fact that the applicable copyright regulations do not correspond to solutions adopted in provisions pertaining to the organisation of higher education. Currently, in a situation where Article 116.7 of the LHES directly refers to the provisions of Copyright Law, we are faced with a systemic clash between statutory regulations, where the object of copyright protection is not defined by the LHES or even the PIT Act, but rather by Copyright Law. The Act – Law on Higher Education and Science does not contain provisions specifying that in the case of work performed by academic teachers and the specificity thereof, a special type of works subject to copyright protection are produced. Indeed, there is nothing to

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52 Supreme Court ruling of 22 March 2018, *supra* note 50, LEX el.

53 *Id*. LEX el.

54 *See* Supreme Court ruling of 15 November 2002, II CKN 1289/00, LEX no. 78613.

55 *See, e.g*., Supreme Court ruling of 22 June 2010, IV CSK 359/09, LEX no. 694269; Supreme Court ruling of 25 January 2006, I CK 281/05, LEX no. 181263. *See* also Janusz Barta & Ryszard Markiewicz in *Prawo autorskie i prawa pokrewne. Komentarz* [*Copyright and Related Rights. Comment*] 22 (Janusz Barta & Ryszard Markiewicz eds., 2011).

56 *See, e.g*., Administrative Court in Warsaw ruling of 18 February 2009, I ACa 809/08, LEX no. 1120180.

57 *See* Art. 16 of the Copyright Law. For more information *see* Maria Poźniak-Niedzielska & Adrian Niewęgłowski in *System Prawa Prywatnego. T. 13: Prawo autorskie* [*Private Law System. Vol. 13: Copyright*] 9 (Jerzy Barta ed., 2013).

58 Supreme Administrative Court in Warsaw ruling of 11 July 2018, II FSK 1845/16, LEX no. 2528581.

suggest any departure from the legal definition to which the LHES directly refers, i.e. the definition of a "work" provided in the Copyright Law. It is therefore justified to directly apply the legal definition contained therein to the interpretative process. Under the principles of effective legislation, should the legislator wish to depart from the same, the alternative meaning of the concept (creative work of academic teachers) ought to have been clearly stipulated and its exact scope of reference determined.[59] The legislation also does not determine whether the respective forms of academic teachers' didactic activity can indeed be treated as works[60] or what principles should apply when determining the management of the related rights relative to the employment relationship existing between the academic teacher and the university. Consequently – and rather unsurprisingly – interpretative uncertainty continues to persist and be reflected in the practice of tax authorities and administrative courts with inevitable negative consequences for the taxpayers – academic teachers, particularly with respect to the statutorily guaranteed "legal certainty."[61]

5. Tax Policy

Since the new law's entry into force, universities have been coping with the situation by introducing internal regulations determining the percentage share of the remuneration to which the 50% expenditure deduction may be applied, e.g. 95% for research staff members, 70% for didactical staff members, 60% for librarians. Additionally, a number of various obligations were introduced (including provision of written employee statements) with regard to documenting and evidencing the extent of work subject to copyright protection. However, this practice has not been fully endorsed by either tax authorities or administrative courts. As an example, one can evoke the position of the Director of the National Tax Information Office who concluded that where the employment relationship includes both activities subject to copyright protection and not subject thereto, the value of remuneration paid specifically in consideration of the use of copyright needs to be documented. It is not sufficient to determine the percentage of the employee's overall work hours or overall remuneration. The primary condition is for *a work within the meaning of the Copyright Law to be established. The performance of creative work assignments as such*

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[59] § 147 of the Regulation of the Council of Ministers of 20 June 2002 on "Principles of Legislative Technique" (consolidated text, Dz. U. [Journal of Laws] of 2016, item 283).

[60] *See* Maria Poźniak-Niedzielska & Grzegorz Tylec, *Działalność naukowo-dydaktyczna na wyższej uczelni w świetle prawa autorskiego* [*Research and Teaching Activities at a University in the Light of Copyright*], 5 Państwo i Prawo [State and Law] 33 (2009).

[61] Reply of the Minister of Finance to parliamentary interpellation no. 22980 of 30 July 2018, no. DD3. 054.43.2018, unpubl.

does not automatically entail the establishment of a work and the transfer of the title thereto to the employer.[62]

The interpretation of this issue in administrative case law tends to evoke similar arguments, i.e. the need to clearly identify the proportion of the remuneration due with respect to the disposal of copyrights to a work that is actually established, and clear regulation of the same in the provisions of relevant employment contracts or other regulations applicable internally in the given place of work, e.g. remuneration policy.[63]

Upon the introduction of the solution stipulating that the performance of professional tasks by an academic teacher constitutes creative activity of individual character, within the meaning of Article 1.1 of the Act of 4 February 1994 on Copyright and Related Rights (Dz. U. [Journal of Laws] of 2018, items 1191 and 1293),[64] the practice of tax authorities and administrative courts was not substantially affected.[65] Also the Minister of Finance continues to endorse his original interpretation.[66] He additionally explained that since tax regulations reference Copyright Law, a different authority is more competent to provide interpretation (Minister of Culture and National Heritage).[67]

A comparative analysis of the interpretations and legal order applicable clearly reveals blatant shortcomings of the LHES. Furthermore, it seems that the road to effective implementation of the preferential provisions providing academic teachers with the right to apply 50% tax-deductible expenditures will necessitate adequate amendment of the LHES and Copyright Law, rather than adaptation of tax laws or issuance of different interpretations of the existing regulations.

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62 Letter from the Director of National Tax Information Office of 31 August 2018, ref. no.: 0114-KDIP3. 4011.305.2018.2.PP, unpubl., and Voivodeship Administrative Court in Poznań ruling of 24 January 2018, ref. no. I SA/Po 831/17, Central Database of Administrative Court Rulings.

63 The Supreme Administrative Court emphasised on numerous occasions that it is insufficient to merely indicate in the employment contract the portion of work time devoted to creative activity. Such a distinction does not specify whether any actual work is being established or whether payment is affected in return for the use thereof. *See* Supreme Administrative Court ruling of 12 March 2010, II FSK 1791/08, LEX no. 745894; of 16 September 2010, II FSK 839/09, Central Database of Administrative Court Rulings, and of 29 April 2011, II FSK 2217/09, LEX no. 1081354.

64 Art. 116.7 of the LHES.

65 *See, e.g.*, individual interpretation of 11 July 2018, no. 0113-KDIPT3-4011.173.2018.2.PP, and individual interpretation of 1 June 2018, no. 0115-KDIT2-1.4011.82.2018.2.MK.

66 *See* Reply from the Minister of Finance, no. DD3.8223.361.2017, unpubl.; reply to parliamentary interpellation no. 18569 of 5 February 2018, and reply from 14 February 2018 to parliamentary interpellation no. 187446.

67 *See, e.g.*, Letter from the Minister of Finance, no. DD3.8223.361.2017, unpubl., and Letter from the Minister of Finance, no. DD3.8223.363.2017, unpubl.

6. Legal Effects of Internal University Regulations

Faced with the general confusion regarding interpretation of the LHES, Polish universities were forced to take various steps at the level of internal legislation. Their purpose was to ensure safe implementation of regulations pertaining to the eligibility for 50% tax-deductible expenditures. Given the government's failure to provide a definitive opinion, the universities had to act somewhat "in the dark." A vast majority of institutions decided to adopt internal Senate resolutions. Unfortunately, the very gist of such resolutions proved to have been based – as already discussed above – on rather questionable grounds, specifically the narration and legal argumentation provided by the Ministry of Science and Higher Education. One should emphasise at this point that the same do not constitute sources of law nor can they substantially weigh on interpretative decisions.

It is noteworthy that some universities elected to regulate the principles of applying the 50% tax deductible expenses by way of the Rector's decision rather than a resolution of the Senate.[68] There are also some universities that decided not to amend their current internal regulations until such time that a definitive statement is provided by the government or a general interpretation of tax law is issued; some have also adopted regulations that retained the former percentage division of remuneration with identification of the part thereof subject to copyright protection.[69]

Already at the stage of this analysis, it becomes fairly evident that such measures fail to ensure legal certainty. Firstly, the sole fact that such initiatives stem directly from the position of the Minister of Science and Higher Education, which holds no legitimacy, may render such internal university acts legally contestable and ineffective in the event of a potential dispute between a taxpayer (academic teacher) and a tax authority. Moreover, the mentioned diversity with regard to the chosen form of intra-university regulations itself constitutes a perfect illustration of the legal chaos resulting from the implementation of the higher education reform. Under such circumstances, one can hardly speak of universality and equality of taxation or uniformity in the application of law under, let us not forget, the legal system of one and the same state. One should bear in mind that the scale of the negative legal consequences is not limited to the relatively small number of Polish universities but affects the entire social group of academic employees.

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[68] *See, e.g.*, Resolution no. 87 of the Rector of Jagiellonian University of 14 December 2018, 75.0200.82.2018 on the principles of applying 50% tax-deductible expenditures for the use of author's copyrights and Regulation no. 128 of the Rector of the University of Warsaw of 10 December 2018 on the principles of calculating revenue generated from employment relationships to which 50% tax-deductive expenditures can be applied.

[69] *See, e.g.*, Resolution no. 78/2018 of the Rector of the University of Szczecin of 1 October 2018 on the principles and procedure in calculating tax-deductive expenditures of academic teachers employed at the University of Szczecin with respect to copyrights within the framework of personal income tax.

The activity of universities that decided, despite the above, to take certain legislative steps to remedy the situation has also been significantly varied. Some fully embraced the interpretation provided by the Minister of Science and Higher Education and adopted, in their internal regulations, the principle of applying the 50% rate of tax-deductible expenditures to the entire remuneration received by academic teachers. At the same time, one should note that even in the context of universities that adopted the Minister's interpretation, the specific method of applying the 50% rate varies from one university to another. For instance, some decided to exclude certain components of remuneration, e.g. jubilee awards, rector's and minister's awards, or retirement benefits.[70]

Apart from differences in terms of the relevant exclusions, discrepancies can also be observed with regard to the effective dates of the particular regulations. In fact, these differences can reach up to one year.[71] In an effort to correlate with the statutory dates, some universities adopted resolutions retroactively.[72]

The nationwide lack of consistency and chaotic legislative measures taken internally by universities further corroborate the aforementioned thesis of the need to amend the provisions of the LHES. The current level of confusion regarding the applicability of the analysed regulations cannot be tolerated as it can lead to negative legal consequences for taxpayers (authors) in the future.

7. Main Tax Legal Solutions in BRICS Countries

While discussing the meaning and essence of Polish legal regulations, it is worthwhile to show this issue against the background of selected examples of solutions in the BRICS countries. Below is an overview of only the basic regulations on taxation of academic teachers' income in Brazil, Russia, India, China and South Africa.

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[70] Resolution no. 63/19 of the Senate of the University of Gdańsk of 23 May 2019 on the amount of remuneration subject to the copyright of academic teachers employed at the University of Gdańsk, and Resolution no. 58 of the Senate of Nicolaus Copernicus University in Toruń of 30 April 2019 on the amount of remuneration subject to the copyright of academic teachers employed at the Nicolaus Copernicus University in Toruń.

[71] *See* Resolution no. 78/2018 of the Rector of the University of Szczecin of 1 October 2018 on the principles and procedure in calculating tax-deductive expenditures of academic teachers employed at the university of Szczecin with respect to copyrights within the framework of personal income tax and Resolution no. 569 in the Statutes of the University of Zielona Góra of 30 October 2019 amending Resolution no. 316 in the Statutes of the University of Zielona Góra of 19 December 2018 on the application of 50 tax-deductible expenditures to revenues obtained under the work relationship.

[72] Resolution no. 62/2019 of the Rector of the University of Wrocław of 19 April 2019 on the principles of applying 50% tax-deductible expenditures to revenues generated under employment relationships at the University of Wrocław, § 9 thereof stipulates that the resolution comes into force as from the day of adoption, but the provisions pertaining to academic teachers in the period of employing increased deductible costs come into force as from 1 January 2019.

Residents of *Brazil* are taxed on their worldwide income, and non-residents are taxed exclusively at source on their Brazilian-sourced income. The source of income is determined by the place where the income payer is located, irrespective of where the work is performed. Resident taxpayers who receive income from Brazilian sources are subject to withholdings. Resident taxpayers who receive income from non-Brazilian sources (e.g. through split payroll arrangement) or from individuals (e.g. rental income) are subject to mandatory monthly tax payments on amounts not subject to withholdings.

The monthly income tax will be calculated based on the following progressive tax rates (in Brazilian real or BRL) as of April 2015 (*Table 2*).[73]

Table 2

Income at or over (BRL)	Up to (BRL)	Tax rate (%)	Deductible tax amount (BRL)
0	1,903.98	Exempt	0
1,903.99	2,826.65	7.5	142.80
2,826.66	3,751.05	15.0	354.80
3,751.06	4,664.68	22.5	636.13
4,664.68	and above	27.5	869.36

Taxable compensation includes everything that is either directly or indirectly connected with the work and/or assignment remuneration package, including salary, premiums, bonuses, allowances of any kind, tax reimbursements, club dues, and company-owned cars. For Brazilian tax legislation purposes, the items mentioned *expressis verbis* in the statute, may be deducted from an employee's annual taxable income. In lieu of the itemised deductions, taxpayers may take the benefit of a standard annual deduction (20% of gross taxable income, limited to a certain specific amount established each year by the tax authorities: BRL 16,754.34 since 2015, with no changes up to 2020). The option for a standard deduction is not allowed on exit returns or for those individuals who will offset losses from farming activities in the annual income tax return.

In Brazil, royalties from copyrights, patents, and oil, gas and mineral properties are taxable as ordinary income. The aforementioned, are reported in Part I of Schedule E (Form 1040 or Form 1040-SR), Supplemental Income and Loss. However, if the taxpayer holds an operating oil, gas, or mineral interest or is in business as a self-

[73] Individual – Taxes on Personal Income, PwC (Aug. 2, 2022), available at https://taxsummaries.pwc.com/brazil/individual/taxes-on-personal-income.

employed writer, inventor, artist, etc., reports income and expenses on Schedule C.[74] Royalties from copyrights on literary, musical, or artistic works, and similar property, or from patents on inventions, are amounts paid to you for the right to use your work over a specified period of time. Royalties are generally based on the number of units sold, such as the number of books, tickets to a performance, or machines sold.[75]

In *Russia*, all income received in the course of a calendar year from employment is subject to PIT. This includes all earnings, bonuses, and other forms of payment or remuneration in cash or in kind. Royalties from the creation, publication, performance, and use of works of literature, art, and science, as well as from inventions, discoveries, and industrial prototypes are included in taxable income (subject to deductions).[76] As of 1 January 2021, progressive taxation is introduced in Russia. Generally, an annual income of up to RUB 5 million will be taxed as 13%, whereas income above this limit will be taxed at 15%.

However, there are several exceptions to this rule:

• Income from the sale and receipt of property other than securities as a gift and taxable insurance and pension payments is subject to a flat rate of 13%.

• The value of any awards and prizes received during contests, games, and other events conducted for the purpose of advertising goods, work, and services, in excess of set limits, is taxed at 35%.

• Loans taken with an interdependent entity (i.e. an entity in which the individual has direct or indirect control), with an employer, or representing the offset of a counterclaim from an individual to the lender, which are considered as "beneficial loans." Interest rates on beneficial loans are less than 9% (for non-Russian currency loan) and less than 2/3 of refinancing rate of the Central bank of Russia (for rubble denominated loans). The difference between the actual interest paid and interest recalculated at the respective rate is taxed at 35% (*Table 3*).[77]

Authors who receive income from their works and cannot confirm their expenses with documents have the opportunity to take advantage of a deduction from 20 to 40%. The percentage depends on the type of income. For example, authors of literary works or scientific works can reduce their income by 20% and sculptors — by 40%. Professional Tax Deductions were presented above.[78]

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[74] What Is Taxable and Nontaxable Income?, Internal Revenue Service (Aug. 2, 2022), available at https://www.irs.gov/businesses/small-businesses-self-employed/what-is-taxable-and-nontaxable-income.

[75] Publication 525 (2021), Taxable and Nontaxable Income, Internal Revenue Service (Aug. 2, 2022), available at https://www.irs.gov/publications/p525#en_US_2021_publink1000229289.

[76] Individual – Taxes on Personal Income, PwC (Aug. 2, 2022), available at https://taxsummaries.pwc.com/russian-federation/individual/income-determination.

[77] *Id*.

[78] Tax Code of the Russian Federation, Part II, Federal Law No. 117-FZ of 5 August 2000 (Ernst & Young trans.), Arts. 221–224 (Aug. 2, 2022), available at https://data.nalog.ru/html/sites/www.eng.nalog.ru/Tax%20Code%20Part%20Two.pdf.

Table 3

	Norms of expenditures (as a percentage of the amount of accrued income)
Creation of literary works, including for theatre, cinema, stage and circus	20
Creation of artistic graphical works, photographic works for publications, works of architecture and design	30
Creation of works of sculpture, monumental-decorative painting, decorative applied and designer art, easel painting, theatre and cinema decoration art and graphics executed using various techniques	40
Creation of audio-visual works (video, television and cinema films)	30
Creation of musical works: stage musical works (operas, ballets, musical comedies), symphonic, choral and chamber works, works for brass band, original music for cinema, television and video films and theatre productions	40
other musical works, including those prepared for publication	25
Performance of literary and artistic works	20
Creation of scientific works and designs	20
Discoveries, inventions and creation of industrial samples (for amount of income received in the first two years of use)	30

In *India*, while the Income tax department charges tax on the income under "Profit and Gains of Business or Profession" or "Other Sources" head of Income, it also provides a deduction. The deduction is covered under 80QQB of the Income-Tax Act, 1961, as amended by Finance Act, 2021.[79] Where, in the case of an individual resident in India, being an author, the gross total income includes any income, derived by him in the exercise of his profession, on account of any lump sum consideration for the assignment or grant of any of his interests in the copyright of any book being a work of literary, artistic or scientific nature, or of royalty or copyright fees (whether receivable in lump sum or otherwise) in respect of such book, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction from such income, computed in the manner specified in the provisions analysed (sub-section 1, 80QQB of the Income-Tax Act, 1961). The deduction under the sections mentioned shall be equal to the whole of such income referred to in sub-section 1, or an amount of three

[79] Income-Tax Act, 1961 [43 of 1961], Central Board of Direct Taxes, Government of India (Aug. 2, 2022), available at https://www.incometaxindia.gov.in/pages/acts/index.aspx.

lakh rupees, whichever is less. Nevertheless, no deduction shall be allowed unless the assessee furnishes a certificate in the prescribed form and in the prescribed manner, duly verified by any person responsible for making such payment to the assessee as referred to in sub-section 1, along with the return of income, setting forth such particulars as may be prescribed. Furthermore, no deduction under this section shall be allowed in respect of any income earned from any source outside India, unless the assessee furnishes a certificate, in the prescribed form from the prescribed authority, along with the return of income in the prescribed manners.

Therefore, there are certain conditions to be satisfied for income earned in India and outside India:

1) Individual claiming the deduction must be a resident in India or resident but not ordinarily resident in India;

2) Individual must have authored or co-authored a book that falls under the category of literary, artistic or scientific work;[80]

3) Individual must file his income tax return to claim the deduction;

4) If an individual has not received a lump sum amount, 15% of the value of the books sold during the year (before allowing any expenses) should be ignored;

5) Individual must obtain FORM 10CCD from the person responsible for making the payment.

For income earned outside India, there are additional requirements. Individual is allowed deduction on income earned outside India when the income is brought to India in convertible foreign exchange within 6 months from the end of the year or within the period allotted by RBI or other competent authority for this purpose. Individual must obtain a certificate in FORM 10H.[81]

Residents in *China* are generally subject to China individual income tax (IIT) on their worldwide income. An individual is taxed in China on one's income by category. China's IIT law groups personal income into 9 categories. Within these categories are in particular: remuneration for labour services, author's remuneration, royalties. Each income category has its own tax rate(s), allowable deductions, etc. For residents, employment income, remuneration for labour services, author's remuneration, and royalties are combined as "comprehensive income" for aggregate tax calculation purpose on an annual basis. Income from the other categories is taxed separately by category on a monthly or transaction basis. For residents, calculation of IIT on annual comprehensive income is based on progressive tax rates using the following formula: (Annual taxable income x Tax rate) – Quick deduction (*Table 4*).[82]

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[80] Books here do not include journals, guides, newspapers, textbooks for school students, pamphlets, dairies and other publications of similar nature.

[81] Section 80QQB – Royalty Income – Deductions under 80QQB, ClearTax (Aug. 2, 2022), available at https://cleartax.in/s/section-80qqb/.

[82] Individual – Taxes on Personal Income, PwC (Aug. 2, 2022), available at https://taxsummaries.pwc.com/peoples-republic-of-china/individual/taxes-on-personal-income.

Table 4

Annual taxable income (in renminbi) (CNY)	Tax rate (%)	Quick deduction (CNY)
0 to 36,000	3	0
Over 36,000 to 144,000	10	2,520
Over 144,000 to 300,000	20	16,920
Over 300,000 to 420,000	25	31,920
Over 420,000 to 660,000	30	52,920
Over 660,000 to 960,000	35	85,920
Over 960,000	45	181,920

When calculating taxable comprehensive income for residents, IIT law allows a number of personal deductions (non-refundable and no carry back/forward provisions). As of 1 January 2019, the amount of the standard basic deduction is CNY 60,000 *per annum* (i.e. CNY 5,000 for monthly tax withholding purpose). There are also certain deductible items specifically provided by various IIT regulations. A deduction equal to 20% of the gross receipt is allowed when determining the income from labour services, author's remuneration, and royalties. A further deduction of 30% is allowable for author's remuneration.[83]

South African residents are taxed on their worldwide income. Progressive tax rates apply for individuals. The rates for the tax year commencing on 1 March 2021 and ending on 28 February 2022 are as follows (*Table 5*):

Table 5

Income (ZAR)	Tax on column 1 (ZAR)	Tax on excess (%)
0 to 216,200	0	18
216,201 to 337,800	38,916	26
337,801 to 467,500	70,532	31
467,501 to 613,600	110,739	36
613,601 to 782,200	163,335	39
782,201 to 1,656,600	229,089	41
1,656,601 and above	587,593	45

Certain limited expenses may be deducted by employees from their employment income. Such expenses include business-related travel, automobile, and

[83] Individual – Deductions, PwC (Aug. 2, 2022), available at https://taxsummaries.pwc.com/peoples-republic-of-china/individual/deductions.

entertainment expenses, with the amount that is deductible by an employee also being limited to the amount of the relevant allowance that is granted to the employee by their employer. A capital depreciation deduction is also available for allowance assets used in the course of employment. Legal fees incurred in respect of employment income are also deductible.

Employees who earn most of their income in the form of commissions may, subject to certain requirements, deduct their home office expenses. As a general rule, allowances (subject to certain limits), granted to an employee by an employer to meet business expenditure are taxable in South Africa, but only to the extent that they are not so expended for business or exceed the maximum limit for deduction. Allowances to meet purely domestic or private expenditure, such as the cost of living, are taxable. As far as royalties are concerned, ordinary tax rates are applied (depend on the tax bracket).[84]

Conclusion

Is it true that Law on Higher Education creates the implementation of a ground-breaking, comprehensive reform of the higher education system introduced by the Polish government under the motto of "Constitution for Science"? Does it establish optimum conditions to facilitate scientific and didactic excellence, ensure sustainable development of academic centres throughout Poland, and provide universities with effective management tools? Due to rapid globalisation, unfortunately, universities all over the world are competing with institutions from all corners of the world. With pressure to respond to increasingly fierce competition, higher education systems are forced to improve or risk falling behind. Therefore, the Polish government has introduced a number of changes, which it says should improve the quality of education and are a response to the rapidly changing economic and demographic situation in Poland. New rules regarding the allocation of resources and awarding grands have been implemented in an attempt to stabilise university finances. Currently Polish universities, as universities in BRICS countries, are experiencing a very big demographic change. Therefore, the system of higher education in Poland, should not be based only on the number of students as was previously done. Universities were only interested in improving their offer to recruit more students, but they should build their future on the quality of the studies. The minister of Science and Higher Education proposed a new model of financing universities. The mentioned tends are also discussed in different higher education systems, in BRICS countries.[85] If the development of the higher education is to be discussed, not only

[84] Bojan Radulovic, *Royalty Income Tax Rate for 2020*, Taxhub, 9 December 2019 (Aug. 2, 2022), available at https://www.gettaxhub.com/royalty-income-tax-rate-for-2020/.

[85] Poland Today (Aug. 2, 2022), available at https://poland-today.pl/future-of-higher-education/.

quality of the studies should be analysed. It should first be noted that financial and organisational conditions of academic teachers should be improved. For the time being, taking into consideration the lack of coherence between different Polish statutory acts, it is not practically provided. It is hard to sum up that the reform 2.0 meets the standards of clarity and transparency. The efforts made to date by the Minister of Finance and Minister of Science and Higher Education in the face of the many difficulties emerging at the meeting point between copyright, tax and education laws have to be deemed still ineffective and the employed solutions are characterised by considerable complexity and lack of consistency. This fact has a negative impact on the applicability of the government's envisioned preferential tax regulations dedicated to the group of academic teachers. It is unfortunately difficult to avoid the conclusion that although the idea of preferential treatment of researchers (taxpayers) is highly laudable as such, the manner in which it is being introduced contradicts the very purpose of the implemented reform.

A juxtaposition of the respective provisions of the Copyright Law and the LHES does not only alleviate the identified practical issues but actually adds to the already piling up problems. Unfortunately, it is difficult to find a duly justified substantive solution to the same within the framework of tax law. The formula of academic teachers' work adopted in the LHES significantly hinders the effective application of the 50% rate in terms of tax-deductible expenditures. By means of internal regulations, universities specified the percentage levels of remuneration eligible for the 50% expenditure deduction, even though such practice has not been endorsed or recognised by neither tax authorities nor administrative courts. The time during which the professional duties of academic teachers are performed cannot be treated as a determinant of the eligibility for the preferential 50% cost deduction of a given portion of remuneration, while the actual establishment and transfer of any work should entail the payment of a specifically identified amount rather than merely a percentage of total remuneration. Tax authorities are right to emphasise that only a clear distinction and due documentation of results (works in copyright) and the remuneration paid relative to the same can provide sufficient grounds for the application of 50% tax deductible expenditures.

This lack of a consistent, governmental interpretation leads to a situation where one has to question the professed preferential character of the 50% expenditure deduction principle stipulated in the act. Without questioning the premise and legal basis of the solution, one cannot but note the significant limitations to its practical reception in the academic context. Undoubtedly, the specifics of university operations and the scope (including manner of definition) of the tasks performed by academic teachers leads to a situation where determining the specific value of the work produced may prove very difficult in actual practice – indeed, even impossible in some cases. This pertains in particular to the requirement of determining the amount of payment due for each documented establishment of a work. Irrespective

of the above, it seems necessary to conclusively determine whether the respective forms of academic teachers' professional activity can be classified as creative works[86] and on what terms are the related rights to be disposed of within the framework of the employment relationship between an academic teacher and a university. Inevitably, urgent legislative changes will have to be introduced to restore systemic consistency between the LHES and Copyright Law regarding the special character of tasks performed by academic teachers.

Unfortunately, the efforts made to date by the Minister of Finance and Minister of Science and Higher Education in the face of the many difficulties emerging at the meeting point between copyright, tax and education laws have to be deemed ineffective. As a consequence, the situation has led to the misidentification of the creative process performed by the copyright subject with the result (product) of creative activity. Therefore, the negative effects thereof accumulate within the framework of tax law, preventing the possibility of consistent and substantially correct interpretations.

As in Poland, in BRICS countries, a variety of tax instruments are used to take into account the creative nature of the work of academic teachers. A full assessment of these solutions would have to include an extensive simulation tailored individually to different groups of taxpayers performing research activities. For the purposes of this article, it may be noted that the quoted solutions most often boil down to the application of tax deductions specifically dedicated to academic teachers resulting in a reduction of the tax burden. Of course, other elements of the tax structure are also important. In this respect, it is also worth noting the use in Russia of a relatively low tax rate of 13%, which in itself has a preferential character for taxpayers (on a global scale) – and thus also for academic teachers. In comparison, in Poland the minimum tax rate – 17%.

Against the background of the analysed solutions, however, it seems that the Polish solutions are the most far-reaching in terms of protecting the interests of academic teachers. They lead to a reduction of the tax burden (by applying 50% tax deductible costs) by exactly half. Importantly, this solution covers the entire income of academic teachers. It should also be emphasised that the regulations adopted in Poland in fact cover not only typical income from copyright, but also income covering the performance of other duties of teachers which are not actually creative in nature (e.g. conducting exams, consulting students). Thus, it may be assumed that these regulations are favourable for academic teachers.

While the very idea adopted on the grounds of Polish legal solutions deserves a high assessment and may constitute an interesting model to be copied in the area of BRICS countries (as far-reaching benefits for university researchers), the manner of its introduction deserves criticism. The adopted legal basis, as shown in the study, is

[86] *See* Poźniak-Niedzielska & Tylec 2009.

not internally coherent at the junction of tax law, copyright law and higher education law. In fact, they are even mutually exclusive. It is true that the Minister of Finance rescued the situation by issuing an interpretation favourable for academic teachers, but it also raises serious reservations from the point of view of legislative technique.[87] For this reason, the manner of proceeding with this legitimate regulation cannot be recommended in BRICS countries.

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[87] General interpretation by the Minister of Finance, no. Nr DD3.8201.1.2018 of 15 September 2020 regarding the applicability of 50% tax-deductible costs to royalty revenues (Dz. Urz. 2020, item 107).

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