Volume 12 Issue 1 (2025)

BRICS LAW JOURNAL

The journal's founder is

University of Tyumen UTMN

ISSN 2412-2343 (Online)

ISSN 2409-9058 (Print)

Key title: BRICS law journal (Print)
Abbreviated key title: BRICS law j. (Print)
Variant title: BRICS LJ

Contacts: bricslaw@gmail.com

BRICS Law Journal (BLJ)

An independent, professional peer-reviewed academic legal journal.

Aim and Scope

The *BRICS Law Journal* serves as a platform for comparative research and legal development not only in and among the BRICS countries themselves but, more importantly, also between the BRICS countries and other countries across the globe. Additionally, the *BLJ* provides an open forum for legal scholars and practitioners to reflect on issues of international significance that are relevant to the BRICS countries. Prospective authors who are involved in legal research, legal writing, and legal development associated with these subjects are, therefore, the main source of potential contributions for publications in the *BLJ*.

The *BRICS Law Journal* is published in English and appears four times per year. The *BLJ* is indexed by Scopus.

Notes for Contributors

Manuscripts must be the result of original research, not published elsewhere. Articles should be prepared and submitted in English. The *BLJ* doesn't accept translations of original articles prepared not in English. All articles are subject to professional editing by native English speaking legal scholars. The *BLJ* welcomes qualified scholars, but also accepts serious works of Ph.D. students and practicing lawyers.

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

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

TABLE OF CONTENTS

OPINION ARTICLE

The Goals of Legal Education: A U.S. Practitioner's Perspective*

Steven M. Schneebaum,

School of Advanced International Studies, Johns Hopkins University (Washington, D.C., United States of America)

https://doi.org/10.21684/2412-2343-2025-12-1-5-19

Received: January 27, 2025
Reviewed: February 7, 2025
Accepted: March 7, 2025

Abstract. The techniques and content of legal education have not changed much over the years, but the law itself has changed a great deal. There is a clear need for law faculties to rethink their approach to teaching, including students who intend to embark on careers as legal practitioners, and others whose legal studies will take them in other directions. The core of legal training should, in the author's view, be advocacy: the ability to present a case on behalf of another to a neutral reader or listener in a way intended to inform or to persuade. Obviously, legal education requires mastery of material, but far more emphasis needs to be placed upon how that material came into being, how it relates to other cultural phenomena, and how it can be used going forward. It is, moreover, essential for law teachers to be aware of the demands of globalization: they must expand their horizons to include developments occurring outside their own countries and legal regimes. This article suggests several devices that might serve to broaden law faculty curricula, and to promote the elusive goal of "learning to think like a lawyer" in the contemporary world: a set of skills that should be valuable to all students as they embark on their careers.

Keywords: legal education; advocacy; curricular reform; "thinking like a lawyer."

---

* An earlier version of this article appeared in Schneebaum, S.M. (2013). Reforming Legal Education: A Practitioner's Perspective. *Protection Project Journal of Human Rights and Civil Society*, 6, 1–12.

To cite: Schneebaum, S.M. (2025). The Goals of Legal Education: A U.S. Practitioner's Perspective. *BRICS Law Journal*, *12*(1), 5–19.

There is a vast divide between the legal academy and the world of legal practice, which often appears unbridgeable in either direction. The old adage that "those who can, do; those who can't, teach"[1] seems to have found a home in law schools around the world, regardless of geographic location or specific legal tradition.

Law faculties are not trade schools, nor are they meant to be. Yet a person must pass certain pedagogical milestones before being permitted to hold herself or himself out to the public as qualified to discharge the responsibilities of a legal professional. Graduating law students must have acquired three things: a body of knowledge of the law and its application; internalized patterns of thought (glibly if accurately summarized in U.S. law schools as learning "to think like a lawyer"); and a means of expressing both, using a specialized vocabulary and syntax. Whether they have done so is meant to be measured by the examinations that are the bane of their existence. Yet once those challenges have been met and overcome, new lawyers often find themselves living in an entirely unfamiliar world, for which their university experiences have not prepared them well, if at all.

The causes of the chasm between legal education and legal practice are many. Some are purely logistical: many law faculties are understaffed and underfunded, and they simply do not have the resources to invest in the kind of personalized, intensive pedagogy required to optimize the preparation of practitioners. In some legal systems, practical training takes place only after basic educational thresholds have been crossed, through a graduate degree, a specialized training facility, or a period of clerkship, articles, or internship. Occasionally, law professors view themselves as theoreticians, scholars whose ethereal universe has no room or time to consider actual clients or actual lawsuits: those rough-and-tumble things can be internalized after graduation. But more importantly, law faculties around the world are home to hordes of students who have not the slightest desire or intention ever to practice law: they are there to acquire a certain perspective, which they believe will grant them comparative advantage in business, or of government, or of consulting. To them, practice-focused education would be an unwanted distraction.

The diversity of consumers of legal education poses an unusual challenge to the academy. Most students pursuing degrees in medicine hope to become doctors, and so they and their teachers need not spend much effort exploring where academic study ends and "tradecraft" begins. Medical students virtually to a person want, and need, both. Architecture professors can ordinarily assume that the large majority of

[1] This *bon mot*, hardly beloved, for obvious reasons, of those in the teaching profession, is frequently attributed to H.L. Mencken but appears to have originated with George Bernard Shaw in his notes to *Man and Superman* (Cambridge University Press, 1903).

their charges want to design buildings after they leave school: they are not there to learn to "think like an architect."

The dilemma for law faculties, then, is this: how can a single classroom, or a single curriculum, prepare students whose career plans are so very different? And this practical question raises more fundamental ones: what exactly do we want a student to know, or to be able to do, on the day that she receives her degree in law, whatever might be her next steps?[2] What does "thinking like a lawyer" really mean, anyway? What is it that people with law degrees can do that people without them cannot?

There is a one-word answer to that last question, which should drive all legal education, regardless of the constitutional or cultural milieu in which it takes place. That word is **advocacy**. What law professors should be training their students to do – irrespective of whether they intend to be active members of the legal profession – is to be able to advocate, effectively, persuasively, and within the contours of existing law.

It might be objected that substantial numbers of lawyers are not advocates, and many successful ones have never seen the inside of a courtroom. Why, then, should they be required to internalize a set of skills that they will never use? But the question is based on a flawed assumption. Students trained in the law, if they have been paying attention and if their professors have taught them well, should be able to act as advocates, and should know how to do it, not only in courtrooms, but in boardrooms, in the office, and in correspondence. They should be able to make their case for themselves, or for those for or with whom they work, in whatever field of endeavor they enter.

Advocacy is something inherent in our daily lives, and most of us engage in it without thinking. We constantly try to persuade others to embrace our point of view, and in all likelihood we do so with at least some degree of success. So, when we were successful in getting someone else to do something important to us – a parent who allowed us to follow an educational goal; a friend who accepted an invitation to join us; a teacher whose approval we needed to take a next step in school – when we brought them around, how did we do it?

Probably, we did instinctively just what law schools should be teaching and refining. We appealed to logic and precedent. We explained the good things that would happen if we had our way, and the bad things that would follow if we didn't. We fended off objections, by presenting facts, and by appealing to rules and principles, that have already been accepted. No, it is not dangerous to go there. No, the opportunities will far outweigh the risks. No, you will not miss out on better options if you come with me. No, I am not being untrue to our shared values.

2 I use the female pronoun generically not out of political correctness, but in recognition of the fact that, around the world today, a significant majority of law students are, in fact, women. The American Bar Association reports that, in 2024, women enrolled in law school outnumber men by 5-4, "and the gap is growing every year." *See* ABA Profile of the Legal Profession 2024. https://www.americanbar.org/news/profile-legal-profession/

And, of course, advocacy has enormous potential social significance, for those motivated to employ it and trained to employ it well. An accomplished advocate can be the voice of someone who is otherwise without a voice. A trained advocate can be the most successful promoter of change, just as she may be the guardian of fundamental values when political forces turn against them.

That is, after all, what lawyers, and those trained in the law, are empowered to do. And it is that role of lawyers that make us feared by despots and tyrants. History demonstrates again and again that lawyers are the ones manning the barricades when democracy is under attack.

As usual, Shakespeare said it best. Everyone knows the famous line from Henry VI, Part Two, in which the character Jack Cade famously says: "The first thing we do, let's kill all the lawyers." That forms the basis of countless lawyer jokes, and it is pinned up on break-room bulletin boards in law firms around the world. But far from an insult, as is usually perceived, the context shows that Shakespeare was offering profound testimony to the promise that a legal education may offer.

In the play, Cade and his friend Dick Butcher were lazily musing about how they would overthrow the government: and, indeed, all of the existing social order. Here is Jack Cade's platform:

CADE

There shall be in England seven halfpenny loaves sold for a penny: the three-hooped pot shall have ten hoops, and I will make it a felony to drink small beer: all the realm shall be in common; and in Cheapside shall my palfrey go to grass: and when I am king, as king I will be, there shall be no money; all shall eat and drink on my score; and I will apparel them all in one livery, that they may agree like brothers and worship me their lord.

The English may not be entirely transparent to contemporary readers, but the thought most certainly should be. Were Cade and his friends to have their way, they would make decisions for the people, who would not only tolerate that, but welcome it. They, the rulers, would dictate what is sold and for how much, and what food, drink, and clothing would be permitted. Meanwhile, they would enjoy whatever privileges they seek (Cade's "palfrey" – pony – would nibble the grass of Cheapside, a public commons), and because of the favors they would dole out, they would be "worshipped" as the people's "lord."

But the ne'er-do-wells recognized that there would a problem in reaching those goals: there would be guardians at the gates who would not permit these things to happen. It is in response to Cade's pipedream that his accomplice Butcher chimes in,

BUTCHER

The first thing we do, let's kill all the lawyers.

With that, Cade is in ready agreement:

CADE

Nay, that I mean to do. Is not this a lamentable thing, that of the skin of an innocent lamb should be made parchment? That parchment, being scribbled o'er, should undo *a man? Some say the bee stings: but I say, 'tis the bee's wax; for I did but seal once to a thing, and I was never mine own man since*.

Impressing a wax seal on a deed made an otherwise nonbinding commitment enforceable at law. In other words, Cade was lamenting that he had entered into a contract and was going to be held to it. And, to a thief, a despot, or a brigand, being required to keep promises is something to be avoided at all costs.

That is why Cade and Butcher wanted to "kill all the lawyers." Because it is the lawyers who would oppose their scheme. It is the lawyers who would stand and defend the conspirators' intended victims. It is the lawyers who would ensure that promises duly made be kept, that order for the common good be respected, and that neither Cade nor any other man in England would be worshipped as the people's lord.

That is how they knew that the success of anarchy, of dictatorship, would require the elimination of the lawyers. In every society in which human rights are openly violated in today's world, the lawyers must first be silenced, be coopted, be marginalized, and be systematically neutralized.

So that is the essential challenge for law teachers and their students: is to prove that Jack Cade was right. And that is why the fundamental assumptions of legal education around the world need to be revisited. Some steps might be taken to make legal education more relevant to the needs of all students without unduly freighting it with elements of interest to only a fraction of its audience. First, demonstrably unsatisfactory methods of presenting material in classrooms, used only because they are deeply embedded in tradition, need to be weeded out. It is common, for example, for law teachers to present their subjects as if they constituted an arbitrary, tedious, and boring barrier that students must overcome. There is simply no reason to embrace this approach, and certainly "it has always been done this way" is not an acceptable defense. That argument quite likely never worked; it will certainly not work in today's interconnected and high-tech world.

The law has never been a collection of dry maxims, or arbitrary rules to be memorized and then recited in examinations. The study of the law is the study of human society. It is about relationships, about how people and entities are required to treat one another if we are all to live together in some kind of generally acceptable harmony. Its concepts are deeply embedded in history, in philosophy, in religion, and in economics. And students of the law must be encouraged to envisage their academic pursuits against those backdrops.

Obviously, in the law and elsewhere, rote learning, memorization, and repetition have a role to play. It is important to know, for example, how long a defendant has to answer a civil complaint against him, or for how many hours a criminal suspect may be held by the authorities without formal charges. But acquiring that knowledge is facilitated if it is presented in context. How and why did these seemingly arbitrary rules come into effect? Who promoted their adoption, and to achieve what goals? Were they opposed at their inception, and if so by whom? How have they been applied, over the years? It is not difficult to embed, say, a course in civil procedure in this kind of context. And when the subject more readily lends itself to a broader view – constitutional law, for example, or the rules of evidence – there is no excuse for dry and bloodless presentations.

Of course, the goal of law professors to teach how to "think like a lawyer" is often challenged by students who are all too well aware that those teaching them are not, in fact, lawyers, at least if by that term one means people who earn their living by advising clients, drafting legal documents, or appearing in court. Moreover, there is no clear connection between listening to hours and hours of lectures and acquiring and assimilating any particular habits of thought.

This article asks – and with diffidence proposes answers to – seven questions as starting points for analyzing whether there is a legal education model that can be anchored in the real world of people, businesses, and government. And no model makes sense if it fails to remain true to the philosophical and logical underpinnings of critical concepts that law students must learn and understand, also taking into account the practical constraints that law teachers are destined to face.[3]

My perspective as primarily a practitioner is different from that of men and women learned in the law whose career mission is passing on a set of skills or a compendium of knowledge. As both a professor and a practitioner, I have had opportunities to observe the legal systems of other countries, and I have been privileged to have studied comparative law extensively in law school and throughout my career. But I identify first as a lawyer in private practice, and as such I am not fluent in the specialized vocabulary of legal education as a subject of study in itself.

With those caveats well noted, these are the suggestions of a veteran advocate on the proper role of the academy and its ideal interactions with the world of legal practice:

1. What skills are required of law graduates, and how do professors help students to maximize their chances of acquiring those skills? It is easy to answer this question in the abstract by invoking broad categories of activity: "reading," "researching," "writing," "analyzing." Perhaps a more progressive answer would add "listening" or "bringing perspective to legal problems." But the core function of lawyering is advocacy. The trick is in translating this answer into an educational approach that is realistic.

---

[3] Many additional issues confronting legal education are outside the scope of this article. In the United States, for instance, we are currently experiencing a vast oversupply of law school graduates, for whom the economy offers no serious hope of fulfilling professional employment in their chosen field. Some analysts even suggest that law schools are deliberately creating the imbalance between supply and demand: having become a profit center for universities, law schools now have a mission entirely unmoored from the task of imparting a serious legal education, much less training lawyers of the next generation. That said, it would seem to be inappropriate for law schools to shut their doors to anyone eager to gain the unique perspective that such schools are – when they are at their best – well designed to impart.

An advocate is given the high responsibility of analyzing a legal document, or presenting a plea to a neutral magistrate, or negotiating a relationship, from the perspective of another who presumably lacks the formal training to do so. Much depends on the advocate's skill in carrying out that task: possibly someone's freedom, or the applicability of a government sanction, or the success of a venture, or the conditions under which people will interact with each other. For an advocate, it is both a heavy responsibility and a great privilege to have the well-being of others in one's hands.

It is impossible to conceive of a successful lawyer who is inadequate as an advocate. But it is all too possible to envisage a student who succeeds at internalizing legal knowledge but who cannot then use that knowledge to present the cause of another person. So the teaching of advocacy must be the center of legal education, including the training of those who intend to pursue careers in business, in government, or in teaching, rather than in the practice of law. Fortunately, a curricular focus on advocacy as a skill is actually quite simple to embrace. The history of the law – decided cases, legislative enactments, scholarly writings, negotiated solutions to problems – is itself a record of the outcomes of advocacy. Advocacy, in other words, is not only the substance of the practice of law as a profession, but also the theme that runs through the development of the legal systems under which we all live today.

Matters resolved by courts in the past are– and should be taught as – not static results, but the outcomes of dynamic processes. Students should be encouraged not merely to learn the rules that decided cases either articulate or apply, but also to understand how the courts were seized of those issues in the first place. What did the losing side have to say? After all, the position that opposed the ultimate outcome was initially defensible in theory and then defended in practice. What was that defense? What arguments were put forward? Why were they ultimately rejected as inconsistent with existing law? Could they have been strengthened and, if so, how? How would we argue the two sides of the dispute had we been handed the assignment? What can we infer about the policies and principles that underlie the legal system from a given example, or a set of examples?

Nor is this focus something applicable only in common law countries, with their emphasis on judicial precedent and their reliance on the doctrine of *stare decisis*. In the same way, the statutory enactments and the contents of legal codes in civil law regimes should be seen as the outcomes of competitions between differing interests. And this is true with respect to routine applications of the rules, as well as the "big" questions whose resolution is likely to resonate far and wide. Why is it that to be valid, a will requires a specific number of witnesses? What would happen were the law otherwise? Should blasphemy and other forms of hateful speech be treated as criminal offenses against the body politic, subjecting their perpetrators to punishment by civil authorities? How far may public dissent against government policies go in a state bound to adhere to international human rights instruments? What do our societal answers to these questions say about the balance between individual and collective rights?

Addressing these questions, and countless others like them, is as important to a legal education as knowing the limitations period for breach of contract lawsuits. Questions beginning with the word "why" should always be welcome in the classroom; indeed, they should be anticipated and addressed.

The contest of interests leading the legislative body to adopt a particular approach, or provoking a specific interpretation by the judiciary, may reflect political, philosophical, or even religious controversy, but discussions over how and why that is so should be embraced, rather than avoided, in the teaching of law. Such disputes are a critical part of the story of how the law came to be what it is. Realizing that is vital to an understanding of how the law is to be interpreted or applied, and how promotion of changes in the law should be grounded. Students should learn to understand, for example, that what is now statutory, "black-letter" law may well have been opposed – and even resisted – by members of society who thought it to be antithetical to other important concerns.

Such an approach, with very little or no need for investment of additional material resources, inculcates in students the notion that the goal of the study of law is ultimately the development and refinement of the skills of advocacy. And that, in turn, stands them in good stead as they begin to confront and analyze real legal problems presented by real clients in the real world. As an additional advantage, it enriches and in no way dilutes or diverts the studies of those not interested in the practice of law as a career.

2. What are the responsibilities of the legal academy to students who wish to practice law as a career? It is hard to walk the fine line between overdoing practical training and ignoring it. But there are areas to explore here. Students who intend to become legal practitioners generally enroll in more specific courses that will provide them with more practical exposure, while those with interests in other areas tend to select classes that may stray far from the core curriculum. There is no doubt, however, that the quality of the entering cohort of practitioners will be improved if their training in specialized practical skills and concepts is not entirely deferred until after they receive their degrees.

Practitioners responsible for recruiting and hiring young lawyers often debate whether to favor students whose coursework in law school has exposed them to the specialized areas that they may need to address in practice. Certainly a graduating student unfamiliar with even the basic vocabulary of a particular area of practice – say, international trade, or domestic relations – will have a difficult time finding her feet in a law firm whose business depends on that specialty. But is it helpful for that student to have concentrated in electives with a limited focus? Would such courses, while deepening her exposure to specialized learning, be likely to leave the student underprepared to address questions that are not so neatly circumscribed?

With very few exceptions–certainly patent law, possibly taxation–specialty is something that best takes place in professional environments, not in school. The better view certainly seems to be a truism: to be a good international (or criminal, or environmental, or family, or fill-in-the-blank) lawyer, the first thing you have to be is a good lawyer. Specialized classes can be analogized to language learning: it is sufficient, in the beginning, to teach basic vocabulary, the rules of grammar, and elementary conversation. Fluency comes only from speaking and listening as well as reading, which are not restricted to the classroom. Certainly, a student who has read and understood the plays of Jean Racine will get good grades in French, but he may still be entirely lost in efforts to navigate the Paris Metro.

Encouraging thinking about the law as simultaneously a humanities discipline and a social science is critical to imparting an understanding of what lawyers do. Nor does this in any way imply contradiction or paradox. Sometimes the classes and coursework that seem most removed from the day-to-day life of practice – courses in jurisprudence or legal philosophy, for example – play the most vital roles in encouraging development of the skills and perspective most important to successful work as a legal professional. Teachers of such fields have a special responsibility not to treat their subjects as of academic interest only, and they should seek examples and illustrations from the real world in which lawyers interact with clients and with the instruments and institutions of the legal regime itself.

The responsibility of the academy to the profession, therefore, is not to ensure that students entering specific areas have studied those areas to the depth at which experienced practitioners are comfortable. Training programs, law firms, and government agencies can better play the role of tailoring specific skill sets to their particular needs. The educational institution's job is to increase the level of basic proficiencies: reading, writing, listening, speaking, or in this case advocacy, the stock in trade of legal practice and the currency of legal education properly conceived.

3. What level of facility in oral and written advocacy should be expected of students awarded university degrees in law and intending to practice, and how is such facility to be achieved? There is likely to be universal agreement that, as a matter of preference in an ideal world, the answer is "as much as possible." But in the reality in which legal educators have to operate, there are economic and logistical constraints on how much can be taught and what resources would have to be invested in a sensible program to achieve this goal.

Although encouraging a focus on advocacy is to be urged above all, time should not be wasted asking students to opine on whether a particular legal doctrine or the outcome of a legislative campaign or even an executive decree is "right" or desirable. The professor's objectives should be to challenge prejudgments, to make students recognize their assumptions even when they are unspoken, and to insist that positions taken in discussion or analysis be well defended. Students should explore the likely consequences of the law and how those consequences would have been different had the dispute ended differently. They should be asked to think about whether one or the other or both possible outcomes of a case can be reconciled with higher legal principles, such as those enshrined in our national constitution, or in international law.

The proper emphasis is on what legal premises underlie the outcome and what would have underlain the opposite had it prevailed. The legal system rests on identifying and understanding the core values and principles of the law. Only lawyers who are consistently able to understand those core principles will be able to represent their clients in more than mechanical settings, and only law students familiar with such an approach have any business calling themselves laureates in legal studies.

The ability to communicate effectively in the legal language of the jurisdiction in which a student studies the law is absolutely vital to her accomplishment as a practitioner. There can be no compromise here, because a lawyer must use words and use them well to have any prospect of success in the legal profession. Words are the tools of our trade as advocates, and a lawyer must be able to understand and employ words in an intelligent and persuasive manner. If there is one metric that most directly reflects the achievements of practicing lawyers in the field, it is their fluency in the language that they must deploy for their professional communications.

There is no reason to believe that advocacy cannot be taught, even if in reality some people seem far more predisposed to internalize its rules than others. And, of course, the only way to learn to advocate is to do it and do it and do it again. Even if individualized faculty guidance is not possible, students are generally willing to help each other to achieve a level of accomplishment in the requisite skill categories. Every opportunity to create a vehicle for advocacy should be seized until effective advocacy is a habit.

Again, this emphasis does not require abandoning the teaching of constitutional law in favor of encouraging students to debate their views on political philosophy. Such a transition would be sterile at best and certainly would do nothing to promote familiarity with basic legal concepts. It does, however, require that legal principles be seen in their context as the result of, and as subject to, contests between competing claims to authenticity and correctness.

Some tremendously valuable tools for the honing of these skills are moot courts, mock trials, and clinical programs, all of which ask students to put themselves in the shoes of practitioners addressing practical problems that might be encountered in the real world. Nor should such programs be restricted to those intending careers as lawyers. On the contrary, if acquiring the skills and techniques of successful advocacy is seen as central to the study of law, then all who receive a law degree should have had significant exposure to that nucleus. Presumably no student would earn a medical degree without doing basic dissections, with no exception for those who plan on careers in psychiatry (or in health care policy!). The heart of the curriculum and the measure of its success should be designed to embrace this perspective.

The Philip C. Jessup International Law Moot Court Competition, which is sponsored and administered by the International Law Students Association, is a particularly effective vehicle for the promotion of advocacy training in the field of international law.[4] The Jessup,[5] as it is universally known, is the largest moot court program in the world, with over 800 law schools in more than 100 countries participating in 2025. Founded in 1959 at Harvard Law School, it requires students to submit written memorials and to present oral argument on both sides of a fictitious case between two fictitious countries before the International Court of Justice in The Hague. The final round of the Competition ordinarily takes place before a bench of world-renowned international lawyers in Washington, D.C., each April. It is commonplace for former Jessup participants to report that the experience changed their lives. Enrollment in the Jessup is easily arranged, and its sponsoring organization is ready to help new participants become familiar with the basic rules and procedures.

Incidentally, not only does the Jessup provide invaluable experience in written and oral advocacy as well as in substantive law, but it also introduces law students to their counterparts and future colleagues from around the world. Other programs have begun to adopt the Jessup model, and there are now international competitions in fields such as criminal law (including a moot styled on the International Criminal Court), environmental protection, and even commercial negotiation. All of these programs are accessible, and all provide wonderful educational opportunities.

4. How much knowledge of nonlegal fields – economics, history, sociology, psychology – should be expected of young law students by the time they receive their degrees? The old cliché is that "good lawyers know the law; great lawyers know the judge." Perhaps this platitude was true once, and perhaps it is still true in dysfunctional systems. But the better view today is that "good lawyers know the law; great lawyers know the context within which the law operates."

Law students and lawyers obviously must familiarize themselves with bodies of knowledge not contained in legal textbooks. They must have a grounding in economics as well as in history and government. That does not mean that they need to qualify for degrees in these fields, but they must be conversant in them, because without some level of comfort in discussing, say, basic economic concepts, a lawyer, or a legally-trained adviser, will be of no use to a client about to enter a sophisticated international business arrangement.

---

[4] Full disclosure: I was founding Chairman of the Board of Directors of the International Law Students Association, and I currently serve as its Chair again. And I have been involved in the Jessup Competition for more than four decades. Materials about the current year's Jessup, as well as earlier competitions and lots of practical information, can be found at http://www.ilsa.org/jessup.

[5] Philip C. Jessup was a revered American scholar and practitioner of international law who served as judge on the International Court of Justice from 1961 to 1970.

5. How should law faculties reform themselves to address contemporary changes in the world of legal education and practice? Two recent developments are of special (and interrelated) significance to law teaching: globalization, and the increasing reach and importance of technology. If there is an innate, often understandable resistance to change among legal educators, these are the areas in which it is most likely to be seen. Yet these are also the places where willingness to change and adapt will be the most accurate predictor of competitiveness.

Globalization virtually demands that the English language be part of a law student's education everywhere in the world, as well as a comparative approach to the law that will give the student a basic familiarity with differences and similarities among legal systems. International law is no longer a specialty but rather something with which every law student must have some measure of acquaintance. This means that a degree of international "literacy" is essential. Law graduates must feel at home in international legal research, analysis, and real-life applications. If law faculties want to provide adequate training for the practitioners of the future, they will need to immerse themselves in all of those.

The importance of these developments is difficult to overstate. Rare indeed is the practitioner who can operate as a lawyer anywhere in the world without encountering issues that require consideration of foreign, comparative, or international law. Intellectual property, the environment, taxation, and even family law can no longer confidently be addressed within the comfortable borders of one's own country. And the pace of change continues to accelerate. Consider these facts:

• Sixty years ago, the ways in which a country treated its own citizens were thought – with only a very few exceptions – not to be of international legal concern. That has changed.[6]

• Sixty years ago, how the nations of the world traded with each other was subject to little international legal scrutiny. That has also changed.[7]

• Sixty years ago, how nations used and abused their air and water, how they set up means of communication and transportation, how they protected their intellectual property and developed their natural resources: none of these were subjects of an international legal regime.[8] That too has changed.

---

[6] Such instruments as the International Covenant on Civil and Political Rights, concluded and opened for signature in 1966, demonstrate the "internationalization" of human rights principles as law, to be interpreted and applied like any other rules of law. As one United States federal judge put it, human rights law has been utterly transformed by such developments, and is no longer, if it ever was, "a mere set of benevolent yearnings, never to be given effect." *Filártiga v. Peña-Irala*, 577 F. Supp. 860, 863 (E.D.N.Y. 1984).

[7] Treaties like the General Agreement on Tariffs and Trade (1947) and its progeny under the World Trade Organization have imposed an increasingly normative regime on international commerce, complete with methods (even if far from perfect methods) of enforcement.

[8] Preserving and protecting our natural environment has increasingly been the subject of international conventions and regimes, including such comprehensive agreements as the ones reached in Paris and Kyoto. It seems quite obvious that threats to our planet from climate change, pollution, and overpopulation cannot be addressed satisfactorily by any one nation or group of nations acting alone.

The next generation of lawyers will continue to manage changes in all of those areas and in others that we cannot now even imagine. That is an enormous challenge not only to law students and practitioners, but also, importantly, to law teachers, if they and their work are to remain relevant.

As for technology, it is beyond doubt that computers and the Internet have completely revolutionized even the most quotidian of legal tasks, such as research and communication with colleagues and tribunals, both of which are increasingly carried out not in libraries or in meeting rooms but in front of computer monitors and keyboards. Artificial intelligence is causing us with accelerating urgency to subject our craft to radical self-examination. A successful legal practitioner in the 21st century simply cannot be technology-illiterate.

Yet the fact cannot be ignored that when the generation now teaching tomorrow's lawyers were acquiring their own education, they never needed technological fluency. And for many, it is hard to adapt. The problem for educators is exacerbated when students have been developing their expertise in the use of computers beginning at an ever-younger age. Law teachers simply must be sufficiently versed in contemporary methods to be able to use them and to teach them with confidence.

6. Do law schools, deliberately or inadvertently, create biases either for or against students intending careers in legal practice? Within the four walls of the academy, as between the thinkers about the law and those who intend to get their hands dirty practicing it, the former are all too often favored over the latter. This bias can be seen in classrooms and in faculty lounges, and it is reinforced when those who set rules for the academic institution themselves have no understanding of or personal experience in the world of practice. So without reversing the bias with equally unfortunate results, the task here is to restore the level playing field. There is no right or wrong way to impart or to absorb legal training, although the law faculty might appropriately feel more responsibility toward those intending to use what they have learned.

The notion that law schools should avoid teaching anything practical because the academic discipline of the law is corrupted when exposed to sunlight is simply wrong. It is a fallacy to suggest that courses such as civil and criminal procedure, evidence, or trial practice are focused on the "craft" rather than the study of jurisprudence and, therefore, have no legitimate place in the academy. Indeed, in the U.S. at least, many graduates think back on their training in the law of evidence as among the most intellectually rigorous experiences of their educations.

While the undervaluing of areas of maximum direct practical applicability may reflect nothing more than the biases of teachers who themselves have never traveled in the world of legal practice, it does have insidious effects on students. It passes along a value system that disrespects the use of the law for the purposes for which it was intended. It makes the law as a field of study something akin to pure mathematics: beautiful and fascinating to those few who understand it, but perplexing, opaque, hopelessly recondite, and above all, useless, to all others.

Engaging students in exercises of advocacy helps to reduce this tendency. So, too, does encouraging them – no matter whether they intend to practice law as a career – to experience for themselves what practicing lawyers really do. Summer internships, clinical programs, mentorships, adjunct faculty – all are ways of broadening students' understanding of how the law works in the real world. All offer them another perspective – a vital one – on the law alongside the one portraying it as an academic discipline, as well as on its integral role in making it possible for its subjects to live in something resembling an ordered society. Even those students who have no desire to engage with the law for a living should, by the time they receive their degrees, have a sense of how their brothers and sisters who become lawyers spend their lives.

7. To the extent that law schools do help their students to prepare for practice, are they making those opportunities available to everyone, including underrepresented populations? Like all merit-based professions, the law can act as an equalizer: a door of opportunity through which all who can master the materials are welcome to enter. Saying this, of course, is easy; living by it is hard. Yet instilling young lawyers with an understanding of the extent to which existing legal systems have helped to entrench existing inequalities would aid in the promotion of this critical objective.

In most cultures, the profession of legal practice brings significant rewards in terms of compensation, prestige, and role in society. Those engaged in the profession may jealously guard their fiefdom against intruders, especially those from disfavored backgrounds and groups.

Although law teachers can hardly be expected to take on the task of ending prejudices and establishing utopian equality of opportunity, they certainly can play their part in promoting the practice of law as a vehicle for positive social change. They can do so by ensuring that, to the extent that they are offering or facilitating opportunities to experience the world of practice, they are careful to make those opportunities available to all. They must chase away their own prejudices, including those, for example, regarding the "proper" role of women in the profession or in the world. They must encourage all of their students to reach their potential to the best of their ability, unrestrained by limitations based on ethnicity, sex, religion, sexual orientation, or physical condition.

The adjustments being proposed here have more to do with changing attitudes than with reallocating resources. But there can be no doubt that in the world of the 21st century – a world in which business, the environment, labor, investments, culture, and technology recognize no national boundaries – lawyers are going to have to be trained according to models different from those that have served for centuries. The test of legal education, therefore, will be how well the law faculty of tomorrow is preparing those who will practice law in a world very different from the one in which they themselves were raised. That reform will require law professors to do some hard thinking about the nature of the law itself, and the role that they play in preparing their students for careers as trained advocates, and as the women and men defending stability, democracy, and human rights against unprecedented challenges.

Law students must be trained, in other words, to the best of their ability, to be the kind of lawyers that Jack Cade and Dick the Butcher knew that they would have to kill.

References

Schneebaum, S.M. (2013). Reforming Legal Education: A Practitioner's Perspective. *Protection Project Journal of Human Rights and Civil Society*, 6, 1–12.

Shaw, G.B. (1903). *Notes to Man and Superman*. Cambridge University Press.

Information about the author

Steven M. Schneebaum (Washington, D.C., United States of America) – Adjunct Professor of International and Constitutional Law, School of Advanced International Studies, Johns Hopkins University; Chair, Board of Directors, International Law Students Association; Founder, Steven M. Schneebaum, P.C. (1750 K St., N.W., Suite #1210, Washington, D.C., 20006, United States of America; e-mail: sms@smslawdc.com).

ARTICLE

Legal Regulations of Surrogate Motherhood in Russia and South Africa: Similarities and Differences

Elena Mitryakova,

University of Tyumen (Tyumen, Russian Federation)

Amanda Boniface,

University of Johannesburg (Johannesburg, South Africa)

https://orcid.org/0000-0002-1507-6695

https://doi.org/10.21684/2412-2343-2025-12-1-20-39

Received: November 10, 2023
Reviewed: January 5, 2024
Accepted: March 2, 2024

Abstract. This study analyzes the laws and regulations surrounding surrogacy in two of the BRICS countries, namely Russia and South Africa. In particular, the authors examine the list of persons authorized to act as parties to such a contract and the requirements that must be met. The methodological basis of the research is the multidisciplinary approach. The research methods employed included the analysis of scientific literature and legislation. Furthermore, this research examines issues related to determining a child's origin when using assisted reproductive technologies. It also employs a comparative legal analysis to suggest potential solutions for resolving issues in this area that are relevant in both Russia and South Africa. This study is significant given that no comparative analysis of Russian and South African surrogacy legislation has previously been conducted.

Keywords: surrogacy agreement; commissioning parents; surrogate mother; reproductive technologies; Russia; South Africa.

To cite: Mitryakova, E., & Boniface, A. (2025). Legal Regulations of Surrogate Motherhood in Russia and South Africa: Similarities and Differences. *BRICS Law Journal*, *12*(1), 20–39.

Table of Contents

Introduction

The adoption of Russia's new Family Code in 1995 officially legalized surrogacy in the country.[1]

It is worth noting that to date, the surrogacy industry is regulated by only two articles of the Family Code, namely Article 55 of Federal Law No. 323-FZ of November 21, 2011, "On the Basics of Public Health Protection in the Russian Federation" (hereinafter the Basics of Public Health Protection)[2] and the order of the Ministry of Health of the Russian Federation of July 31, 2020 No. 803n, "On the Procedure for the Use of Assisted Reproductive Technologies, Contraindications, and Restrictions to their Use" (hereinafter Order No. 803n).[3]

Despite the significant number of problems that have arisen in relation to surrogacy, legislation in this sphere has remained unchanged in Russia for many years.

Most recently, in December 2022, Federal Law No. 538-FZ of December 19, 2022 was enacted,[4] which clarified and began to partially regulate several legal aspects concerning the methods of assisted reproductive technologies, commonly referred to as ART. In essence, the new laws add Russian citizenship as one of the requirements for parties to a surrogate agreement.

---

1 Family Code of the Russian Federation of December 29, 1995, No. 223-FZ (ed. of July 31, 2023). Collection of Legislation of the Russian Federation, 1996, No. 1, Art. 16. (In Russian).

2 Federal Law No. 323-FZ of November 21, 2011 "On the Basics of Protecting the Health of Citizens in the Russian Federation" (ed. of June 13, 2023). Collection of Legislation of the Russian Federation, 2011, No. 48, Art. 6724. (In Russian).

3 Order of the Ministry of Health of the Russian Federation "On the Procedure for the Use of Assisted Reproductive Technologies, Contraindications and Restrictions to Their Use" (registered with the Ministry of Justice of the Russian Federation on October 19, 2020, No. 60457). Official Internet Portal of Legal Information (July 7, 2023). (In Russian).

4 Federal Law No. 538-FZ of December 19, 2022 "On Amendments to Certain Legislative Acts of the Russian Federation" (ed. of July 7, 2023). (In Russian).

South African laws are not only regulated by legislation[5] but are also founded in case law[6] and the common law[7] as well as by the South African Constitution.[8] Surrogacy provisions can be mainly found in legislation and case law. In the majority of cases in South Africa, surrogacy is predominantly regulated by the provisions of the Children's Act 38 of 2005.[9] A surrogacy agreement is entered into between a commissioning parent(s) and a surrogate, and the agreement must be confirmed by the High Court of South Africa. There must also be a genetic link established between at least one of the commissioning parents and the gamete or gametes used in the surrogacy.

South African law allows for In-Vitro Fertilization (IVF) as well as surrogacy. The South African Regulations Relating to Artificial Fertilization of Persons[10] state that IVF is "the process of spontaneous fertilization of an ovum with male sperm outside the body, in an authorized institution." The regulations define a "gamete donor" as a person whose gametes are used for artificial fertilization while a "surrogate" is described by the regulations as a "recipient," a woman who is going to be artificially fertilized. Section 3(13) of the Children's Act defines a "surrogate motherhood agreement" as

> an agreement between a surrogate mother and a commissioning parent in which it is agreed that the surrogate mother will be artificially fertilized for the purpose of bearing a child for the commissioning parent and in which the surrogate mother undertakes to hand over such child to the commissioning parent upon its birth, or within a reasonable time thereafter, with the intention that the child concerned becomes the legitimate child of the commissioning parent.

Thus, there is sufficient regulation pertaining to surrogacy in South Africa, and the issue of whether or not the genetic link requirement for surrogacy is constitutional has recently been dealt with by the South African courts, firstly in the High Court[11] and subsequently in the Constitutional Court.[12] The Constitutional Court case will be discussed further below.

---

5 Also known as statutes. An example that is relevant for surrogacy in South Africa is the Children's Act 38 of 2005.

6 Case law consists of decisions of the lower courts, the Magistrate's courts, and the High Courts of South Africa.

7 The main common law in South Africa is Roman-Dutch law, it can be found in the works of authors and referred to in case law.

8 The Constitution is the supreme law and all other laws must comply with the provision of rights found in the Constitution. A copy of the Constitution, Act 108 of 1996 is simply referred to as the Constitution. South African Government. https://www.gov.za/sites.www.gov.za/files/images/a108-96.pdf

9 The Children's Act. SAFLII. https://www.saflii.org/za/legis/consol_act/ca2005104/

10 South African Government. (2012). *Government Notice R175 of 2012*. https://www.gov.za/sites/default/files/gcis_document/201409/35099rg699gon175.pdf

11 *AB and Another v. Minister of Social Development* (2016) 2 SA 27 (GP).

12 *AB and Another v. Minister of Social Development* [2016] ZACC 43.

This study primarily focuses on the key legal and regulatory aspects surrounding surrogacy in Russia and South Africa and, based on a comparative legal analysis, offers appropriate proposals to reform Russian legislation in this area.

We will first examine the key and most controversial aspects of surrogacy in the countries under consideration.

1. Parties to the Surrogacy Agreement in Russia and South Africa

There is no strict definition of a "surrogacy agreement" in Russia. However, it follows from paragraph 9 of Article 55 of the Law on Health Protection that the parties to such a contract are: (a) a "surrogate mother" (a woman carrying a fetus after the transfer of a donor embryo) and (b) the "commissioning parents" whose germ cells were used for fertilization, for whom carrying and giving birth to a child is impossible for medical reasons (genetic mother and genetic father). This could be either two people who are married to each other or a single woman whose germ cells were used for fertilization and for whom carrying and giving birth to a child is impossible for medical reasons (i.e. can primarily be a genetic mother).

Paragraph 10 of the Law on Health Protection states that a woman between the ages of twenty and thirty-five can be a surrogate mother**.** In addition, a candidate for the role of a surrogate mother must meet the following requirements:

- be a citizen of the Russian Federation;
- have at least one healthy child of her own;
- obtain a medical report on a satisfactory state of health;
- provide written and informed voluntary consent for medical intervention.

If she is married, the woman must receive her spouse's informed consent to participate in the program. It must be noted that in Russia, a surrogate mother does not have the right to also be an oocyte donor.

In South Africa, as in Russia, there are strict legal requirements stipulating that a surrogate mother must already have her own child. However, in contrast to Russian legislation, a pregnant mother in South Africa has the right to be an oocyte donor, that is, she can also be the biological mother of the child.

Another difference between surrogacy regulations in Russia and South Africa is that surrogacy can only be carried out free of charge in South Africa. The woman receives financial compensation to cover transportation and medical expenses but carrying someone else's child cannot be a source of income in South Africa, as it can be in Russia. When it comes to surrogacy in Russia, there is practically no difference between it and a contract for the provision of paid services, with the primary motivation being the desire to earn money.

In South Africa, chapter 19 of the Children's Act provides that a surrogate motherhood agreement must be in writing, signed by all parties, as well as confirmed by the High Court of South Africa.[13] Additionally, the surrogacy agreement must be

---

[13] Sec. 292 of the Children's Act.

signed by all parties and must be entered into in the Republic of South Africa,[14] and at least one of the parents (or the commissioning parent where a single person) as well as the surrogate mother (and her husband or partner, if applicable) must be domiciled in the Republic of South Africa[15] at the time of entering the agreement.

In cases where the commissioning parent is married (or in a permanent relationship), then the court cannot confirm the agreement unless the spouse or partner has given their written consent,[16] and if the surrogate mother is married or in a permanent relationship, then the court may not confirm such an agreement unless her husband or partner has given their written consent and is a party to the agreement.[17] If the husband or partner of the surrogate mother (who is not the genetic parent of the child) unreasonably withholds their consent, the court can still confirm the agreement[18] (sec. 293(3)). Section 294 of the Children's Act states that

> No surrogate motherhood agreement is valid unless the conception of the child contemplated in the agreement is to be effected by the use of the gametes of both commissioning parents or, if that is not possible due to biological, medical, or other valid reasons, the gamete of at least one of the commissioning parents or, where the commissioning parent is a single person, the gamete of that person.

This latter section is known as the "genetic link requirement" and was brought before the Constitutional Court[19] as being unconstitutional. However, the court found that section 294 was valid, making it now a requirement in order for surrogacy to take place in South Africa, although it is not a requirement for IVF if the woman carrying the child in her womb through IVF is also going to be the mother of the child, i.e. keep this child. In the case of surrogacy, the surrogate must carry the product of at least one gamete of the commissioning parents, as well as have some genetic link with the commissioning parents.

Thus, the court will not confirm any surrogate motherhood agreement unless the following requirements are complied with:[20]

1. The commissioning parent(s) are not able to give birth to a child due to a condition that is permanent and irreversible.
2. The commissioning parents are suitable persons to be parents.

---

14 A surrogacy agreement that takes place in South Africa cannot be entered into in a country other than South Africa. The agreement must be entered into in South Africa as well as approved by a court in South Africa.

15 Sec. 292 of the Children's Act.

16 Sec. 293(1).

17 Sec. 293(2).

18 Sec. 293(3).

19 In the *AB and Another v. Minister of Social Development* case.

20 Secs. 295–296.

3. The commissioning parents understand and accept the legal consequences of the surrogacy agreement.

4. The surrogate mother must be a suitable person to be a surrogate mother.

5. The surrogate mother must understand and accept the legal consequences of the surrogacy agreement.

6. The surrogate mother may not use surrogacy as a source of income and must enter into the surrogacy agreement for altruistic reasons.

7. The surrogate mother must have a documented history of at least one pregnancy and living delivery, and she must have a living child of her own.

8. The surrogacy agreement must include provisions that adequately provide for the care, contact, upbringing, and general welfare of the child.

9. The surrogate mother may not undergo any artificial fertilization until after the surrogacy agreement has been confirmed by the court.

Now let us take a closer look at the requirements and restrictions that determine eligibility for surrogacy. First, we will look at who can act as commissioning parents. Changes to Russian legislation of December 19, 2022 clarified and significantly narrowed the circle of the commissioning parents. Those ordering surrogacy services must include and meet the following requirements:

A. Spouses or a single woman.

Russian legislators have finally addressed the possibility of single men participating in the surrogacy program. Consequently, henceforth, neither single men nor their *de facto* spouses have the right to participate in a surrogacy program. This restriction has prompted considerable discussions among scientists. Some authors view this as discrimination and a violation of the constitutional rights of unmarried men. Others believe that this is an adequate measure in response to events that occurred not so long ago in Russia, which we describe below.

In February 2020, Russian media reported that there were hundreds of newborn children born in Russia, whose genetic parents came from countries that do not legally permit surrogacy. Border closures as a result of the COVID-19 pandemic prevented these biological parents from physically taking their children.

Recall that Russia is one of the few countries in which surrogacy is permitted, including for commercial purposes whereby the pregnant mother receives remuneration for her services. There are numerous medical centers in the country offering IVF services with the participation of surrogate mothers, not only to Russians but also to foreign citizens.

Since February 2020, 180 families from China, as well as citizens of Singapore, France, Argentina, Australia, and the Philippines, have had children on behalf of foreign customers as noted by the Deputy Chairman of the Human Rights Council, Irina Kirkora. Furthermore, a St. Petersburg-based company providing surrogacy services also reported that at least 600 of these children were unable to leave for their home countries.[21]

[21] Pravmir. (2020, July 30). *As a result of the pandemic, approximately one thousand babies from surrogate mothers were "stuck."* https://www.pravmir.ru/iz-za-pandemii-v-rossii-zastryali-okolo-tysyachi-mladenczev-ot-surrogatnyh-materej. (In Russian).

The number of children born 'for export' caused legislators and the public to think seriously about the problem. To be more explicit, the primary concern was two-fold: firstly, it was impossible to officially register the children in accordance with a legally established procedure, and secondly, they did not have an official legal guardian. In the end, these children's births and their subsequent fates were beyond the purview of any form of state control or regulation.

The exact number of children born by surrogate mothers in Russia, including those for foreign customers, is unknown, as there is no state registration for such children. According to some reports, as of 2020, Russia ranked second after the United States in the surrogacy market.[22] According to the Association of Medical Tourism, Russia is one of the most attractive countries for so-called "genetic tourists."[23]

As for South Africa, both single men and women and even same-sex spouses can act as commissioning parents in that country. There is no requirement in South Africa that the surrogate mother must be married; she can be single. However, if the surrogate mother is married or in a partnership, then her husband or partner must also consent to the surrogacy, as explained above.[24]

B. At least one of the spouses must, at the time of the conclusion of the surrogacy agreement, be a Russian citizen.

As demonstrated by the abovementioned requirements, in South Africa, the parties to the surrogacy agreement must also be domiciled in South Africa. You can be a citizen and domiciled in South Africa, but you do not have to be a citizen in order to be domiciled in South Africa. One of the requirements for being domiciled in South Africa is that the person must be lawfully present in the country; thus, residents who are not citizens can be lawfully domiciled only in cases where they are granted residency by Home Affairs in South Africa.

C. Those ordering surrogacy services must be unable to carry or give birth to a child for medical reasons (*see* para. 70 of the Order of the Ministry of Health of July 31, 2020 No. 803n). In other words, the clients are infertile.

An analysis of the current Russian regulatory framework indicates that surrogate motherhood is a viable option to overcome female infertility. However, there is an ongoing debate among scientists and legal practitioners regarding the use of surrogate motherhood for so-called "social purposes." Social purposes encompass a number of different reasons apart from infertility, in which people are unable to

---

22 Pankrashkina M. (2020, June 24). *Babies for export: How the pandemic has jeopardized the surrogacy business in Russia, which has been supplying children abroad for more than 25 years*. Spektr.Press. https://spektr.press/deti-naprokat-pandemiya-i-zakrytye-granicy-stali-ugrozoj-surrogatnomu-materinstvu-v-rossii-kotoraya-pyatnadcat-let-postavlyaet-mladencev-na-eksport/. (In Russian).

23 Draft Law No. 133590-7 "On Amendments to Certain Legislative Acts of the Russian Federation regarding the Prohibition of Surrogacy." Russian Association of Human Reproduction. http://www.rahr.ru/dindex/zsm.pdf. (In Russian).

24 Bardashevich, Y.V. (2021). Features of legal regulations on surrogacy and examples in foreign countries. *Epomen, 51*, 113. (In Russian).

bear or give birth to a child on their own. This could be the fear of childbirth, an unwillingness to enter into a close relationship just for the sake of conception, the fear of spoiling one's figure, or the lack of opportunity to carry a child on their own due to the peculiarities of their work (for example, athletes, actresses, ballerinas, and so on).

Some authors believe that surrogacy should be permitted beyond solely for medical purposes. They propose expanding the category of persons who can have access to surrogacy.[25] We believe that a widespread usage of surrogate childbirth will cause infertile people to stop adopting children. In addition, this will also devalue the role of motherhood itself. The surrogate mother will be perceived as a living incubator. Alternative methods of childbirth should in no way routinely replace natural methods. They should be used only in exceptional cases (when the birth of children naturally is impossible for medical reasons). The greater the use of surrogacy, the more likely it is that lawsuits will arise, leading to an increase in problems and more 'rejected' children. It no doubt appears reasonable to consider this method as the only way to have a child that is genetically related to the parent. However, surrogacy should not become a means of income for lawyers, medical clinics, and surrogate mothers themselves. Surrogate mothers are often not fully aware of the consequences of such "work" for their bodies (i.e. the taking of hormonal drugs before and during pregnancy, the risk of infertility, etc.).

Clearly, neither society nor the institution of family law is ready to consolidate a wide list of the various social purposes at the legislative level in Russia. Nevertheless, in our opinion, it is possible to consolidate some non-medical social purposes that could be applied at the legislative level.

One such social purpose could be, for instance, cases involving the death of a female spouse and the desire of a single man to have a child that is genetically related to the parents. This would require the cryopreservation of her oocytes and permission to use them in the event of her death.

In Russia, in practice, there have been cases in which people who were not the genetic parents of the child submitted applications for surrogacy to a reproductive center. For example, a close relative of one or more of a deceased genetic parent may want a surrogate mother to carry the child of a parent who donated their biological material for cryopreservation during their lifetime.

The latest achievements in the field of medicine provide for the possibility of the cryopreservation and storage of biological material that can be subsequently applied for assisted reproductive technologies. Thus, the birth of a new life even after the death of a genetic parent is possible today.[26]

---

[25] Levushkin, A.N., & Saveliev, I.S. (2015). Requirements imposed legislators to the future parents of a child born using surrogate motherhood technology. *Modern Law, 9*, 92–96. (In Russian).

[26] Stebleva, E.V. (2011). Legal regulation of posthumous reproduction using the surrogate motherhood method. *Civilist, 3*, 92–96. (In Russian).

However, there are no legal regulations around the conditions for using such biological material after the death of the person who provided it, nor is there a procedure for registering "posthumous" children.

Here is an actual example to illustrate this point. In November 2005, a boy was born in Russia whose father died two years before conception in an Israeli clinic. The child's father had been diagnosed with cancer. He was treated in Israel, where post-mortem reproduction is allowed and actively employed. Before the start of the course of chemotherapy, the young man had his male gametes (sperm) taken from him, which were then frozen and stored in an Israeli hospital for nine years. After his death, the young man's mother decided to conclude an agreement with a surrogate mother for the birth of a grandson. Since there is no legal regulation concerning posthumous reproduction in Russia, registration authorities refused to register the child for the woman. The woman appealed to the court for the protection of her interests, but the court refused to recognize her rights as the mother.[27]

In a similar situation in November 2016, the court upheld the claims of the grandmother. She was recognized as the mother of her granddaughter.[28]

It goes without saying that both lawyers and doctors should exercise caution when formulating a definition of the social purposes surrounding surrogacy. The rights of the child should not be violated, and traditional family values should not lose their significance.

The requirements for surrogacy in South Africa dictate that the woman who is the commissioning parent must not be able to carry a pregnancy; the logic behind this is that if a woman can carry a pregnancy, she can make use of IVF instead of surrogacy. Furthermore, when using surrogacy, the gametes that are donated must also be genetically linked to at least one of the commissioning parents. Surrogate pregnancy can be used by both married and unmarried commissioning parents who are heterosexual as well as same-sex couples, as long as one of the gametes is genetically related to one of the commissioning parents.

D. The germ cells (oocytes and gametes) of the genetic parents are used for fertilization of an embryo and then transferred to the surrogate mother (para. 9 of Art. 55 of the Fundamentals of Public Health Protection). If the client is an unmarried woman, she must also be the oocyte donor.

However, as it turns out, if one of the spouses does not have such cells, it is impossible to use donor material, since the main condition for participation in the program is the genetic link between the unborn child and both commissioning parents.

---

27 Decision of the Babushkinsky District Court of Moscow of April 28, 2011 in Case No. 2-2222/11. Archives of the Court. (In Russian).

28 Decision of the Prikubanskinsky District Court of Krasnodar of November 1, 2016 in Case No. 2-13109/2016). Archives of the Court. (In Russian).

K. Svitnev writes that the requirement for direct genetic kinship with both parents or with the mother, if we are talking about a single woman, is "an example of discrimination on the basis of health."[29]

It seems reasonable to allow the use of motherhood in the case of a child's genetic relationship with at least one of the commissioning parents.

If germ cells are absent from both spouses, then a refusal to participate in the program seems quite logical. In this case, people are turning to a surrogate mother to carry a genetically alien child. In such a situation, it would be advisable and logical to consider adopting a child.

In South Africa, a truncated genetic relationship with one of the commissioning parents is also acceptable.

In the Constitutional Court case,[30] Section 294, which requires a genetic link with at least one of the commissioning parents, was ruled as constitutional. Prior to the Constitutional Court case, the High Court had determined that the genetic link requirement of Section 294 of the Children's Act was unconstitutional.[31] The Constitutional Court's ruling revealed that the majority of the court agreed on the necessity of a genetic link between the commissioning parent or parents and the child born from surrogacy. The Constitutional Court held that the High Court had disregarded the object of the Children's Act and had, instead of looking at the purpose of the provision of Section 294 and the best interests of the children, overemphasized the best interests of the commissioning parents. The Constitutional Court did not support the High Court decision that Section 294 violates Section 9(1) of the Constitution. In the second applicant's Heads of Argument in the Constitutional Court, the applicant argued that "families without a parent-child genetic link are just as valuable as families with such a link,"[32] and in essence, the High Court also held that "a family cannot be defined with reference to the question whether a genetic link between the parents and the child exists." Despite the arguments brought forward by the second applicant, the Constitutional Court determined that the genetic link requirement as provided for in Section 294 of the Children's Act is constitutional. It is submitted that the High Court decision was the better decision as the court referred to the commissioning parent's right to dignity, and this right is often used instead of the right to a family because no specific right to a family is found in the South African Constitution and families in South Africa are constituted in various ways.

---

29 Pavlova, Z. (2022, December 12). *Law adopted prohibiting foreigners and stateless persons from using the practice of surrogacy in the Russian Federation*. Advocate newspaper. https://www.advgazeta.ru/novosti/nedelya-ag-16-12-2022. (In Russian).

30 *AB and Another v. Minister of Social Development* [2016] ZACC 43.

31 For a further discussion of the High Court case and submission that the High Court case was correctly decided, *see* Boniface, A. (2017). The Genetic Link Requirement for Surrogacy: A Family Cannot Be Defined by Genetic Lineage. *Journal of South African Law, 2017*(1), 190–206.

32 Pg. 5, AB case, Heads of Argument.

Moreover, just because there is no genetic link does not mean that the family is any less important, such as when a family is formed by adoption. In the Constitutional Court case of AB,[33] the Constitutional Court adopted an archaic version of what constitutes a family.

2. Determining the Origin of a Child in Russia and South Africa

This is the most frequently discussed issue among scientists in Russia, both from a legal and bioethical point of view.

In Russia, according to subparagraph 2 of paragraph 4 of Article 51 of the Family Code of the Russian Federation, genetic parents may be recorded as the parents of a child only with the surrogate mother's consent. That is to say, at the legislative level, a surrogate mother has priority in the determination of a child's origin.

For many years, there have been disagreements in the scientific community regarding the degree to which the above-mentioned regulation is reasonable. Most scientists side with genetic parents in this matter. They state that, based on the child's best interests, it is the client who should be recorded as the child's parents, regardless of whether or not they have received the consent of the pregnant mother. Some authors believe that by giving priority to the surrogate mother in the issue of the origin of the child, the law opens up the possibility of blackmail on her part. Furthermore, the intended purpose of the surrogacy agreement, which specifies the surrogate mother's obligation to transfer the child to the clients, has no legal significance.[34]

By giving preference to the will of a surrogate mother, the lawmakers obviously pursued the goal of protecting the rights of a child in the event that the genetic parents change their minds about taking custody. In addition, it should be understood that during pregnancy and childbirth, deep biological and psychosomatic connections arise between the child and the surrogate mother, which may cause a woman to develop maternal feelings and reassess the situation.

Moreover, it is important to mention that the Constitutional Court of the Russian Federation also took the side of the surrogate mother.[35]

---

33 www.saflii.org/za/cases/ZACC/2016/43.html

34 Gaibatova, K.D., & Shamsudinova, P.M. (2022). The Problem of Establishing the Origin of Children as a Legal Consequence of the Surrogacy Contract. *Legal Bulletin of Dagestan State University, 41*(1), 67. (In Russian).

35 Definition of the Constitutional Court of the Russian Federation of May 15, 2012, No. 880-O "On Refusal to Accept for Consideration the Complaint of Citizens of C.P. and C.Y. on the Violation of their Constitutional Rights by the provisions of paragraph 4 of Art. 51 of the Family Code of the Russian Federation and paragraph 5 of Art. 16 of the Federal Law 'On Acts of Civil Status.'" ConsultantPlus Legal Database. https://www.consultant.ru. (In Russian); Definition of the Constitutional Court of the Russian Federation No. 2318-O of September 27, 2018 "On Refusal to Accept for Consideration the Complaint of Citizens of S.D. and S.T. on Violation of their Constitutional Rights under paragraph 4 of Art. 51, paragraph 3 of Art. 52 of the Family Code of the Russian Federation, paragraph 5 of Art. 16 of the Federal Law, 'On Acts of Civil Status', and part 9 of Art. 55 of the Federal Law, 'On the Basics of Protecting the Health of Citizens in the Russian Federation.'" ConsultantPlus Legal Database. https://www.consultant.ru. (In Russian).

In 2018, Judge of the Constitutional Court of the Russian Federation, A.N. Kokotov expressed a dissenting opinion on the matter.

The judge stressed that the surrogate mother provides the biological resources of her body to the child during pregnancy, which determines the child's immune and hormonal system. In his opinion, the connection between a pregnant mother and a child is no less significant than its genetic connection with commissioning parents.

> ... regardless of the will and consciousness of the surrogate mother, the instinct of motherhood awakens in her; a deep biological and emotional-spiritual connection is established between her and the child. Modern medicine provides more and more evidence that the intrauterine period of a person's life has a decisive influence on his subsequent development. Pregnancy – with its worries, limitations, and joys – as well as childbirth and the accompanying stress, create a unique bond between the biological mother and the child. As for the clients of the surrogate mother's services, after receiving the child, they still have to feel unaccountable parental feelings for him.[36]

Until 2017, Russian courts ruled in favor of surrogate mothers in disputes arising from the refusal of the latter to consent to the registration of clients as the parents of the child. The courts referred to the gestational model of surrogacy enshrined in the Family Code of the Russian Federation.

However, on May 16, 2017, the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 16, "On the Application of Legislation by Courts when Considering Cases Related to the Establishment of the Origin of Children" was adopted.[37] This called into question the priority of the surrogate mother on this matter.

Paragraph 31 of the above Resolution states that the refusal of the surrogate mother to provide consent to register the clients as the official parents is no longer an unquestionable basis for refusing and denying clients the right to be recorded as the child's parents. In order to properly consider the case, the Supreme Court of the Russian Federation recommends that the courts, in particular, verify whether a surrogacy contract was concluded and what its conditions were. These steps will help accurately determine whether the plaintiffs are the genetic parents of the child and for what reasons the surrogate mother is refusing to consent to the registration of the plaintiffs as the parents of the child. The Court further noted that, after considering the circumstances established in the case as well as the provisions

---

[36] Ruling of the Constitutional Court of the Russian Federation No. 2318-O of September 27, 2018 "On Refusal to Accept for Consideration the Complaint of Citizens of S.D. and S.T. on Violation of their Constitutional Rights by paragraph 4 of Art. 51, paragraph 3 of Art. 52 of the Family Code of the Russian Federation, paragraph 5 of Art. 16 of the Federal Law, 'On Acts of Civil Status', and part 9 of Art. 55 Federal Law, 'On the Basics of Protecting the Health of Citizens in the Russian Federation.'" ConsultantPlus Legal Database. https://www.consultant.ru. (In Russian).

[37] Resolution of the Plenum of the Supreme Court of the Russian Federation No. 16 of May 16, 2017 "On the Application of Legislation by Courts when Considering Cases related to the Establishment of the Origin of Children" (ed. of Dec. 26, 2017). Rossiyskaya Gazeta, May 24, 2017, No. 110. (In Russian).

of Article 3 of the Convention on the Rights of the Child, the dispute must be resolved in the child's best interests, that is, the child's needs should take precedence. Thus, the courts of general jurisdiction are recommended not to limit themselves to the literal interpretation of paragraph 4 of Article 51 of the Family Code of the Russian Federation but to approach the decision from the perspective of the best interests of the child.

It is clear that it is often very challenging for courts to make decisions on such cases. The court is forced to act as an arbitrator between two mothers – the one bearing the child and the genetic mother. Apart from these two women, the court decision also affects the interests of a child that was born as a result of surrogate motherhood, the spouse of the surrogate mother, her own children, and other relatives of both parties. In some cases, it is not easy to determine where and with whom the child will be better off and, obviously, sometimes it is simply impossible.

On the one hand, it must be understood that the surrogate mother, at the time of concluding the contract, wants to provide a paid service to carry a child for a monetary reward and not to give birth to a genetically alien child for her personal desire. She has not made any plans to bear the costs associated with their development and upbringing. The entire purpose of this reproductive method is solely the creation of a child with genetic parents.

On the other hand, we must also understand that a surrogate mother performs a very delicate and extremely risky service. There always exists the risk that she can become attached to the child during its gestation. She also runs the risk of jeopardizing her health and often her life. More importantly, the surrogate mother's refusal to consent to the registration of the client as the child's parents is a perfectly legitimate right granted to her by the norms of the Family Code.

Let us now examine the regulations governing the contractual right of a service provider to refuse to provide paid services. The surrogacy agreement has considerable similarities with this arrangement. The contractor, under the contract for the provision of paid services, has the right, according to paragraph 2 of Article 782 of the Civil Code of the Russian Federation,[38] to "refuse to fulfill obligations at any time, as long as they provide compensation to the client." It should be noted that such a refusal is legitimate.

Therefore, allegations that a surrogate mother may violate the terms of the contract by deciding to keep the child for herself appear to be unfounded. Moreover, the provisions of the contract that establish the obligation of the pregnant mother to give consent after childbirth to the registration of the clients as the parents of the child should be considered null and void as they violate the rights of the individual performing the service. It is no doubt necessary to understand and realize that such a contract is risky for commissioning parents due to the unique nature of its subject

[38] Civil Code of the Russian Federation (Part Two) of January 26, 1996, No. 14-FZ (according to comp. on July 24, 2023). Collection of Legislation of the Russian Federation, 1996, No. 5, Art. 410. (In Russian).

matter. However, the contract is also risky for a surrogate mother since it is unknown how the pregnancy and childbirth will develop (as a result of complications, the pregnant mother herself could lose the ability to further bear and give birth to children); it is also uncertain what could occur with the clients during pregnancy (for example, divorce, death, refusal of the contract, etc.), leaving the surrogate mother to fend for the baby regardless.

Additionally, it is important to remember that in any contract pertaining to the provision of paid services, customers are not actually paying for the result but for the actions that are involved of those performing the tasks; the client may or may not obtain the desired effect of the service. This is neither good nor bad, fair nor unfair – it is merely a "unique" contract and definitely not conventional or natural, since according to some authors, "such processes interfere with human nature and divine providence."[39]

Accordingly, it is extremely difficult for the Russian legislature to adopt a law that would satisfy the interests of all parties to the surrogacy agreement.

Considering that the Resolution of the Plenum of the Supreme Court of the Russian Federation adopted in 2017 is not a normative legal act, research authors V.M. Ashura and E.L. Nevzgodina believe that the procedure for establishing the origin of a child born by a surrogate mother does not require explanation but rather legislative changes.[40]

It is hard to argue with the authors. Their rationale is clear; the law should, in their opinion, protect the interests of the genetic parents since for them surrogacy is the only chance to have a genetically native child. However, given that cases of a surrogate mother claiming the child for herself are extremely rare, we agree with the opinion of the judge of the Constitutional Court of the Russian Federation A.N. Kokorin, who believes that the risks to clients can be minimized by including relevant norms in the text of the contract. So, for example, the contract could include a condition stating that if the pregnant mother keeps the child for herself, she will not receive remuneration and must reimburse the ordering party for the expenses incurred by them under the contract.[41]

We believe that the adopted Resolution of the Plenum of the Supreme Court of the Russian Federation is sufficient for now to protect the interests of commissioning

---

[39] Savchenkova, E.C., & Sadovaya, L.C. (2015). Ethical Aspects of Surrogacy. *Education and Science in Modern Conditions, 3*, 245. (In Russian).

[40] Ashuha, V.M. (2017). Paragraph 4 of Art. 51 of the Family Code of the Russian Federation – A Guarantee of Protection of Maternal Rights, a Reason for Abuse of the Right, an Anachronism? *Bulletin of Omsk University. Series: Law, 3*(52), 114. (In Russian).

[41] Definition of the Constitutional Court of the Russian Federation No. 880-O of May 15, 2012 "On Refusal to Accept for Consideration the Complaint of Citizens of C.P. and C.Y. on Violation of their Constitutional Rights by the provisions of paragraph 4 of Art. 51 of the Family Code of the Russian Federation and paragraph 5 of Art. 16 of the Federal Law, 'On Acts of Civil Status.'" ConsultantPlus Legal Database. https://www.consultant.ru. (In Russian).

parents. It seems premature to talk about changing the gestational model of surrogacy in Russia at the moment.

Even if a lawmaker considers it reasonable to give priority to commissioning parents, in any case, the inherently risky nature of the contract will not disappear for the clients. Furthermore, for example, certain changes may occur in the life of a surrogate mother, in which she will not be able or will not want to continue carrying a child. And ultimately, no law or contract can force her to continue to "provide a service."

Thus, the practice of surrogate motherhood presents numerous moral, ethical, and legal problems. Obviously, this is the reason why this method of childbirth is forbidden in so many countries.

In South Africa, the right of a surrogate mother to register as the parent of the child is impossible (unless she is also an egg donor); the commissioning parents are officially registered as the parents.

If the surrogate mother is also an egg donor (which again is impossible in Russia), a different rule applies – in this case, the woman has the right to be registered as the mother of the child within sixty days after giving birth.

Section 297 of the Children's Act provides that a child born from a surrogate mother is considered the child of the commissioning parent or parents from the moment that such a child is born and the surrogate mother must hand the child over to the commissioning parents as soon as it is reasonably possible after birth. Furthermore, the surrogate mother and her husband or partner or relatives have no rights with regards to the child born from the surrogacy, and the surrogate mother and her husband or partner also have no right to have any contact with the child, although contact could be provided for by means of such a provision in the surrogacy agreement. The Act also makes it clear that a surrogacy agreement may not be terminated after the surrogate mother has been artificially fertilized. Furthermore, the child born as a result of surrogacy does not have any claim of succession (inheritance) or maintenance against the surrogate mother, her husband or partner, or any relatives. If a child is born from a surrogacy where the agreement did not comply with the provisions of the Children's Act, then the agreement becomes invalid and the child is considered the child of the woman that gave birth to that child and not the child of the commissioning parents.

Where a surrogate mother is also a genetic parent of the child, then she may terminate the surrogate motherhood agreement any time prior to sixty days after the birth of the child, and the court will then issue an order that is in the best interests of the child.[42] Section 299 of the Children's Act provides that the effect of the termination of the surrogacy agreement is such that parental rights are given to the surrogate and her husband and partner, or if none, to the commissioning father and such parties are obliged to accept the obligation of parenthood while

---

[42] Sec. 298 of the Children's Act.

the commissioning parents will not have any parental rights unless they adopt the child born of the terminated surrogacy agreement.

In South African law, a fetus is regarded as being a part of its mother's body, and thus the Children's Act allows the surrogate mother to terminate the pregnancy in accordance with the terms of the Choice of Termination of Pregnancy Act 92 of 1996,[43] but the surrogate mother must first inform the commissioning parents that she wants to terminate the pregnancy and she must also consult with them. If the surrogate mother decides to terminate the pregnancy, she is not liable for any payment to the commissioning parents except any payments made as per section 301, particularly if the decision to terminate was not due to medical grounds. Section 301 of the Children's Act provides that no reward or compensation may be given for surrogacy. The surrogate mother may only receive compensation for expenses that are directly related to the pregnancy and birth as well as the confirmation of the agreement. Additionally, consideration may be given for the potential loss of earnings that a surrogate mother may experience as well as medical and insurance costs associated with a surrogate's potential death or disability resulting from the pregnancy. However, the persons who provide professional legal or medical services are entitled to receive compensation for such services.

The privacy of the parties to a surrogacy agreement is protected by section 302, which prohibits the publication of their identities unless the parties have provided their written consent. Section 303 of the Children's Act further regulates surrogacy by stating that no one may artificially fertilize a woman for the purpose of surrogacy unless an agreement has been approved by a court.

Conclusion

Having considered the legal regulations surrounding surrogacy in two BRICS countries, namely Russia and South Africa, we will now briefly outline the main differences in their regulatory norms:

1. In Russia, the circle of persons entitled to use the surrogacy method as customers is noticeably narrower compared with South Africa. In Russia, this procedure has, in fact, recently been restricted to only an infertile married couple or an unmarried, barren woman.

In South Africa, both same-sex couples and unmarried men and women can act as clients for surrogacy.

2. In Russia, the requirements for surrogate mothers are fixed at the legislative level. Compliance with these requirements is checked by the medical organization conducting the IVF procedure. In South Africa, compliance of parties with the stipulated requirements is ensured by the High Court of South Africa. Moreover, the court checks not only the surrogate mother for compliance with the requirements but also the commissioning parents.

---

[43] Sec. 300 of the Children's Act.

3. In Russia, in paragraph 9 of the Fundamentals of Public Health Protection, there is only a cursory mention of the surrogacy contract, in which it is said that such a contract is concluded between a surrogate mother and commissioning parents. However, the very definition of this agreement and its requirements are absent. In South Africa, the surrogate motherhood agreement must be concluded in writing, signed by all parties, and approved by the High Court of South Africa. Such a certification from the authority of a court in South Africa seems reasonable. In Russia, on the other hand, it would be necessary to establish the written form of the contract at the legislative level and also require that it be certified by a notary.

Furthermore, in contrast to Russian legislation, a pregnant mother in South Africa has the right to participate in an oocyte procedure. In other words, she can also serve as the biological mother.

In Russia, there is a legal requirement for commissioning parents to be Russian citizens, married, show proof of infertility, and have a genetic connection with the child.

We mentioned that in Russia, both commissioning parents must be the child's genetic parents. In other words, if one of the spouses or a single woman, for some reason, cannot provide their own biological material for conceiving an embryo, they cannot participate in the surrogacy program. Moreover, in May 2023, the Government of the Russian Federation adopted a resolution developed by the Ministry of Health of the Russian Federation "On Approving the Procedure for Establishing Commissioning Parents as a Genetic Mother and Genetic Father, as well as a Single Woman as a Genetic Mother."[44] In accordance with this decree, the procedure for establishing the genetic relationship of potential parents or a potential single mother with a newborn is an obligatory stage of the surrogacy program.

Thus, establishing the commissioning parents as genetic parents includes:

• confirmation that the fertilization process, within the framework of assisted reproductive technologies, was undertaken using genetically affiliated germ cells, and (or) the use of an embryo from commissioning parents or a single woman;

• molecular genetic research to accurately determine the genetic relationship of a child born by a surrogate mother to commissioning parents or a single woman.

Based on the results of the medical study, a medical report is issued on the establishment (non-establishment) of the commissioning parents as the genetic mother and genetic father or a single woman as a genetic mother.

Commencing from the date of entry into force of the decree (September 1, 2023), commissioning parents will be able to be officially recorded as the child's parents only after the genetic relationship is established by the above method. That is, in addition to obtaining the consent of the surrogate mother, commissioning parents

---

44 Resolution of the Government of the Russian Federation No. 882 of 31 May 2023 "On Approval of the Procedure for Establishing Potential Parents as a Genetic Mother and Genetic Father, as well as a Single Woman as a Genetic Mother." Government of Russia. http://government.ru/docs/all/147805/. (In Russian).

must now undergo a medical examination as a required stage of the program. It is possible that the developers of this project have data related to violations on the part of medical authorities involving genetically alien children passed on to commissioning parents. Such a scenario could likely occur if one of the spouses, or even both, does not possess the germ cells necessary to conceive a child. As a result, the proposed measure seems justified since it is aimed solely at complying with the requirements of the law on the child's mandatory genetic relationship with both potential parents or with the mother (in the case in which a surrogate is carrying the child of a single woman).

In South Africa, a truncated genetic relationship is permissible – this means that in order to participate in the program, at least one of the two commissioning parents must provide biological material. This is, again, understandable since same-sex couples are also allowed to participate in the program in the country. In principle, such couples cannot participate in the program without donating oocytes or spermatozoa.

The changes made to regulatory legal acts in December 2022 in Russia, which narrowed the pool of persons who can act as clients, should be assessed as positive as they were adopted in the interests of the child. On the matter of the surrogacy agreement, it should be noted that as the next step, it would be advantageous for lawmakers to, in the near future, provide clear regulations about age restrictions for commissioning parents and strict requirements regarding their mental health.

South African law also imposes specific requirements on the commissioning parents. The commissioning parents must be able to take on parental rights and be proper parents for the child born from a surrogacy agreement. Additionally, the commissioning parent or parent must be genetically linked to the child born from a surrogacy in order to fulfill the requirements of the Children's Act.

3. If in Russia, genetic parents are recorded as parents only with the consent of the surrogate mother, then in South Africa, a child born from a surrogate mother is considered the child of the commissioning parent or parents from the moment that such child is born. Only in cases in which the carrying mother is also his biological mother (oocyte donor) can she keep the child for herself. The surrogate mother is required to make such a decision within a certain period of sixty days at the legislative level.

4. Another difference between surrogacy regulations in Russia and South Africa is that surrogacy is solely permitted without payment, i.e. free of cost in South Africa. This restriction in South Africa is obviously aimed at preventing the exploitation of women in difficult financial situations by well-off people and the mass use of pregnant women in the role of "living incubators." However, a surrogate in South Africa may be compensated for reasonable expenses incurred (medical costs, insurance, etc.) as well as for any loss of earnings caused as a result of undertaking the surrogacy. Furthermore, it is possible that commissioning parents still informally pay a surrogate mother a reward for the birth of a healthy child. Otherwise, the motivation of the

surrogate mother, who decided to take such a step only for compensation of medical and transportation costs, is not entirely clear, other than for altruistic reasons.

Acknowledgements

This article was published as part of the NRU HSE Project "Mirror Laboratories" 2022 entitled, "Actual Aspects of Human Rights in Bioethics."

References

Ashuha, V.M. (2017). Paragraph 4 of Art. 51 of the Family Code of the Russian Federation – A Guarantee of Protection of Maternal Rights, a Reason for Abuse of the Right, an Anachronism? *Bulletin of Omsk University. Series: Law, 3*(52), 111–116. https://doi.org/10.25513/1990-5173.2017.3.111-116. (In Russian).

Gaibatova, K.D., & Shamsudinova, P.M. (2022). The Problem of Establishing the Origin of Children as a Legal Consequence of the Surrogacy Contract. *Legal Bulletin of Dagestan State University, 41*(1), 66–70. https://doi.org/10.21779/2224-0241-2022-41-1-66-70. (In Russian).

Harris, P.T. (2020). Chapter 5 – Surrogacy. In P.T. Harris & E. Baker (Eds.), *Seafloor Geomorphology as Benthic Habitat* (2nd ed) (pp. 97–113). Elsevier. https://doi.org/10.1016/B978-0-12-814960-7.00005-1

Levushkin, A.N., & Saveliev, I.S. (2015). Requirements imposed legislators to the future parents of a child born using surrogate motherhood technology. *Modern Law, 9*, 92–96. (In Russian).

Pande, A., & Moll, T. (2018). Gendered bio-responsibilities and travelling egg providers from South Africa. *Reproductive Biomedicine & Society Online, 6*, 23–33. https://doi.org/10.1016/j.rbms.2018.08.002

Savchenkova, E.C., & Sadovaya, L.C. (2015). Ethical Aspects of Surrogacy. *Education and Science in Modern Conditions, 3*, 244–246. (In Russian).

Stebleva, E.V. (2011). Legal regulation of posthumous reproduction using the surrogate motherhood method. *Civilist, 3*, 92–96. (In Russian).

Svitnev, K.N. (2010). 196 Surrogacy and its Legal Regulation in Russia. *Reproductive BioMedicine Online, 20*, Supplement 3, S90. https://doi.org/10.1016/S1472-6483(10)62614-4

Information about authors

Elena Mitryakova (Tyumen, Russian Federation) – Assistant Professor, Department of Civil Law and Procedure, University of Tyumen (6 Volodarskogo St., Tyumen, 625003, Russian Federation; e-mail: e.s.mitryakova@utmn.ru).

Amanda Boniface (Johannesburg, South Africa) – Associate Professor, Department of Private Law, Faculty of Law, University of Johannesburg; Advocate, High Court of South Africa (Kingsway Ave., Auckland Park, South Africa, Or PO Box 524, Auckland Park, 2006, South Africa; e-mail: aeboniface@uj.ac.za).

ARTICLE

CCTV and Crime Prevention Effectiveness: Experience of Hungary

Vince Vári,

Ludovika University of Public Service (Budapest, Hungary)

Szabolcs Mátyás,

Ludovika University of Public Service (Budapest, Hungary)

Miklós Tihanyi,

Ludovika University of Public Service (Budapest, Hungary)

Kristina Krasnova,

North-West Branch of the Russian State University of Justice named after V.M. Lebedev (Saint Petersburg, Russian Federation)

https://doi.org/10.21684/2412-2343-2025-12-1-40-55

Received: November 10, 2023
Reviewed: January 5, 2024
Accepted: March 2, 2024

Abstract. This article examines the influence of CCTV on the realization of the person`s intention to commit a crime. The authors present the results of their own research which was conducted among Hungarian prison population (172 respondents) using a questionnaire method. The questionnaires were of a survey-type with a closed set of questions. The research sought to determine how offenders relate to CCTV, its role in crime prevention, and whether any differences in attitudes towards CCTV can be observed in terms of age and time spent in prison. In the course of the research, it was found that a significant negative correlation can be found between the time spent in a penitentiary institution and the fear of CCTV among those who spent more time in prison. Furthermore, it was also determined that the deterrent power of cameras is comparable to that of uniformed police officers. Research showed that CCTV's effectiveness depends on factors such as camera placement, real-time monitoring, and integration with police patrols. While studies confirm reductions in certain crime types – particularly property crime and offenses in urban areas – other findings suggest CCTV primarily displaces crime geographically rather than preventing it. Offenders perceive cameras as deterrents in visible, well-monitored spaces, but this effect diminishes with sporadic deployment or inadequate implementation. This finding has significant criminological and national economic significance.

Keywords: safety; cameras; security; closed circuit television; video surveillance; predictive control; public transport; crime prevention; policing.

To cite: Vári, V., et al. (2025). CCTV and Crime Prevention Effectiveness: Experience of Hungary. *BRICS Law Journal*, *12*(1), 40–55.

Table of Contents

Introduction

CCTV can prevent crime by making a significant contribution to the detection of potential perpetrators by the authorities. Besides, CCTV can encourage potential victims to take safety precautions, also potentially deter police and security personnel from committing crimes.[1] CCTV is playing an increasingly important role in crime prevention and detection both in Hungary and in other countries worldwide. It is characteristic of their development speed that in 4-5 years, we can talk about a change of generation for certain camera types, their technical development is so fast. The question may arise as to whether technological development is followed by scientific surveys examining camera use. Unfortunately, we find that the number of law enforcement publications related to camera use in Hungary is negligible.

---

1 Armitage, R., Smyth, G., & Pease, K. (1999). Burnley CCTV evaluation. In K. Painter & N. Tilley (Eds), *Surveillance of public space: CCTV, street lighting and crime prevention* (pp. 226–227). Criminal Justice Press.

However, the number of foreign sources is also quite small if we compare it with the number of studies presenting technical development.[2]

It is no exaggeration to say that the use of CCTV in larger numbers is essential for the efficient operation of the police. In many areas, the increasing cost of human labor means surveillance cameras can not only replace but, in many cases, more effectively perform the work of human personnel.[3] Many studies have that cameras significantly increase the population's sense of subjective security, which is also an important factor.[4] Ethically and professionally impeccable work also contributes greatly to law enforcement's efficiency, which is one of the means of (internal) control of the operation of space surveillance and other camera systems. The present study is the second step in a series of research. First, Gyula Csege and Szabolcs Mátyás conducted a population-based questionnaire survey to determine how the "average" citizen relates to CCTV. In the course of the research, it was established, among other things, that the role of CCTV in increasing the subjective sense of security has increasingly significant potential among the population.[5]

In the present research, a questionnaire survey conduct among the Hungarian prison population. The primary aim was to determine the persons convicted of the crime about the crime surveillance camera and their crime prevention effect.

Before the start of the research, several research questions and hypotheses set up. The authors hypothesized that age, education, marital status, and time spent in a penitentiary institution affect CCTV' attitudes.

1. The Legal Background to the Use of CCTV

In recent years, CCTV proliferation has increased, mainly to prevent crimes in public places. According to some, e.g., the UK is already at the level where it can be declared an effective "supervisory society" because it monitors citizens' lives and activities to such an extent.[6] It is estimated that the number of public CCTV cameras in the UK is

---

2 Csege, G., & Mátyás, S. (2018). Térfigyelő rendszerek hazai szabályozása empirikus kutatások és a biztonsági kihívások tükrében. *Jog Állam Politika: Jog-és politikatudományi folyóirat, 3*, 163–172.

3 Sallai, J., et al. (2016). A „jó rendészet" közpolitikai kapcsolódási lehetőségei. In K. Tamás (Ed.), *A jó állam nagyító alatt: speciális jelentések A-tól V-ig (az adóbürokráciától a versenyképességig)* (p. 89). Dialóg Campus Kiadó. (In Hungarian); Horgos, L., et al. (2018). The importance of data compilation in criminalistics. *Journal of the National University "Ostroh Academy". Series "Law", 1*(17), 3. (In Ukranian).

4 Dávid, L., et al. (2007). Biztonság, terrorizmus, turizmus. *Gazdálkodás, 51* (különkiadás), 161–166. (In Hungarian); Mátyás, S. (2015). Szubjektív biztonságérzet – lakossági vélemény a közbiztonságról és a rendőrségről. *Magyar Rendészet, 5*, 159–170. (In Hungarian).

5 Csege & Mátyás, 2018.

6 Goold, B.J. (2004). *CCTV and policing: Public area surveillance and police practices in Britain*. Oxford University Press; Norris, C. (2007). The intensification and bifurcation of surveillance in British criminal justice policy. *European Journal on Criminal Policy and Research, 13*, 139–158; Norris, C., & Armstrong, G. (1999). *The maximum surveillance society: The rise of CCTV*. Berg.

4.2 million, or one for every 14 citizens,[7] accounting for nearly one-fifth of all CCTV cameras worldwide. The legal regulation of public space surveillance is at the crossroads of two social interests. Therefore, it is the respective state's primary responsibility to strike a balance in home affairs policy between security and the interests of the private sphere. The more extensive the legal possibility of space surveillance, the greater the public safety potential in applying this tool. Simultaneously, the integrity of the individual against the state's need to know decreases in direct proportion; that is the possibility of protecting personal data against the state decreases. The balance between these two interests is the (self-) restriction of use and the guarantee standards of data protection systems. The latter aspects have come to the fore extraordinarily, with technological development and globalization allowing unprecedented levels of data collection. Accordingly, both EU and national legislation impose strict rules on the processing of personal data, including, of course, the operation of surveillance systems. There is no doubt that CCTV deployment in public places such as city centers, public housing estates, and transport facilities provokes greater resistance to restrictions on privacy and other civil liberties and promises major social disadvantages. Including the increasing impact of a police state-minded society and social exclusion of the marginalized population.[8]

The European Union's general data protection regulation states that the right to the protection personal data is not absolute; it must be considered in accordance with the principle of proportionality, taking into account its role in society and balancing it with, in balance with other fundamental rights. Due to the specific legal nature of the separate EU law enforcement data protection directive, it requires the Member States to take steps to harmonize their legislation in order to achieve the set goals. Therefore, it is important to examine harmonization of internal and EU law, given the lack of direct effect and applicability of the latter.

Since 2004, the Hungarian data protection regulations have specifically included taking photographs, sound, or images as data management. If based on the location or technical properties of the device, natural persons cannot be identified in the recorded image, and this is not technologically possible (e.g., by enlarging a portion of the recording). Then the observation or recording is not covered by the Data Protection Act. This might include low-resolution webcams mounted on main squares, which monitor highways and junctions in traffic policing, so in this case, it is not regulate how long such recordings can be store; in what form each type can be used.

Act CXII of 2011 concerns the right to information self-determination and freedom of information. According to the provisions of this Act, given that the current legislation only allows a minimal number of people to monitor public space. The legal

---

[7] Norris, C., & McCahill, M. (2006). CCTV: Beyond penal modernism? *British Journal of Criminology, 46*, 97–118.

[8] Clarke, R.V. (2000). Situational prevention, criminology, and social values. In A. von Hirsch, D. Garland & A. Wakefield (Eds.), *Ethical and social perspectives on situational crime prevention* (pp. 97–112). Hart.

basis for data processing related to CCTV is, in all cases, mandatory data processing based on legal authorization and not the data subject's consent.

According to Cornish and Clarke's classification of situational crime prevention, CCTV is a "surveillance by official agencies" technique.[9] In this regard, CCTV is improving upon or replacing security personnel. The Hungarian legislature allows camera surveillance of public areas for two types of bodies: one is the police, and the other is public area inspectorates operating within the municipal police framework. These rules determine the purpose for which the images are taken, the areas in which the images are used, the storage time, and the data management organization. A person employed by a municipal body or company, or employed by an external company, may not be involved in the surveillance of the camera images, nor may an external company be employed for this purpose. As EU law entitles law enforcement agencies and other authorities to monitor public spaces, the Hungarian solution is sufficiently aligned with EU law. The only critical point may be that civilian guards can also carry out surveillance using municipal police or the police cameras; that is, thet may act as civilian helpers of the police. As a non-governmental organization, citizenship cannot operate a public space surveillance system on its own under EU law. Therefore, the Hungarian legislator chose the solution that a civil guard can only observe live recordings; they cannot handle the recordings themselves. Accordingly, they perform data processing, not data management. It's as if the cameras are the remote eyes of the civil guards.

One of the important principles of regulation is the transparency. Accordingly, the surveillance of public spaces can only be perceived as legitimate by others, using cameras that indicate spatial surveillance. Hidden or camouflaged devices cannot be used for this purpose. In areas monitored by cameras, a notice informing individuals of the surveillance must be published. Furthermore, the locations where the cameras have been installed must be posted on the organization's website operating the space surveillance system (municipality or police). The purpose of this transparency is to ensure that a person entering the area is aware that they may be photographed and can make an informed decision about whether or not to enter that area. Although, with the increasing proliferation of cameras, it is becoming increasingly difficult to avoid surveillance. More important to this research is that public observation provides an opportunity for a person in the observed area to decide to commit or abstain from a particular behavior.

Purposefulness is also of fundamental importance. In this sense, camera installation should be a means to an end. Cameras should be only placed where a genuine public security interest justifies it. In many cases, police camera systems are operated and financed by the municipalities. Therefore, it is natural that the municipality's needs also arise, and these needs may not always align with genuine public safety needs.

---

9 Cornish, D.B., & Clarke, R.V. (2003). Opportunities, precipitators and criminal decisions: A reply to Wortley's critique of situational crime prevention. In M.J. Smith & D.B. Cornish (Eds.), *Theory for practice in situational crime prevention* (pp. 41–96). Criminal Justice Press.

On the other hand, it is common for residents to request cameras be placed in locations where they offer little benefit to objective public security interests and their subjective sense of security. At the same time, if public safety interpreted sufficiently broadly, the latter interest can also be considered part of the field of public safety.[10] The purpose limitation also applies during data management, as the recordings can only be used in criminal, infringement, or administrative proceedings specified by law.

2. CCTV and Crime Prevention

International research on CCTV primarily examines its effectiveness of CCTV based on the application's purpose and location.[11] It should be noted that despite the creation of police forces at the supranational level (Interpol, Europol), bi- and multilateral cooperation between individual countries remains limited, with "each country using only its own countermeasures to combat traditional and high-tech crime."[12] Unfortunately, little research has analyzed the deployment of CCTV from the offender's perspective, considering the psychological processes and moral roots it triggers.[13] The use of CCTV focuses primarily on crime prevention, reducing criminal opportunities, and increasing the perceived risk of crime by modifying the physical environment.[14] Situational crime prevention is rooted mainly in the rational choice perspective, which views crime as "purposeful behavior to meet the everyday needs of the perpetrator."[15] As a result, an important consideration is how potential perpetrators perceive the risk of being caught if they detect the deployed cameras before or during the formation of their intent to commit an offense. The fact that potential perpetrators consider whether cameras are detected is evident from the fact that when passive and real-time surveillance, and multilateral intervention systems are deployed, significantly more effective crime prevention can be achieved.[16] Video surveillance effectively reduces crime when cameras monitor in real-time and on-duty police patrols are kept

---

10 Tihanyi, M. (2017). Közrend, közbiztonság, rendészet a keresztény közgondolkodásban. In *Államtudományi Műhelytanulmányok*. (In Hungarian).

11 Krasnova, K. (2024). Using CCTV for law enforcement operations and public safety. *Criminal Geographical Journal, 1-2*, 9–14.

12 Dmitrieva, A., Alshdaifat, Sh., & Pastukhov, P. (2023). The Features of the Use of Information Technologies in Criminal Proceedings in the BRICS Countries. *BRICS Law Journal, 10*(1), 88–108.

13 Tihanyi, M., Vári, V. & Krasnova, K.A. (2024). Ethics of Sin and Punishment. *Kutafin Law Review, 11*(4), 741–760.

14 Clarke, R.V. (1995). Situational crime prevention: Its theoretical basis and practical scope. In M. Tonry & N. Morris (Eds.), *Crime and justice: A review of research. Vol. 4* (p. 225–255). University of Chicago Press; Krasnova, 2024.

15 Clarke, R.V. (1997). Introduction. In R.V. Clarke (Ed.), *Situational crime prevention: Successful case studies* (2^{nd} ed.) (pp. 9–10). Harrow and Heston.

16 Piza, E., et al. (2019). CCTV surveillance for crime prevention: A 40-year systematic review with meta analysis. *Criminology & Public Policy, 18*, 135–159.

informed.[17] Consequently, the deployment and use of CCTV can be more rationally considered in its design and implementation. Of particular note is the continuing need to focus CCTV on vehicle and property crime rather than as a "stand-alone" crime prevention measure. Scientists view CCTV's primary goal as triggering a detection mechanism that influences certain elements of a perpetrator's decision-making process by persuading them to refrain from committing crimes. Because crime can be considered a rational action, CCTV's role in intelligence and investigative work, as well as its use as evidence, also increases crime's deterrent effect. The most commonly cited mechanism by which video surveillance can deter crime is its potential impact on punishment's perceived certainty.[18] Coupe and Kaur found that CCTV in a fixed location within buildings doubles the chances of identifying the perpetrator instead of a location where the building is not equipped with it.[19] Consequently, how often CCTV provides useful evidence and how it is affected by circumstances are important factors in its effectiveness for detection and as evidence. An analysis 251,195 crimes on the British rail network between 2011 and 2015, which were recorded by the British Transport Police, provides further insight. Camera footage provided by CCTV was available to investigators in 45% of cases, and proved useful in 29% of those cases. With the operation of CCTV, the chances of solving crimes have increased significantly for almost all types of crimes. Images of the offense were more likely to be available for more serious crimes and demonstrably less likely to be available for crimes occurring at an unknown time or in certain types of locations.[20] It is then clear that increased fear of being caught among offenders, reduced crime rates, and more conscious behavior by law-abiding citizens are among the potential outcomes of using CCTV. Although CCTV has many potential public security applications – including preventing crime, detecting crime, and improving emergency response – it is mostly used to help manage certain crime-prone sites more effectively and to reduce public fear of crime. Nonetheless, CCTV's contradictory nature needs to be pointed out, as surprisingly little is known about its use and effectiveness in achieving different public safety goals. A systematic review of 41 studies by Welsh and Farrington concluded that CCTV effectively prevents certain types of crime in certain circumstances. Still, the evidence suggests that it has a more limited impact than previously thought.[21]

---

17 Piza, E.L., et al. (2015). The effects of merging proactive CCTV monitoring with directed police patrol: A randomized controlled trial. *Journal of Experimental Criminology, 11*, 43–69; Gerell, M. (2016). Hot spot policing with actively monitored CCTV cameras. *International Criminal Justice Review, 26*(2), 187–201.

18 Piza, E. L., Caplan, J. M., Kennedy, L. W., & Gilchrist, A. M. (2015). The effects of merging proactive CCTV monitoring with directed police patrol: A randomized control trial. *Journal of Experimental Criminology*, 11, 43–69.

19 Coupe, T., & Kaur, S. (2005). The Role of Alarms and CCTV in Detecting Non-residential Burglary. *Security Journal, 18*(2), 53–72.

20 Ashby, M.P.J. (2017). The Value of CCTV CCTV as an Investigative Tool: An Empirical Analysis. *European Journal of Criminal Policy and Research, 23*, 441–459.

21 Welsh, B.C., & Farrington, D.P. (2008). Effects of closed circuit television surveillance on crime. *Campbell Systematic Reviews, 4*(1), 1–73.

Most recently, Alexandrie (2017) reviewed seven randomized and natural experiments on use CCTV and found that the number of crimes on public roads and urban subway stations decreased by 24% to 28%, but that CCTV had no significant effect in car parks or suburban subway stations. Perhaps the most significant finding is that the coordination of policing and CCTV can significantly increase CCTV's effectiveness.[22]

Thus, when video surveillance is combined with the presence of existing police patrols, it may have greatly contributed to maintaining more efficient public order on the streets or subway stations.[23] According to Priks, the ability to respond quickly to nearby security guards and police officers may explain why CCTV have caused crime reduction at city metro stations, but not at suburban stations.

Comprehensive research on CCTV's effectiveness in Cincinnati has shown rather limited and highly conditional results regarding a declining trend in crime within residential environments. The cameras did not perform to the extent that they were theoretically intended. This was due to the cameras' poor deterrence, as well as the unplanned or poor implementation of CCTV deployment (e.g., the inadequate density of cameras or inadequate signals indicating the presence of CCTV). It may also have been related to the fact that Cincinnati police did not use the cameras for proactive activities, but rather preferred them for investigative purposes. Essentially, certain crime categories (burglary, robbery, etc.) were displaced from camera-covered areas, and this did not significantly affect the overall crime situation at the study site.[24] Cerezo found that overall crime did not decrease significantly even after the introduction of 17 open-street CCTVs in Malaga, Spain.[25] Other studies on the effects of CCTVs on general crime show mixed results. For example, La Vigne et al. examined the effects of open-street CCTVs in Baltimore, Chicago, and Washington, D.C.[26] They found differences; in Baltimore, overall crime declined at most CCTV deployment sites. In Chicago, however, the overall effects of crime reduction appeared in only half of the deployment locations. Nor did the introduction of CCTVs in Washington, D.C., lead to an overall reduction in crime. Some research on CCTV's effects has focused on certain categories or types of crime, as mentioned earlier. The majority of such

---

22 La Vigne, N.G., & Lowry, S.S. (2011). *Evaluation of camera use to prevent crimes in commuter parking facilities: A randomized control trial.* URBAN Institute; Piza, E. L., Caplan, J. M., Kennedy, L. W., & Gilchrist, A. M. (2015). The effects of merging proactive CCTV monitoring with directed police patrol: A randomized control trial. *Journal of Experimental Criminology*, 11, 43–69; Analyzing the influence of micro-level factors on CCTV camera effect. *Journal of Quantitative Criminology, 30*, 237–264.

23 Gómez, S., Mejía, D., & Tabón, S. (2017). *The deterrent effect of public CCTV on crime* (Working paper No. 9); Munyo, I. & Rossi, M. (2016). *Is it displacement? Evidence on the impact of police monitoring on crime* (Working Paper No. 126).

24 Lim, H., & Wilcox, P. (2017). Crime-reduction effects of open-street CCTV: Conditionality considerations. *Justice Quarterly, 34*, 597–626.

25 Cerezo, A. (2013). CCTV and crime displacement: A quasi-experimental evaluation. *European Journal of Criminology, 10*, 222–236.

26 La Vigne & Lowry, 2011.

crime-specific studies have examined the categories of crimes against property and violent crimes.[27] Despite these differences, most previous studies on property crime have largely supported the effectiveness of CCTV. Thus, we can conclude that the deployment of CCTV can reduce the number of crimes in certain circumstances (e.g., at night or on weekends in residential environments) or for certain types of crime (e.g., against property or robberies). However, it is not appropriate to attribute an exclusive crime prevention role to it.

Accordingly, some studies emphasize the importance of selecting appropriate locations for CCTV installation and provide guidelines on how to select these locations.[28]

3. Research Methodology

Obtaining the large number of samples required for the survey from police forces at different levels would have taken an extremely long time. Therefore, the most viable solution was to interview individuals detained in penal institutions. Inmates at the Hajdú-Bihar County Penitentiary Institute (after this: HBMBVI) and the Tököl National Penitentiary Institute (after this: TOBVI) provided the sample for the questionnaire survey. The questionnaire was completed by individuals serving erving their final sentences or those in pre-trial detention. Survey-type questionnaires with a closed set of questions are advantageous from a research methodology perspective because they can be quantified and easily replicated. Allowing for the collection of representative data. The questionnaires were administered voluntarily to the staff of the penal institutions. In May 2019 by 73 people at the Hajdú-Bihar County Penitentiary Institute and 100 people at the Tököl National Penitentiary Institute completed the questionnaires. Based on the completed questionnaires, 1 person (TOBVI) misunderstood the questionnaire's completion; therefore, his answer was not considered.

There are almost 18,000 prisoners in Hungarian penal institutions. Thus, based on the number of respondents, almost 1% of the Hungarian prison population participated in the survey.

The authors closely monitored criminal incidents and news that affected detainees to ensure no action could negatively impact participants. However, no extraordinary events occurred during the study period that would have affected the respondents in any way. In compiling the questionnaire, the authors drew upon the experience of previous surveys conducted in penal institutions, taking into account that the proportion of prisoners with a lower level of education is higher than in the general Hungarian population. The questions were short and concise,

---

[27] Sivarajasingam, V., & Shepherd, J.P. (1999). Effect of closed circuit television on urban violence. *Journal of Accident & Emergency Medicine, 16*, 255–257.

[28] Yun, W. (2021). A study on the selection of the CCTV location for crime prevention. *J-Institute, 6*, 14–25.

the vast majority of questions were closed (with only one scale question), and the overall number of questions was relatively small. For ease of understanding, the questions did not contain any foreign terms or jargon. In developing the questions, the authors considered both the staff's suggestions from the Measurement and Methodology Office of the National Civil Service University and the comments of specialist staff at the ORFK (National Police Headquarters). The primary goal of the survey was to understand the criminals' perceptions of surveillance cameras, their prior experiences, and the perceived crime prevention effect of cameras from the criminals' perspective. This information could be used later during the installation of CCTV. The collected results were analyzed using the IBM SPSS statistical program.

4. Research Results

The age group distribution shows that all age groups of the Hungarian adult prison population were represented. The respondents' average age was practically identical between the two groups (HBMBVI: 37 years, TOBVI: 38 years), with a mean age of 37.5 years.

Regarding age, it might be assumed that younger offenders, due to their age and lack of previous experience, are less cautious and consider the presence of cameras less threatening. Not confirmed during the research, no such correlation could be established. The next question in the questionnaire concerned marital status. 15% of respondents were divorced, 28% were married, 32% were unmarried, and 25% were in other categories.

The relationship between marital status and precaution was also among the areas studied. However, no correlation could be established between marital status and attitudes towards CCTV.

37% of respondents had 8 primary or lower education degrees, 32% had a vocational qualification, 6% had a formal vocational qualification, 16% had a baccalaureate degree, and 9% had a tertiary degree (There was no significant difference in the educational attainment between the two groups).

The research sought a link between educational attainment and the deterrent effect of CCTV. However, we found that the surveillance cameras have a deterrent effect regardless of education level; therefore, so there is no correlation between higher education and CCTV deterrence.

Participants in the questionnaire survey spent an average of 18.5 months in a penitentiary institution (HBMBVI: 14.9 months; TOBVI: 22.1 months). In the research, we found a significant negative correlation observed between the time spent in a penitentiary institution and CCTV's fear, i.e., who spent more time in prison. That shows if the prisoners spend more time in prison Institute, were less affected by the presence of CCTV when considering committing a crime.

34% of the detainees had committed crimes against property, 19% violent crimes, and 47% other crimes. Crimes against property and violent crimes were specified because the largest number of offenses recorded by surveillance cameras can be best classified in these two groups, even with the perpetrator's knowledge. (There was no significant difference in the criminal profiles of detainees between the two groups). Some empirical evidence suggests that one explanation for the discrepancy between property and violent crime in police statistics is that violent crimes elicit a significantly higher rate of police response, thus making detection more effective.[29]

Randomized and natural experiments have shown that CCTV can reduce the number of crimes, particularly property crimes, under various conditions. Thus, we hypothesized that CCTV has a greater deterrent effect on perpetrators of property crimes, as these are the individuals who typically commit crimes in a planned manner. In contrast, violent crimes are often impulsive acts, and perpetrators are less sensitive to detection and punishment. Given that these two explanations have very different implications for how CCTV is used in curbing violent and property crimes, it is more common for perpetrators of violent crime to commit crimes occasionally and be guided by momentary anger. The present research did not confirm this assumption. Based on the respondents' answers, there is no correlation between the deterrent effect of CCTV and the type of crime committed.

The second part of the questionnaire specifically asked questions about CCTV. When asked if "would you be deterred from committing a crime if you knew that a surveillance camera was installed in a public place near the location?", the vast majority of respondents answered yes (82%). On the other hand, there was a 10% difference between the two groups; the detainees in Debrecen were more deterred from committing the crime by the presence of a surveillance camera (88%) than the detainees Tököl.

The next question explored whether respondents had previously committed a crime knowing that a surveillance camera might record the act; this question was specifically directed at the two groups of prisoners. A significant difference of more than 20% was observed between the two institutions, with 84% of those surveyed in HBMBVI and 63% of those surveyed in TOBVI answered "no." Based on the aggregated responces, 72% of the respondents had not previously committed a crime while aware that their actions were being recorded by a surveillance camera, even when considering both prisons. Despite this significant difference between the institutions, we can state that the above percentages clearly demonstrate the deterrent and crime-preventing effect of CCTV, as nearly three-quarters of respondents answered no to the question.

Question 9 was only partially related to CCTV. This question aimed to determine if an offender, upon seeing a warning sign indicating the use of a surveillance camera (rather than an actual camera), would refrain from committing a crime.

29 Vollaard, B. & Hamed, J. (2012). Why the police have an effect on violent crime after all: Evidence from the British Crime Survey. *Journal of Law and Economics, 55*(4), 901–924.

81% of respondents stated that they would refrain from committing a crime if they saw such a warning sign (There was only a slight difference of a few percentage points between the two prisons). We are pleased to note this result, as this more cost-effective approach than installing cameras can still have a significant crime-preventing effect.

It is unfortunate to rank the questions in a research questionnaire; however, in the present case, one of the most serious questions was whether, according to the perpetrators, CCTV has a crime-preventing effect. Despite the relatively large difference between the two prisons' responses (HBMBVI: 92%, TOBVI: 76%), we can state that according to the offenders, the crime prevention effect of CCTV is also very significant. Based on the aggregated responses, 83% answered that CCTV has a crime prevention effect.

In any case, a surprising finding emerged regarding which has more deterrent power for an offender: a constantly monitored CCTV system or a uniformed police officer. Examining the entire sample, no significant difference was observed; the deterrent force of a uniformed police officer, according to the respondents, is almost the same as that of a surveillance camera. 76% of the respondents rated the deterrent effect of a uniformed police officer as five, and 74% rated the deterrent effect of CCTV as five (not 74%). In HBMBVI, the rating for a uniformed police officer was 8% higher than the average of the two prisons, while at the Tököl National Penitentiary, the proportion of those who evaluated the deterrent effect of the surveillance camera relatively high (13%) (Figures 1 and 2). Experimental results confirmed this finding by showing a decrease in certain types of crime, especially in residential areas, following the deployment of CCTV. The existing crime situation influenced the effectiveness of CCTV in an area. It is worth noting that the combination of CCTV with police forces has proven to be much more effective. In other words, the real-time involvement and intervention of the police force significantly increase the crime-reducing ability of CCTV.[30]

Based on the above, it can be concluded that a visible, attention-grabbing surveillance camera has almost the same crime prevention effect as a uniformed police officer.

The final question asked whether detainees had ever been in a situation where they chose not to commit a crime because they noticed a CCTV camera. 41% of the respondents stated that they had previously stopped committing a crime because of CCTV, indicating that CCTV's crime prevention effect is significant (There was a notable difference between the responses from the detainees at the two prisons; HBMBVI: 34%, TOBVI: 46%.). This finding partially confirmed the initial assumption, suggesting a weak, positive correlation.

[30] Lim & Wilcox, 2017.

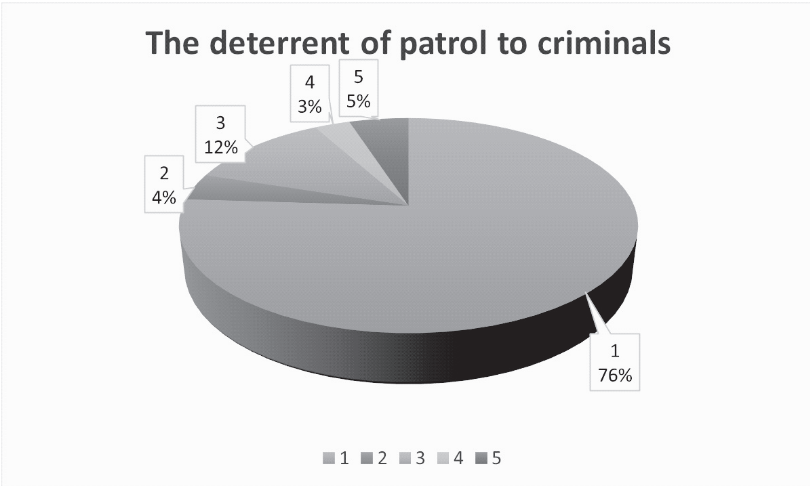

Figure 1: The deterrent force of a uniformed patrol from the perspective of offenders

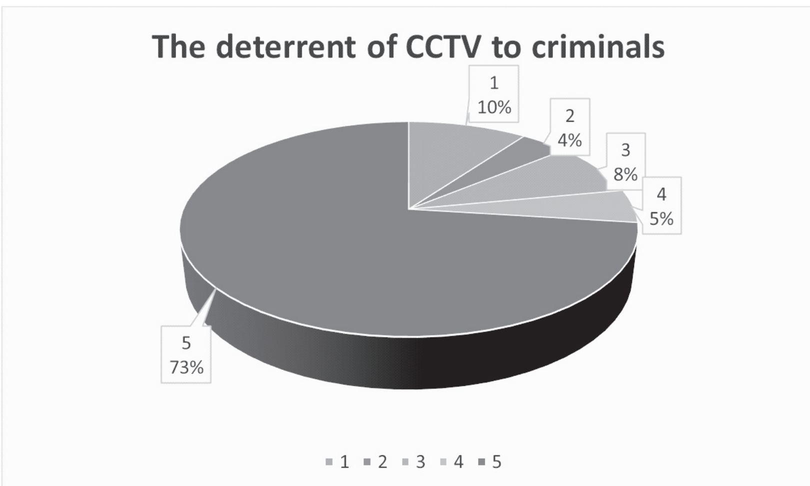

Figure 2: The deterrent force of the surveillance camera from the point of view of offenders

Conclusion

This study examined inmates' opinions about CCTV. The questionnaire survey based on the opinions of 172 detainees from two penitentiary institutions formulated its main findings. In terms of age and marital status, there is no relevant difference between inmate opinions regarding CCTV, nor is there a correlation between the deterrent effect of CCTV and the type of crime committed. On the other hand, there is a negative correlation between the time spent in a penitentiary institution and CCTV's fear. The longer time is observed in the prison in the institute, prisoners are less affected by the camera when the crime committed. The crime-preventing effect of CCTV evidenced by the fact that more than 80% of respondents stated that they would refrain from committing a crime if a camera placed in a public place or a CCTV warning sign seen. The above is also confirmed by the fact that the deterrent force of a uniformed policeman is almost the same as that of a space surveillance camera in the respondents' opinion. Based on the research results, the use of CCTV, which provides continuous surveillance or combined with the police service, deters offenders more, which in turn has the consequence that the offender commits his act in a place where no CCTV deployment took place. Therefore, the general crime prevention use of CCTV cannot justify because its sporadic deployment only results in the territorial relocation of crime. And its total or even more widespread use can be detrimental to civils integrity and envisions the nightmare of a dictatorial state. Consequently, CCTV can certainly be used as a good tool to "clean up" crime-frequented areas.

References

Armitage, R., Smyth, G., & Pease, K. (1999). Burnley CCTV evaluation. In K. Painter & N. Tilley (Eds), *Surveillance of public space: CCTV, street lighting and crime prevention* (pp. 225–250). Criminal Justice Press.

Ashby, M.P.J. (2017). The Value of CCTV CCTV as an Investigative Tool: An Empirical Analysis. *European Journal of Criminal Policy and Research, 23*, 441–459. https://doi.org/10.1007/s10610-017-9341-6

Cerezo, A. (2013). CCTV and crime displacement: A quasi-experimental evaluation. *European Journal of Criminology, 10*, 222–236.

Clarke, R.V. (1995). Situational crime prevention: Its theoretical basis and practical scope. In M. Tonry & N. Morris (Eds.), *Crime and justice: A review of research. Vol. 4* (p. 225–255). University of Chicago Press.

Clarke, R.V. (1997). Introduction. In R.V. Clarke (Ed.), *Situational crime prevention: Successful case studies* (2nd ed.) (pp. 9–10). Harrow and Heston.

Clarke, R.V. (2000). Situational prevention, criminology, and social values. In A. von Hirsch, D. Garland & A. Wakefield (Eds.), *Ethical and social perspectives on situational crime prevention* (pp. 97–112). Hart.

Cornish, D.B., & Clarke, R.V. (2003). Opportunities, precipitators and criminal decisions: A reply to Wortley's critique of situational crime prevention. In M.J. Smith &

D.B. Cornish (Eds.), *Theory for practice in situational crime prevention* (pp. 41–96). Criminal Justice Press.

Coupe, T., & Kaur, S. (2005). The Role of Alarms and CCTV in Detecting Non-residential Burglary. *Security Journal, 18*(2), 53–72. https://doi.org/10.1057/palgrave.sj.8340198.

Csege, G., & Mátyás, S. (2018). Térfigyelő rendszerek hazai szabályozása empirikus kutatások és a biztonsági kihívások tükrében. *Jog Állam Politika: Jog-és politikatudományi folyóirat, 3*, 163–172. (In Hungarian).

Dávid, L., et al. (2007). Biztonság, terrorizmus, turizmus. *Gazdálkodás, 51* (különkiadás), 161–166. (In Hungarian).

Dmitrieva, A., Alshdaifat, Sh., & Pastukhov, P. (2023). The Features of the Use of Information Technologies in Criminal Proceedings in the BRICS Countries. *BRICS Law Journal, 10*(1), 88–108. https://doi.org/10.21684/2412-2343-2023-10-1-88-108

Gerell, M. (2016). Hot spot policing with actively monitored CCTV cameras. *International Criminal Justice Review, 26*(2), 187–201.

Goold, B.J. (2004). *CCTV and policing: Public area surveillance and police practices in Britain*. Oxford University Press.

Horgos, L., et al. (2018). The importance of data compilation in criminalistics. *Journal of the National University "Ostroh Academy". Series "Law", 1*(17), 1–14. (In Ukranian).

Krasnova, K. (2024). Using CCTV for law enforcement operations and public safety. *Criminal Geograthical Journal, 1-2*, 9–14.

Krasnova, K.A. (2024). Preventive action of video surveillance in public places: the experience of St. Petersburg. *Scientific works of the Almaty Academy of the Ministry of Internal Affairs of the Republic of Kazakhstan named after M. Esbulatov, 1*(78), 183–188.

La Vigne, N.G., & Lowry, S.S. (2011). *Evaluation of camera use to prevent crimes in commuter parking facilities: A randomized control trial.* URBAN Institute.

Lim, H., & Wilcox, P. (2017). Crime-reduction effects of open-street CCTV: Conditionality considerations. *Justice Quarterly, 34*, 597–626.

Mátyás, S. (2015). Szubjektív biztonságérzet – lakossági vélemény a közbiztonságról és a rendőrségről. *Magyar Rendészet, 5*, 159–170. (In Hungarian).

Norris, C. (2007). The intensification and bifurcation of surveillance in British criminal justice policy. *European Journal on Criminal Policy and Research, 13*, 139–158.

Norris, C., & Armstrong, G. (1999). *The maximum surveillance society: The rise of CCTV*. Berg.

Norris, C., & McCahill, M. (2006). CCTV: Beyond penal modernism? *British Journal of Criminology, 46*, 97–118.

Piza, E., et al. (2019). CCTV surveillance for crime prevention: A 40-year systematic review with meta analysis. *Criminology & Public Policy, 18*, 135–159. https://doi.org/10.1111/1745-9133.12419.

Piza, E.L., Caplan, J.M., & Kennedy, L.W. (2014). Analyzing the influence of micro-level factors on CCTV camera effect. *Journal of Quantitative Criminology, 30*, 237–264.

Piza, E.L., et al. (2015). The effects of merging proactive CCTV monitoring with directed police patrol: A randomized controlled trial. *Journal of Experimental Criminology, 11*, 43–69. https://doi.org/10.1007/s11292-014-9211-x

Ratcliffe, J.H. (2011). *Video surveillance of public places. Problem-Oriented Guides for Police Response Guides Series*. Center for Problem-Oriented Policing.

Sallai, J., et al. (2016). *A „jó rendészet" közpolitikai kapcsolódási lehetőségei*. In K. Tamás (Ed.), A jó állam nagyító alatt: speciális jelentések A-tól V-ig (az adóbürokráciától a versenyképességig). Dialóg Campus Kiadó. (In Hungarian).

Sivarajasingam, V., & Shepherd, J.P. (1999). Effect of closed circuit television on urban violence. *Journal of Accident & Emergency Medicine, 16*, 255–257.

Tihanyi, M. (2017). Közrend, közbiztonság, rendészet a keresztény közgondolkodásban. In *Államtudományi Műhelytanulmányok*. (In Hungarian).

Tihanyi, M., Vári, V. & Krasnova, K.A. (2024). Ethics of Sin and Punishment. *Kutafin Law Review, 11*(4), 741–760. https://doi.org/10.17803/2713-0533.2024.4.30.741-760.

Vollaard, B. & Hamed, J. (2012). Why the police have an effect on violent crime after all: Evidence from the British Crime Survey. *Journal of Law and Economics, 55*(4), 901–924.

Welsh, B.C., & Farrington, D.P. (2008). Effects of closed circuit television surveillance on crime. *Campbell Systematic Reviews, 4*(1), 1–73. https://doi.org/10.4073/csr.2008.17.

Yun, W. (2021). A study on the selection of the CCTV location for crime prevention. *J-Institute, 6*, 14–25. https://doi.org/10.22471/Regulations.2021.6.4.14.

Information about the authors

Vince Vári (Budapest, Hungary) – Associate Professor, Department of Criminal Procedure Law, Faculty of Law Enforcement, Ludovika University of Public Service (2 Ludovika Tér, Budapest, H-1083, Hungary; e-mail: vari.vince@uni-nke.hu).

Szabolcs Mátyás (Budapest, Hungary) – Associate Professor, Department of Criminology, Faculty of Law Enforcement, Ludovika University of Public Service (2 Ludovika Tér, Budapest, H-1083, Hungary; e-mail: mszabolcs1975@gmail.com).

Miklós Tihanyi (Budapest, Hungary) – Associate Professor, Department of Public Safety, Faculty of Law Enforcement, Ludovika University of Public Service (2 Ludovika Tér, Budapest, H-1083, Hungary; e-mail: tihanyi.miklos@uni-nke.hu).

Kristina Krasnova (Saint Petersburg, Russian Federation) – Associate Professor, Department of Criminal Law, Faculty of Training Specialists for the Judiciary (Law Faculty), North-West Branch of the Russian State University of Justice named after V.M. Lebedev (5 Alexandrovsky Park, Saint Petersburg, 197046, Russian Federation; e-mail: krasnova_vnii@mail.ru).

ARTICLE

Contesting the Registration of Real Estate Rights in BRICS and the Laws of Other Countries

Tikhon Podshivalov,

South Ural State University (Chelyabinsk, Russian Federation)

https://orcid.org/0000-0001-9717-7176

https://doi.org/10.21684/2412-2343-2025-12-1-56-79

Received: June 19, 2023
Reviewed: November 19, 2023
Accepted: December 20, 2024

Abstract. In doctrinal sources, a claim for the recognition of property rights constitutes a special protection method that is not commonly found in the legislation of every country and is not widespread like vindication and negatory actions. However, there has been no sufficient research on the judicial means of correcting the errors that occur during the registration of real estate rights. This article is a comparative legal study of national laws of those countries that provide for the registration of rights (titles) in real estate but not for the acts (deeds) from which the rights emerge. It is commonly held that claims for the recognition of property rights are known only to some legal systems and are not found in the laws of several states. Our study revealed that this is not entirely true. First, claims for the recognition of property rights do exist in the laws of countries of the Romano-Germanic legal family. In several countries, they are enshrined at the legislative level; in other countries, they are formulated at the level of judicial practice and recognized in legal doctrine; while in some countries, this claim relates to contesting the registration of real estate rights. Second, there are analogs of claims for the recognition of property rights also found in common law legal systems, which operate through tort claims arising from two possible violations – conversion (appropriation) and slander of title (libel of the title). The many different methods and instruments for correcting registration errors in the laws of different countries may be described as a single type of claim – the claim for the recognition of property rights. This claim is applied when the reliability of an entry in the registry of the real estate rights is questioned or when the right of an individual entered in the registry is contested. Claims for the recognition of property rights aim to correct erroneous entries in the registry of rights to real estate when an individual considers themselves the owner of a real estate, but the real estate is registered under a different individual.

Keywords: property rights; real estate; real estate title registration; land registration; real action; property rights recognition claim; negatory action; vindication action.

To cite: Podshivalov, T. (2025). Contesting the Registration of Real Estate Rights in BRICS and the Laws of Other Countries. *BRICS Law Journal*, *12*(1), 56–79.

Table of Contents

Introduction

Historically, the development of judicial practice and scientific doctrine concerning the claims for the recognition of property rights has been associated with social upheavals and economic and political transformations. It goes without saying that the unstable development of an economy naturally requires certainty on who owns real estate and the rights to such real estate.

Claims for the recognition of property rights play an important role in the effectiveness of the registration of real estate rights. This claim provides legal certainty regarding the right to real estate (right holder) and helps to ensure the reliability of the registry of real estate rights.

This study analyzes how various national laws manage the correction of the errors that occur during the registration of real estate rights. After analyzing different approaches to this issue in various national legal systems, suggestions may be proposed for a unified judicial means of correcting registration errors associated with the recognition of property rights recognition claims.

The main thesis of this paper is that the means of correcting the registration errors that arise in various jurisdictions can be generalized and unified under a single claim – the claim for the recognition of property rights. The research question can be formulated as follows: Is it possible to unify the maintenance of registers of real estate rights to create a common correction method for registration errors in the laws of different countries?

Subsequently, the subsidiary theses of the study can be formulated as follows:

1. Is it possible to identify multiple approaches to the qualification of a claim for the recognition of a right *in rem* under Romano-Germanic law, and is it possible to propose a common way of correcting registration errors for the laws of these countries?

2. Can the rules on claims for the recognition of property rights in community law, such as the European Community, be harmonized positively and effectively?

3. What is the relationship between a claim for the recognition of property rights and a claim for conversion and slander of title in common law countries?

4. Can the hypothesis that a claim for the recognition of property rights is known only to some legal orders and is not common in the laws of many different states be regarded as true?

5. Is unifying and harmonizing the laws of different countries pertaining to the issue of correction of a registration error through the application of a common method for the recognition of property rights feasible, or are such prospects for the development of the laws of different countries impossible?

The legal literature suggests that property rights recognition claims are only found in the legislation of some countries, as it is an exotic instrument for safeguarding the rights to real estate. This study examines the laws of different countries that are applicable when contesting the right to a real estate in the registry through the use of property rights recognition claims. This allows us to determine how common such claims are in the legislation of different countries.

It is observed that there is no systematization of the scientific approaches to the legal classification of these claims. The claim itself is common in the legal order of foreign countries, but there is no comparative legal research carried out by researchers from these countries. Therefore, it has become vital to generalize and harmonize the laws of different countries in the context of the application of property rights recognition claims.

Despite the fact that this claim has existed in the legislation and judicial practice of several countries since the 19th century, issues related to its legal nature, definition, and general description often cause difficulties.

1. Challenging the Land Registration: Literature Overview

Property rights recognition claims aim to correct inaccurate information in the registries of rights to real estate and strategically improve the registration system. In developed legal systems, the prompt correction of erroneous entries in the registry of real estate rights is not a pressing issue because the legal mechanisms for correcting inaccuracies in registry entries have been developed and streamlined over the long period of the existence of the registration system of real estate rights. Additionally, the bulk of scientific publications are not related to the judicial challenge of the rights entered in the registry but to improving the entire registration system.[1] As a result, it would be beneficial to systematize the different options for correcting errors in order to create a foundation for unifying and harmonizing real rights and property registration across different countries.

It would be incorrect to say there are no scientific publications on correcting erroneous registry entries. As Goymour writes:

> When the Land Registration Act 2002 first came into force, the prevailing academic view was that it had created a system of 'title by registration,' such that, where someone (B) is mistakenly registered as the owner of another person's (A's) land, he acquires a good title (notwithstanding the mistake) that can validly be conveyed to someone else (C). … whilst the logic of the 'title by registration' principle might be conceptually attractive, it has proven to be unworkable in practice, is questionable as a matter of policy, and – looking to the future – ought to be abandoned in favor of a more subtle legislative scheme for resolving A-B-C disputes.[2]

In the above quote, the author seeks to balance the principle of introduction and the principle of opposition. The determination of the legal value of registration of the right to real estate, from the moment of registration and by virtue of it, or from the moment of committing legal facts (making a contract, etc.), depends on finding this balance.

In his article, Ko draws attention to the fact that erroneous entries in the registry of real estate rights can be eliminated through correction and indemnity, and by themselves, these mechanisms make it possible to reduce the acuteness of the

---

1 *See* Kashyap, A., & Batwara, V. (2022). Legal Analysis of Real Estate Investment Trust Regulation in India. *BRICS Law Journal, 9*(1), 133–134; Goscinski, J., & Kubacki, A.D. (2020*)*. Land registration concepts in translation. *International Journal for the Semiotics of Law – Revue internationale de Sémiotique juridique, 34*(17); Bondarieva, M. (2019). The role of the notary in the efficient protection of property rights. *Access to Justice in Eastern Europe, 4*, 60; Lee, A. (2016). Land registration: validity, priority and statutory interpretation. *Hong Kong Law Journal, 46*(2), 415; Carruthers, P. (2015). A tangled web indeed: The English Land Registration Act and comparisons with the Australian Torrens system. *University of New South Wales Law Journal, 38*(4), 1261; Chen, L. (2014). Land registration, property rights, and institutional performance in China: Progress achieved and challenges ahead. *Hong Kong Law Journal, 44*(3), 841.

2 Goymour, A. (2013). Mistaken registrations of land: Exploding the myth of "Title by registration." *Cambridge Law Journal, 72*(3), 617.

problem of registration of rights to real estate and modernize the system rather than reform it.[3] Similarly, great importance is attached to correction and indemnity in the overcoming of registration errors according to a study conducted by Lees.[4]

All of these studies are carried out as part of the process of seeking to reform the national registration system, and subsequently, the problem is leveled off by developing a mechanism for its elimination and adjustment.

More detailed studies on contesting registered rights and correcting registration mistakes can be found in research based on the legal doctrine of Romano-Germanic legal systems. In these studies, researchers have a more unified approach to the legal nature of claims to correct errors in the registry.[5]

In contrast to the above studies, it would also be worthwhile to pay attention to the judicial correction of registration errors when such corrections are initiated by an interested party submitting a claim to resolve a real estate dispute while not demanding compensation.

2. Methods of Comparative Law as a Basis for Research

The methods used in this research were determined by the main issue to be analyzed: how registration errors are corrected under the laws of different countries and whether claims for the recognition of property rights can be used for that purpose. Different countries apply different instruments to challenge registered rights, and these instruments for addressing registry errors are used within judicial procedures. Therefore, the question that needs to be resolved is whether it is possible to unify the different judicial correction instruments for addressing registration errors into a single type of claim – a claim for the recognition of property rights.

The main research method employed was the analysis of legislative acts of different countries. The countries were grouped depending on the degree to which their legislation included provisions for addressing property rights recognition claims. In the countries where property rights recognition claims have no legislative basis, scientific literature and judicial acts were studied.

While choosing the countries for the comparative analysis, we focused on jurisdictions where the title in real estate is registered in a registry rather than being founded on an act (deed) on which the title is based. Such a choice is caused by the

---

3 Ko, S. (2013). Rectification and indemnity in land title registration: A risk analysis for reform. *Hong Kong Law Journal, 43*(1), 111.

4 Lees, E. (2013). Title by registration: Rectification, indemnity and mistake and the Land Registration Act 2002. *Modern Law Review, 76*(1), 62.

5 *See* Wieling, H.J. (2006). *Sachenrecht. Bd. 1: Sachen, Besitz und Rechte an beweglichen Sachen* (p. 626). Springer. (In German); Dauner, B., Heidel, T., & Ring, G. (2008). *Nomos Kommentar zum BGB. Bd. 3: Sachenrecht* (p. 201). Nomos. (In German); Schellhammer, K. (2009). *Sachenrecht nach Anspruchsgrundlagen* (p. 458). C.F. Müller. (In German); Kostkiewicz, J.K., et al. (2011). *Schweizerisches Zivilgesetzbuch. Kommentar* (p. 1606). Orell Füssli. (In German); Reboul-Maupin, N. (2012). *Droits des biens* (pp. 480–496). Dalloz. (In French).

practical need to limit the scope of the study, which otherwise would be too wide and would go beyond the volume of a scientific article.

The comparative jurisprudence method suggests that in foreign legal orders, this method of protection is also most often used to adjust the registry of rights to real estate. At the same time, the possibility of filing a claim to recognize property rights in some countries is enshrined in legislative acts, while in others it is based on judicial interpretation.

3. Results

3.1. Property Rights Recognition Claims in Countries Using a Romano-Germanic Legal System

There are several approaches to qualifying and determining the legal nature of claims for the recognition of property rights.

In the *first approach*, property rights recognition claims are considered a general method of protecting civil law. For example, Article 1.138 of the Civil Code of the Republic of Lithuania lists the methods for protecting civil rights and, among others, indicates the possibility of recognizing rights.

While the Civil Code of Belarus does not contain a special article dedicated to property rights recognition claims, the possibility of its application stems from Article 11 of the Civil Code of Belarus, which allows for filing a claim to recognize rights.

In the *second approach*, property rights recognition claims are not explicitly named as a method of protecting property rights in any particular law. For instance, Japanese civil law distinguishes three types of claims for the protection of property rights: the demand for the return of property, the demand to eliminate a violation of property, and the demand to prevent a violation of property. The first type of claim relates to vindication, whereas the latter two define the scope of the negatory action in Japan.

The absence of an explicit, normatively-enshrined claim for the recognition of property rights does not mean that there is no such method of protection in the legal order of a particular state. This type of approach is also applied to Russian and Spanish law.

The 1992 Netherlands Civil Code, in Book 5, Section 1, "Rights *in rem*," states that there are two real actions – a vindication action and a negatory action. In the scientific literature in the Netherlands, particularly at the level of dissertation research, the scope of real action is limited to two types, with a universal emphasis on the negatory action.[6]

In the *third approach*, property rights recognition claims are considered a type of vindication or negatory action, which are subject to satisfaction if the plaintiff proves that they have a real right to the estate that is the subject of dispute. Article 2247

---

[6] *See* Es, P.C. van (2005). *De actio negatoria: een studie naar de rechtsvorderlijke zijde van het eigendomsrecht*. Doctoral Thesis. Meijers-reeks. Wolf Legal Publishers. (In Dutch).

of the Argentine Civil and Commercial Code of 2016 (Código Civil y Comercial de la Nación), entitled "Property Claims," contains the following rule:

> Property claims are the means of protecting the existence, completeness, and freedom of property rights against violations that hinder their implementation. The property claims provided for in this chapter are vindication, confessional action, negatory action and boundary action. (Las acciones reales son los medios de defender en juicio la existencia, plenitud y libertad de los derechos reales contra ataques que impiden su ejercicio. Las acciones reales legislationladas en este Capítulo son la reivindicatoria, la confesoria, la negatoria y la de deslinde.)

The beginning of Article 2247 specifies that real claims confirm the existence of property rights (existencia), which is the purpose of property rights recognition claims. The Argentinian law includes four real claims, namely, a vindication claim, a negatory action, a confessional claim (understood as a claim in defense of the right of the owner of an easement), and a claim to determine the boundaries of land plots. Consequently, in Argentinian law, the existence of property rights is confirmed using vindication and negatory action.

It is worth noting that this understanding is more typical for the countries where, at the legislative level, real claims do not have a specific division, but a general claim is fixed and referred to as a "claim from property" or "proprietary claim," which alone covers all possible cases of real rights' violations and challenges.

In the *fourth approach*, property rights recognition claims are considered a negatory action. For example, the Bolivian Civil Code consolidates the considered protection method as one of the requirements included in the subject of a negatory action. In Article 1455 of the Civil Code of Bolivia, entitled "Negatory Action", Point 1 states that "The legal owner may sue anyone who claims to have rights to property and ask to recognize the absence of such rights" (El propietario puede demandar a quien afirme tener derechos, sobre la cosa y pedir que se reconozca la inexistencia de tales derechos). Additionally, only Part 2 of Article 1455 of the Civil Code of Bolivia includes a more familiar characteristic of a negatory action, which is a demand to stop disorder or inconvenience; that is to say, the elimination of obstacles in the use of the property and restoration of the calm exercise of real rights.

Therefore, under this approach, there are no sufficient grounds to classify property rights recognition claims as negatory actions since the former eliminates the challenge to a right and the latter removes violation of rights. Challenging a right and violating a right are different legal facts. Methods of protection are also differentiated depending on the nature of the defendant's illegal actions. The possibility of using a negatory action as a means of protection against a challenge is not provided for in the legislation of Western European countries either. Point 1 of section 1004 of the German Civil Code states that "if the property right is violated in any way other than seizure or illegal deprivation of possession, then the owner may demand from the violator to eliminate the violation." Oddly enough, in German law, a claim for the recognition of property rights is qualified as a kind of negatory action.

In German law, negatory actions are mainly aimed at protecting the owner from the influence of third parties and are referred to as a claim for eliminating and omitting exposure (Beseitigungs und Unterlassung).

German researchers also noted the excessive universalization of the negatory action cas caused by expanding its scope. Gröschler writes:

> § 1004 BGB expands the action negatory, limited to individual cases of illegal use of the right, to a general claim to eliminate violations of property rights not related to deprivation of ownership, and further abstain from them. Thanks to their function of protective claims, at present, both the vindication claim from section 985 BGB and the claim from section 1004 BGB can be designated as negatory actions in a broad sense.[7]

In German civil law, real rights are protected by real claims, which include vindication claims and negatory actions. At the same time, while the vindication claim eliminates violations related to the deprivation of ownership, the negatory action suppresses all other forms of violation of property rights so long as they are not associated with the deprivation of ownership.[8] Collectively, vindication claims and negatory actions can eliminate the entire spectrum of possible property rights violations, and negatory action is given a universal meaning.

German legal thinking is characterized by a hypertrophied expansion of the scope of negatory protection through the subsidiary application of section 1004 of the German Civil Code to claims based on obligations,[9] such as the protection of personal non-property rights. In most cases, the need for subsidiary application of section 1004 of the German Civil Code arises due to the preventive function of a negatory action, which tries to guarantee the elimination of a repeated similar violation. Moreover, Wilhelm pointed out the applicability of a negatory action for liability rights,[10] and Habersak substantiated the idea of using a negatory action in corporate relations.[11]

This qualification of property rights recognition claims is the result of the legislator's inattention to the regulation of this claim and the fact that, in the codified acts, the scope of application of negatory action has historically been very broadly

---

7 Gröschler, P. (2010). Protection of property rights in Germany: Theory and practice. In *Civil studies. Vol. IV* (p. 374). Peleng. (In Russian).

8 *See* Windscheid, B. (1870). *Lehrbuch des Pandektenrechts. Bd. 1* (pp. 546–547). Buddeus. (In German); Hochloch, G. (1976). *Die negatorischen Anspruche und ihre Beziehungen zum Schadenersatzrecht* (p. 26). A. Metzner. (In German); Picker, E. (1972). *Der negatorische Beseitigungsanspruch* (pp. 65–66). L. Röhrscheid. (In German); Wieling, H.J. (2006). *Sachenrecht. Bd. 1: Sachen, Besitz und Rechte an beweglichen Sachen* (p. 626). Springer. (In German).

9 *See* Mager, H. (1993). Besonderheiten des dinglichen Anspruchs. *Archiv für die civilistische Praxis, 193*(1), 79. (In German).

10 *See* Wilhelm, J. (2007). *Sachenrecht* (p. 51). De Gruyter. (In German).

11 Habersack, M. (1996). *Die Mitgliedschaft: Subjektives und «sonstiges» Recht* (pp. 21–22). Mohr Siebeck. (In German).

defined to the extent that it includes independent protection methods that do not have the characteristics of a negatory action.[12]

Many countries, however, enshrine the *fifth approach* in their law, which is based on the idea that property rights recognition claims are a manifestation of vindication claims. With this understanding, the emphasis is on the fact that the defendant may object to the vindication requirement by having a real right to the subject of the dispute, which makes it necessary for the court to establish the right holder of the disputed property; that is, recognize the real right of one of the parties to the dispute.

Point 1 of Article 1311 of the Civil Code of Portugal "Vindication Claim" states: "The owner can in court demand the property from any occupier or holder, or demand the recognition of his ownership and the subsequent return of everything that belongs to him." Of particular interest is Point 2 of the same article, which raises the question of the relationship between a vindication claim and a claim for the recognition of property rights, stating: "After an individual is recognized as having ownership of property, he may be denied the return of this property only in cases provided for by law." This is most likely a reference to disputes on the right to real estate registered in the prescribed manner. However, point 2 of Article 1311 of the Civil Code of Portugal draws a borderline between these two claims, emphasizing that the subject of protection is different for them.

Article 1044 of the Latvian Civil Law of 1937 states: "The owner may bring a claim for property against anyone who illegally holds his property; its purpose is to recognize ownership and thereby grant ownership." The peculiarity of such regulation is that, in this legal system, the types of property claims are not differentiated. Instead, there is one single property claim, which can have varying legal effects when applied. This reflects the influence of the German legal doctrine, which discussed the idea of separating a single claim from the violation of property rights. From the provisions of Article 1044 it follows that the emphasis is on vindication, that is, the elimination of violations associated with deprivation of ownership.

Legislative regulation of property rights recognition claims is significantly influenced by the existence of a system for registering rights to real estate, the balance and competitiveness of the principle of introduction, and the idea of opposing registered rights. Therefore, a *sixth approach* can be proposed, which singles out a distinct type of claim focused on contesting the registered right and adjusting registration records. In the legislation of such countries, two property claims are usually enshrined–vindication and negatory, with the latter being broadly and abstractly formulated in the law, which makes it possible to formally qualify a claim as falling under the scope of negatory protection starting from the moment the right is registered.

The most canonical example of this type of approach is the provision of the Swiss Civil Code of 1907. Point 2 of Article 641 of the Swiss Civil Code states: "He or she has

---

12 For more details, *see* Podshivalov, T. (2019). Models of Actio Negatoria in the law of Russia and European countries. *Russian Law Journal, 7*(2), 128; Podshivalov, T. (2020). Conditions for satisfaction of negatory claim. *Tomsk State University Journal of Law, 36*, 189.

the right to demand it from anyone who detains it and to protect it from any unjustified interference." As evident, the subject of protection in a negatory action is defined broadly enough through the wording "any unjustified interference."

Article 661 of the Swiss Civil Code establishes the rule on the conditional indisputability of the registered right to real estate: "If an individual was mistakenly registered in the Land Registry as the owner of real estate, his or her ownership can no longer be contested if he or she owned it in good faith, continuously and without any problems for ten years." If the registration of the real right in the Land Registry is erroneous, the right can be contested; however, the presence of the composition of acquisitive prescription remediates and validates the basis for acquisition, and consequently, the already introduced real right becomes indisputable.

There is a special claim provided for in section 894 of the German Civil Code to adjust the registry of rights to real estate in the German law, which states:

> If the content of the land registry does not correspond to the actual legal position in relation to any right to a land plot or to the right to such a right, or to the restriction of the right to dispose of it, provided for in Article 892, Part 1 – the one whose right has not been entered at all, or entered incorrectly, or violated by the entry of a nonexistent encumbrance or restriction, may require the consent to the appropriate correction of the land registry from persons whose rights are affected by such a correction …

The claim for the correction of the registry entry is an essential prerequisite for approval of the land registry correction. By virtue of section 900 of the German Civil Code, the limitation period does not apply to claims for adjusting the registry: "The claims specified in Articles 894–896 are not extinguished by limitation." However, acquisitive prescription remediates the right to a land plot in the event that the registry entry in the land registry was recorded on an insufficient premise but at the same time it has existed for thirty years or more. This is provided for in section 900 of the German Civil Code, which says: "Anyone who is included in the land registry as the owner of a land plot, but is not such, acquires ownership if such a record existed for 30 years and during this time, he owned this land plot as his own."

More modern codifications contain a similar mechanism for resolving the issue of recognizing the property rights of real estate. For example, the Estonian Law on Property Rights 1993, Part 1 of Article 56 consolidates the presumption of fidelity of the registered right: "It is assumed that the data entered in the land registry are deliberately correct." The second part of this article allows the cancellation of an incorrect entry: "In the event of cancellation of a right entered in the land register, it is assumed that the right has been terminated." This issue is regulated in more detail in Article 65 of the Estonian Property Law Act 1993, where the first and third parts contain the following rules:

> An individual whose right has been violated by an incorrect entry may require the consent of the person whose rights are affected by the correction to correct the incorrect entry ... The requirements specified in Part 1 of this Article

may not be made in relation to real rights acquired by a bona fide third party and entered in the land register.

Article 89 of the 1993 Estonian Property Law Act contains the most universal wording of a negatory action: "The owner has the right to demand the elimination of any violation of property rights, even if this violation is not related to the loss of ownership." According to Article 80 of the Estonian Property Law Act, acknowledging the right is considered a manifestation of vindication when it precedes vindication, thereby confirming that the claimant has the right to the disputed property.

This form of regulating the recognition of real rights is also characteristic of civil laws adopted relatively recently. For example, Part 2 of section 980 of the Czech Civil Code of 2012 (entered into force in 2014) reads: "If the right to property is included in the publicly available list, it is considered that it was registered in accordance with the actual legal situation. If the right to property has been removed from the public list, then it is considered that it does not exist." In the event of competition between two rights to one real estate, priority is given to a bona fide acquisition, which is enshrined in Point 1 of section 984: "If the state registered in the publicly available list does not correspond to the actual legal status, then the registered state testifies in favor of the person who acquired the real right on behalf of an individual authorized to do so in accordance with registered law."

At the same time, the Civil Code of the Czech Republic in section 1042 secures only two real claims – vindication and negatory. It formulates a negatory action on the residual principle in comparison with vindication: "The owner has the right to demand protection from anyone who illegally interferes with his property rights or hinders him otherwise than with property."

Article 1.247 of the Civil Code of Brazil contains the following rules for contesting the registration of title to real estate: "If the content of the record does not express the truth, the interested party may demand that it be corrected or canceled. Once the registration has been canceled, the owner can claim the property, regardless of the good faith or title of the third-party purchaser."

In the presence of mandatory registration of rights to real estate, disputes most often arise in situations where one of the parties to the dispute has a stronger position since they are listed in the registry as the owner. It is rare but possible that both parties to a litigation claim cannot prove their rights to a real estate property, and neither of them is listed as the registered owner. Two models for the claims can be applied to resolve such a dispute. The first model, which is found in German law, is based on *actio spolii*. The second model, enshrined in section 372 of the Austrian General Civil Code, is based on the *actio Publiciana*, wherein the dispute is resolved quite simply, by granting priority to the party who owns the property.

In the *seventh approach*, property rights recognition claims are treated as independent real claims. Article 912 of the Civil Code of the Canadian province of Quebec (Code civil du Quebec) establishes that the owner and holder of other property rights can apply to the court for their right to be recognized (Le titulaire d'un droit de propriété ou d'un autre droit réel a le droit d'agir en justice pour faire reconnaître ce droit).

The Civil Code of the People's Republic of China (中华人民共和国民法典) 2021 refers to a claim for the recognition of a right *in rem* (Art. 234 of the Civil Code states: "Where a dispute arises over the attribution or contents of a real right, an interested person may request for confirmation of the right" – 因物权的归属、内容发生争议的，利害关系人可以请求确认权利), a vindication action (Art. 235) and a negatory action (Art. 236). It is important to note that the claim for recognition of a right *in rem* is at the top of the list of actions *in rem*.

The possibility of applying property rights recognition claims to both movable and real estate is provided for in the legislation of the Republic of Cuba. Point 3 of Article 129 of the Civil Code of Cuba, 1987 (Codigo civil de Cuba) says: "The legal owner may also demand recognition of his rights by the competent authority of jurisdiction and registry it in the appropriate register" (El propietario puede también solicitar el reconocimiento de su derecho por el órgano jurisdiccional competente e inscribirlo en el correspondiente registro). This rule emphasizes that property rights recognition claims can be a means of correcting a registration record and the basis for registering a right to real estate.

The Civil Code of Spain (Código Civil de España) 1889 does not consolidate property rights recognition claims, focusing mainly on the vindication claim (Art. 348), the claim for delimitation (acción de deslinde, Art. 384), and the claim for the establishment of fences or enclosing structures (acción de cerramiento de fincas, Art. 388). The remaining property claims–the negatory claim, the confessional claim, and the claim for recognition of property rights–are derived by doctrine and judicial practice from the idea of freedom of property and its inviolability. In the scientific literature on real estate law, it is indicated that the owner has a special claim for the recognition of ownership (la acción declarativa de la propiedad), which is a kind of declarative claim for the recognition of rights (acción declarativa).[13]

This confirms the existence of property rights recognition claims in Spanish law. It should be noted that the legislative regulation of this claim is influenced by the legislation on real estate. Article 40 of Spain's Mortgage Law (Ley Hipotecaria), 1946 establishes a claim for the rectification of the Registry (acción de rectificación del Registro). Moreover, the doctrine of the Spanish civil law, based on Article 41 of the Mortgage Law, distinguishes between real registration claims (acción real registral), which can only be filed against an individual who, without possessing a registered title, contests the above real right or interferes with its implementation.

The civil codes of several countries bordering the Russian Federation contain property rights recognition claims in the sections devoted to protecting real rights. For example, in Article 157.1 of the Civil Code of Azerbaijan, Article 273 of the Civil

---

[13] *See* Penco, A.A. (2016). *Derechos reales y derecho inmobiliario registral* (pp. 125–126). Dykinson. (In Spanish).

Code of Armenia, Article 259 of the Civil Code of Kazakhstan, and Article 321 of the Civil Code of Tajikistan, the first proprietary remedy, indicates property rights recognition claims, securing the owner's authority "to demand recognition of the property right." In particular, Article 392 of the Civil Code of Ukraine specifies: "The owner of the property can file a claim for the recognition of his ownership, if this right is disputed or not recognized by another person, as well as in case of loss of the document certifying his ownership."

The Estonian Law on Real Rights of 1993 provided Article 81, which secured the claim to recognize the real right, but this article became invalid in 2003. This might have occurred due to the development of the registration system of rights to real estate since property rights recognition claims are most often used to resolve the ownership issues related to real estate rights.

3.2. Property Rights Recognition Claims in Common Law Countries

Analogs of property rights recognition claims can be found in the laws of countries with legal systems based on common law. The common law model was based on Roman law and was founded on the casuistic Institutes of Gaius. From this stems the very absence of the classic pandect division of civil law into real claims and obligations, which is characteristic of the law of countries that later received Roman laws, in particular the Digest of Justinian. Therefore, in countries that follow the common law system, tort claims can be applied to protect against the violations of property rights based on a variety of offenses (torts): dispossession; violation of possession that did not entail its deprivation (trespass); violation that does not allow the normal use of real estate (nuisance); retention (detinue, detainer); and conversion.

It is important to understand three features of these claims that distinguish them from the property claims in countries belonging to the Romano-Germanic legal family. First, the specified instruments are tort claims, not property claims. Second, monetary compensation is awarded for these claims, either in the form of compensation or the situation preceding the violation is restored, such as the return of possession or the removal of an obstacle in exercising the right to property. Third, these claims are considered property claims; that is, they can be declared by an individual who has any title to the property, given that the individual can prove the legality of their possession of the property.

The instrument closest to property rights recognition claims is the claim for conversion, in which the defendant ascribes and appropriates the ability to dispose of the property.[14] A claim for the conversion is only applicable to movable property,

---

[14] *See* Curwen, N. (2006). The remedy in conversion: Confusing property and obligation. *Legal Studies, 26*(4), 571; Lee, P.-W. (2009). Inducing breach of contract, conversion and contract as property. *Oxford Journal of Legal Studies, 29*(3), 512; Douglas, S. (2011). The scope of conversion: Property and contract. *Modern Law Review, 74*(3), 329; Dyson, M. & Green, S. (2014). The properties of the law: Restoring personal property through crime and tort. In M. Dyson (Ed.), *Unravelling Tort and Crime* (pp. 389–390). Cambridge University Press.

not real estate, and the corrected violation consists in the appropriation for one's own movable property, to which another person has the direct right to possess or use.

In common law, property rights have a fundamental division depending on the object of the right; for instance, there are separate rights to real estate, and a separate regime is established for the rights to movable property. In contrast to this, the laws of countries using the Romano-Germanic system attempt to unify property rights to movable property and real estate. The applicability of a claim for conversion solely to movable property is due to the peculiarities of the registration system of rights to real estate in common law countries, where the degree of the deposit principle is high, and registration creates the indisputability of the right to real estate, which in turn significantly complicates the possibility of contesting the registered right. This is quite difficult for us to understand since the Russian system of real estate registration is built on a model where the principle of entry and the principle of opposition operate simultaneously and are equivalent. The only proof of the right to real estate is an entry in the registry, which can be contested in court, not as an exclusive measure but as general rules applicable for the challenge of any civil right. Therefore, a conversion claim is not needed to protect property rights in common law countries.

The scope of a conversion claim is most often determined by a situation in which the copyright holder lost movable property, and the defendant appropriated it for themselves by impersonating the copyright holder, performing actions that can usually only be performed by an individual who has the right to the property. Consequently, in a conversion claim, the defendant owns the property and considers themselves entitled to it, while the plaintiff requires the court to establish that it is the plaintiff who has the real right to this property and that it be returned. Additionally, a dispossession claim is applied in cases when the offender unlawfully took possession of the property but did not arrogate to themselves the right to it and impersonate its copyright holder.

For conversion claims, it is not important whether the defendant acquired possession of the items legally or illegally. The main requirement is the desire of the defendant to appropriate the right to movable property; this distinguishes it from dispossession.

The scope of the claim for conversion is also much wider than the Russian claim for recognition of the real right since it covers claims for damages and the award of the full value of the property. In this regard, it can be highly advantageous to understand the protective effect of this requirement in common law, as it pertains to a claim arising from an offense that engenders obligations, that is, tort requirements. Of all the types of claims, the claim for conversion is closest to the Russian claim for recognition of the real right since it is based on the fact that the defendant, by their actions, assigns a title to movable property, thereby contesting the claimant's right. A claim to property constitutes a violation of the type of conversion in cases when the defendant arrogates to themselves the ability to dispose of property, destroy it, transfer the right to it, or pledge it.

The applicability of a claim for conversion when contesting the right to property of a particular individual is also noted in the legal literature. Lusk writes that in US civil law, a conversion violation is "the exercise of illegal domination over the movable property of another person or illegal seizure of someone else's movable property," while this claim eliminates a violation that "is incompatible with the right of ownership or other rights this other person to this property, or is aimed at denying these rights."[15]

The common law analog of property rights recognition claims is only applicable in relation to movable property not because of what happened historically in these countries, or not because of the voluntaristic decision of the legislator, but rather because of the specifics of the registration system. In other words, by virtue of the indisputability of a registered right to real estate, there simply cannot arise a situation when property rights recognition claims might be needed to correct the registration record. The indisputability of such a right, nevertheless, is not absolute, and such a right can be challenged, although only in exceptional cases; however, this is more commonly associated not with civil transactions but with criminal offenses.

If an individual claims that they have the right to a real estate that is registered with another person, it constitutes a violation referred to as a malicious and knowingly unjustified defamation of a legal title or slander of title.[16] In essence, this is a denial of title, particularly in a situation where the principle of deposit is most consistently introduced as the basis for registering rights to real estate, that is to say, when the registration record is the only proof of the existence of a right to a real estate. With such a legal interpretation of registration of rights to real estate, the statement of an individual that they are the holder of the right to property registered for another person cannot be assessed and qualified in any way other than libel.

It is important to emphasize the focus of the claim on the slander of title in order to prohibit the further dissemination of information that would introduce uncertainty in the question of the authenticity of a particular person's title to real estate and the quality of this title. In essence, the Russian property rights recognition claims have a similar focus when the property rights owner goes to court to prove the reliability and quality of their title.

The presence of malicious intent on the part of the defendant can be refuted by evidence that the defendant considered themselves to be acting lawfully. For example, the defendant unknowingly committed slander of title and could not have known that their subsequent statements were not truthful. However, considering the openness and public reliability of the registration of rights to real estate, such

15 Lusk, H.F. (1957). *Business law: principles and cases*. Irwin.

16 *See* Moss, W. (1960). Practice and procedure-right to appeal from a judgment in a jactitory action. *Louisiana Law Review, 20*(4), 787; Garrett Power, Power, G. (2002). Palazzolo v. Rhode Island: Regulatory takings, investment-backed expectations, and slander of title. *Urban Lawyer, 34*(2), 313–314; Ritchie, Z. (2013). A fresh look at an old tort: Litigating slander of title in mineral disputes. *West Virginia Law Review, 115*(3), 1125.

ignorance of the existence of registration of rights for the plaintiff is unlikely, even though it is not excluded.

In the most general terms, property rights recognition claims are known to common law through tort claims arising from two possible violations, namely conversion and slander of title; the first concerns movable property, while the second concerns real estate.

In the legal systems of foreign countries, procedural legislation plays a significant role in a claim for the recognition of property rights. Property rights recognition claims are declarative claims. In countries using Romano-Germanic law, qualifications are made according to the substance of the claim (declaratory, establishment, and announcement), while in countries with common law, they are determined by court decision (declaratory judgment).[17] At the same time, in common law systems, a claim for recognition is the preliminary stage in the consideration of a claim for an award to determine whether there is a subjective right to the protection sought by the plaintiff, as was the case in Roman private law with *actiones praeiudicialeso*. This connection between the common law declarative claim and the Roman *actiones praeiudicialeso* emphasizes the British adoption of the Roman private law, although not the postclassical stage (as was the case with the countries of the Romano-Germanic law) but the classical stage of its development.

In the legal systems in England and the United States, recognition of the right in question is an integral (intermediate) part of the award. In fact, the recognition of the right is a separate element to be established before the court makes a final verdict to resolve the dispute. This is due to the absence of any significant study of this method of protection by the civil law scientists of these countries.

German literature on property rights emphasizes that the holder of a property right can bring forth a claim for recognition,[18] which refers to the procedural version of the claim and not the property claim we are examining as a substantive claim. The claim for recognition in German law is referred to as "Feststellungsklage" and can be translated as a declarative claim or a claim for establishment. Recognition of law in Germany is an institution of procedural, not substantive law, while its significance is of a legitimate nature – a form of protection that serves to eliminate doubts in legal relations. Part 1 of section 256 of the German Civil Procedure Code (Zivilprozessordnung der BRD) states:

> In order to establish the existence or non-existence of a certain legal relationship, in order to recognize the authenticity of a document or in

[17] *See* Ritchie, L. (2008). Re-evaluating declaratory judgment jurisdiction in intellectual property disputes. *Indiana Law Journal, 83*(2), 957; Robeck, M. & McNabb, J. (2011). Pennsylvania court raises questions about Marcellus shale gas ownership. *Oil and Gas Journal, 109*(18), 78–79; Chiang, E. (2015). Reviving the declaratory judgment: A new path to structural reform. *Buffalo Law Review, 63*(3), 549; McIntyre, J. (2016). The declaratory judgment in recent jurisprudence of the ICJ: Conflicting approaches to state responsibility? *Leiden Journal of International Law, 29*(1), 178.

[18] *See* Westermann, H., Gursky, K.-H., & Eickmann, D. (2011). *Sachenrecht* (p. 4). C.F. Müller. (In German).

order to establish its falsification, a claim may be brought if the plaintiff has a legal interest in the legal relationship or the authenticity or forgery of the document was soon established by a court decision.

We can draw several conclusions from our study. First, property rights recognition claims are clearly present in the laws of countries of the Romano-Germanic legal family – in several countries these claims are enshrined at the legislative level, while in other countries, they are formulated at the level of judicial practice and recognized in doctrine. In many countries, this claim is associated with a claim from the registration of rights to real estate. Second, in countries of the common law, analogs of property rights recognition claims can be found in the system of tort claims and can arise from two possible violations – conversion (appropriation) and slander of title. Third, property rights recognition claims are often qualified as declarative claims, which are legislatively enshrined in the laws of numerous countries in acts related to civil proceedings.

4. Discussion: Perspectives on the Study of a Property Rights Recognition Claim

We can conclude that property rights recognition claims are enshrined in the laws of the majority of developed legal systems. However, they have different names in the laws of different countries and different conditions of application.

The implications of this study have less impact on practice than on theory. This is explained by the fact that for developing and improving judicial practice or the administrative practice of the registration authority, the unity of academic opinions on the nature of property rights recognition claims is necessary. However, such unity of academic doctrine is possible only in the future, with the further development of research on property rights recognition claims and procedures to correct registration errors.

In future research, it might be possible to consider the general characteristics of property rights recognition claims, the conditions necessary for these claims, their relevance with regard to the limitation of actions, the order of execution of court decisions on the recognition of property rights, and the determination of the legal basis for the proper application of property rights recognition claims.

The principles of civil law, namely the principle of inviolability of property, the principle of the inadmissibility of arbitrary interference in private affairs, and the principle of legal certainty, provide the normative basis for the application of property rights recognition claims. The principle of inviolability of property stipulates that unauthorized persons cannot interfere with the exercise of property rights. The prohibition of arbitrary interference in personal disputes allows one to guard against arbitrary denial of the existence of property rights and their challenges.

The principle of legal certainty directly determines property rights recognition claims since it aims to introduce certainty into the issue of ownership of a specific person over the disputed property. In the majority of countries, the principle in question is not established at the legislative level, but rather, it is formulated at the level of scientific doctrine.[19]

The principle of legal certainty has its own content, which consists of the following ideas. First, the principle of legal certainty manifests itself in the desire to consolidate generally understandable, clear, and precise rules. Ideally, the legislator expects that the participants in legal relations are rational individuals. However, individuals are emotional by nature, and this circumstance should be considered when forming legislation. Second, legal certainty consists in the presence of clarity regarding the rights and obligations in a particular civil legal relationship and the idea of their legal status. Third, the construction of legitimate expectations (which includes legal expectations, reasonable expectations, and legitimate expectations) constitutes an integral part of the principle of legal certainty. The principle of legal certainty mandates that reasonable expectations of persons whose rights and (or) obligations may be affected by a specific civil legal relationship must be met. The term "legitimate expectation" was first used by Lord Denning in the case of *Schmidt vs. Secretary of State* in 1968. In a judicial ruling, Lord Denning indicated that, in addition to the subjective right and legitimate interest, the legitimate expectations of an individual are also subject to protection.[20] Fourth, legal certainty consists of the predictability of legislative regulation and law enforcement. This is what stabilizes the civil turnover, allowing the participants to plan their activities. Fifth, the principle of legal certainty is one aspect of the rule of law.

The most argued approach to the qualification of the claims analyzed in the Romano-Germanic law system is to define the claims as independent property claims, existing on a par with vindication claims and negatory actions. However, without defining this claim as independent, it is impossible to give a legal qualification to the owner's claims in several situations since they cannot be brought under another property claim in cases where the plaintiff only seeks to establish that rights to the property belong to him but does not require the defendant to fulfill any obligations, such as, for example, return the property or eliminate the consequences of a violation. Legally, such claims can only be qualified as property rights recognition claims

---

19 *See* Wade, H.W.R. (1941). The concept of legal certainty a preliminary skirmish. *Modern Law Review, 4*(3), 183; Alexy, R. (2015). Legal certainty and correctness. *Ratio Juris, 28*(4), 441; Squintani, L., & Rijswick, M. (2016). Improving legal certainty and adaptability in the programmatic approach. *Journal of Environmental Law, 28*(3), 443; Portuese, A., Gough, O., & Tanega, J. (2017). The principle of legal certainty as a principle of economic efficiency. *European Journal of Law and Economics, 44*(1), 131; Okoli, P. (2018). English worldwide freezing orders in Europe: A pragmatic search for legal certainty and the limits of judicial discretion. *European Journal of Comparative Law and Governance, 5*(3), 250; Perinetto, P.A. (2019). Intent and competition law assessment: Useless or useful tool in the quest for legal certainty? *European Competition Journal, 15*(1), 153; Huhta, K. (2020). Anchoring the energy transition with legal certainty in EU law. *Maastricht Journal of European and Comparative Law, 27*(4), 425.

20 Lord Justice Laws. Lecture III: The Common Law and Europe (Hamlyn Lectures, November 27, 2013). http://www.nottingham.ac.uk/hrlc/documents/specialevents/laws-lj-speech-hamlyn-lecture-2013.pdf

because their purpose is to formalize an already existent and established right to a disputed property. This claim initiates a dispute, which determines the ownership of the disputed property.

Property rights recognition claims aim to protect the rights of an owner from third parties who are not connected with the owner by any obligation. These claims initiate a dispute that determines the ownership of the disputed property. The claim for the recognition of a proprietary right protects this right directly, confirming its indisputability and introducing certainty into the question of whether the plaintiff has a proprietary right. This indicates both the real nature of the claim in question and the need to qualify it as an independent real claim.

The following special features thus characterize property rights recognition claims: (a) the plaintiff has legal possession of the subject of the dispute; (b) the real right was acquired by the plaintiff on a sufficient legal basis and continues to exist at the time of the consideration of the dispute; (c) there exists legal uncertainty regarding the ownership of an individual's property rights; (d) the presence of a defendant contesting the real right of the plaintiff; (e) exceptional application; (f) the actual application of property rights recognition claims has independent legal significance; (g)the claim is non-contractual in nature; (h) the legal uncertainty concerns an individually defined property (in the overwhelming majority of cases– real estate), which physically exists at the time of the court's decision; and (i) the claim must be restorative.

Property rights recognition claims have a legal character, as their application confirms the existence of a subjective real right of the plaintiff to the disputed property that arose earlier, although the existence of the right may not be obvious to all participants in the civil circulation. These claims, due to their unique legal nature, form an independent type of real claim, specifically a claim for the acquisition (establishment) of property rights. Moreover, a claim for acquiring a proprietary right constitutes a proprietary claim of title. Additionally, these two claim types differ in their legal implications, as they serve to either confirm the existing property rights or establish property rights.

Further research on property rights recognition claims can raise the question of how to harmonize the legislation on this method of protecting the right to property in different countries. Since unification is not possible in property rights matters through the development and ratification of an international treaty, harmonization is the only remaining option, wherein countries unilaterally approximate their national legislation.

Moreover, the laws of most countries already contain property rights recognition claims typically related to contesting a right to real estate registered in the registry.

In the laws of the countries of the European Union, an attempt is made to grandiose harmonization of European private law, within which the Model Rules of European Private Law have been developed through the Draft Common Frame of Reference (DCFR; Principles, Definitions and Model Rules of European Private Law).

In 1998, an international study group devoted to research on the European Civil Code started work under the leadership of German professor Christian von Bahr. By 2008, the result of the work was published–the DCFR, which is a draft of the Civil Code of the European Union.

As part of harmonizing the private law in the European Union, it has been proposed to unify methods for protecting property rights and, *inter alia*, to provide for the possibility of applying property rights recognition claims. Chapter 6, entitled "Protection of Property Rights and Possession" of Book VII, "Acquisition and Loss of Ownership of Property" of the Model Rules of European Private Law, includes Article VIII.-6: 101, "Protection of Property Rights," Part 2, which states: "Where another person interferes with the owner's rights as an owner or where such interference is imminent, the owner is entitled to a declaration of ownership and a protection order." This article enshrines the vindication claim in the first paragraph and Part 2 – negatory action and property rights recognition claims – by outlining the result of protection against interference with the owner's rights.

Part 3 of Article VIII.-6: 101 of the Model Rules of European Private Law delineates the types of claims that fall under an order for the protection of property rights, noting that "A protection order, an order which, as per the circumstances, may be required: (a) prohibits imminent future interference; (b) orders the cessation of existing interference; (c) orders the removal of traces of past interference."

Based on the provisions of the Model Rules of European Private Law, it is noted that there is a tendency to separate property rights recognition claims from vindication and negatory actions, making the mentioned claims independent.

Conclusion

The following main conclusions can be drawn from our study:

First, the initial hypothesis that property rights recognition claims are known only to some legal orders was incorrect. Property rights recognition claims are part of the laws of the majority of countries with a developed legal order. This instrument of judicial correction of errors in the registration of a title is being used in numerous countries where the registration system allows for the registration of titles rather than real estate deeds.

Second, the main difficulty is that this claim is referred to by various different terms in legal texts, thereby complicating comparative legal research. If we proceed not from the terms of the claims but instead focus on the main purpose of these claims, which is to correct an error in the registry of rights to real estate, then property rights recognition claims become more understandable.

Third, property rights recognition claims clearly exist in the laws of countries that belong to the Romano-Germanic legal family–in several countries, these claims are enshrined at the legislative level, while in other countries they are formulated at the level of judicial practice and recognized in the doctrine. In many countries, this type of claim is either associated with or part of a claim related to the registration of rights to real estate.

Fourth, analogs of property rights recognition claims are found in common law countries as well; however, these instruments are applied in the system of tort claims that arise from two possible violations – conversion (appropriation) and slander of title.

Fifth, property rights recognition claims are often qualified as declaratory claims and are legislatively enshrined in the laws of many countries as a matter of procedural law.

Sixth, the legal basis for the claim for the recognition of real rights is formed by the principle of legal certainty. This principle aims to meet legitimate expectations of the plaintiff, who is petitioning for the correction of the erroneous entry in the real estate registry through claims for the recognition of real rights.

Seventh, within the process of harmonizing European law, discussions are already underway regarding the unification of the instruments that are used to protect real rights, including the possible application of claims for the recognition of real rights. In Chapter 6 of Book VII of the Model Rules of European Private Law (entitled "Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference"), Article VIII.-6:101 has been introduced. Based on the provisions of the Model Rules of European Private Law, this demonstrates the inclination and desire to separate claims that recognize real rights as distinct from vindication and negatory claims, thereby affirming the independent nature of claims for recognition.

References

Alexy, R. (2015). Legal certainty and correctness. *Ratio Juris, 28*(4), 441–451. https://doi.org/10.1111/raju.12096

Bondarieva, M. (2019). The role of the notary in the efficient protection of property rights. *Access to Justice in Eastern Europe, 4*, 60–75. https://doi.org/10.33327/AJEE-18-2.4-a000023

Carruthers, P. (2015). A tangled web indeed: The English Land Registration Act and comparisons with the Australian Torrens system. *University of New South Wales Law Journal, 38*(4), 1261–1299.

Chen, L. (2014). Land registration, property rights, and institutional performance in China: Progress achieved and challenges ahead. *Hong Kong Law Journal, 44*(3), 841–864.

Chiang, E. (2015). Reviving the declaratory judgment: A new path to structural reform. *Buffalo Law Review, 63*(3), 549–608.

Curwen, N. (2006). The remedy in conversion: Confusing property and obligation. *Legal Studies, 26*(4), 570–583.

Dauner, B., Heidel, T., & Ring, G. (2008). *Nomos Kommentar zum BGB. Bd. 3. Sachenrecht*. Nomos. (In German).

Douglas, S. (2011). The scope of conversion: Property and contract. *Modern Law Review, 74*(3), 329–349. https://doi.org/10.1111/j.1468-2230.2011.00850.x

Dyson, M., & Green, S. (2014). The properties of the law: Restoring personal property through crime and tort. In M. Dyson (Ed.), *Unravelling Tort and Crime* (pp. 389–421). Cambridge University Press. https://doi.org/https://doi.org/10.1017/CBO9781107588820.016

Es, P.C. van (2005). *De actio negatoria: een studie naar de rechtsvorderlijke zijde van het eigendomsrecht*. Doctoral Thesis. Meijers-reeks. Wolf Legal Publishers. (In Dutch).

Goscinski, J., & Kubacki, A.D. (2020). Land registration concepts in translation. *International Journal for the Semiotics of Law – Revue internationale de Sémiotique juridique, 34*(17), 1451–1482. https://doi.org/10.1007/s11196-020-09800-y

Goymour, A. (2013). Mistaken registrations of land: exploding the myth of 'Title by registration.' *Cambridge Law Journal, 72*(3), 617–650. https://doi.org/10.1017/S000819731300072X

Gröschler, P. (2010). Protection of property rights in Germany: Theory and practice. In *Civil studies. Vol. IV* (pp. 372–402). Peleng. (In Russian).

Habersack, M. (1996). *Die Mitgliedschaft: Subjektives und «sonstiges» Recht.* Mohr Siebeck. (In German).

Hochloch, G. (1976). *Die negatorischen Anspruche und ihre Beziehungen zum Schadenersatzrecht*. A. Metzner. (In German).

Huhta, K. (2020). Anchoring the energy transition with legal certainty in EU law. *Maastricht Journal of European and Comparative Law, 27*(4), 425–444. https://doi.org/10.1177/1023263X20932056

Kashyap, A., & Batwara, V. (2022). Legal Analysis of Real Estate Investment Trust Regulation in India. *BRICS Law Journal, 9*(1), 114–135. https://doi.org/10.21684/2412-2343-2022-9-1-114-135

Ko, S. (2013). Rectification and indemnity in land title registration: A risk analysis for reform. *Hong Kong Law Journal, 43*(1), 111–137.

Kostkiewicz, J.K., et al. (2011). *Schweizerisches Zivilgesetzbuch. Kommentar.* Orell Füssli. (In German).

Lee, A. (2016). Land registration: validity, priority and statutory interpretation. *Hong Kong Law Journal, 46*(2), 415–443.

Lee, P.-W. (2009). Inducing breach of contract, conversion and contract as property. *Oxford Journal of Legal Studies, 29*(3), 511–533.

Lees, E. (2013). Title by Registration: Rectification, Indemnity and Mistake and the Land Registration Act 2002. *Modern Law Review, 76*(1), 62–82. https://doi.org/10.1111/1468-2230.12002

Lusk, H.F. (1957). *Business law: principles and cases*. Irwin.

Mager, H. (1993). Besonderheiten des dinglichen Anspruchs. *Archiv für die civilistische Praxis, 193*(1), 68–85. (In German).

McIntyre, J. (2016). The declaratory judgment in recent jurisprudence of the ICJ: Conflicting approaches to state responsibility? *Leiden Journal of International Law, 29*(1), 177–195.

Moss, W. (1960). Practice and procedure-right to appeal from a judgment in a jactitory action. *Louisiana Law Review, 20*(4), 781–787.

Okoli, P. (2018). English worldwide freezing orders in Europe: A pragmatic search for legal certainty and the limits of judicial discretion. *European Journal of Comparative Law and Governance, 5*(3), 250–274. https://doi.org/10.1163/22134514-00503003

Penco, A.A. (2016). *Derechos reales y derecho inmobiliario registral*. Dykinson. (In Spanish).

Perinetto, P.A. (2019). Intent and competition law assessment: Useless or useful tool in the quest for legal certainty? *European Competition Journal, 15*(1), 153–175. https://doi.org/10.1080/17441056.2019.1625150

Picker, E. (1972). *Der negatorische Beseitigungsanspruch*. L. Röhrscheid. (In German).

Podshivalov, T. (2019). Models of Actio Negatoria in the law of Russia and European countries. *Russian Law Journal, 7*(2), 128–164. https://doi.org/10.17589/2309-8678-2019-7-2-128-164

Podshivalov, T. (2020). Conditions for satisfaction of negatory claim. *Tomsk State University Journal of Law, 36*, 189–202. https://doi.org/10.17223/22253513/36/17. (In Russian).

Portuese, A., Gough, O., & Tanega, J. (2017). The principle of legal certainty as a principle of economic efficiency. *European Journal of Law and Economics, 44*(1), 131–156. https://doi.org/10.2139/ssrn.2332016

Power, G. (2002). Palazzolo v. Rhode Island: Regulatory takings, investment-backed expectations, and slander of title. *Urban Lawyer, 34*(2), 313–328.

Reboul-Maupin, N. (2012). *Droits des biens*. Dalloz. (In French).

Ritchie, L. (2008). Re-evaluating declaratory judgment jurisdiction in intellectual property disputes. *Indiana Law Journal, 83*(2), 957–995.

Ritchie, Z. (2013). A fresh look at an old tort: Litigating slander of title in mineral disputes. *West Virginia Law Review, 115*(3), 1097–1125.

Robeck, M. & McNabb, J. (2011). Pennsylvania court raises questions about Marcellus shale gas ownership. *Oil and Gas Journal, 109*(18), 78–81.

Schellhammer, K. (2009). *Sachenrecht nach Anspruchsgrundlagen*. C.F. Müller. (In German).

Squintani, L., & Rijswick, M. (2016). Improving legal certainty and adaptability in the programmatic approach. *Journal of Environmental Law, 28*(3), 443–470. https://doi.org/10.1093/jel/eqw022

Wade, H.W.R. (1941). The concept of legal certainty a preliminary skirmish. *Modern Law Review, 4*(3), 183–199.

Westermann, H., Gursky, K.-H., & Eickmann, D. (2011). *Sachenrecht*. C.F. Müller. (In German).

Wieling, H.J. (2006). *Sachenrecht. Bd. 1: Sachen, Besitz und Rechte an beweglichen Sachen*. Springer. (In German).

Wilhelm, J. (2007). *Sachenrecht*. De Gruyter. (In German).

Windscheid, B. (1870). *Lehrbuch des Pandektenrechts. Bd 1*. Buddeus. (In German).

Information about the author

Tikhon Podshivalov (Chelyabinsk, Russian Federation) – Head, Department of Civil Law and Civil Legal Procedure, Deputy Director of Research, Law Institute, South Ural State University (87 Lenina Ave., Chelyabinsk, 454080, Russian Federation; e-mail: podshivalovtp@gmail.com).

ARTICLE

Struggling Against Violence and Harassment in the Workplace: A Legal Narrative of the BRICS Countries' Experience

Elena Sychenko,

Saint Petersburg State University (Saint Petersburg, Russian Federation)

https://orcid.org/0000-0002-7045-9218

Irina Chikireva,

University of Tyumen (Tyumen, Russian Federation)

https://orcid.org/0009-0005-4544-6545

Rupa Korde,

FLAME University (Pune, India)

https://orcid.org/0000-0001-7192-8007

Aakash Bothra,

WageIndicator Foundation (Bangalore, India)

https://orcid.org/0009-0000-4119-7282

Mauro Laruccia,

Pontifical Catholic University of São Paulo (São Paulo, Brazil)

https://orcid.org/0000-0002-9624-6245

Dalton Cusciano,

Catholic University of Brasília (Brasília, Brazil)

https://orcid.org/0000-0003-1690-2669

Jiaojiao Wang,

Jilin University (Jilin, China)

https://orcid.org/0009-0008-2281-4407

Nasima Carrim,

University of Pretoria (Pretoria, South Africa)

https://orcid.org/0000-0002-1325-7978

https://doi.org/10.21684/2412-2343-2025-12-1-80-114

Received: January 16, 2024
Reviewed: March 3, 2024
Accepted: October 17, 2024

Abstract. The adoption by the International Labour Organization (ILO) of a special convention dedicated to the struggle against violence and harassment in the workplace, namely the Violence and Harassment Convention, 2019 (C190), is a special opportunity to research the level of protection against these phenomena granted by national legislations and to better understand the ways to improve it. The main objective of this article is to analyze the national approaches of the BRICS countries to the issue of harassment in the world of work in order to identify the current problems and the possible ways of solving them, including through the implementation of the norms of the C190 or following Violence and Harassment Recommendation, 2019 (No. 206) (R206). In the five sections of this article, each of which is dedicated to a separate member state of BRICS, the authors examine the national labor legislation and other laws that are relevant to the topic, the gaps in these norms as compared to the requirements of the C190, and the case law in this field. The research demonstrates that certain BRICS nations, such as South Africa, have implemented a legal framework to address and prevent harassment, having ratified C190. In Brazil, violence and harassment in the workplace are not regulated by a special law; instead, the country's norms are rather fragmented and tend to protect mostly women, in particular against sexual harassment. On the other hand, countries such as China and India, despite their focus on prohibiting sexual harassment against women, often overlook the aspect of moral harassment. Russia tends to neglect both issues, altogether disregarding the inclusion of specific norms in the labor law.

Keywords: violence; harassment; workplace; employment; case law; national regulations; BRICS; prevention; occupational health and safety.

To cite: Sychenko, E., et al. (2025). Struggling Against Violence and Harassment in the Workplace: A Legal Narrative of the BRICS Countries' Experience. *BRICS Law Journal*, *12*(1), 80–114.

Table of Contents

Introduction

The need to protect human dignity is the cornerstone of national and international norms that prohibit workplace violence and harassment. Kantian philosophy taught the civilization that human dignity is an innate worth or status and that people should treat humanity in each person never merely as a means but always as an end in itself.[1] This idea might be found in the majority of core International Labour Organization (ILO) documents: for instance, the ILO Constitution affirms that all human beings,

1 Hill, T.E., Jr. (2021). *Beyond duty: Kantian ideals of respect, beneficence, and appreciation*. Oxford University Press.

irrespective of race, creed, or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, whereas the Declaration of Philadelphia, which states that labor is not a commodity, is also a reflection of Kantian words about treating humans as means and not ends.

The ILO's adoption of the special convention dedicated to the struggle against violence and harassment (hereinafter V&H) in the world of work, namely the Violence and Harassment Convention, 2019 (No. 190, commonly referred to as C190), and its accompanying Recommendation (No. 206), are the most recent and very important steps towards protecting employee's dignity. The Convention defines the term "violence and harassment" as a range of "unacceptable behaviors and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual, or economic harm, and includes gender-based violence and harassment."

C190 provides the rules and the guidelines for ensuring the protection of dignity in the workplace through developing an "inclusive, integrated, and gender-responsive approach"[2] to prevent and address violence and harassment at work (Art. 4(2)). This approach of the Convention includes action on prevention, protection, enforcement, remedies, guidance, training, and awareness raising (Arts. 4, 7–11) and takes into account third parties as both victims and perpetrators. Together with Recommendation No. 206, the C190 proposes a robust, strategic framework for the creation of the efficient protection of employees' dignity within the context of the occupational safety and health regulations.

This article aims to analyze the national approaches of the BRICS countries to the issue of harassment in the workplace in order to identify the current problems and the possible ways of solving them, such as through the implementation of the norms of the C190 or following the recommendations of R206.

At one of the earliest BRICS Summits, the leaders of the five countries affirmed their commitment to strengthen dialogue and cooperation in the fields of social protection, decent work, and gender equality.[3] A workplace that is free from violence and harassment is undoubtedly one of the aspects of decent work. Even before the adoption of the Violence and Harassment Convention, 2019 (No. 190) and its accompanying Recommendation (No. 206), several ILO Conventions and Recommendations contained direct references to violence and harassment (V&H).[4] Furthermore, United Nations (UN) human rights instruments have also embraced

---

2 Preamble to ILO Convention No. 190.

3 Sanya Declaration, Hainan, China, April 14, 2011. https://www.brics.utoronto.ca/docs/110414-leaders.html

4 For example, the Indigenous and Tribal Peoples Convention, 1989, No. 169; the Domestic Workers Convention, 2011, No. 189, and its accompanying Recommendation No. 201; the Maritime Labor Convention, 2006 (MLC, 2006) as amended in 2016; the HIV and AIDS Recommendation, 2010, No. 200; the Transition from the Informal to the Formal Economy Recommendation, 2015, No. 204; ILO (2020). *Safe and healthy working environments free from violence and harassment*. https://www.ilo.org/publications/safe-and-healthy-working-environments-free-violence-and-harassment

the problem of harassment in the workplace through explicit recognition of the right to protection[5] as either directly stated in the texts or through the interpretations of the human rights bodies.[6]

Some BRICS countries have already established the legal framework for the protection against harassment at work and ratified the C190 (South Africa, for example); others tend to mostly regulate the issue of sexual harassment while neglecting the aspects of moral harassment (as in China or India, for example); and a few others tend to altogether ignore the problem as such and avoid including special norms in the labor laws (as in Russia, for example). In this article, we will subsequently consider the national legal approaches to the issue of violence and harassment in the workplace, the data on the prevalence of these phenomena in the given societies, as well as their respective laws, national policies, and case law. We will seek to establish if the issue falls within the national Occupational Safety and Health (OSH) framework and whether the law provides effective remedies to the victims of V&H.

1. Protection Against Violence and Harassment (V&H) in the Workplace in Brazil

1.1. National Regulations on the Protection Against V&H in the Workplace in Brazil

The problem of V&H in the workplace is very widespread in Brazil. In 2021 alone, more than 52,000 cases related to moral harassment and more than 3,000 cases of sexual harassment were filed in labor courts nationwide, as per data from the Brazilian Superior Labor Court (TST).[7]

On March 8, 2023, President Luiz Inácio Lula da Silva signed statements to the National Congress for the ratification of Convention No. 190 and Convention No. 156, officially initiating the process that would lead to the ratification of the two conventions by Brazil.[8] According to the 1988 Brazilian Federal Constitution, specifically Article 5, all

---

5 *See*, for example, Article 27 of the Convention on the Rights of Persons with Disabilities: "…(b) protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances."

6 *See*, General Recommendation No. 19, adopted by the Committee on the Elimination of Discrimination against Women: violence is recognized as a form of discrimination against women if it is committed because the victim is a woman or if the violence has a disproportionate impact on women. Also, the International Covenant on Economic, Social and Cultural Rights enshrines the right of everyone to just and favorable conditions of work (Art. 7). According to paragraph 48 of General Comment 2016, No. 26 of the International Committee on Economic, Social, and Cultural Rights, all workers should be free from physical and mental harassment.

7 https://www.trt13.jus.br/informe-se/noticias/em-2021-justica-do-trabalho-registrou-mais-de-52-mil-casos-de-assedio-moral-no-brasil. (In Portugese).

8 International Labour Organization. (2023, March 8). *OIT saúda governo do Brasil por iniciar processo de ratificação das Convenções 190 e 156*. https://www.ilo.org/brasilia/noticias/WCMS_871030/lang--pt/index.htm. (In Portugese).

treaties and conventions to which Brazil is a party enter into force immediately, which means that they must be applied without delay, and no prior adoption of legislative, administrative, or other measures is required. Therefore, once the instrument is ratified, all workers may claim their rights guaranteed by the C190 (i.e. the broad material and personal scope of protection stipulated in Arts. 2 and 3; the enumerated list of employer's obligations outlined in Art. 9; the right to remove themselves from a work situation that they have reasonable justification to believe presents an imminent and serious danger to life, health, or safety due to violence and harassment, the right to privacy protection, effective remedy, as articulated in Art. 10, among others).

At the present moment, violence and harassment in the workplace are not regulated by a special law in Brazil. The norms are somewhat fragmented and tend to protect mostly women, in particular against sexual harassment.

The Brazilian Federal Constitution of 1988, specifically Article 170, VI, emphasizes the importance of a balanced work environment by stipulating that the economic order and the exercise of free initiative must be based on protecting the environment and appreciating human labor. It establishes that the dignity of the human person and the value of social work are the fundamental principles of the Brazilian Republic and that every citizen has the right to health, work, and dignity.

The Brazilian Labor Code (CLT, 1943) prohibits some of the behaviors that may be considered as harassment under C190, including, for example, prohibition against causing harm to the workers (Arts. 373-A and 483 of the CLT); treating workers with excessive severity (either by the employer or hierarchical superiors); engaging in acts that damage the honor and good reputation of workers or their family members; and physical insults.

Although Law No. 8.112 of December 11, 1990 (Legal Regime of Civil Servants of the Union), which only governs the legal status of civil servants in the Brazilian Union, does not clearly regulate the issue of sexual harassment, the perpetrator's conduct may be punished when it violates the duty of morality and constitutes improper conduct. Thus, the employer is responsible for the actions of its employees and, if convicted, may bring an action for restitution against the employee.

Brazilian legislation began to specifically regulate sexual harassment on May 15, 2001, adding by the Law No. 10,224 of the new norms criminalizing sexual harassment in the workplace by a supervisor (Article 216-A of the Criminal Code). Article 216-A specifically prohibits sexual harassment, but it only addresses one type, the *quid pro quo* ("this for that") or sexual harassment by extortion, in which the actor (the superior) demands an unwanted behavior of a sexual nature from the victim by threatening the loss of an advantage or promising an advantage.[9] Sexual harassment by intimidation, characterized by intrusive sexual inducements or other expressions of the same nature (verbal or physical) that interfere with a person's

---

9 Decreto-Lei nº 2.848, de 7 de dezembro de 1940. Planalto. http://www.planalto.gov.br/ccivil_03/decreto-lei/Del2848compilado.htm. (In Portugese).

work performance or create an offensive, hostile, or intimidating situation in the workplace, is not covered by criminal law.

Law 14,188 of July 2021 additionally adds to the Criminal Code the offense of psychological violence against women, attributed to any person who causes emotional harm "that disrupts and interrupts their full development or attempts to degrade or control their actions, behaviors, beliefs, and choices." Such an offense may be committed through threats, shaming, humiliation, manipulation, isolation, blackmail, ridicule, restriction of the right to come and go, or other methods. This legal measure is part of the Brazilian fight against domestic violence, which is why it is aimed only at women.

In 2002, the Brazilian Civil Code (Law No. 10406) established that the employer or principal can be held civilly liable by his employees, servants, and agents if, in the performance of their duties or by virtue of these acts, they violate the law and cause harm to others, even if this harm is exclusively moral (Arts. 186, 927, and 932).

Also, Article 187 of the Brazilian Civil Code addresses the concept of abuse of rights. It states that a person commits an unlawful act when, in exercising a right, they manifestly exceed the limits imposed by its economic or social purpose, good faith, or morals.

In addition, since 2007, the Annual Budget Law prohibits the granting or renewal of loans or financing by official financial development agencies for institutions whose directors have been convicted of child labor, slave labor, crimes against the environment, moral or sexual harassment, or racism, not including any public procurement. (Law No. 14,436/2022).[10]

In the same vein, Law No. 11,948/2009 of the Brazilian Development Bank (BNDES) prohibits the granting or renewal of loans or financing to private sector companies whose directors have been convicted of moral or sexual harassment, racism, child labor, slave labor, or crimes against the environment.[11]

In September 2023, a legal opinion from the Federal Attorney General's Office mandated the dismissal of civil servants found guilty of sexual harassment.[12] It was approved by the President of the Republic on the 4th of September, which means that such opinion became binding on all federal administration bodies and entities (Article 40, § 1º, of Brazil's Complementary Law No. 73, dated February 10, 1993).

In October 2021, Ministerial Order No. 423, 17 Regulatory Standard, Annex II, issued by the Ministry of Labor,[13] prohibited the use of methods that cause moral harassment, fear, or embarrassment in workers, such as the following:

---

10 Lei nº 14.436, de 9 de Agosto de 2022. Planalto. https://www.planalto.gov.br/ccivil_03/_ato2019-2022/2022/lei/l14436.htm. (In Portugese).

11 Lei nº 11.948, de 16 de Junho de 2009. Planalto. https://www.planalto.gov.br/ccivil_03/_ato2007-2010/2009/lei/l11948.htm. (In Portugese).

12 https://www.in.gov.br/en/web/dou/-/despacho-do-presidente-da-republica-508264976. (In Portugese).

13 https://www.in.gov.br/en/web/dou/-/portaria/mtp-n-423-de-7-de-outubro-de-2021-351614985. (In Portugese).

• abusively promoting competition among workers or work groups or teams;

• requiring workers to permanently or temporarily wear props, accessories, costumes, and clothing for punishment, promotion, or publicity;

• publicly disclosing performance evaluations of operators.

On September 21, 2022, Brazilian Law No. 14,457/2022, for the promotion of a healthy and safe work environment that favors the inclusion and retention of women in the labor market, required companies that have an Internal Commission for the Prevention of Accidents and Harassment (Cipa) to adopt the following measures to prevent and combat sexual harassment and other forms of violence in the workplace:

1. Include rules of conduct regarding sexual harassment and other forms of violence in the company's internal control mechanisms and widely disseminate the content among both male and female employees.

2. Establish procedures for receiving and following up on complaints; establish and verify the facts; and, where appropriate, impose administrative sanctions on those directly or indirectly responsible for sexual harassment and violence while ensuring the anonymity of the complainant.

3. Incorporate issues related to preventing and combating sexual harassment and other forms of violence into Cipa's activities and practices.

4. Conduct training, counseling, and awareness-raising activities for both male and female employees on issues related to violence, harassment, equality, and diversity in the workplace, at all levels of the company's hierarchy, at least once every twelve months, using accessible formats.

These recent norms largely comply with Articles 9, 10, and 11 of the C190.

1.2. The Case Law and Current Challenges to Protection Against V&H in the Workplace in Brazil

As mentioned above the understanding of sexual harassment by the Criminal Code is very narrow. Additionally, the level of proof required by the criminal proceedings is very high. As a result, it becomes extremely difficult to prove sexual harassment because harassing behavior does not usually occur in public places or in front of witnesses. On the contrary, they typically occur only in the presence of the harasser and the victim, as Nunes Schneider points out.[14]

The protection against V&H at work in public service was developed by the case law of the Brazilian Superior Court of Justice (STJ). In its Special Appeal 1.286.466/RS judgment, it recognized moral harassment as an act of administrative improper behavior, as stated in Article 11 of Law No. 8,429/92, and that it might also be punished as such. The reporter in this case, Minister Eliana Calmon, pointed out that

> moral harassment, more than provocations in the workplace like sarcasm, criticism, ridicule, and intimidation, is a psychological campaign of terror aimed

---

14 Nunes, G.H.S. (2013). A dificuldade probatória do assédio moral no trabalho. *Repertório IOB de Jurisprudência, 27*(1), 21–25. (In Portugese).

> at making the victim feel like a rejected person. The target is subjected to slander, abuse, aggressive behavior, and cold and impersonal treatment.[15]

This approach was further developed in the case where an expert physician of the INSS sexually harassed two insured persons who were performing a medical examination. The Court found that the physician was violating the guiding principles of public administration, especially the rules of administrative morality, which can be classified as an active subject of the administrative offense provided for in Article 11 of Law 8,429/92.[16]

Classification of an act as administrative improper behavior allows for both dismissal of the public servant and payment of a civil fine for violation of administrative morality.

When considering the case law, it is essential to emphasize the significant role of the labor courts in ensuring due remedy and compensation. In two landmark cases, the higher instances courts significantly increased the sum of the compensations paid to the victims. For instance, the 1st Chamber of the Brazilian Superior Labor Court (TST) increased the sum paid by a Rio de Janeiro company for sexual harassment of a female employee by a supervisor from R$2,040 (approximately four hundred and forty dollars) to R$20,000 (approximately four thousand dollars) based on Articles 186 and section III of Article 932, both of the Brazilian Civil Code from 2002 (and which have been applied subsidiarily to Brazilian Labor Law (CLT), as regulated by Article 8º of CLT) for violation of dignity and of Article 483 from CLT. The case was subject to judicial secrecy to preserve the employee's dignity but was highlighted in the judgment session as a warning of the seriousness of the problem of sexual harassment and the corrective role of the labor court. "Women are still treated like objects in the 21st century," stressed the reporting judge, Minister Walmir Oliveira da Costa.[17]

In another decision, from 2020, McDonald's in the city of Varginha (MG) was ordered by the 2nd Chamber of the Brazilian Superior Labor Court (TST) to pay R$20,000 (four thousand dollars) in compensation to a former employee who the manager morally harassed, while the court of first instance had only ordered a payment of R$2,000 (four hundred dollars). The female employee reported that she was insulted by the store manager in front of the other employees. According to her statements, words like "hell" and "a bunch of pigs who don't know how to work" were common in the

---

15 Superior Tribunal de Justiça. (2013, September 3). Special Appeal No. 1.286.466/RS. Reporting Justice Eliana Calmon. http://www.stj.jus.br/docs_internet/revista/eletronica/stj-revista-eletronica-2013_232_capSegundaTurma.pdf. (In Portugese).

16 Tribunal Regional Federal da 4ª Região. (n.d.). Appeal No. 5002966-94.2018.4.04.7201, 3rd Chamber. https://consulta.trf4.jus.br/trf4/controlador.php?acao=consulta_processual_resultado_pesquisa&txtValor=50029669420184047201&selOrigem=SC&chkMostrarBaixados=&selForma=NU&hdnRefId=&txtPalavraGerada=. (In Portugese).

17 Tribunal Superior do Trabalho. (n.d.). *Assédio sexual: o que é, quais são os seus direitos e como prevenir?* https://www.tst.jus.br/assedio-sexual/-/asset_publisher/89Dk/content/id/24416578. (In Portugese).

work environment. The employee, who had only been on the job for eight months, also said the manager made offensive comments to her and sought physical contact. Embarrassed and humiliated, she said the only alternative was to quit.[18]

Despite the numerous suits that were filed in labor courts nationwide, research specialist B. Lima claims that, in general, the trivialization and normalization of sexual harassment results in many women still being unable to recognize unprofessional and improper behavior as acts of sexual harassment.[19] A number of victims think it is "part of the game." The fear that no one will believe the victims and fear of being personally or professionally avenged by the harasser results in many cases "being dropped." Shame and guilt, stemming from a perceived feeling of responsibility for the harasser's criminal behavior because they wear a certain type of clothing or are alone in a place with the harasser, also lead to withdrawal of complaints. Fear of reliving what they have experienced, fear that the process will go nowhere because of the length of such processes, inability to bear the costs of the lawsuit, or the possibility of losing and instead having to pay something to the harasser often lead to the charges being withdrawn.

Here it is important to underline that C190 provides the norms on protection against victimization of or retaliation against complainants, victims, witnesses, and whistle-blowers, as well as the right to legal and other support of the victims (Art. 10). The implementation of these norms in Brazil might be an efficient way to solve the problems mentioned above. Ultimately, it is important to keep in mind that Brazil is considered a sexist country, and this is also reflected in the world of work.[20]

2. Protection Against V&H in the Workplace in Russia

2.1. National Regulations on the Protection Against V&H in the Workplace in Russia

According to statistics, one third (31%) of young workers aged 18 to 24 have been subjected to harassment, while one in ten (9% of workers) have experienced sexual propositions or demands at work as adults in Russia. However, the majority of Russians, apparently, have not experienced such situations in their workplace (87%).[21] There are no official statistics available regarding the number of applications to the

---

[18] Tribunal Superior do Trabalho. (2020, August 26). Case No. RR-10062-58.2019.5.03.0153. Reporting Justice Delaíde Miranda Arantes. https://www.tst.jus.br/-/rede-de-lanchonete-%C3%A9-condenada-por-ass%C3%A9dio-moral-comprovado-contra-atendente. (In Portugese).

[19] Lima, B.A.A.C., et al. (2014). Reflexões sobre assédio moral: Um estudo à luz da organização pessoense com maior incidência em ações trabalhistas entre 2008 e 2012. *Revista Gestão & Tecnologia, 14*(1), 201–224. (In Portugese).

[20] http://www.onumulheres.org.br/wpcontent/uploads/2016/04/MapaViolencia_2015_mulheres.pdf

[21] All-Russian Center for the Study of Public Opinion. (2020, August 3). *Harassment and harassment at work: we haven't encountered it, but we condemn it!* https://wciom.ru/analytical-reviews/analiticheskii-obzor/pristavaniya-i-kharassment-na-rabote-ne-stalkivalis-no-osuzhdaem. (In Russian).

courts, prosecutor's offices, and the State Labor Inspectorate on the actual numbers of V&H in the workplace.[22] Nevertheless, the presence of mobbing and harassment and judicial practice in this area is evidenced by workers' claims in court to appeal against forced dismissal at will, workers' applications to the State Labor Inspectorate with complaints about various forms of psychological pressure and harassment in the workplace,[23] as well as by publications in the media[24] and the scientific literature.[25] Despite the widespread occurrence of the phenomena, there is no special regulation that addresses the issue of V&H. The Russian laws do not comply with the provisions of the C190, nor do they prevent V&H or protect victims. Remedy in the form of compensation of moral damage, as we will demonstrate further, might be granted if discrimination or other violations of labor law norms can be proven.

In Russia, there is no legal definition of V&H and no right to protection against them in the Labor Code of the Russian Federation. Nevertheless, Article 75.1 of the Constitution of the Russian Federation guarantees the protection of the dignity of citizens and respect for human labor. In accordance with Article 2 of the Labor Code of the Russian Federation, ensuring the right of employees to protect their dignity during employment is a basic principle of the legal regulation of labor relations.[26] In 2014, Russia adopted the National Standard GOST R 55914-2013 "Guidance on the Management of Psychosocial Risk in the Workplace," which is identical to the publicly available specification PAS 1010:2011* (PAS 1010:2011 "Guidance on the Management of Psychosocial Risks in the Workplace") and specifies that "harassment (bullying, mobbing) at work" is any form of "harassing, insulting, socially excluding someone or exercising a negative influence on someone's performance of their work tasks; the negative actions are repetitive, regular and continue over a period of time." "Harassment occurs when one or more employees or supervisors are subjected to repeated and deliberate insult, intimidation and/or humiliation in work-related circumstances," and bullying is defined as "abusive behaviour in the form of vindictive, violent, malicious or humiliating attempts to undermine the position of an individual or group of employees."[27]

---

22 Judicial statistics of the Russian Federation. https://stat.xn----7sbqk8achja.xn--p1ai/. (In Russian).

23 Onlineinspektsiya.rf. https://xn--80akibcicpdbetz7e2g.xn--p1ai/. (In Russian).

24 Changellenge. (n.d.). *This is (un)acceptable! Harassment checklist*. https://changellenge.com/article/eto-ne-dopustimo-chek-list-po-kharassmentu/. (In Russian).

25 Kursova, O. (2014). Protection from mobbing in labor relations: Problems of legal regulation. *Siberian Legal Review, 3*(24), 28–31. (In Russian); Golovina, S., Sychenko, E., & Voitkovskaya, I. (2021). Protection from violence and mobbing in work: Challenges and possibilities for Russia and Kazakhstan. *Bulletin of Perm University. Legal Sciences, 53*, 624–647. (In Russian).

26 Labor Code of the Russian Federation, Art. 2. (In Russian).

27 Risk management. Guidance on the management of psychosocial risks in the workplace. (2014). https://docs.cntd.ru/document/1200108135. (In Russian).

Special rules have been established in respect of pedagogical workers, as well as state and municipal employees.[28] Other employees can likewise be held disciplinary, administratively, and criminally liable for psychological violence and harassment in the workplace.

If victims perceive mobbing and harassment as a manifestation of discrimination, then Article 5.62 of the Code of Administrative Offences of the Russian Federation provides for administrative liability, and Article 136 of the Criminal Code of the Russian Federation provides for criminal liability. The general norm of part 1 of Article 5.27 of the Code of Administrative Offences of the Russian Federation, which provides for liability for any violation of labor legislation, may also serve as the basis for administrative liability for psychological violence in the sphere of labor in Russia. Furthermore, Article 5.61 of the Code of Administrative Offences provides for liability for insult, i.e. humiliation of the honor and dignity of another person, expressed in an indecent or other form contrary to generally accepted norms of morality and ethics.

A victim of V&H may seek remedy by referring to Article 237 of the Labor Code of the Russian Federation, which provides for compensation for moral damage caused to an employee by unlawful acts or omissions of the employer.

Coercion to engage in actions of a sexual nature, if committed by blackmail, threatening to destroy, damage, or seize property, or by exploiting material or other dependencies of the victim, also entails criminal liability under Article 133 of the Criminal Code of the Russian Federation. But it should be noted that other forms of sexual harassment, such as unwanted hints, physical touching, and proposals are not covered by this rule of law.

OSH legislation in theory can be extended to violence and harassment, as labor protection is a system for preserving the life and health of workers in the process of labor activity, which includes legal, socio-economic, organizational and technical, sanitary and hygienic, therapeutic and preventive, rehabilitation, and other measures.[29] The main principles of labor safety are minimization of damage to workers' health.[30] Given that health is a state of physical, mental, and social well-being of a person in which there are no diseases or disorders of the functions of the organs and systems of the body,[31] employers are obliged to ensure labor safety,

---

[28] Article 336 of the Labor Code of the Russian Federation provides for an additional ground for termination of a labor contract with a pedagogical worker, as well as the head or deputy head of a state or municipal educational organisation of higher education, for the use, including one-time use, of methods of upbringing associated with physical and (or) mental violence against the personality of a student or pupil.

[29] Labor Code of the Russian Federation, Art. 209. (In Russian).

[30] Labor Code of the Russian Federation, Art. 209.1. (In Russian).

[31] Federal Law No. 323-FZ of November 21, 2011 "On the Fundamentals of Health Protection of Citizens in the Russian Federation," Art. 2. Collection of Legislation of the Russian Federation, 2011, No. 48, Art. 6724. (In Russian).

develop measures to ensure labor safety, and implement them.[32] However, the Labor Code does not contain a special regulation for employers to identify, record, and take appropriate measures to prevent violence and harassment in the workplace as psychosocial risks, which significantly reduces the possibility of protecting violated rights. It is interesting to note that the Government of the Russian Federation has expressed its intention to supplement Article 214 of the Labor Code of the Russian Federation with the obligation of the employer to inform employees about the ways of protection against harassment expressed in infringement of human dignity, threatening, hostile, humiliating, or insulting situation.[33]

Prohibition of mobbing and harassment may be stipulated by local regulations of the organization. For example, an employee who violates the rules may be subject to disciplinary sanctions and violations repeated within twelve months may result in dismissal.

2.2. The Case Law and Current Challenges to Protection Against V&H in the Workplace in Russia

The absence of special norms that protect against V&H in Russia reduces the effectiveness of judicial protection afforded. This is confirmed by numerous court decisions that rejected claims because employees were unable to provide evidence of the violations. When appealing the unlawfulness of forced dismissals and disciplinary sanctions resulting from mobbing and harassment, employees quite often refer to discrimination[34] and violation of the principle of respect for the dignity of the employee.[35] Researchers who have conducted comprehensive analyses of judicial practice in these categories of cases conclude that courts of general jurisdiction often take a formalistic approach to the consideration of the claims made by plaintiffs, leaving in most cases the claims without satisfaction.[36]

The gaps in the federal legislation governing violence and harassment in the workplace could be more quickly addressed at the level of organizations. The Codes of Corporate Ethics of state organizations and large private companies quite often prohibit obscene, vulgar, rude, cruel, discriminatory, aggressive or offensive expressions, gestures, and forms of behavior.[37] In these types of cases, an employee

---

[32] Labor Code of the Russian Federation, Arts. 22, 214. (In Russian).

[33] European Committee of Social Rights. (2019, January 20). *Second report on the non-accepted provisions of the European Social Charter*. https://rm.coe.int/2nd-report-russianfederation-eng-naprovisions/16809e1123

[34] Labor Code of the Russian Federation, Art. 3. (In Russian).

[35] Labor Code of the Russian Federation, Art. 2. (In Russian).

[36] Sychenko, E.V., & Bobovnikova, E.V. (2023). Comparative legal analysis of the application of the principle of respect for the dignity of the employee. *Russian Journal of Labour & Law, 13*, 223–230. (In Russian).

[37] The Code of Corporate Ethics of Sberbank. https://media.rspp.ru/document/1/a/b/ab28a778f83ec053dd1081f8d959b952.pdf, almost similar to the Code of Corporate Ethics of Public Joint

who has suffered from such actions could seek protection from the employer, the state labor inspectorate, the prosecutor's office, or the court.[38]

Before the adoption of ILO Convention No. 190, mobbing and harassment were rarely invoked by employees, and in most cases, they could not be proved.

The adoption of Convention No. 190, despite the lack of its ratification by the Russian Federation, has had a positive impact on Russian judicial practice, as plaintiffs began to refer more frequently to mobbing and harassment as a reason for forced dismissal and unlawful disciplinary liability, describing unlawful behavior in accordance with the Convention. Claims now reference various forms of psychological pressure, including creating unbearable working conditions, constant threats and reproaches, forced dismissal, turning the team against the plaintiff,[39] emotional pressure, excessive and unjustified criticism, providing false information to senior management, humiliation in front of colleagues and superiors,[40] as well as social isolation.

The few rulings by the courts of first instance that are in favor of workers are mainly found in cases where psychological violence is associated with a clear violation of labor law by the employer, such as numerous unjustified assignments allotted during night-time or downtime due to discrimination on the grounds of belonging to a trade union organization and regular obstruction of access to the workplace.[41]

However, in the vast majority of cases, employees either cannot prove the fact of psychological violence or courts do not attach importance to it, even in cases when audio and video recordings of unethical remarks and actions are presented as evidence.[42]

In 2020–2021, judicial practice changed in a positive direction. The Supreme Court of the Russian Federation has since repeatedly overturned the decisions of

---

Stock Company "Gazprom." https://www.gazprom.ru/f/posts/60/091228/2014-02-25-codex-of-corporate-ethics-2019-08-20-edit.pdf, Code of Business Ethics of the Public Joint Stock Company "LUKOIL Oil Company." https://www.lukoil.ru/FileSystem/9/312213.pdf

38 *See*, for example, the Decision of the Supreme Court for Civil Cases of the Fourth General Court of Cassation of March 17, 2022 in Case No. 8G-4051/2022[88-9906/2022. ConsultantPlus Legal Database. https://www.consultant.ru. (In Russian).

39 Determination of the Fourth Cassation Court of General Jurisdiction of February 24, 2022 in Case No. 88-6184/2022. ConsultantPlus Legal Database. https://www.consultant.ru. (In Russian).

40 Appellate Determination of the Murmansk Regional Court of May 18, 2022 No. 33-1409/2022 in Case No. 2-98/2022. ConsultantPlus Legal Database. https://www.consultant.ru. (In Russian).

41 Appellate Determination of the Omsk Regional Court of April 18, 2018 in Case No. 33-2297/2018. ConsultantPlus Legal Database. https://www.consultant.ru. (In Russian).

42 Decision of the Pervomaisky District Court of Penza (Penza Region) of July 28, 2020 in Case No. 2-1005/2020; Decision of the Surgut City Court of July 9, 2019 No. 2-5019/2019 in Case No. 2-5019/2019; Decision of the Supreme Court for Civil Cases of the Fourth General Court of Cassation of March 17, 2022 in Case No. 8G-4051/2022[88-9906/2022/. ConsultantPlus Legal Database. https://www.consultant.ru. (In Russian).

lower courts because facts of psychological violence were ignored by the court.[43] The Judicial Collegium for Civil Cases of the Supreme Court of the Russian Federation has recognized as unlawful insults and ridicule by management and other employees, the creation of unbearable conditions for an employee,[44] and obstacles to the performance of labor duties in the form of disabling his account, forcing him to undergo an extraordinary certification, threats, and hitting. The Supreme Court drew attention to the fact that the facts of psychological violence were not properly assessed by the lower courts. The Supreme Court further ascertained that the lower courts should determine that this circumstance is relevant to the case and put this circumstance on the table in order to verify the arguments related to psychological coercion for dismissal. Moreover, if the employee is referring to a conflict that is creating unbearable working conditions the employer has the obligation to find out the reasons for dismissal.[45]

Nevertheless, due to low awareness of the illegality of mobbing and harassment among employees, the majority of employees who are subjected to humiliation in the workplace do not realize that they are facing unethical and unacceptable behavior and therefore do not seek judicial protection. This situation could be changed by incorporating the employees' right to protection from psychological violence and sexual harassment in the workplace into Article 21 of the Labor Code and the employer's obligation to respect the employee's dignity, refrain from actions that violate the principle of respect for dignity, and ensure the prevention of violations in this area into Article 22 of the Labor Code. Furthermore, Article 241 of the Labor Code of the Russian Federation, regulating the employer's obligations in the area of labor protection, should be supplemented with the obligation to ensure a psychologically healthy working environment.[46]

In addition to improving legislation, it is necessary to formulate appropriate policies, adopt and implement program documents, and raise awareness about the issue. In summing up this analysis, it is important to underline that a systemic approach to V&H is urgently needed in Russia, starting with the recognition of the problem by the authorities, making changes to the norms regarding the duties of employers and employees in the OSH, and recognizing V&H as legitimate occupational risks. All of these steps are fixed in the C190. These conventions can

---

43 Determination of the Supreme Court of the Russian Federation of July 13, 2020 in Case No. 39-KG20-3-K1; Determination of the Supreme Court of the Russian Federation of February 1, 2021 in Case No. 14-KG20-14-K1. ConsultantPlus Legal Database. https://www.consultant.ru. (In Russian).

44 Determination of the Judicial Board for Civil Cases of the Supreme Court of the Russian Federation of August 16, 2021 in Case No. 56-KGPR21-11-K9. ConsultantPlus Legal Database. https://www.consultant.ru. (In Russian).

45 Decision of the Judicial Board for Civil Cases of the Supreme Court of the Russian Federation of April 5, 2021 in Case No. 5-KGPR20-165-K2. ConsultantPlus Legal Database. https://www.consultant.ru. (In Russian).

46 Sychenko & Bobovnikova, 2023.

establish a stronger framework for the creation of healthy and safe workplaces free from V&H.

3. Protection Against V&H in the Workplace in India

3.1. National Regulations on the Protection Against V&H in the Workplace in India

According to a survey conducted by Careerbuilder.in, 55% of Indian workers are bullied at their workplace.[47] Furthermore, a study of 100 Bombay Stock Exchange companies in 2019 revealed that there was a 14% increase in sexual harassment with 823 cases registered against 722 cases the previous year. It is also revealed that 70% of women choose not to report cases of harassment.[48] The vision of the legislator in India is focused primarily on the sexual harassment of women, which is more widespread. India has not yet ratified C190 but is making strides in its legal structure for the protection of workers in preventing and addressing workplace harassment and violence.

A Confederation of Indian Industry (CII) () survey conducted on the topic "sexual harassment in the workplace" covering 4,000 employees across four Information Technology (IT) companies found a "lack of awareness" and "anxiety of stigma and defamation" as the most common reasons for why women avoided complaining about sexual harassment. Some of the women also stated that they feared the "loss of job, demotion, and loss of opportunities."[49] Workplace violence and harassment pose even more complex and challenging issues in a culturally and geographically diverse country with a high degree of collectivism and patriarchal culture. While new laws are being codified, there is a gap between the *de facto* and the *de jure*.

The Indian Constitution enshrines the right to equality, prohibiting any form of discrimination that is based on caste, religion, race, gender, and other protected characteristics. A few important laws, the Equal Remuneration Act, 1976; the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989; and the Rights of Persons with Disabilities Act, 2016, explicitly prohibit discrimination in the workplace. These laws view discrimination as a form of workplace violence when it leads to harassment, mistreatment, or denial of opportunities for employees based on their protected characteristics.

---

47 India Today. (2020, December 22). *55% Indian Employees Bullied at Work: Effects of Workplace Bullying and How to Address the Issue*. https://www.indiatoday.in/education-today/jobs-and-careers/story/55-indian-employees-bullied-at-work-effects-of-workplace-bullying-and-how-to-address-the-issue-1752096-2020-12-22

48 India Today. (2020, May 10). *Why Does Prevention of Sexual Harassment at the Workplace Remain Elusive?* https://www.indiatoday.in/education-today/jobs-and-careers/story/why-does-prevention-of-sexual-harassment-at-the-workplace-remain-elusive-1676362-2020-05-10

49 Taneja. (2013, September 22). *Lack of Awareness Main Problem of Sexual Harassment Victims*. DNA India. https://www.dnaindia.com/pune/report-lack-of-awareness-main-problem-of-sexual-harassment-victims-1891656

Pre-1997, the Indian Penal Code was the main law in this field. While there are more specific acts today, the failure in compliance still leads back to the Indian Penal Code. The Indian Penal Code, which is the foundation of criminal law, covers this field under sections 323 (punishment for voluntary causing hurt), 354 (outraging the modesty of a woman), and 509 (punishment of an individual or individuals for using a word, gesture, or act intended to insult the modesty of a woman).[50] Sections 354 and 509 were the most frequently used sections pre-1997. In the period from 1997 to 2013, when the special law, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, was adopted, the prohibition of V&H in the workplace was mainly drawn from case law (*see* further in section 3.2 below).

The Sexual Harassment of Women in the Workplace (Prevention, Prohibition, and Redressal) Act is a key legal framework that defines sexual harassment in the workplace. It encompasses unwelcome acts or behavior of a sexual nature, including physical, verbal, or non-verbal conduct, that creates an intimidating, hostile, or offensive work environment for women. The Act defines the responsibilities of employers, requires the establishment of Internal Complaints Committees (ICCs) in workplaces, and mandates the process for filing complaints, conducting investigations, and providing redressal for victims of sexual harassment. The Act significantly expanded the scope of protection to also include "domestic workers" under section 2e; nevertheless, the disparities that exist between these victims and their perpetrators have led to minimal or no improvement for these workers.[51]

Therefore, this law is partly in line with the requirements of the C190, but only in certain aspects, specifically with regard to women and sexual harassment. The downside is that the act does not allow for settlement using monetary compensation, instead it only results in an adverse entry in the perpetrator's records and a deduction from the employees dues. Moreover, this point appears to contradict the norms of the C190 regarding providing effective remedy (*see* also para. 15 of the R206).[52]

The Occupational Safety and Health (OSH) legislation in India covers violence and harassment in the workplace. The OSH legislation mandates employers to take appropriate steps to prevent violence and harassment during and in relation to work, in particular, as stipulated in section 2, subsection (p) of the Occupational Safety, Health, and Working Conditions Code.[53] This includes conducting risk assessments, implementing preventive measures, providing training and awareness programs to

---

50 Das, R. (2017). *All you need to know about workplace discrimination laws in India*. IPleaders. https://blog.ipleaders.in/need-know-workplace-discrimination-laws-india/

51 Human Rights Watch. (2020, October 14). *India: Women at risk of sexual abuse at work*. https://www.hrw.org/news/2020/10/14/india-women-risk-sexual-abuse-work

52 Paragraph 15 of the R206 (Violence and Harassment Recommendation, No. 206): "Victims of violence and harassment in the world of work should have access to compensation in cases of psychosocial, physical or any other injury or illness which results in incapacity to work."

53 Ministry of Labour & Employment. (2023, March 31). *The Occupational Safety, Health and Working Conditions Code*. https://labour.gov.in/occupational-safety-health-and-working-conditions-code

employees, and establishing effective grievance redressal mechanisms. The legislative framework also requires that employers consider the psychosocial risks associated with violence and harassment in the management of occupational safety and health, thereby ensuring the overall well-being of employees.[54] These norms indicate that the ILO approach to preventing V&H in the workplace as a component of workplace safety measures is already implemented in India (Art. 9(b) of the C190).

Victims of workplace bullying can seek remedy under the Industrial Employment (Standing Orders) Act, 1946, which requires employers to establish standing orders that prohibit any behavior that is detrimental to the dignity and well-being of employees covered by section 2(g) of the act.[55]

3.2. The Case Law and Current Challenges to Protection Against V&H in the Workplace in India

As stated before, prior to 1997, the Criminal Code was the only instrument punishing sexual harassment in the workplace in the legal frameworks that encompassed several criminal offenses. This changed after the introduction of the "Vishaka" guidelines. The Supreme Court in *Vishaka v. State of Rajasthan*[56] for the first time in Indian law recognized and defined sexual harassment. While pre-1997, sexual harassment was prohibited under the Indian Penal Code, employers had no roles or responsibilities. The case led to a series of guidelines for employers called the "Vishaka" Guidelines. These apply to all women, whether they are students, part-time or full-time employees, contract or voluntary, or honorary.[57] Although they are not legally binding, these guidelines act as a form of guidance for expected behavior. The guidelines place a strong emphasis on preventive and curative measures for employers.

The following are some of the most important ways in which the guidelines place the onus on employers to provide a harassment-free work environment:

1. Employers must form a complaints committee.

2. Expressly emphasize the prohibition of any form of sexual harassment and make the employees aware of the implications through in-house communication systems, posters, and meetings.

---

[54] Tiwari, S. (2020, September 22). *Bill Summary: The Occupational Safety, Health and Working Conditions Code, 2020*. PRSIndia. https://prsindia.org/billtrack/prs-products/prs-bill-summary-3576

[55] Jain, Y. (2019). *The Industrial Employment (Standing Orders) Act, 1946 in India*. IPleaders. https://blog.ipleaders.in/industrial-employment-standing-orders-act-1946/; Shodhganga: a reservoir of Indian theses @ INFLIBNET. https://shodhganga.inflibnet.ac.in:8443/jspui/pdfToThesis.jsp?toHandle=https://shodhganga.inflibnet.ac.in/handle/10603/206578&toFile=https://shodhganga.inflibnet.ac.in/bitstream/10603/206578/2/11-chepter%207.pdf

[56] *Vishaka and Ors. v. State of Rajasthan and Ors.*, (1997) 6 SCC 241. https://indiankanoon.org/doc/1031794/

[57] Pandey, G. (2017, March 17). *Bhanwari Devi: The rape that led to India's sexual harassment law*. BBC. https://www.bbc.com/news/world-asia-india-39265653; Dogra, A., & Ahluwalia, N.K. (2015, February 3). *Sexual Harassment at Workplace (Prevention, Prohibition and Redressal) Act, 2013: A Critical Analysis*. Academike. https://www.lawctopus.com/academike/sexual-harassment-workplace-prevention-prohibition-redressal-act-2013-critical-analysis/

3. Prohibition of sexual harassment must also be accompanied by appropriate penalties against the offender in the company's conduct rules.

4. Prohibition of sexual harassment must be incorporated in the standing orders as mandated under the Industrial Employment (Standing Orders) Act, 1946, and must be included by all private employers.

5. Provision of appropriate work conditions with respect to work, leisure, health, and hygiene to further ensure that there is no hostile environment towards women.

6. Victims of sexual harassment should be given the option to seek either the transfer of the perpetrator or their own transfer.[58]

The guidelines led to a legal stipulation for the creation of a complaints committee,[59] which would be headed by a woman employee, and no less than half of its members would be women. Complaints of sexual harassment would be directed to this committee, which would maintain confidentiality and advise on the action to be taken by the management to resolve the complaint as well as the action to be taken against the perpetrator.

In *Medha Kotwal Lele v. Union of India*, Aalochana,[60] a center of documentation and research on women along with other women's rights groups, petitioned the Indian courts to implement the Vishaka guidelines more effectively, citing individual cases in which the Vishaka guidelines failed to live up to its purpose. The major issue appeared to be the inadequate or inefficient implementation of these guidelines by the various states. Later these developments were fixed in the Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act.

Despite the presence of a legal framework for combating V&H at work, even if fragmented, the primary challenge is the fear of retaliation from the perpetrator or even from the employer. Retaliation can come in various forms, such as threats, discrimination, demotion, or termination. This fear of retaliation may prevent workers from speaking up and seeking protection, as they fear the potential negative consequences of reporting harassment. This, in turn, can create a culture of silence and impunity, where workers are afraid to come forward and seek redressal for the harassment they have experienced. There was an attempt to consider these acts as offenses under the Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act; however, the Delhi High Court, at the time in 2020, refused to create a new category of offense stating that

> retaliation, or victimisation, is only the provocation for an act of assault. If an act of assault amounts to sexual harassment, it would anyway be punishable

58 Goyal, A. (2014, December 7). *Sexual Harassment at the Workplace*. Academike. https://www.lawctopus.com/academike/sexual-harassment-at-the-workplace/

59 Cyrill, M. (2021). *India's Occupational Safety, Health and Working Conditions Code, 2020*. India Briefing. https://www.india-briefing.com/news/indias-occupational-safety-health-and-working-conditions-code-2020-what-is-it-and-how-should-companies-prepare-21545.html/

60 *Medha Kotwal Lele & Ors. v. U.O.I. & Ors.*, AIRONLINE 2012 SC 632. https://indiankanoon.org/doc/48293767/

> under the Act, 2013. If it does not, it cannot be punishable under the said Act, as the Act deals with only offences of a sexual nature, and an offence which does not lead to sexual harassment, can obviously find no place therein.[61]

However, more recently, in 2023, the Supreme Court delivered a judgment in the case of *Sunita Thawani v. Union of India and Another* and refused to entertain a public interest litigation (PIL) filed in relation to the issuance of directions for protecting complainants, witnesses, and other persons in cases of sexual harassment from potential retaliation or victimization at the hands of the accused person or the concerned organization.[62]

Therefore, Indian legislation and case law do not wholly correspond to the requirements of the C190 for ensuring the protection against victimization of or retaliation against complainants, victims, witnesses, and whistle-blowers (Art. 10). Interestingly, the Handbook on the Act does list "threats, intimidation or retaliation against an employee who speaks up about unwelcome behavior with sexual overtones" as examples of sexual harassment in the workplace.[63] However, this document has only a soft law nature.

Another challenge is the lack of awareness and education among workers about their rights and the legal provisions related to violence and harassment or sexual harassment in the workplace. Workers are frequently not aware of what constitutes violence and harassment and the forms it takes as well as the legal remedies available. This can hinder workers from recognizing violence and harassment and taking appropriate actions to report and address it. Employers may also lack proper knowledge and understanding of their obligations under the law, leading to inadequate implementation of policies and procedures to prevent and address such incidents. Therefore, in conjunction with the implementation of the C190 norms, also providing guidance, training, and awareness-raising (Art. 11) is extremely essential.

India shows limited progress in creating a safe work environment, although there are positive developments. The changing global landscape and formalization of the workforce have left India with little choice but to make significant strides towards improving its labor laws. Factors such as reduced bureaucracy, increased female employment, rising living costs, and growing aspirations fuelled by shifting societal values from collectivism to individualism have created a political climate that prioritizes simplifying laws and integrating digitalization for greater effectiveness. An example of this trend is the Occupational Safety and Health (OSH) Act, which has replaced multiple outdated British-era laws with a more modern and streamlined

---

61 Chatterjee, S. (2023, July 22). *SC declines PIL to protect complainants of sexual harassment against retaliation at workplace: Is the law adequate?* The Leaflet. https://theleaflet.in/sc-declines-pil-to-protect-complainants-of-sexual-harassment-against-retaliation-at-workplace-is-the-law-adequate/

62 *Id.*

63 Ministry of Women and Child Development. (2015, November). *Handbook on Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal Act) 2013*. https://www.iitk.ac.in/wc/data/Handbook%20on%20Sexual%20Harassment%20of%20Women%20at%20Workplace.pdf

legislation. While there may be multiple reasons for these changes, including urbanization, improved communication, and better access to education, India's progress towards ensuring fundamental rights for all, not just in theory but also in practice, has significant social benefits. As the world's largest democracy, any positive change in India has far-reaching implications, even though it may take time for such a massive country to make significant strides. Nevertheless, there are promising signs of progress in this direction.

4. Protection Against V&H in the Workplace in China

4.1. National Regulations on the Protection Against V&H in the Workplace in China

Scholars have often stated that Chinese culture may be characterized as being a high power distance culture[64] and that such an environment may be conducive to fostering hierarchical and autocratic relationships between managers and subordinates, as well as workplace bullying.[65] At the same time, there are very few researchers who have addressed this issue;[66] the Chinese law lacks provisions that can be directly invoked in situations of V&H other than sexual harassment. However, for some types of harassing behaviors that infringe workers' "personality rights," workers can ask relevant responsible personnel to bear tort liability for such conduct, as this is regulated by tort liability law. For instance, if the managers commit indecency, insulting, slander, or other similar acts, or any other bullying behavior at work that causes minor injuries, the violation might be considered a crime. In addition, the labor law clearly stipulates that if an employer forces an employee to work, humiliates, physically punishes, beats, illegally searches, or detains a worker, the public security organs may warn, fine, or detain the person who is responsible, and in serious cases, he or she may be investigated for criminal responsibility.

Like in India, the attention of the legislator in China is also mainly focused on sexual harassment, so the present research will primarily address this issue. According to the Executive Report of the 3rd Survey on the Status of Chinese Women, 7.8% of women have encountered sexual harassment in the workplace or at school.[67]

---

64 Schaubroeck, J., et al. (2007). Embracing transformational leadership: Team values and the impact of leader behavior on team performance. *Journal of Applied Psychology, 92*(4), 1020–1030; McCormack, D., et al. (2009). Workplace bullying and intention to leave among schoolteachers in China: The mediating effect of affective commitment. *Journal of Applied Social Psychology, 39*(9), 2106–2127.

65 McCormack et al., 2009.

66 Wang, H. (2022). Legislative and judicial responses to workplace sexual harassment in Mainland China: Progress and drawbacks. *Frontiers in Public Health, 10*, Article 1000488; Cheo, R. (2017). Migrant workers and workplace bullying in Urban China. *Social Indicators Research, 132*(1), 87–115.

67 Project Group of the 3rd Survery on the Status of Chinese Women. (2011). Executive Report of the 3rd Survery on the Status of Chinese Women. *Journal of Chinese Women's Studies*, *108*(6),13–14. (In Chinese).

In their effort to prevent sexual harassment, China has formed a legal system consisting of one code, multiple laws, one special provision, and multiple local regulations.[68] Article 38 of the Constitution of the People's Republic of China stipulates that the personal dignity of its citizens is inviolable. Insulting, slandering, and falsely accusing citizens by any means are all explicitly prohibited.[69] In 1994, the "Measures of Hubei Province for Implementation of the Law of the People's Republic of China on the Protection of Women's Rights and Interests" clearly stipulated "sexual harassment" in local regulations for the first time. Subsequently, the Law of the People's Republic of China on the Protection of Women's Rights and Interests (2005 Revision) used the term "sexual harassment" in the basic law for the first time. Article 11 of the "Special Provisions on the Labor Protection of Female Employees," promulgated in 2012, stipulates that employers have the responsibility to prevent and stop sexual harassment of female employees in the workplace.[70] As a result, some provinces have introduced and even refined the specific implementation measures that are relevant to each province. Article 1010(1) of the Civil Code of the People's Republic of China (promulgated in 2020) stipulates that in the event of sexual harassment against another person's will by way of words, characters, images, or physical acts, the victim has the right to request the actor to assume civil liability according to the law.[71] Article 23 of the Law of the People's Republic of China on the Protection of Women's Rights and Interests (2022 Revision) stipulates the general rules for the prevention of sexual harassment; Article 24 outlines special regulations for sexual harassment on a campus; Article 25 pertains to workplace sexual harassment; and Article 80 specifies the legal liability provisions.[72]

However, these laws and regulations do not explicitly define sexual harassment but rather delineate it by enumerating and describing infringements. Although China's basic law does not officially define sexual harassment, the term is clearly defined in local regulations in some regions. For example, the Sex Discrimination Ordinance of the Hong Kong Special Administrative Region of the People's Republic of China defines sexual harassment as: (a) making an unwanted sexual demand against a woman or an unwanted demand for sexual favors or other sexual acts, where having regard to all the relevant circumstances, it is reasonable to expect that

---

68 Wang, L. (2022). Legislation against sexual harassment in China: Experience and prospects. *Journal of Chinese Women's Studies, 5*, 89. (In Chinese).

69 https://www.npc.gov.cn/npc/c505/201803/e87e5cd7c1ce46ef866f4ec8e2d709ea.shtml. (In Chinese).

70 Art. 11 of the Special Rules on the Labor Protection of Female Employees (2012 Issued): "An employer shall prevent and stop sexual harassment of female employees in the workplace." https://www.gd.gov.cn/zwgk/wjk/zcfgk/content/post_2532181.html. (In Chinese).

71 https://www.npc.gov.cn/npc/c30834/202006/75ba6483b8344591abd07917e1d25cc8.shtml. (In Chinese).

72 https://www.npc.gov.cn/npc/c30834/202210/d80092ae46b24946b30b3a880c2f2be5.shtml. (In Chinese).

the woman will feel offended, insulted, or intimidated; and (b) a person committing an act involving sex, either independently or in conjunction with others, that creates a hostile or intimidating environment for the woman, constitutes sexual harassment against the woman.[73]

China does not use the term "employer" in labor legislation but instead uses the phrase "employing units" to refer to the equivalent of workers. This includes enterprises, individual economic organizations, private non-enterprise units, and other organizations in China; additionally, state organs, public institutions, and social organizations can also qualify as employing units when establishing labor relations with workers, as can legally established accounting firms, law firms and other partnerships, and foundations. On the other hand, civil servants and the staff of public institutions and social organizations that apply the civil servant system, rural workers (except for workers in township enterprises and farmers working in cities and doing business), military personnel in active service, and family nannies are not considered workers in labor relations.[74] According to Article 1010(2) of the Civil Code of the People's Republic of China,[75] state organs, enterprises, schools, and other entities are all subject to the duty and responsibility of preventing and controlling sexual harassment. At the same time, the Civil Code of the People's Republic of China abandons the traditional practice of protecting women only, as was the case in the previous sexual harassment legislation, and provides protection to men as well. On this basis, Article 25 of the Law of the People's Republic of China on the Protection of Women's Rights and Interests (2022 Revision) lists the measures that employers should take to prevent and stop sexual harassment, including formulating rules and systems, specifying responsible persons and institutions, conducting education and training activities, taking security measures, setting up complaint channels, establishing and improving investigation and resolution procedures, assisting in enforcement of rights, providing psychological counseling, and other reasonable measures.[76] The "Special Rules on the Labor Protection of Female Employees" also clarifies the employer's obligation to prevent and stop sexual harassment.

---

73 https://www.elegislation.gov.hk/hk/cap480?xpid=ID_1438403244330_001

74 https://www.mohrss.gov.cn/fgs/202103/t20210312_411025.htm. (In Chinese).

75 Art. 1010(2) of the Civil Code of the People's Republic of China: "Organs, enterprises, schools, and other entities shall take reasonable measures of prevention, acceptance of complaints, investigation, and handling, so as to prevent and cease sexual harassment conducted by violators by making use of their powers and affiliation relationships."

76 Art. 25 of the Law of the People's Republic of China on the Protection of Women's Rights and Interests (2022 Revision): "An employer shall take the following measures to prevent and stop sexual harassment of women: (1) Formulating rules and systems prohibiting sexual harassment. (2) Specifying a responsible department or person. (3) Conducting education and training activities to prevent and stop sexual harassment. (4) Taking necessary security measures. (5) Publishing complaint telephone numbers and mailboxes, among others, and keeping complaint channels unimpeded. (6) Establishing and improving investigation and resolution procedures, resolving disputes in a timely manner, and protecting the privacy and personal information of parties. (7) Supporting and assisting aggrieved

Sexual harassment is not specifically regulated in the relevant legislation on occupational safety and health. However, as a labor standard law, Article 3 of the Labor Law of the People's Republic of China (2018 Amendment) stipulates that workers have the right to be employed on an equal basis and receive labor safety and sanitation protection; Article 13 provides the right of workers to non-discrimination; in particular, Chapter VI is a special chapter on labor safety and sanitation, in which Article 52 stipulates that employers shall establish and improve the labor safety and sanitation system.[77] The relevant legislation, such as the "Work Safety Law of the People's Republic of China" and the "Law of the People's Republic of China on the Prevention and Control of Occupational Diseases," also requires employers to provide a safe working environment for workers, and such a safe production environment should include a working environment for employers to provide workers free from sexual harassment. In the end, the state has explicitly clarified the security obligations of employers with respect to sexual harassment in legislation.

There are several guidelines in place to encourage employers to establish a prevention mechanism against workplace sexual harassment.[78] In terms of legal liability, the perpetrator of sexual harassment may bear civil liability,[79] administrative liability,[80]

women in lawful enforcement of rights, and providing them with psychological counseling when necessary. (8) Other reasonable measures to prevent and stop sexual harassment." https://www.npc.gov.cn/npc/c30834/202210/d80092ae46b24946b30b3a880c2f2be5.shtml. (In Chinese).

77 Labor Law of the People's Republic of China. https://www.66law.cn/tiaoli/2.aspx. (In Chinese).

78 The Manual of Guidance on Preventing Workplace Sexual Harassment adopted by the Rights and Interests Department of the All-China Women's Federation and the Model Texts of the Rules for Eliminating Workplace Sexual Harassment in 2021 and the Model Texts of the Rules for Female Workers Special Labor Protection in the Workplace adopted by the Ministry of Human Resources and Social Security of the People's Republic of China, the Supreme People's Procuratorate of the People's Republic of China, and the All-China Federation of Trade Unions.

79 Art. 1010(1) of the Civil Code of the People's Republic of China: "In the event of sexual harassment against another person's will by words, characters, images, or physical acts, the victim has the right to request the actor to assume civil liability according to the law."

80 Art. 80(1) of the Law of the People's Republic of China on the Protection of Women's Rights and Interests: "Where this Law is violated by sexually harassing a woman, public security authorities shall give reprimand and education, or issue a written admonition and the entity where the violator works shall administer discipline according to the law." The Public Security Administration Punishments Law of the People's Republic of China, Art. 42: "A person who commits any of the following acts shall be detained for not more than five days or be fined not more than 500 yuan; where the circumstances are more serious, he shall be detained for not less than five days but not more than ten days, and may also be fined not more than 500 yuan: …(2) openly insulting another person or slandering another person by fabricating stories; …(5) repeatedly dispatching pornographic, insulting, intimidating or other information to disturb the normal life of another person; …" Art. 44: "A person who molests another person or intentionally exposes his/her body in a public place, and the circumstances are abominable, shall be detained for no less than five days but no more than ten days; A person who molests an intellectually disabled person, or a person suffering mental disorder, or a person who has not attained to the age of 14, or commits such an act with other serious circumstances, shall be detained for no less than ten days but no more than fifteen days." https://www.law-lib.com/law/law_view.asp?id=403793. (In Chinese).

or criminal liability.[81] The Civil Code of the People's Republic of China does not specify what kind of legal liability the employer should bear if it fails to fulfill its obligation to prevent sexual harassment, and there are many controversies on this topic in the academic circle.[82] However, Article 77 and Article 80[83] of the Law of the People's Republic of China on the Protection of Women's Rights and Interests (2022 Revision) stipulate the responsibilities of employers, including that the procurator organ may issue recommendations to the employer, and the superior organ or the competent department shall then order the corrections and administer discipline to the directly liable executive in charge and other directly liable persons in accordance with the law.

The workers have the right to be removed from working environments where they have reasonable grounds to believe that violence and harassment would constitute an imminent peril to their life, health, or safety. When a worker encounters workplace sexual harassment, the victim may make a complaint, apply for mediation and arbitration, institute legal proceedings, while procurator organs may file a public interest litigation, and the trade union might negotiate with the employer on behalf of the employee, as well as request intervention from the local government to deal with the employer if he or she refuses to solve the problem.

4.2. The Case Law and Current Challenges to Protection Against V&H in the Workplace in China

In Chinese jurisprudence, direct lawsuits for sexual harassment are rare. In sexual harassment damage compensation disputes, there are often problems, such as the

---

[81] Art. 237(1) of the Criminal Law of the of the People's Republic of China: "Whoever acts indecently against or insults a woman by violence, coercion or any other forcible means, shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention."

[82] Some think it is general tort liability, some think it is the employer's vicarious liability, some think it is the violation of the employer's incidental obligations, and some think the employer bears jointly and severally assume the compensatory liability. Zhang, Y. (2022). Research on the anti-sexual harassment duty of organizations and relevant tort liability. *China Legal Science, 3*, 60–81. (In Chinese); Tian, X., & Zhang, Y. (2021). Employer's responsibility in sexual harassment in the workplace – Comments on Article 1010 and 1191 of the Civil Code of the People's Republic of China. *Journal of Tianjin University (Social Sciences), 23*(04), 327–333. (In Chinese); Lu, H. (2020). Employer liability for sexual harassment in the workplace: Expanding on Art. 1010 of the Civil Code. *Journal of Chinese Women's Studies, 5*, 87–96. (In Chinese); Wang, L. (2021). Legal regulation on sexual harassment in workplace during the age of the Civil Code. *Law Science, 1*, 133–154. (In Chinese); Zheng, M. (2022). On the civil liability of institutions for failing to fulfill obligations to prevent and curb sexual harassment. *Northern Legal Science, 16*(03), 5–16. (In Chinese).

[83] Art. 77 of the Law of the People's Republic of China on the Protection of Women's Rights and Interests (2022 Revision): "Where the violation of the lawful rights and interests of women causes damage to the public interest, procurator organs may issue a procurator recommendation." Art. 80(2): "Where a school or an employer violates this Law by failure to take necessary measures to prevent and stop sexual harassment, causing violation of women's rights and interests or creating an execrable social impact, superior organ or the competent department shall order it to take corrective action, and administer discipline to the directly liable executive in charge and other directly liable persons in accordance with the law, if corrective action refuses to be taken, or the circumstances are serious." https://www.npc.gov.cn/npc/c30834/202210/d80092ae46b24946b30b3a880c2f2be5.shtml. (In Chinese).

inability to prove the existence of sexual harassment, the flaws in the probative force of evidence, and the risk of infringing the legitimate rights and interests of others in the process of providing proof.[84] In addition, it is difficult to determine what kind of civil liability the employer bears,[85] and the amount of damages to be granted.[86]

In practice, the most common cases are disputes over how employers handle employees suspected of sexual harassment in the workplace. There are mainly two kinds of situations. First, the employer actively acts to dismiss the employee who commits sexual harassment in the workplace, which leads to a labor dispute between the laid-off employee and the employer. Second, employers take no action and are even indifferent to sexual harassment incidents in the workplace, resulting in labor disputes between the infringed employees and employers. However, in both these two types of disputes, the identification of sexual harassment in the workplace is only to prove the legality of the employer's dismissal decision and does not involve the protection of the rights and interests of the victim, nor does it effectively compensate for the physical or psychological trauma of the victim.

As mentioned above, the inability to prove the existence of sexual harassment, the weaknesses in the evidence's probative power, along with the risk of infringing the legitimate rights and interests of others in the process of proof are all common issues that arise in sexual harassment damage compensation disputes.[87] Moreover, the chances of victory for the victims are extremely slim. At the same time, although the Civil Code of the People's Republic of China stipulates the civil litigation rights of sexual harassment victims and the employer's obligation to prevent such occurrences, which breaks through the gender limitations that are traditionally associated with sexual harassment prevention and the protection of women's rights and interests, in cases when an employer does violate this obligation, the specifics regarding the kind

[84] Wang, L., & Yu, H. (2022). Relief dilemma of sexual harassment in the workplace and the way out of judgment – Based on judicial case analysis. *Human Rights, 2*, 180–300. (In Chinese); Lu, H. (2019). Research on the issue of proving cases of sexual harassment in the workplace. *Journal of Chinese Women's Studies, 5*, 80–88. (In Chinese); Gu, J. (2020). Research on the legal liability of employer in the workplace: Sexual harassment. *Shandong Trade Unions' Tribune, 26*(06), 87–101. (In Chinese); Jiang, Y., et al. (2021). The dilemma of legal intervention and improvement route to prevent workplace sexual harassment: Based on statistical analysis of 147 related civil litigation cases. *Journal of China Women's University, 33*(6), 40–53. (In Chinese).

[85] The Civil Judgment of Hangzhou Jinjiang District People's Court, 2014-Hang-Bin- Min-Chu-Zi-1173. The court held that "not everything illegal that occurs in the workplace of the employer is the employer's failure to provide labor protection or labor conditions, or breach of its obligation to prevent and stop sexual harassment of female employees." (In Chinese).

[86] The Civil Judgment of Beijing Chaoyang District People's Court, 2019-Jing-0105-Min-Chu-27423. The court awarded the compensation to the employer for the economic loss of $40,000, and no compensation was ordered for the harassed person. The Civil Judgment of Henan Province Queshan County People's Court, 2019-Yu-1725-Min-Chu-3936. The court awarded the defendant $500 for the plaintiff's mental comport. (In Chinese).

[87] Wang & Yu, 2022; Lu, 2019; Gu, 2020; Jiang et al., 2021.

of civil liability, the criteria of liability and the methods of bearing such liability are not clear,[88] and the amount of compensatory damage is difficult to determine.[89]

The present analysis leads us to conclude that a clear legislative framework covering all forms of V&H is absent in China. However, there are employers' policies in place that forbid discrimination and V&H in an effort "to create a healthy, safe, positive, diverse and inclusive work environment, and to ensure that employees are not subjected to any form of discrimination and harassment at work."[90] Still, much needs to be done to ensure that law prohibits not only sexual but all forms of harassment, that it covers all types of workers, that these risks are part of the OSH, and that the mechanisms of prevention, protection, and remedy are established.

5. Protection Against V&H in the Workplace in South Africa

5.1. National Regulations on the Protection Against V&H in the Workplace in South Africa

There has been an increase in harassment cases, especially sexual harassment cases, in South African workplaces. A recent study indicates that over 51,000 cases of sexual offenses are committed annually in South African workplaces.[91] There are some industries where this issue is particularly spread. For example, in the mining industry, there are reported cases and incidences on an almost daily basis of women being physically assaulted, verbally abused, and raped, being asked to trade sexual favors for other benefits or employment.[92]

The regulations pertaining to protection in this regard are rather fragmented in South Africa. We can refer to Article 10 of the South African Constitution as a cornerstone of protection. According to this article, everyone has inherent dignity and the right to have their dignity respected and protected.[93] In addition, the Employment Equity Act

---

88 The Civil Judgment of Hangzhou Binjiang District People's Court, 2014-Hang-Bin- Min-Chu-Zi-1173. The court held that "not everything illegal that occurs in the workplace of the employer is the employer's failure to provide labor protection or labor conditions, or breach of its obligation to prevent and stop sexual harassment of female employees." (In Chinese).

89 The Civil Judgment of Beijing Chaoyang District People's Court, 2019-Jing-0105-Min-Chu-27423. The court awarded the perpetrator of sexual harassment should compensate the employer for the economic loss of $40,000, and no compensation was involved for the harassed person. The Civil Judgment of Henan Province Queshan County People's Court, 2019-Yu-1725-Min-Chu-3936. The court awarded the defendant $500 for the plaintiff's mental comport. (In Chinese).

90 *See*, e.g., Xiamen C&D Co. Ltd. (n.d.). Anti-discrimination and Anti-harassment Policy. https://www.chinacnd.com/upfiles/policy/202303/1678876407546.pdf. (In Chinese).

91 Kubjana, M. (2020). Understanding the law on sexual harassment in the workplace (through a case law lens): A classic fool's errand. *Obiter, 41*(1), 88–105. https://hdl.handle.net/10520/EJC-1df91e392a

92 Minerals Council South Africa. (2020, March). *Women in Mining in South Africa*. https://www.mineralscouncil.org.za/womeninmining/wp-content/uploads/2023/08/fact-sheet-minerals-council-women-in-mining-sa-2020.pdf

93 Constitution of the Republic of South Africa, 1996. South African Government. https://www.gov.za/documents/constitution-republic-south-africa-1996

(EEA) prohibits harassment of an employee when it is a form of unfair discrimination (sec. 6). Section 54 of the Amended Employment Equity Act provides the Code of Good Practice on the Prevention and Elimination of Harassment and elaborates on the diverse forms of violence and harassment prohibited in the workplace.[94] Section 60(3) renders the employer liable if one of its employees contravenes a provision of the EEA while at work in respect of another employee, and it is immediately brought to the attention of the employer (not necessarily by the victim), who then fails to take the necessary steps to eliminate the conduct. Upon such a failure, the conduct of the primary perpetrator is assigned to the employer. However, even if the employer fails to act as contemplated in section 60(2) of the EEA, subsection 4 does provide another "escape route" for the employer, if the employer can show that "it did all that was reasonably practicable to ensure that the employee would not act in contravention of" the EEA. Violence and harassment are covered under the Occupational Health and Safety Act No. 85 of 1993 in South Africa. Section 5(1) of the Occupational Health and Safety Act 85 of 1993 states that it is the obligation of every employer to provide and maintain a workplace that is safe and without risk to the health of employees.[95] A labor inspector can assist and investigate harassment violations in the workplace and ensure that the law is enforced within the workplace.[96]

The Promotion of Equality and Prevention of Unfair Discrimination Act 2000 (PEPUDA) prohibits unfair discrimination by the government, by private organizations and individuals and forbids hate speech and harassment.[97] The Protection from Harassment Act, No. 17 of 2011 (PHA) came into force on April 27, 2013. The PHA applies to everyone who commits acts of harassment and is specifically designed to protect victims of "stalkers". It also covers harassment in the workplace. Harassment and sexual harassment are defined in detail in this Act.[98] The definition covers also the actions prohibited by C190.

---

94 Employment Equity Act, No 55 of 1998. Department of Employment and Labour. https://www.labour.gov.za/DocumentCenter/Acts/Employment%20Equity/Act%20-%20Employment%20Equity%20 1998.pdf

95 Occupational Health and Safety Act No. 85 of 1993. South African Government. https://www.gov.za/sites/default/files/gcis_document/201409/act85of1993.pdf

96 AgriOrbit. (2022, October 31). *Three types of labor inspections*. https://agriorbit.com/three-types-of-labour-inspections/

97 Promotion of Equality and Prevention of Unfair Discrimination Act, 2000. Department of Justice. https://www.justice.gov.za/legislation/acts/2000-004.pdf

98 Under this Act, "harassment" means directly or indirectly engaging in conduct that the respondent knows or ought to know that (a) causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably (i) following, watching, pursuing, or accosting the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies, or simply happens to be; (ii) engaging in verbal, electronic, or any other form of communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or (iii) sending, delivering, or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail, or other

Under the terms of the PHA, victims of harassment are entitled to have an interim protection order (restraining order) issued against the harasser. The harasser can be moved to another department due to the restraining order.[99] After obtaining a court order against a harasser in the workplace, an employee can use the Employment Equity Act to proceed with the grievance process.[100]

Under the Protection from Harassment Act, an employer can be vicariously held liable for an employee being harassed in the workplace. When the court grants a protection order against a harasser employed in the same department as the aggrieved party, the employer is obliged to take measures to ensure compliance with the protection order. In addition, the employer is required to take disciplinary action against the harasser. The employer is also liable for the conduct of delivery persons, customers, and other third parties. Thus, the scope of protection provided is broad and corresponds to the requirements of the C190.

Particular attention should be paid to the Code of Good Practice on the prevention and elimination of harassment in the workplace.[101] According to this instrument, all forms of violence and harassment are regarded as unfair discrimination and are deemed an obstacle to equality and equity within South African workplaces. The Code consolidates the terms "violence" and "harassment" into a single term, "harassment."[102] It sets forth the guidelines on best practices for employers to follow when dealing with labor matters or disputes. However, the Code is not binding, as employers are not legally required to follow them. Thus, employers can depart from the guidelines in the Code as long as they are able to justify not using them. Nonetheless, when departing from the guidelines, it becomes difficult to justify this in a workplace, the reason for this being that the Labor Court judges and arbitrators

---

objects to the complainant or a related person or leaving them where they will be found by, given to, or brought to the attention of the complainant or a related person; or (b) amounts to sexual harassment of the complainant or a related person. "Harm" is defined as any mental, psychological, physical, or economic harm. "Sexual harassment" is defined as any (a) unwelcome sexual attention from a person who knows or ought reasonably to know that such attention is unwelcome; (b) unwelcome explicit or implicit behavior, suggestions, messages, or remarks of a sexual nature that have the effect of offending, intimidating, or humiliating the complainant or a related person in circumstances, in which a reasonable person having regard to all the circumstances, would have anticipated that the complainant or related person would be offended, humiliated, or intimidated; (c) implied or expressed promise of reward for complying with a sexually oriented request; or (d) implied or expressed threat of reprisal or actual reprisal for refusal to comply with a sexually oriented request.

99 Protection from Harassment Act No. 17 of 2011. Department of Justice. https://www.justice.gov.za/legislation/acts/2011-017.pdf

100 Landman, A., & Ndou, M. (2013). The protection from harassment act and its implications for the workplace. *Contemporary Labour Law, 22*(9), 81–90. http://www.workplace.co.za/issues/cll2209.pdf

101 Department of Employment and Labour. (2022). *Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace*. https://www.labour.gov.za/DocumentCenter/Code%20of%20Good%20Practice/Employment%20Equity/Code%20of%20Good%20Practice%20on%20the%20Prevention%20and%20Elimination%20of%20Harassment%20in%20the%20Workplace.pdf

102 *Id.*

refer to the Code before taking a decision on a legal issue.[103] The Code establishes the following obligations of an employer:

• conduct a risk assessment to assess the potential possibility of harassment to employees in its workplace;

• ensure that there is sufficient awareness training and communication to staff;

• upon receiving an allegation of harassment, the employer needs to consult with relevant parties; try and address the grievance in accordance with the terms of the Code, the collective bargaining agreement, and any other relevant policies; and take the necessary steps to eliminate the harassment;

• the employer's policy should outline the disciplinary sanctions that will be placed on the perpetrator.

Furthermore, it explicitly states that employers need to develop and implement a workplace policy related to violence and harassment. However, strictly speaking, this Code is still a soft law instrument, and as such, it cannot be considered as being fully compliant with the norms of the C190.

5.2. The Case Law and Current Challenges to Protection Against V&H in the Workplace in South Africa

When reviewing judgments on sexual harassment issued by the Labor Courts, it is clearly seen that some judges and arbitrators have a tendency to apply incorrect standards when dealing with evidence in general, particularly to the application of evidence involving single witnesses, from all of the various pieces of legislation dealing with harassment and especially sexual harassment.[104] Unlike the PEPUDA, the EEA does not define harassment in its broader sense.[105] However, even though the EEA does not explicitly define sexual harassment as a form of harassment, the Code of 2022 provides a test for assessing sexual harassment and sets out the criteria necessary to establish sexual harassment. It can be argued that a literal interpretation of the EEA cannot directly apply PEPUDA's definition as PEPUDA is not a labor law that applies to employees. On the other hand, a counter argument is that it may be applicable in so far as it relates to harassment within the scope of the EEA.[106]

The Employment Equity Act (EEA) prohibits sexual harassment of employees by colleagues and holds the employer liable in such cases even if the employer does not know that the sexual harassment is going on. Section 60 of the EEA specifies that, if the employer fails to take the steps necessary to deal with unfair discrimination or sexual harassment and it is proven that an employee has contravened the relevant

---

103 Legalese. (n.d.). *Workplace Harassment: The New Code and What You Need to Know*. https://legalese.co.za/blog/workplace-harassment-the-new-code-and-what-you-need-to-know/

104 22nd Commission for Employment Equity (CEE). *Annual Report (2021–2022).* https://www.abp.org.za/wp-content/uploads/2022/06/CEE-22nd-Annual-Report-2021-2022.pdf

105 *Id.*

106 *Id.*

provisions, the employer must be deemed also to have contravened that provision. The courts have upheld this provision, for example, in the case of *Christian v. Colliers Properties*.[107] The above norm and its interpretation in this case might lead employers to believe that, in order to protect themselves, they need to dismiss any employee found guilty of sexual harassment.

However, this is not always the case. For example, in the case of *SABC Ltd. v. Grogan*,[108] a regional sales manager was dismissed for (among other things) sexual harassment after he had allegedly kissed a junior female colleague several times, given her love literature, and had physical contact with her in his car. An arbitrator later found that, while he was guilty of sexual harassment, the level of seriousness of his conduct did not merit dismissal. This was mainly because the alleged victim had not rejected his advances and had said she thought he should not be dismissed. The arbitrator therefore ordered the employer to reinstate the employee. The employer took this decision on review to the Labor Court but lost the case as the court pronounced the arbitrator's finding to not have been properly thought out and justified.[109]

In a different case, the court stated that an alleged violation should be brought immediately to the attention of the employer in order to enable him to eliminate the alleged conduct. In this case, the employee started the proceedings three years after the alleged violation took place. The court referred to a previous Labor Appeal Court decision in *Liberty Group v. M.M.*, in which the court suggested that the word "immediate" must be afforded what it termed a "sensible meaning", and that a slight delay in reporting would be acceptable. In this case, it was one or two months.[110]

In another recent case, the Labor Appeal Court in Qheberha clarified the principles of dealing with cases of alleged sexual harassment in the workplace by an employer.[111] The complainant alleged that she was sexually harassed by her manager with whom she shared an office. This judgment developed three important principles, which are important for employers to take cognizance of.[112]

First, the credibility of evidence regarding the alleged sexual harassment must be proven on a balance of probabilities and not simply be taken for granted (as happened in this case). Second, the credibility of witnesses must be carefully

---

107 *Christian v. Colliers Properties* (C323/2004) [2005] ZALC 56.

108 *SABC Ltd. v. Grogan* (2006) 2 BLLR 207.

109 Israelstam, I. (2023). *Employers cannot ignore sexual harassment*. Labor Guide. https://labourguide.co.za/employment-equity/employers-cannot-ignore-sexual-harassment/

110 *Id.*

111 *Amathole District Municipality v. Commission for Conciliation, Mediation and Arbitration and Others* (PA9/2018) [2022] ZALAC 119; (2023) 44 ILJ 109 (LAC); [2023] 2 BLLR 103 (LAC).

112 Mokoana, T., & Fulton, S. (2022, November 15). *Employers' liability for sexual harassment in the workplace*. Bowmans Law. https://bowmanslaw.com/insights/employment/south-africa-employers-liability-for-sexual-harassment-in-the-workplace/

assessed. In this regard, their demeanor is important, but so too is other evidence regarding the surrounding circumstances. Third, the employer's liability for damages or compensation flowing from sexual harassment in the workplace is not automatic. It has to also be established that the employee reported the alleged harassment and that the employer failed to take steps to protect the employee from such harassment in order for there to be liability.[113]

South African courts regularly endorse targeted employment equity policies, arguing that such policies do not amount to unfair discrimination since their aim is to achieve substantive equality. Yet, South African courts have said little about the duty of employers to dismantle the structural and systemic barriers that encumber the progress and well-being of those who find themselves on the wrong side of any power hierarchy in the workplace. The latter is about more than merely curtailing the bad behaviour of sexist co-workers. It is about changing the workplace rules originally designed in the image of an imaginary middle-class, middle-aged, white man. Rules, for example, that take for granted that their (senior) employees are never the primary caregivers of children. It is about changing the institutional culture of a workplace, including any aspect of that culture that condones or turns a blind eye to the harassment and sexual harassment of employees.[114]

Conclusion

In times of economic and political crisis, the vulnerability of numerous categories of workers increases, which in turn increases their dependence on their employers. In such circumstances, particularly in the absence of an effective legal framework for providing protection against V&H, the workers are exposed to an increased risk of these phenomena at the workplace. It is imperative to emphasize that harassment should be considered not only as a violation of an individual's right to dignity and the OSH regulations but also as a threat to the organization or business. Several studies have demonstrated that V&H at the workplace increases absenteeism and staff turnover, which can result in replacement costs and lost productivity, as well as affect group self-esteem and organizational climate.[115] Therefore, efficient prevention of these phenomena and protection of victims is in the best interests of the state in order to ensure both human welfare and economic development.

Each of the BRICS states addresses the issue of V&H differently; at the present moment, only South Africa has ratified C190, while Brazil has officially committed to

---

113 Mokoana & Fulton, *supra* note 12.

114 *Id.*

115 Cusciano, D. (2020). Acidentes de trabalho no Brasil: história, regulação e judicialização. https://bibliotecadigital.fgv.br/dspace/handle/10438/28832. (In Portugese); Paula, C. de F.N.Q. de, et al. (2021). O assédio moral nas organizações: as consequências dessa prática para a sociedade. *Serviço Social & Sociedade, 142*, 467–487. (In Portugese); Àvila, R.P. de. (2014). As consequências do assédio moral no ambiente de trabalho. http://www.dominiopublico.gov.br/download/teste/arqs/cp067933.pdf. (In Portugese).

do so. Gaps in the regulation exist, as it is demonstrated in this paper, in all of the five BRICS countries studied. Some countries, such as Russia, tend to completely ignore the problem and do not perceive it as a labor law matter, while in China and India, the attention is primarily focused on sexual harassment at the workplace and the protection of women. The authors believe that a greater awareness of the problem, combined with pressure exerted by the various labor organizations and trade unions upon the states to make steps towards the ratification of the C190, might be just the way to raise the standards in all the BRICS countries.

References

Cheo, R. (2017). Migrant workers and workplace bullying in Urban China. *Social Indicators Research, 132*(1), 87–115. https://doi.org/10.1007/s11205-015-1214-0

Cusciano, D. (2020). Acidentes de trabalho no Brasil: história, regulação e judicialização. https://bibliotecadigital.fgv.br/dspace/handle/10438/28832. (In Portugese).

Das, R. (2017). *All you need to know about workplace discrimination laws in India*. IPleaders. https://blog.ipleaders.in/need-know-workplace-discrimination-laws-india/

Golovina, S., Sychenko, E., & Voitkovskaya, I. (2021). Protection from violence and mobbing in work: Challenges and possibilities for Russia and Kazakhstan. *Bulletin of Perm University. Legal Sciences, 53*, 624–647. https://doi.org/10.17072/1995-4190-2021-53-624-647. (In Russian).

Gu, J. (2020). Research on the legal liability of employer in the workplace: Sexual harassment. *Shandong Trade Unions' Tribune, 26*(06), 87–101. (In Chinese).

Hill, T.E., Jr. (2021). *Beyond duty: Kantian ideals of respect, beneficence, and appreciation*. Oxford University Press. https://doi.org/10.1093/oso/9780192845481.001.0001

Jiang, Y., et al. (2021). The dilemma of legal intervention and improvement route to prevent workplace sexual harassment: Based on statistical analysis of 147 related civil litigation cases. *Journal of China Women's University, 33*(6), 40–53. (In Chinese).

Kursova, O. (2014). Protection from mobbing in labor relations: Problems of legal regulation. *Siberian Legal Review, 3*(24), 28–31. (In Russian).

Landman, A., & Ndou, M. (2013). The protection from harassment act and its implications for the workplace. *Contemporary Labour Law, 22*(9), 81–90.

Lima, B.A.A.C., et al. (2014). Reflexões sobre assédio moral: Um estudo à luz da organização pessoense com maior incidência em ações trabalhistas entre 2008 e 2012. *Revista Gestão & Tecnologia, 14*(1), 201–224. (In Portugese).

Lu, H. (2019). Research on the issue of proving cases of sexual harassment in the workplace. *Journal of Chinese Women's Studies, 5*, 80–88. (In Chinese).

Lu, H. (2020). Employer liability for sexual harassment in the workplace: Expanding on Art. 1010 of the Civil Code. *Journal of Chinese Women's Studies, 5*, 87–96. (In Chinese).

McCormack, D., et al. (2009). Workplace bullying and intention to leave among schoolteachers in China: The mediating effect of affective commitment. *Journal of Applied Social Psychology, 39*(9), 2106–2127. https://doi.org/10.1111/j.1559-1816.2009.00518.x

Nunes, G.H.S. (2013). A dificuldade probatória do assédio moral no trabalho. *Repertório IOB de Jurisprudência, 27*(1), 21–25. (In Portugese).

Paula, C. de F.N.Q. de, et al. (2021). O assédio moral nas organizações: as consequências dessa prática para a sociedade. *Serviço Social & Sociedade, 142*, 467–487. https://doi.org/10.1590/0101-6628.260. (In Portugese).

Schaubroeck, J., et al. (2007). Embracing transformational leadership: Team values and the impact of leader behavior on team performance. *Journal of Applied Psychology, 92*(4), 1020–1030. https://doi.org/10.1037/0021-9010.92.4.1020. (In Portugese).

Sychenko, E.V., & Bobovnikova, E.V. (2023). Comparative legal analysis of the application of the principle of respect for the dignity of the employee. *Russian Journal of Labour & Law, 13*, 223–230. https://doi.org/10.21638/spbu32.2023.115. (In Russian).

Tian, X., & Zhang, Y. (2021). Employer's responsibility in sexual harassment in the workplace – Comments on Article 1010 and 1191 of the Civil Code of the People's Republic of China. *Journal of Tianjin University (Social Sciences), 23*(04), 327–333. (In Chinese).

Wang, H. (2022). Legislative and judicial responses to workplace sexual harassment in Mainland China: Progress and drawbacks. *Frontiers in Public Health, 10*, Article 1000488. https://doi.org/10.3389/fpubh.2022.1000488

Wang, L. (2021). Legal regulation on sexual harassment in workplace during the age of the Civil Code. *Law Science, 1*, 133–154. (In Chinese).

Wang, L. (2022). Legislation against sexual harassment in China: Experience and prospects. *Journal of Chinese Women's Studies, 5*. (In Chinese).

Wang, L., & Yu, H. (2022). Relief dilemma of sexual harassment in the workplace and the way out of judgment – Based on judicial case analysis. *Human Rights, 2*, 180–300. (In Chinese).

Zhang, Y. (2022). Research on the anti-sexual harassment duty of organizations and relevant tort liability. *China Legal Science, 3*, 60–81. (In Chinese).

Zheng, M. (2022). On the civil liability of institutions for failing to fulfill obligations to prevent and curb sexual harassment. *Northern Legal Science, 16*(03), 5–16. (In Chinese).

Information about the authors

Elena Sychenko (Saint Petersburg, Russian Federation) – Associate Professor, Law Faculty, Saint Petersburg State University; Associate Researcher (7 22nd Line of Vasilievsky Island, Saint Petersburg, 199106, Russian Federation; e-mail: e.sychenko@spbu.ru).

Irina Chikireva (Tyumen, Russian Federation) – Associate Professor, Department of Civil Law Disciplines, University of Tyumen (38 Lenina St., Tyumen, 625000, Russian Federation; e-mail: i.p.chikireva@utmn.ru).

Rupa Korde (Pune, India) – Assistant Professor, FLAME University (Gat No. 1270, Lavale, Off Pune Bangalore Hwy., Pune, Maharashtra, 412115, India; e-mail: rupa.korde@flame.edu.in).

Aakash Bothra (Bangalore, India) – Researcher, WageIndicator Foundation (Mondriaan Tower, 17th Floor, Amstelplein 36, 1096 BC Amsterdam, Netherlands; e-mail: aakashbothra@wageindicator.org).

Mauro Laruccia (São Paulo, Brazil) – Associate Professor of Business, School of Economics, Business and Accounting, Pontifical Catholic University of São Paulo (710 Capote Valente St., São Paulo, 05409-002, Brazil; e-mail: mauro.laruccia@fundacentro.gov.br).

Dalton Cusciano (Brasília, Brazil) – Associate Professor, Master of Public Policies, Catholic University of Brasília (710 Capote Valente St., São Paulo, 05409-002, Brazil; e-mail: dalton.cusciano@p.ucb.br).

Jiaojiao Wang (Jilin, China) – Lecturer, Jilin University (2699 Qianjin St., Chaoyang, Changchun, Jilin, China; e-mail: halsbury@163.com).

Kabir Nagadia (Pune, India) – Data Analyst, WageIndicator Foundation (Gat No. 1270, Lavale, Off Pune Bangalore Hwy., Pune, Maharashtra, 412115, India; e-mail: rupakorde@wageindicator.org).

Nasima Carrim (Pretoria, South Africa) – Associate Professor, University of Pretoria (South Africa) (Dr. Savage Rd., Prinshof 349-Jr, Pretoria, 0084, South Africa; e-mail: nasima.carrim@up.ac.za).

ARTICLE

The Competition Law Institutions in the BRICS Countries Need Better Enforcement Mechanisms

Narendra Kumar,

University of Allahabad (Uttar Pradesh, India)

https://doi.org/10.21684/2412-2343-2025-12-1-115-139

Received: August 29, 2022
Reviewed: December 9, 2023
Accepted: October 11, 2024

Abstract. This study emphasizes the need for improved enforcement mechanisms within the competition law institutions of the BRICS countries, as these mechanisms play a vital role in ensuring fair competition and preventing anti-competitive behavior in their respective economies. The shifting trend of the digital market invites many challenges in the current enforcement mechanisms, particularly in India. For that purpose, a close examination of the institutional frameworks and enforcement mechanisms of competition law is required. This article starts with a brief introduction, highlighting the significance of the international competition law agenda and the BRICS countries. It also focuses on the evolution of institutional growth and the efforts undertaken by the respective national competition law authorities in the BRICS countries to improve their enforcement process not only during the COVID-19 pandemic but also to meet other upcoming challenges. Further, it examines whether these nations, including India, have adequately developed enforcement mechanisms or if they require more attention in order to effectively regulate. The results of this study reveal that the competition law agencies in BRICS have made tremendous efforts in this area, especially during the COVID-19 pandemic, and highlight a trending change in their enforcement mechanisms onto digital platforms. However, there are certain important areas where these nations need to improve their institutional framework, regulatory mechanisms, enforcement process, and other aspects. In the end, the author suggests some recommendations for policy-making and future implementations.

Keywords: BRICS; COVID-19; pandemic; competition law; enforcement mechanisms; antitrust; market dynamics; regulatory institutions.

To cite: Kumar, N. (2025). The Competition Law Institutions in the BRICS Countries Need Better Enforcement Mechanisms. *BRICS Law Journal*, *12*(1), 115–139.

Table of Contents

1. Introduction: The International Competition Law Agenda and the BRICS Countries

The idea of "BRIC"[1] (Brazil, Russia, India, and China) was first coined by economist "Goldman Sachs" in 2001 for the economic development of these emerging economies.[2] However, even prior to this, "the Doha Round of World Trade Organization" negotiations had a task agenda to predict the need for global competition laws, but the idea was postponed. Subsequently, due to its growing nature, South Africa also joined this group in 2009, and it became "BRICS."[3] Today, this group represents

[1] Jensen, T.H., & Larsen, J.A.K. (2004). The BRIC Countries. *Danmarks National Bank Monetary Review*, *39*(4), 39–54.

[2] O'Neill, J. (2001). *Building Better Global Economic BRICs*. Goldman Sachs. https://www.goldmansachs.com/pdfs/insights/archive/archive-pdfs/build-better-brics.pdf

[3] Thakur, R. (2014). How Representative Are BRICS? *Third World Quarterly*, *35*(10), 1791–1808.

a significant contribution to the world population, GDP, global currency reserves, and world trade, accounting for approximately 40, 24, 40, and 16 percent, respectively.[4] These nations are ranked in the top ten major economies, with China in second place, India in fourth place, and Russia and Brazil in sixth and seventh places. Following the financial crisis of 2007, this group of nations contributed nearly half of the all-inclusive financial growth. This shows a shifting trend of the world economy towards the BRICS countries, which are also capturing major market shares at the global level. To further advance this achievement, recently, on November 17, 2020, Russia organized the 12th BRICS Summit with the theme "Global Stability, Shared Security, and Innovative Development" focusing on intra-BRICS cooperation and key global issues including multilateral structure reform, measures to mitigate the risk of the ongoing COVID-19 pandemic, counter-terrorism cooperation, trade, health, energy, and people-to-people exchanges.[5] Moreover, the upcoming 13th BRICS summit will be hosted by India for the third time, following 2012 and 2016, under the theme of "BRICS@15: Intra-BRICS Cooperation for Continuity, Consolidation, and Consensus" on the occasion of its 15th anniversary.[6] To support this initiative, the International Competition Conference (ICC) also offers a strong platform for emerging economies and emerging nations to share information for the analysis of competition law and policy. The rationale behind hosting the ICC is to provide an opportunity for the allocation of resources, ideas, and areas for potential collaboration and cooperation in the field of competition law. In November 2019, the 6th "BRICS ICC" under the theme "10 Years of Cooperation between the BRICS Competition Authorities: Results and Prospects" was organized by Russia, following Brazil, South Africa, India, and China.[7] As a result, the concepts of "universal proliferation" and "global convergence" more accurately characterize the emerging global environment of competition law regimes. With the rise of BRICS against this scenario as a global economic and political collaboration, China and South Africa also gained significant attention. The BRICS countries do not share the same language or any particular, common cultural, economic, political, or social history. Nonetheless, despite their differences, the significance of economic policies in such large, globalized economies has encouraged considerable collaboration and the sharing of experiences.[8]

---

4 BRICS India. (2021). *Evolution of BRICS*. https://brics2021.gov.in/about-brics

5 Ministry of External Affairs, Government of India. (2022). Mea: Statements: Press Releases. https://www.mea.gov.in/press-releases.htm?51%2FPress_Releases

6 Ministry of External Affairs, Government of India. (2021). *BRICS Acts as a Vital Pillar of Hope for This World Full of Political Challenges Safety Related Challenges and Economic Challenges*. BRICS India 2021. https://brics202.gov.in/

7 BRICS India. (2021). *About BRICS*. https://brics2021.gov.in/13th-summit

8 Svetlicinii, A., & Zhang, J.-J. (2017). The Competition Law Institutions in the BRICS Countries: Developing Better Institutional Models for the Protection of Market Competition. *Chinese Political Science Review*, *2*, 85–100.

In addition, the national competition law authorities of the BRICS countries prohibit any agreement or concerted act with the effect of impeding competition by following the wording of Article 101(1) of the Treaty on European Union Functioning (TFEU); additionally, Article 103 of the TFEU addresses general prohibition on matters of a serious nature, such as price fixing.[9] However, even though legislators and authorities in the BRICS countries have made significant progress in areas such as cooperation, trade, banking, green investments etc., the antitrust enforcement process in the majority of these economies is still in its infancy.

1.1. Literature Review

The significance of analyzing the experiences of the BRICS countries in competition law was first emphasized by American antitrust scholar William Kovacic, who said,

> They offer older and younger competition regimes a way to explore key issues about the institutional foundations for better functioning, the life cycle of competition regimes, and effective measurement.

While academics in antitrust law have primarily focused on the regional competition environments of the BRICS nations,[10] experts also have been examining the best practices in the BRICS countries to evaluate their enforcement process. These experts have noticed that the rapid growth of these countries invites numerous challenges in dealing with the digital market,[11] data protection, cryptocurrency, and artificial intelligence (AI), etc., all of which this group is ineffective in dealing with owing to their various stages of development.[12] While the BRICS group has made significant strides regarding the provision of effective governance systems in terms of competition enforcement, new competition law regimes, in general, have often received little attention. Additionally, experts have studied the institutional design and procedural strategies used by "National Competition Authorities" (NCA) around the world, like the Global Administrative Law (GAL) project. This was further led by a study of comparative analysis pertaining to antitrust legislation, formal schemes, due process, and the right to defense.[13] Furthermore, the transformation of competition law enforcement, institutional design, indicators for competition law and policy, cartelization, antitrust, compulsory licensing, etc., is also noted in an effort to meet upcoming challenges

---

9 Afrika, S.-L., & Bachmann, S.-D. (2011). Cartel Regulation in Three Emerging BRICS Economies: Cartel and Competition Politics in South Africa, Brazil, and India – A Comparative Overview. *The International Lawyer*, *45*(4), 975–1003.

10 Emch, A., et al. (Eds.). (2012). *Competition Law in the BRICS Countries*. Wolters Kluwer. https://yust.ru/img/uploaded/news/news_2012_11_15.pdf

11 Singh, J., & Kumar, N. (2020). Issues pertaining to growth of digital economy: An arduous challenge before CCI. *Journal of Public Affairs, 20*(4). https://onlinelibrarywiley.com/doi/abs/10.1002/pa.2301

12 Kumar, N. (2022). A Critique of India's Regulatory Framework for Cryptocurrency and Competition Law. *International Journal of Law and Policy Review*, *11*(2), 86–116.

13 Trebilcock, M.J., & Iacobucci, E.M. (2002). Designing Competition Law Institutions. *World Competition*, *25*(3), 361–394.

in the BRICS nations and other developing countries.[14] The group also has a wealth of experience in dealing with various social, economic, and political issues (as per the BRICS Mechanism Development Strategy Report, 2017) and digitalization, which have all emerged as major issues before the governing authorities of the BRICS countries. Recently, these authorities identified the vital role of competition policy and regulation in securing consumers' interests and helping companies during the COVID-19 pandemic, as well as optimally overcoming the pandemic's consequences of economic crises following the COVID-19 pandemic. The cooperation among the authorities of the BRICS member states and the exchange of developing competition policies are valued for their potential to revive economic sectors.[15] This has resulted in the extension of the "BRICS Memorandum of Understanding on Cooperation in the Area of Competition Law and Policy" for an indefinite duration. Furthermore, the importance of effective regulation of the excessive pricing of goods and services has been shown to ensure a competitive price for the consumer.[16] Moreover, the significance of intergovernmental relations in shaping the responses of the BRICS countries during this critical period is equally substantial.[17] It has been proved that mutual respect, cooperation, and balance of interest among the BRICS member countries have significantly helped in transforming the global economic status of the West with regard to this group.[18] This has consequently affected each nation's political and regulatory systems as well as the connection between their institutional framework and the associated environmental uncertainty,[19] necessitating a strong international financial system with global governance to deal with such issues.[20] Numerous studies exist on BRICS Competition Law, digital markets, data protection, cryptocurrency, artificial intelligence (AI), etc.; however, the author found that there is no study that focuses on the comparative analysis of the institutional framework, the enforcement

---

14 Jenny, F., & Katsoulacos, Y. (Eds.). (2016). *Competition Law Enforcement in the BRICS and in Developing Countries: Legal and Economic Aspects*. Springer.

15 Ninds Dir Itbp. *Standard Operating Procedure (SOP) BRICS System Design Document (CCI)*. https://fitbir.nih.gov/sites/default/files/BRICS_Design_Document_SOP.pdf

16 Boshoff, W.H. (2020, June). *South African competition policy on excessive pricing and its relation to price gouging during the Covid-19 disaster period.* https://blogs.sun.ac.za/ccle/files/2020/06/merged.pdf

17 de Oliveira, P., et al. (2021). The role of intergovernmental relations in response to a wicked problem: An analysis of the COVID-19 crisis in the BRICS countries. *Revista de Administração Pública, 55*(1). https://www.scielo.br/j/rap/a/GcWQGsn9QZwKHLHB8D6DgWf/

18 Konyshev, V., & Sergunin, A. (2022). Theoretical Perspectives on BRICS: What Kind of an International Institution Is It? In M. Lebedeva & V. Morozov (Eds.), *Turning Points of World Transformation: New Trends, Challenges and Actors* (pp. 101–115). Palgrave Macmillan.

19 Hitt, M.A., et al. (2021). The (COVID-19) pandemic and the new world (dis)order. *Journal of World Business*, *56*(4). https://ideas.repec.org/a/eee/worbus/v56y2021i4s1090951621000225.html

20 Kubayi, J.M.N. (2022). BRICS, Structural Power and the BRICS Bank as a Potentially Progressive Instrument for a Passive Revolution. In S. Zondi (Ed.), *The Political Economy of Intra-BRICS Cooperation* (pp. 39–59). Palgrave Macmillian.

mechanism during the COVID-19 pandemic, and the forthcoming challenges, which are highly predicted to influence the enforcement agencies, particularly in India.

2. The Evolution of Competition Law Institutions in the BRICS Countries

2.1. Brazil

The Administrative Council for Economic Defense (CADE) is an autonomous body that reports to the Ministry of Justice and is based in Brasilia. Initially, it was in charge of observing the enterprise's economic supervision and accounting arrangements. Later, it was shaped by Law No. 4,137/62.[21] In order to improve its efficiency, this law established three sub-bodies in addition to CADE, namely the Secretariat for Economic Law SDE) as a Ministry of Justice body and the Secretariat for Economic Monitoring (SEAE) as a Ministry of Finance body. As a result, the Brazilian Competition Defense System (SBDC) was changed into an autonomous agency reporting to the Ministry of Justice under the regime of Law No. 8,884/94. After considering various changes, the new Brazilian Competition Law (i.e. Law No. 12,529/11) came into effect in May 2012, having jurisdiction over the entire country and carrying out the legal duties assigned to it. The preamble also ensures healthy competition and preventive measures against economic disorder. This law is divided into nine titles and 128 articles, which are further separated into various chapters to cover all relevant aspects, including anti-competitive agreements, cartels, abuse of dominant position, mergers, and combinations, and are provided in Articles 36, 37, 38, Articles 31 to 35, and Articles 88 to 92, respectively. Currently, CADE is accountable for the instruction of executive measures concerning violations of the commercial order as well as the assessment of mergers under the new law.[22]

2.2. Russia

The State Committee of the Russian Soviet Socialist Federative Republic for Antimonopoly Policy and Support, which preceded the Federal Antimonopoly Service (FAS), was formed on July 14, 1990. Subsequently, the committee of 150 members approved the resolution of New Economic Structures No. 344 on September 10, 1990, which called for an anti-monopoly policy. Finally, the FAS (as per the decree of the Russian government on December 25, 2014, No. 1489) was given the function of controlling the state defense order.[23] The existing antitrust law in Russia is Federal Law No. 135-FZ of July 26, which came into force on July 14, 2006. The preamble also ensures a common market free trade zone, freedom of economic activities, protection

---

21 Barros, M.A.L.L. de. (2018). Brazilian Administrative Council for Economic Defense: An Approach from Sociology and History. *University of Bologna Law Review*, *2*(2), 114–148.

22 Podolny, J. (2009). The Buck Stops (and Starts) at Business School. *Harvard Business Review, 87*(6), 62–67.

23 Federal Antimonopoly Service of the Russian Federation. http://en.fas.gov.ru/about/our-history.html

of competition, and the efficient functioning of markets. The Act contains ten chapters and 54 articles in which key concepts like anti-competitive agreements, cartels, abuse of dominant position, and mergers and combinations are covered under Articles 11, 12, 14, 11, 10, Articles 26 to 35, and Articles 36 to 38, respectively. Furthermore, the provisions dealing with penalties are covered under chapters 8 and 9 of the Act.[24]

2.3. India

The relevance of the competitive market can be traced back to "Kautilya's Arthashastra," which influenced the Indian Constitution by incorporating significant clauses, including the preamble, which emphasizes justice, i.e. social, economic, and political. In addition, Part IV (i.e. Directive Principles of State Policy) under Articles 38 and 39 (b) and (c) states that:

> "(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic, and political, shall inform all the institutions of the national life.
> (2) The State shall, in particular, strive to minimize the inequalities in income, and endeavor to eliminate inequalities in status, facilities, and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations."

And Article 39 (b) (c) states that

> "(b) That the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
> (c) That the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;"

The essence of its basic concept can also be seen in the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act, 1969) and the existing antitrust law (i.e. the Competition Act, 2002).[25] Due to the lack of certain provisions and inefficiency of the MRTP Act, 1969, an idea was initiated through "the Budget Speech of the Finance Minister" (1999–2000). It emphasized the need to shift from the MRTP Act to a New Competition Law (i.e. the Competition Act, 2002). Successively, it was enacted with certain objectives, including the constitution of the Competition Commission of India (CCI), prevention of "Appreciable Adverse Effect on Competition" (AAEC), promotion of competition, and freedom of trade and consumer protection.[26] This Act contains nine chapters and 66 sections to deal with the various dimensions of

---

[24] Federal Law No. 135-FZ of July, 26 2006 "On Protection of Competition". WIPO. https://www.wipo.int/edocs/lexdocs/laws/en/ru/ru077en.pdf

[25] Pandey, A., & Trichnopoly, Sh. (2019). Heavy Entry Barriers: A Boom or a Bane? An Examination of the Competition Law Policy in India in Light of the National Competition Policy, 2011. *Supremo Amicus, 12*, 10.

[26] Bhattacharjea, A., et al. (2019). Competition Law and Competition Policy in India: How the Competition Commission Has Dealt with Anticompetitive Restraints by Government Entities. *Review of Industrial Organizations*, *54*, 221–250.

competition law. Sections 3, 4, 5, 6, and 49 include the important clauses about anti-competitive agreements, misuse of dominant positions, mergers and combinations, and competition advocacy.[27] The penalties are covered under sections 42 to 48 of Chapter 6 of the Act. Section 46 of the Act, and the Competition Commission of India (Lesser Penalty) Regulations, 2009 contains provisions dealing with the leniency program.[28] Moreover, due to the high growth of technology and recent trends in the market system, the Competition Law Review Committee was established by the Ministry of Corporate Affairs (MCA) to ensure effective implementation and meet the needs of strong economic fundamentals.[29] Subsequently, on October 31, 2018, this committee, which included distinguished authorities Dr. M.S. Sahoo, Dr. S. Chakravarthy, Prof. Aditya Bhattacharjee, and Dr. Harsha Vardhana Singh, started working with a working group on various issues, including regulatory structure, substantive issues, advocacy and advisory functions of the commission, new-age markets, big data, etc. This expert group took into consideration public comments, suggestions, and international practices before submitting the report of this study. The report is divided into ten chapters and four appendices.[30] As a result, a Competition (Amendment) Bill, 2020 was drafted to implement changes to the existing law for which public comments were also invited.[31] The key changes suggested by Bill 2022 include settlement and commitments; power to review jurisdiction and threshold; the definition of control; structural changes; enforcement functions; deal value threshold; the appointment of the DG; penalty for certain offences; etc.[32] all of which demonstrates the dynamic efforts taken by the concerned authorities.[33] Accordingly, it is incorporated in the Competition (Amendment) Act 2023; however, it appears that there are some areas where it still requires some modifications, such as data protection, cryptocurrency, the impact of BRICS expansion on the market and its conditions, artificial intelligence, and others.

27 Ninds Dir, *supra* note 15.

28 Bhattacharjea et al., 2019.

29 Ministry of Corporate Affairs, Government of India. (2019, July). *Report of Competition Law Review Committee*. https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf

30 *Id.*

31 Competition Commission of India. (2020). *Invitation for Public Comments on the Competition (Amendment) Bill, 2020*. https://www.cci.gov.in/sites/default/files/whats_newdocument/bill.pdf

32 AZB Partners. (2020, February 28). *Summary of the Key Changes in the (Draft) Competition (Amendment) Bill 2020*. https://www.azbpartners.com/bank/summary-of-key-changes-in-the-competition-amendment-bill-2020/

33 Dhir, S., et al. (2022, August 19). *India: Competition Amendment Bill, 2022: Key Changes to the Competition Act, 2002*. Mondaq. https://www.mondaq.com/Article/1223256

2.4. China

The People's Republic of China has been designated a command economy rather than a market economy.[34] Due to economic changes in 1978 and 1992, the reform process was initiated in 1993 by amending the Constitution along with Article 15, which is focused on the socialist market economy. Since then, it has been working to alter itself into a republic with laws that are harmonious with the universal market in order to complete the experiment of forming such a market economy. In 1993, China enacted a law against unfair competition.[35] Following several discussions, it finally adopted the Anti-Monopoly Law (AML) on August 30, 2007, marking a significant milestone in enforcing competition law practices for the continued growth of the market economy.[36] All of the significant elements of a well-established antitrust law, such as the doctrine of domestic effect, consent decree, leniency program, exemptions for certain agreements, factors for determining the dominant position, and presumption regarding economic strength, etc. were also noted to have been incorporated into the creation of China's AML. The AML contains seven chapters and 58 articles, in which Article 1 under Chapter 1 focuses upon the purpose of this Act, including the prevention of unfair business practices and the protection of the consumer as well as the public interest.[37] It also eliminates such practices that are regarded as having adverse effects on competition in the domestic market.[38] Under chapters 2, 3, and 4, the Chinese AML primarily focuses on three areas, namely the prohibition of monopoly agreements, the abuse of dominant market positions, and merger and combination control. The first part deals with Article 13, which outlines the list of prohibited agreements that separate horizontal and vertical agreements. As a result, competing undertakings are prohibited from concluding agreements on the fixing or changing of product prices; restricting production; allocating markets; restricting the development of new technology; joint boycotting transactions; and some other agreements as determined by the AML enforcement agency. On the other hand, Article 14 focuses on vertical agreements, including resale price fixing, restrictions on resale price maintenance, as well as other agreements.[39] The list of exempted agreements is covered under Article 15 and Article 81(3)

---

[34] Leaf, M. (1998). Urban Planning and Urban Reality under Chinese Economic Reforms. *Journal of planning Education and Research, 18*(2), 145–153.

[35] Yu, T. (1993). An Anti-Unfair Competition Law without a Core: An Introductory Comparison between US Antitrust Law and the New Law of the People's Republic of China. *Indiana International and Competition Law Review*, *4*, 315.

[36] Wang, X. (2008). Highlights of China's New Anti-Monopoly Law. *Antitrust Law Journal, 75*(1), 133–150.

[37] Ministry of Commerce, People's Republic of China. (2007, August 30). *Anti-Monopoly Law of the People's Republic of China*. https://www.icao.int/sustainability/Documents/ Compendium Fair Competition /China/Anti-monopoly-Law_China.pdf

[38] Anti-Monopoly Law, China. WIPO. https://www.wipo.int/edocs/lexdocs/laws/en/cn/cn099en.pdf

[39] Bu, Q. (2015). China's Dual Enforcement System regarding Resale Price Maintenance Agreements. *World Competition*, *38*(2), 235–252.

of the European Community Treaty (EC Treaty). The second section deals with Article 17 in Chapter 3, which outlines the prohibited practices relating to the abuse of dominant position. Additionally, paragraph 2 deals with regulations relating to dominant market positions held by business players. Article 18 lists the six factors that are used to determining a dominant market position while Article 19 focuses upon the presumption of holding a dominant market position based on market shares. The third part emphasizes mergers and acquisitions in which Article 20 defines transactions relating to mergers and combinations and also states that such transactions are required to be reported along with the required documents to the relevant authority under Articles 21 and 23 respectively. The reviewing process for such transactions is provided under Articles 25 and 26 of the Act. Further, the assessment factors are also provided under Articles 27 and 28, which places restrictions on such transactions if they restrict market competition. The provisions relating to national security are covered under Article 31.[40] And, chapters 5, 6, and 7 address the misuse of administrative power to remove competition, the examination of alleged anticompetitive conduct, and legitimate responsibilities. This act appears to be quite effective; however, due to the COVID-19 pandemic, various major social and economic changes have been witnessed, which have had a great impact on competition in the market. This has resulted in the Chinese government articulating some modifications in antitrust laws for the future, including draft amendments to the AML, guidelines pertaining to the automobile industry, intellectual property rights (IP), leniency provisions, commitments, platform regulations, and Active Pharmaceutical Ingredients (API). In addition, the State Administration for Market Regulation (SAMR) has provided antitrust acquiescence plans for companies to institute superficial compliance structures.[41] In 2021, it was also observed that the authorities once again focused upon eight major areas for the further "Strengthening of Antitrust Law Enforcement."[42]

2.5. South Africa

South Africa was the first of the BRICS countries to create a national competition law system, namely the Regulation of Monopolistic Conditions Act, 1955.[43] Previously, the Board of Trade and Industry was accountable for examining misconduct, proposing solutions, and negotiating and overseeing enforcement. However, on the other hand, it lacked autonomous powers of inquiry and relief. Thereafter, the Minister of Trade and Industry was in charge of making the decisions, but its remedies were also limited (for

---

40 Wang, X. (2014). *The Evolution of China's Anti-Monopoly Law*. Edward Elgar Publishing.

41 Zhang, A.H. (2022). Agility over Stability: China's Great Reversal in Regulating the Platform Economy. *Harvard International Law Journal, 63*(2), 1–60.

42 Lexology. (2021, February 18). *Year 2020 in Review: A New Wave of China's Anti-Monopoly Law*. https://www.lexology.com/library/detail.aspx?g=8d2de32e-1403-4058-bdc8-314966895495

43 Handler, M. (1976). The American Antitrust Experience and its Relationship to the Regulation of Monopolistic Conditions in South Africa. *Comparative and International Law Journal of Southern Africa, 9*(3), 336–345.

e.g., the authority to order a directive to withdraw from a precautionary arrangement). In 1979, the Maintenance and Promotion of Competition Act was passed, and it established the competition board, which was appointed by the Minister of Trade and Industry and had independent investigative powers. Further on, The Competition Act 89 of 1998, South Africa's third competition legislation,[44] was enacted in 1998 and subsequently updated in 2009. The Competition Commission, the Competition Tribunal, and the Competition Appeal Court were all named as its authorities actively involved in the enforcement process. The Competition Act 89 deals with the establishment of the competition commission, which is accountable for controlling unfair business practices in the market. The Act is divided into eight chapters by incorporating 84 sections and three schedules. The preamble also focuses on the responsibility and accountability of the commission and appellate tribunal by preventing restrictive practices, abuse of dominant position, and any merger-related transactions.[45] More recently, the Competition Amendment Act of 2018 came into existence to improve the determining factors for unfair practices, abuses of dominant position, price discrimination, strengthening the penalty systems, exclusion provisions, merger processes, and encouraging the growth of small and medium businesses, etc.[46]

3. The National Competition Law Authorities in the BRICS Countries

The national competition authorities are responsible for decision-making within their respective jurisdictions. To ensure their effectiveness, there are some unique models that have been identified, such as the bifurcated judicial model, the bifurcated agency model, and the integrated agency model. The first model mainly focuses on the investigative powers and compliance of the cases before courts, along with rights of appeal to appellate courts. The second model deals with investigative powers and is essential for passing regulation cases to the relevant expert competition adjudicative agencies with appellate rights. The third model highlights both exploratory and adjudicative purposes, with the right to plea to specific appellate authorities. In addition, the national competition enforcement institutional schemes are categorized based on numerous elements, such as independence, which empowers the "Stand-Alone Agency" to be distinguished from "Subsidiary Agency Models". The former aims mainly to establish a distinct identity that can ensure the adaption to changing conditions without the need to manage strategies through additional units inside the organization, while the latter focuses

---

44 Hartzenberg, T. (2005). Competition Policy and Practice in South Africa: Promoting Competition for Development. *New Journal of International Law and Business*, *26*, 667.

45 Competition Act No. 89 of 1998. Shepstone & Wylie. https://www.wylie.co.za/wp-content/uploads/Competition-Act-No.-89-OF-1998.pdf

46 Contribution Tribunal, South Africa. Government Gazette: Republic of South Africa. https://www.comptrib.co.za/Content/Documents/Competition

upon a competition control body that is part of a larger organization.[47] Each doctrine and agency model plays an important role in the implementation of competition laws and policies for a healthy business environment. The significance of the NCA of each of the BRICS countries can be examined by referring to the institutional design and their respective capacity to deal with the enforcement process, as detailed in the subsequent paragraphs below.

The NCA of Brazil consists of the Administrative Tribunal for Economic Defense (including the President and Commissioners), the General Superintendence (including the Deputy Superintendent), and the Department of Economic Studies (including the Chief Economist), which make up CADE.[48] The CADE's Legal Office and the Management Office (including the Managing Director) also assist in achieving institutional objectives.[49] The President appoints the General Superintendent after approval from the Federal Senate for two years, and their removal also takes place at the request of the President as determined by law. In order to improve its economic strength, CADE, along with its mechanisms has access to a number of financial resources, including procedural fees, the remuneration for facilities, the capital generated by contributions and allowances, real estate and personal property, the sale of information records, the proceeds from tenders from the economic market, and any other additional revenue such as fines and penalty fees.

In Russia, the Federal Antimonopoly Service (FAS) was founded in May 2004 with a strong position since it combines the functions of a ministry and a service.[50] Its leader is appointed by a government decree and is accountable to the Prime Minister, the Deputy Prime Minister in charge of the subject area, and the entire government. As a high-ranking official, the FAS has the authority to comment on all proposed legislation and measures, as well as participate in policymaking. It also promotes and protects competition through its participative nature. Furthermore, this enforcement body has central offices as well as territorial branches, the latter of which are not readily influenced by local governments owing to their independence in terms of staff and funds. The FAS organization consists primarily of a head, deputy heads, and several divisions for fuel-energy control and supervision, transportation control and supervision, real estate control and supervision, local monopolies and communal services control and supervision, industry, and so on.[51] Along with 75 regional offices, the administration, legal, and information protection departments altogether play important roles.[52]

---

47 Jenny & Katsoulacos, 2016.

48 Administrative Council for Economic Defense – CADE. Govt.br. https://www.gov.br/cade/en/access-to-information/about-us

49 CADE: Structure. Govt.br. http://en.cade.gov.br/about-us/structure

50 Organizational Structure of the FAS, Russian Federation. APECCP. https://www.apeccp.org.tw/htdocs/doc/Russia/Organization/ruorg01.html

51 *Id.*

52 Federal Antimonopoly Service of Russia. http://en.fas.gov.ru/

The NCA of India (i.e. the CCI) consists of a chairperson and other (two to six) commissioners who are appointed by the Central Government. Since the financial assistance comes from the Central Government, the CCI is accountable for sending its budget plan and financial report to this governing body as required. Furthermore, the enforcement of competition law is also dependent upon various other authorities, including the Director General (DG) (who is in charge of investigations), the Chief Metropolitan Magistrate (CMM) (who authorizes the DG to conduct unannounced raids), the Tax Recovery Officer (responsible for the recovery of penalties imposed under the Act), the Civil Courts (tasked with the execution of orders), the Competition Appellate Tribunal (which hears appeals), and the Central Government (who provides policy directions). Therefore, the necessity to execute collectively is entirely to prevent the creation of India as an anti-competitive country.[53]

In China, the National People's Congress appoints the heads of the Ministry of Commerce (MOFCOM), the National Development and Reform Commission (NDRC), and the State Administration for Industry and Commerce (SAIC) who are all tasked with overseeing the various competition regulations.[54] The MOFCOM is in charge of assessing mergers and acquisitions (M&A) as well as other forms of potential market concentrations. It has the authority to approve or disapprove these transactions, with or without conditions. The NDRC is in charge of regulating behavioral pricing, which includes company pricing practices inquiries, price-related elements of monopoly agreements, and companies' misuse of dominant market positions to set or regulate prices. The SAIC is in charge of investigating monopolistic practices that are not related to prices, such as monopoly deals, violations of market power, and monopoly control.[55] In addition, the State Administration for Market Regulation (SAMR) oversees the merger notifications while the Anti-Monopoly Bureau (AMB) is responsible for the regulatory review of mergers. Furthermore, the Provincial Market Regulation Department (PMRD) is responsible for investigating cartels, abuses of market dominance, and governmental monopoly behavior.[56]

In South Africa, the Competition Commission is autonomous and subject to the constitution under the Act (i.e. the Competition Act, No. 89 of 1998). To achieve the specified objectives, the commission is primarily funded by a variety of sources, including funds from the parliament, fees payable to the commission, income derived from investments, and funds received from various other sources. The Commission is one of three independent legislative agencies created to regulate market

---

53 Basant, R., & Morris, S. (2000). Competition Policy in India: Issues for a Globalising Economy. *Economic and Political Weekly*, *35*(31), 2735–2747.

54 Svetlicinii & Zhang, 2017.

55 The US China Business Council. (2014). *Competition Policy and Enforcement in China*. https://www.uschina.org/reports/competition-policy-and-enforcement-china

56 Global Legal Group. (2020). *Merger Control 2021: Laws and Regulations: China: ICLG International Comparative Legal Guides International Business Reports*. https://iclg.com/practice–areas/merger-control-laws-and-regulations/china

competition under the Competition Act, No. 89 of 1998. The Competition Tribunal and the Competition Appeal Court (CAC) are the other bodies that play a significant role in enforcement mechanisms. Furthermore, the commission and tribunal are administratively responsible to the Economic Development Department (EDD), whereas the CAC is part of the judiciary; each of these entities acts independently of the other and of the state.[57]

4. The National Competition Law Enforcement Process in BRICS Countries: A Bird's Eye View

This study on the National Competition Law Enforcement Processes in the BRICS countries examines how the antitrust and competition law enforcement mechanisms work in each of their jurisdictions.[58] The study discusses the similarities and differences between the countries' procedures and what companies can expect if they are facing antitrust investigations in any of the five nations.

In Brazil, the Brazilian National Competition Law Enforcement Agency (CADE) is the administrative body responsible for enforcing the country's competition laws. CADE is a part of the Ministry of Justice and is headquartered in Brasilia.[59] The agency is responsible for investigating and prosecuting anticompetitive practices, such as price-fixing, bid-rigging, and market allocation agreements. It has the power to impose fines on companies and individuals found to violate the competition laws. Its investigative process is conducted in two stages, namely the initial investigation and the formal investigation. The initial investigation is conducted by CADE's Secretariat General, which gathers information and evidence to determine whether there are sufficient grounds to open a formal investigation. If the Secretariat General finds enough evidence of wrongdoing, it will open a formal investigation and refer the case to CADE's Tribunal for adjudication. The formal investigation is conducted by CADE's specialized chamber, which is composed of seven members: three from CADE's Tribunal, two from the Ministry of Justice, and two from the Ministry of Economics. This specialized chamber examines the evidence, hears testimony from witnesses, and makes a final determination about whether or not there has been a violation of the law.

In Russia, the competition law enforcement process is conducted by the Federal Antimonopoly Service.[60] It is responsible for investigating and prosecuting violations

---

57 National Government of South Africa. (2019). *Overview of the Competition Commission of South Africa*. https://www.compcom.co.za/about-us-2/

58 Golovanova, S., & Pontual Ribeiro, E. (2021). Multisided Platform Analysis and Competition Law Enforcement Practice in BRICS Countries. *Journal of Competition Law & Economics*, *18*(3), 730–769.

59 Todorov, F.R., & Filho, M.M.T. (2012). History of Competition Policy in Brazil: 1930–2010. *The Antitrust Bulletin*, *57*(2), 207–257.

60 Avdasheva, S., et al. (2019). The Role of Judicial Review in Developing Evidentiary Standards: The Example of Market Analysis in Russian Competition Law Enforcement. *International Review of Law and Economics*, *58*, 101–114.

of the Russian competition law. It has a wide range of investigatory powers, including the authority to conduct on-site inspections, mandate the submission of documents, and interview witnesses. Its investigations are often initiated in response to complaints filed by businesses or individuals. Complaints can also be filed anonymously, and there is no fee for filing a complaint. Once a complaint is filed, the FAS decides whether to open an investigation or not. If the FAS decides to open an investigation, it notifies the parties involved and allows them to present their side of the story.[61] It then gathers evidence and analyzes it to determine whether there has been a violation of the competition law. If it finds that a violation has occurred, it will issue a decision ordering the parties to cease the illegal conduct and may impose fines. The decisions taken by the FAS can be appealed to an appellate court. The Russian process is effectively designed to protect businesses and consumers from unfair competition practices, if you believe you have been the victim of unfair competition.

The National Competition Law Enforcement Process in India entails the government's involvement in investigating and penalizing companies that engage in anti-competitive practices.[62] The process is overseen by the Competition Commission of India, which is the country's primary competition authority.[63] The CCI is empowered to investigate complaints of anti-competitive behavior and can impose fines on companies found to be engaging in such behavior. It can also order companies to cease their anti-competitive practices. In addition to complaints filed with the CCI, the Indian government may also commence an investigation on its own initiative. Investigations by the CCI are conducted by a team of investigators, who gather evidence and interview witnesses. The team then presents its findings to the CCI, which decides whether or not to take action against the company. If the CCI finds that a company has engaged in anti-competitive behavior, it can impose a fine of up to ten percent of the company's turnover.[64] Similar to Russia, the CCI's decisions can be appealed to the National Company Law Appellate Tribunal.[65] The appellate tribunal can confirm, modify, or set aside the decision taken by the commission.[66]

---

[61] Avdasheva, S., et al. (2016). Economic Analysis in Competition Law Enforcement in Russia: Empirical Evidence Based on Data of Judicial Reviews. In Jenny & Katsoulacos, 2016 (pp. 263–287).

[62] Malhotra, D. (2012, January). *Study on Government Procurement*. Competition Commission of India. https://sps.iitd.ac.in/PDF/SGP.pdf

[63] Parsheera, S. (2018). Challenges of Competition and Regulation in the Telecom Sector. *Economic & Political Weekly*, *53*(38), 45–52.

[64] Majumdar, P.K. (2014). Penalising Anti-Competitive Agreements and Abuse of Dominance. *NUJS Law Review*, *7*(3-4), 225.

[65] Sultania, N., & Jain, P. (2020). COMPAT to NCLAT: Aftermath of the Merger. *Supremo Amicus*, *15*, 222.

[66] Singh, M. (2022). Licensing of SEPs in an Implementer-Oriented Economy: Challenges from an Indian Perspective. In Singh, M. *Standard-Setting Organisations' IPR Policies: Intellectual Property and Competition Issues* (pp. 159–184). Springer.

The National Competition Law of China (NCL) was enacted in 2007[67] and came into effect on August 1, 2008. The NCL is the first comprehensive competition law in China and prohibits anticompetitive agreements, abuse of market dominance, and monopolistic practices. It also regulates mergers and acquisitions that may affect competition in the relevant markets. The National Development and Reform Commission (NDRC) is the primary antitrust enforcement agency in China.[68] The State Administration for Industry and Commerce (SAIC) is another important antitrust enforcement agency in China.[69] The two agencies share concurrent jurisdiction over antitrust matters. The NDRC and the SAIC have been actively enforcing the NCL since its inception.[70] They have imposed heavy fines on companies found to violate the NCL and have taken various other corrective actions such as ordering companies to cease their illegal conduct or divest assets or both. The NDRC has a dedicated Antitrust Enforcement Bureau, which is responsible for investigating and prosecuting antitrust violations. The SAIC also has an Antitrust Enforcement Bureau, which is responsible for investigating and prosecuting antitrust violations. Both agencies have issued numerous decisions against companies found to violate the NCL.

In South Africa, competition law is primarily enforced by the Competition Commission and Competition Tribunal, which prohibits various forms of anti-competitive conduct, including price fixing, market division, bid rigging, and abuse of dominant market position. In addition, the National Competition Law (NCL) is responsible for investigating and prosecuting cartel conduct.[71] The NCL is led by the Competition Commission, which is an independent statutory body responsible for investigating complaints, conducting hearings, and imposing sanctions.[72] The NCL process is enforced by the Competition Tribunal, which hears appeals from decisions made by the Commission. The NCL has been successful in prosecuting several high-profile cartel cases in recent years. These cases have involved cartels in a variety of industries,

---

67 Ross, L., & Ratliff, J. (2007, September 5). *China Enacts National Competition Law*. WilmerHale. https://www.wilmerhale.com/en/insights/publications/china-enacts-national-competition-law-september-5-2007

68 Conventus Law. (2016, March 26). *China's National Development and Reform Commission Signals Three Major Trends in Anti-Monopoly Law Enforcement in Latest Penalty Decisions*. https://conventuslaw.com/report/chinas-national-development-and-reform-commission/

69 Wanglu, N. (2009). Antitrust Enforcement by the Administration for Industry and Commerce in China. *Competition Law International*, *5*, 30.

70 Weinert, L. (2021). International Cooperation in Merger Cases. In C. Jones & L. Weinert (Eds.), *EU Competition Law Volume II: Mergers and Acquisitions* (pp. 1491–1514). Edward Elgar Publishing. https://www.elgaronline.com/view/edcoll/9781802203455/9781802203455.00047.xml

71 Galloway, J. (2007). The Pursuit of National Champions: The Intersection of Competition Law and Industrial Policy. European Competition Law Review. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1767865

72 The Competition Commission South Africa. (2019). Our Role. https://www.compcom.co.za/about-us-2/

including construction, banking, and telecommunications.[73] The NCL has also been working to increase its cooperation with competition authorities in other countries, including the United States and the European Union.

4.1. Enforcement Process during the COVID-19 Pandemic

The BRICS competition law authorities have witnessed the tremendous impact of the COVID-19 epidemic on all elements of global economic stability, particularly in emerging nations. Furthermore, the governing bodies of these nations recognize the critical role of competition policy and enforcement in safeguarding consumer interests, assisting companies during the COVID-19 pandemic, and successfully managing the effects of post-pandemic financial problems. In order to increase transparency, the authorities agreed to join forces in resuming economic sectors and raising awareness about social and economic challenges. This resulted in the execution of a memorandum of understanding to affirm their desire to cooperate in these exceptional circumstances and to exchange intelligence and policies relating to competition enforcement.[74] It is noticed that the unforeseen disruptions induced by the COVID-19 calamity, as well as the measures taken to prevent the pandemic's spread, have had an impact on the functioning of various markets.[75] In the last decade, competition authorities around the world have had to adjust their enforcement strategies not just to the challenges of running their businesses but also to the difficulties of enforcing their regulations in an era of continued economic growth.[76] As a result, competition regulators have had to develop new ways of acting and thinking to respond to a variety of difficulties. Many of these changes have the potential to exacerbate problems that competition authorities were already dealing with before the pandemic, such as rising market concentration, the rapid expansion of digital platforms, protectionism, consumer vulnerability, and the public's understandable lack of trust in markets.[77] The BRICS competition law authorities have also analyzed the differences during COVID-19 and taken some significant measures to meet these challenges.[78]

---

[73] Boshoff, W.H. (2021). South African Competition Policy on Excessive Pricing and its Relation to Price Gouging During the COVID-19 Disaster Period. South African Journal of Economics, 89(1), 112–140.

[74] Competition Commission of India. (2022). *Statement of the BRICS Competition Authorities on COVID-19*. https://www.cci.gov.in/public/events/International%20Cooperation/details/19

[75] WIPO. (2022). *The Impact of the COVID-19 Pandemic on Creative Industries, Cultural Institutions, Education and Research*. https://www.wipo.int/edocs/mdocs/copyright/en/wipo_cr_covid_19_ge_22/wipo_cr_covid_19_ge_22_study.pdf

[76] Jenny, F. (2020). Competition Law Enforcement and the COVID-19 Crisis: Business as (Un)usual. *SSRN*. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3606214

[77] Watson, J. (2020). *The Challenge of Covid-19 for Competition Authorities*. International Bar Association. https://www.ibanet.org/article/9dc34aa3-cb52-4f2f-b110-11413a42306e

[78] United Nations Conference on Trade and Development. (2022, July). *Rethinking competition law enforcement: Lessons learned from the pandemic, particularly in socially important markets – Challenges and opportunities for an effective response during the pandemic and economic recovery in the post-pandemic period*. https://unctad.org/system/files/official-document/ciclpd63_en.pdf

In Brazil, CADE issued a resolution on April 1, 2020, regarding virtual judgment sessions or "online judgments" during the COVID-19 pandemic, which was subsequently approved by the tribunal.[79] Accordingly, virtual sessions would be conducted in a virtual format in the case of a "*force majeure*" circumstance by following an electronic setup through data security. The arguments would be presented in oral form by sending media files to the tribunal during a virtual session, and they would also be made publicly available. The authorities were keenly aware of the likelihood of critical situations arising, particularly in matters relating to mergers and combinations. A little later, on April 14, 2020, CADE expressed its support to the International Competition Network (ICN), i.e. the "ICN Steering Group Statement: Competition during and after the COVID-19 Pandemic." Additionally, it is noted that the ICN stressed the accessibility of goods at competitive worth along with consumer welfare. It also expressed its view that the competitors should engage in "co-operation" to ensure the optimal availability of resources to the public at large. The international groups also emphasized the importance of "joint efforts" of all competition law authorities in order to better deal with the pandemic and other upcoming issues. Moreover, the ICN focused on competition advocacy so as to raise awareness among the stakeholders relating to such issues.[80]

The Government of the Russian Federation has taken all necessary measures to control the COVID-19 situation and economic growth.[81] It monitors all activities of retail and other competitors to ensure competitive prices in the market. Controlling the prices of necessary goods, including food, pharmaceuticals, and medical purposes, is required to be maintained. Since 23 March 2020, the FAS has been regularly monitoring the supply of necessary foodstuffs, and on 27 March 2020, the head of FAS highlighted all of the measures taken by the authorities for the food, medical, and petroleum markets. Additionally, consumers were given the option to submit complaints about any unfair activity relating to excessive pricing, shortage of goods, etc. to the central office. The FAS also changed its operational work strategy during the COVID-19 pandemic by temporarily suspending all appointments and inspections, except in cases of abuses of law related to the safety of health and life of citizens. It temporarily postponed all necessary deadlines and considered the cases relating to anti-monopoly and administrative violations through video

---

79 International Bar Association. (2020, October). *The Global Impact of the Covid-19 Pandemic on Commercial Dispute Resolution in the First Seven Months*. https://www.ibanet.org/article/BD404CE3-3886-48A8-98F6-38EAACCD5F53

80 Govt.br. (2020, April 28). *CADE expresses support to the ICN document on competition during the COVID-19 pandemic*. https://www.gov.br/cade/en/matters/news/cade-expresses-support-to-the-icn-document-on-competition-during-the-covid-19-pandemic

81 The World Bank. (2021, December 1). *Amidst Strong Economic Rebound in Russia, Risks Stemming from COVID-19 and Inflation Build, Says World Bank Report*. https://www.worldbank.org/en/news/press-release/2021/12/01/amidst-strong-economic-rebound-in-russia-risks-stemming-from-covid-19-and-inflation-build-says-world-bank-report

conferences (i.e. online mode). Furthermore, it designated the COVID-19 pandemic as a "*force majeure*" (as per part 5.1 of Art. 3 which allows for procurement due to *force majeure* circumstances etc.) and accepted bidding through an electronic platform. Another major step towards ensuring competition through law enforcement was the receiving and handling of complaints using online methods (including video conferencing, drop-in mailbox, working remotely, etc.). To support all of these goals, a "UNCTAD Webinar" was also organized in June 2020, with the theme "Competition Policy in Times of COVID-19: Is There a Role for International Cooperation?"[82]

On April 19, 2020, the CCI in India issued an advisory to bridge the demand and supply gap during this pandemic. It deemed certain activities as permissible, including the limited coordination of activities by means of sharing data and time to ensure the optimal availability of resources. It allowed joint ventures to help the government in this unprecedented situation and promoted efficiency in production, distribution, supply, etc. In addition, coordinating certain activities was also restricted if they could potentially lead to cartels in terms of price, market, quota, etc. The commission also announced measures for electronic filings under the "Green Channel," an automatic approval route for certain combinations. The commission made it clear that it was actively monitoring the market and related activities to safeguard consumer interests and create a competitive environment. Furthermore, section 54 of the Competition Act, 2002 empowered the state to exempt some categories of businesses under this law. These exemptions are mainly provided when it is necessary for the public interest and the welfare of the state. It is also noted that during this pandemic, the Government of India proactively revised the schedule of the Essential Commodities Act, 1955 to include sanitizers and masks in the list. This shows the continuous efforts made by the commission and the government to ensure the availability of goods and services at a competitive price.[83]

In China, the State Administration for Market Regulation delivered a notification on antitrust enforcement and highlighted some of its applied inferences, including the "Sustained Acceptance of Online Merger Matters," "Fast-Track Review," "Exception of Certain Supportive Agreements," "Stepped-Up Enforcement against Antitrust Violations," "Efficient Support for Reasonable Competition Evaluation" and "Active Supervision on Antitrust Acquiescence of Industries" etc. Additionally, it is noticed that SAMR shall continue its "Online Merger Filings" through online mode, video conference, call, or by roping mail to the "Anti-Monopoly Bureau." The SAMR is proactively making efforts by clearing unconditional merger cases (approximately totaling 71 cases) and also establishing a "Green Channel" to facilitate work resumption and merger filings. Furthermore, exceptions to certain agreements for technological advancement,

---

[82] Competition and Consumer Protection. UNCTAD. https://unctad.org/Topic/Competition-and-Consumer-Protection

[83] Khaitan & Co. (2020, May 1). *India: COVID-19 Not A Blanket Safe Harbour Defence: Competition Act of India*. Mondaq. https://www.mondaq.com/india/operational-impacts-and-strategy/925990/covid-19-not-a-blanket-safe- Harbour-defence-competition-act-of-India

increased efficiency, and public welfare are being considered, which are still under the preview of Article 15 of the AML. The provisional rules on the prohibition against monopoly agreements provide particular issues that need to be considered when shaping immunity, including the precise method, consequence, and causation. Filing complaints about violations of AML were encouraged so that a competitive environment could be maintained for consumer welfare. In addition, SAMR offered the option to initiate antitrust investigations for dominance exemptions to both companies and individuals.[84]

In South Africa, the National Coronavirus Command Council (NCCC) was empowered to enforce lockdown and ensured compliance with "NCCC" protocols for optimum use of human resources. When it was seen that the competitors were increasing the prices of essential goods, including sanitizers and masks, etc., the Ministry of Trade and Industry confirmed that eleven companies were being investigated for violations, and those found guilty will face administrative penalties. The NCC also made special provisions to fulfill the requirements for filing a complaint, including the "Notice of Motion" and "Affidavit" through the "Consumer and Customer Protection Regulations" before the tribunal. The respondent was required to answer within 72 hours, after which the hearing would be initiated through electronic mode (i.e. video or audio proceedings). The respondent could also file an appeal before the "Competition Appeal Court," and the commission, through a consent agreement, would conclude the final settlement. This consent order would be confirmed by the tribunal without hearing any evidence.[85]

5. Why the BRICS Nations Need an Effective Enforcement Mechanism for the National Competition Law at the Global Level

The BRICS countries need to improve their competition law enforcement mechanisms in order to effectively compete with developed economies. The bloc has made great strides in recent years, but there is still room for improvement. By working together to strengthen their antitrust laws and enforcement, the BRICS countries can create a level playing field that will benefit businesses and consumers alike. There is no question that these economies have been increasingly important in the global economy over the past decade. This has been accompanied by a growing need for better competition law enforcement mechanisms within the bloc. However,

---

84 Herbert Smith Free Hills. (2020, April 23). *China's SAMR Continues Focus on Pharma Sector amid Covid-19 Outbreak Fining API Distributors over RMB 300m for Abuse of Dominance*. https://www.herbertsmithfreehills.com/notes/crt/2020-04/chinas-samr-continues-focus-on-pharma-sector-amid-covid-19-outbreak-fining-api-distributors-over-rmb300m-for-abuse-of-dominance

85 Muller, J., & Lodolo, G. (2020, April 7). *South Africa Competition Tribunal: Regulations Published to Expedite COVID-19 Excessive and Unfair Pricing Complaint Referrals*. African Antitrust & Competition Law. https://africanantitrust.com/2020/04/07/south-africa-competition-tribunal-regulations-published-to-expedite-covid-19-excessive-and-unfair-pricing-complaint-referrals/

the existing mechanisms are not adequate to deal with the challenges posed by the increasing economic integration of the BRICS economies.

While the establishment of a supranational competition authority would be a major step forward, it is not the only measure that needs to be taken. The national competition authorities of the BRICS countries also need to be strengthened. This can be done by providing them with greater resources and independence and by ensuring that they are properly coordinated with each other. It is evidenced that these nations have been working together since 2006 to promote economic growth and development. One area where the group has been seeking to improve cooperation is in the enforcement of competition law. The benefits of improved competition law enforcement are clear. Stronger enforcement helps to level the playing field for businesses, ensuring that fair competition can flourish and that consumers can enjoy the benefits of lower prices and greater choice.

Several challenges need to be addressed in order to improve the competition law enforcement process within the BRICS nations. These include ensuring that national competition authorities have the necessary resources and powers to effectively investigate and prosecute antitrust cases; addressing cross-border issues, such as how to deal with companies that operate in multiple BRICS countries; encouraging greater cooperation between national competition authorities, including sharing information and best practices; and raising awareness of competition law among businesses and consumers. Although this group has made some progress in addressing these challenges, more needs to be done. By working together, this group of countries can create a stronger framework for enforcing competition law. A key focus has been on creating better coordination between the national competition authorities (NCAs) of the member countries.

One way to improve coordination is to develop a more formalized system for information sharing and cooperation. The BRICS bloc has been working on a Memorandum of Understanding that would set out rules and procedures for NCAs to follow when cooperating. The MoU is still in the draft stage, but it is hoped that it will be finalized and signed by all member countries soon. Another way to improve competition law enforcement in the BRICS bloc is to establish a joint task force or working group that would work on specific cases or investigations. This would allow member countries to pool resources and expertise and to better target companies that are harming competition in the bloc. The BRICS bloc has made some progress on all of these fronts; nevertheless, more needs to be done to truly improve competition law enforcement in the bloc. The most obvious way to improve competition law enforcement in the BRICS context is to establish a dedicated supranational competition authority. Such an authority would have the necessary expertise and resources to effectively investigate and prosecute antitrust violations. It would also be able to provide much-needed guidance on how best to apply competition law principles in a cross-border context.

Conclusion and Suggestions

The BRICS countries are experiencing rapid economic growth, and it is predicted that by 2050 they will hold a dominant position at the global level. It exposes that it is continuously making efforts to create a healthy competitive environment by taking innovative measures during critical times. During the COVID-19 pandemic, this group initiated advanced measures including "online judgment sessions," "*force majeure* provisions," "joint efforts," "green channel," "sustained acceptance of online merger matters," "fast-track review," "exception of certain supportive agreements," "stepped-up enforcement against antitrust violations," "efficient support for reasonable competition evaluation," "active supervision on antitrust acquiescence of industries," and "online merger filings." This shows the swift transformation of their enforcement mechanisms onto digital platforms.

On the other hand, it is also found that due to rapid e-commerce growth, the market size, consumer demand, and competition have likewise significantly increased, thereby inviting many issues that are of serious concern to stakeholders, particularly regarding AI, cryptocurrency, data protection, and BRICS expansion, along with many others. In addition, while the expansion of BRICS seems beneficial for their economies, it also raises some serious questions, such as how to measure the size of the market on the digital platforms, how to ensure data safety, how to identify factors to determine dominance at the global level, how to develop an institutional framework and enforcement mechanism at their respective jurisdiction, and many more. The work is currently in its developmental stage, yet there is neither any fully developed institutional framework nor any common legislation to deal with these issues at the international level.

This study reveals that the antitrust laws and law enforcement processes in the BRICS nations are either not fully developed or are ineffective and require various changes to be able to meet upcoming issues, especially relating to the digital market. It is found that currently there is no uniform legislation or common law that could deal with such problems at the international level. The respective economies are making efforts and working hard to introduce some changes in their existing laws, but they are still in the progressive stages and are not yet concluded. Hence, in order to address these issues of the competitive market, the BRICS nations need to work jointly on establishing an effective enforcement mechanism. In this regard, the author proposes some recommendations for policy formulation and future implementations as outlined below.

1. Need to Develop a Common Competition Law and Policy at the Global Level: Given the rapid growth of the market and expansion of this group, there should be a common, standardized legislation and common policies akin to those of the World Trade Organization at the universal level so as to improve the effectiveness of the enforcement process.

2. Body of Experts: It is also noticed that the establishment of such a common law requires a body of experts, including specialists in international law and technology.

The reason for having an expert in international law is to properly examine and assess the application and execution of the intended laws, whereas having expertise in technology is essential to ensure that the measures proposed are adequate to meet the current challenges relating to the digital market.

3. Law Negotiation: Before finalizing the law, the lawmaker should ensure rational participation and equal opportunities for each economy at the initial stage, as each state has its domestic law, policies, and enforcement system, regardless of whether it is a developing or developed country. This shall ensure the fairness and effectiveness of that law.

4. Need to Execute a Bilateral Treaty: The nature of legal documents also plays a significant role in determining the liability and accountability of any party. Therefore, the BRICS member states should formulate a common framework for a "Bilateral Treaty" rather than focus solely on the execution of an agreement only. This shall enhance the responsibility and accountability of each member state.

5. Dispute Settlement Mechanism: A "dispute settlement mechanism" and an "alternative dispute resolution system" should be established for the respective member states and legal entities on a digital platform. This should be established at both national and international levels. In addition, the consumers should be afforded the means and options of communicating with the authority at minimum cost and time.

6. Consumer Privacy: The lawmaker should develop an innovative mechanism and include "some specific clause" for the competitors to abide by when they interact with consumers to ensure the privacy of their information. In addition, if they circulate such information further without the consumer's consent then they should be liable accordingly. In short, the strict liability of the competitors should be established.

7. Time-Bound Enforcement Process: The BRICS group should ensure a time-bound enforcement process for improving the efficiency and compliance of law at the global level.

8. Autonomy of the Competition Law Authority: This authority must not be dependent upon the internal or external bodies or agencies for any financial support.

9. Overburdened Workload: It is also observed that the authorities are often overburdened. Hence, an "online dispute settlement mechanism" along with appropriate staff members should be developed.

10. Appropriate Amendments or Modifications of Law: There is no doubt that many countries are already proactively making efforts to deal with all such upcoming issues; however, these efforts have either failed or proved ineffective in covering certain major areas, due to which their overall effectiveness could not be enhanced. Like in India, the Competition Amendment Bill of 2022 has addressed various points, but even so, regulations relating to AI and data protection have still not been effectively addressed.[86] Thus, regular and timely amendments and modifications to the law should be an essential provision incorporated in the standardized framework.

86 Dhir et al., 2022.

11. Blockchain Technology Challenges: The author also noted that the BRICS nations have not fully developed the systems necessary to deal with cryptocurrency and are still in the working stage and unregulated. For example, even in India, the Competition Amendment Bill of 2022 does not cover the nature and status of participants in blockchain technology, and this technology remains unregulated. In addition, it is not clear whether the investors' participation in this technology constitutes an agreement or whether these participants are covered under the definitions of "person" and "enterprise". How then, can we measure the relevance of the market with special reference to cryptocurrency? Many such issues remain to be answered by the competent authority in order to ensure the effective enforcement of competition law in India.

In the end, the BRICS nations have a joint responsibility to develop a common and effective competition law enforcement mechanism at the global level, and the governments of these countries should start by incorporating the necessary changes into their existing laws to meet upcoming issues.

References

Afrika, S.-L., & Bachmann, S.-D. (2011). Cartel Regulation in Three Emerging BRICS Economies: Cartel and Competition Politics in South Africa, Brazil, and India – A Comparative Overview. *The International Lawyer*, *45*(4), 975–1003. https://doi.org/10.2139/ssrn.1869963

Bhattacharjea, A., et al. (2019). Competition Law and Competition Policy in India: How the Competition Commission Has Dealt with Anticompetitive Restraints by Government Entities. *Review of Industrial Organizations*, *54*, 221–250.

Jenny, F., & Katsoulacos, Y. (Eds.). (2016). *Competition Law Enforcement in the BRICS and in Developing Countries: Legal and Economic Aspects*. Springer.

Konyshev, V., & Sergunin, A. (2022). Theoretical Perspectives on BRICS: What Kind of an International Institution Is It? In M. Lebedeva & V. Morozov (Eds.), *Turning Points of World Transformation: New Trends, Challenges and Actors* (pp. 101–115). Palgrave Macmillan.

Kumar, N. (2022). A Critique of India's Regulatory Framework for Cryptocurrency and Competition Law. *International Journal of Law and Policy Review*, *11*(2), 86–116.

Singh, J., & Kumar, N. (2020). Issues pertaining to growth of digital economy: An arduous challenge before CCI. *Journal of Public Affairs, 20*(4). https://doi.org/10.1002/pa.2301

Svetlicinii, A., & Zhang, J.-J. (2017). The Competition Law Institutions in the BRICS Countries: Developing Better Institutional Models for the Protection of Market Competition. *Chinese Political Science Review*, *2*, 85–100. https://doi.org/10.1007/s41111-017-0058-y

Thakur, R. (2014). How Representative Are BRICS? *Third World Quarterly*, *35*(10), 1791–1808. https://doi.org/10.1080/01436597.2014.971594

Trebilcock, M.J., & Iacobucci, E.M. (2002). Designing Competition Law Institutions. *World Competition*, *25*(3), 361–394. https://doi.org/10.54648/5095415

Information about the author

Narendra Kumar (Uttar Pradesh, India) – PhD Assistant Professor, Faculty of Law, University of Allahabad (Senate House Campus, University Rd., Old Katra, Prayagraj (Allahabad), Uttar Pradesh, 211002, India; e-mail: narenderarya86@gmail.com).

ARTICLE

Forms of Lay Participation in Justice in Russia and China: A Comparative Legal Analysis

Anzhelika Gavrilova,

University of Kemerovo (Kemerovo, Russian Federation)

https://orcid.org/0000-0002-7957-1898

Alexander Danshin,

University of Kemerovo (Kemerovo, Russian Federation)

https://orcid.org/0000-0003-0107-8531

https://doi.org/10.21684/2412-2343-2025-12-1-140-160

Received: November 12, 2023
Reviewed: December 6, 2023
Accepted: March 19, 2024

Abstract. Approximately two-thirds of the world's nations employ some form of lay participation in both criminal and civil proceedings, such as the use of juries, lay judges, jurors, lay magistrates, and members of lay courts, as well as other lay personnel. This paper examines the evolution and practice of lay participation in China and Russia, which were specifically chosen for this study of lay participation in justice since they share a common socialist past that influenced both their justice systems in the 20th century. The study employed a range of comparative legal methods, namely the micro-comparison, synchronous, and diachronic methods. The problem-chronological method was used to investigate the essential features of lay representation in civil and criminal proceedings, which helped determine the place and role of this social practice in the judicial system. The formal legal method was applied to analyze and interpret the legal norms that transformed and modernized the institution of people's participation in justice. Historically, both China and Russia have adopted various forms of lay participation, from non-professional people's courts to state courts with lay assessors. In China, the models of people's participation in justice have evolved in tandem with changes in the legal system. For instance, traditional China preferred to resolve most civil disputes within local communities in accordance with the regional traditions and status-oriented norms of behavior. The People's Republic of China has adopted the Soviet model of justice featuring people's assessors. In modern China, the socialist legal tradition coexists with other traditions, giving rise to a hybrid model of people's assessors characterized by specific Chinese features. In Russia, unlike China, completely non-professional courts existed only for a specific period of the Old Russian state, gradually giving way to state courts with lay participation. The Russian institution of lay participation in justice has a chrono-discrete nature, i.e. it is characterized by periodic changes from the quasi-Schöffen to the Schöffen model, from the Schöffen model to jury trials, and vice versa. However, there were periods in Russian history during which the Schöffen model coexisted with jury trials, mainly in the last quarter of the 19th century and in the 20th century.

Keywords: Russia; China; justice; lay/people's participation; lay/people's assessors; jurors; Schöffen court.

To cite: Gavrilova, A., & Danshin, A. (2025). Forms of Lay Participation in Justice in Russia and China: A Comparative Legal Analysis. *BRICS Law Journal*, *12*(1), 140–160.

Table of Contents

Introduction

Lay participation in justice can take two main forms: people's courts and state courts with lay assessors.

People's courts operate on the basis of customary law, i.e. customs and traditions. Although this is the oldest form of lay participation, originating in the pre-state period, it is still used in many countries that have recognized customary law as well as state legislation. For example, the Russian Empire of the 19th century had not only official courts but also traditional courts of the indigenous peoples of Siberia and *volost* courts for state peasants that resolved family and property disputes or minor offenses based on their customs. Today, traditional courts of customary law are still common for some African countries. Despite their colonial past, these countries are currently implementing either a policy of agglomeration, with its disorderly mix of various types of legal systems, or a policy of unification, which aims to incorporate customary law into official law. Another example could be a legal "renaissance" of traditional courts such as those that existed in Kazakhstan known as the Councils of Biys.[1]

The second form of lay participation in justice encompasses official courts comprised of professional judges and lay assessors. This form is characterized by two main models, namely jury courts and courts of lay assessors (Schöffen). The fundamental difference between the two is that a jury determines questions of fact and delivers its verdict separately from the professional judge, who subsequently answers questions of law based on the jury verdict, while a court of lay assessors functions as a single judicial board that is comprised of a judge and assessors who make joint decisions on points of fact and law.[2]

Understanding the processes influencing on the sociocultural characteristics of China and Russia in the prism of their interrelations is very important, taking into account contradiction between the paradigms of state and legal development of these countries. China is one of the oldest civilizations, characterized by sustained cultural traditions and turning to partial modernization through the reception of foreign experience. Russia is a civilization with numerous historic transformations that are accompanied by a complete rejection of previous experience and legal institutions. In the process of the state transformation in the beginning of 1990s a new national identity and sovereignty were searched for, many legal institutions of the Soviet period were completely lost, including those that demonstrated their effectiveness. In this realm the Chinese experience would be useful for an effective model of public participation in justice, contoured in the Article 32 of the Constitution of the Russian Federation.

1. People's Participation in Justice: Chinese Experience

1.1. Justice Administration in Traditional China

The Chinese institution of lay participation in justice originated in the 3rd century BC and became common practice by the beginning of the Song Dynasty (960–

1 Bakirova, A.M. (2019). The Role of Councils of Elders and Councils of Biys in the Justice System of the Russian Federation and the Republic of Kazakhstan. In *Constitution and Social Progress. Second Prokopiev Readings: Proceedings of the International Scientific and Practical Conference* (p. 224). Immanuel Kant Baltic Federal University Publishing House. (In Russian)

2 Biryukova, O.V. (2023). People's Participation in Justice: On the Example of the Sheffen Court and the Jury. *Bulletin of the Kemerovo State University. Series: Humanities and Social Sciences, 7*(1), 59–65. (In Russian).

1279).[3] The legal system of traditional China was based on Confucianism, which was designed to protect a strict hierarchy in society. The state was responsible for maintaining public order and, therefore, it focused primarily on criminal cases, or "questions of punishments" (*xingshi* 刑事), while civil disputes were considered "insignificant matters" (*xishi* 细事)[4] and had to be resolved by the family, as well as the clan and various public self-governing bodies. According to Confucian scholars, an ideal state differed from barbarian societies in that it had social harmony, and consequently, no reasons for any conflict or litigation. If disputes arose, however, they had to be settled by the people, and only when public institutions failed could the state assume the function of an arbitrator. For example, the "Laws of the Great Ming Dynasty" (14th century) established that civil lawsuits between individuals could be brought to court only after they had been considered by public bodies[5] acting as courts of first instance.

Traditional China had several forms of lay participation in justice, each with a number of managerial and judicial powers delegated to them by the authorities. The most notable were village elders "*qilao*" (耆老) and village policemen "*tibao*" (提报) who were elected by local people from the most respected members of their clan. Special recognition was given to those who had an academic degree of *xiucai* (秀才) awarded on the basis of unified state examinations and were deservedly considered part of a privileged learned class of the *shenshi* (绅士). Enjoying great authority, comparable with that of local officials, the *shenshi* helped their fellow villagers draw up various kinds of legal documents and defended them in courts as "lawyers". They often ended up working as court secretaries, clerks, or holders of other similar jobs in state institutions. A district judge could appoint a village police officer to act as an agent between the local administration and public self-governing bodies. Reporting directly to the judge, this police officer would represent the interests of the state in the village without receiving any payment for these services. The main duties of this police officer, in addition to protecting public order, would be to detain suspicious persons, make inquiries into suspicious deaths, search for suspects or defendants and bring them to court, and enforce debt payment by placing debtors in custody if necessary. Additionally, a *xiangbao* (详报), who was elected by the community and then approved by the local judge, was also involved in special instances, for example, in searching for people and bringing them to the judge. A *xiangbao* could be responsible for up to two dozen settlements, in which he also handled civil claims or collected materials on both civil and criminal cases on behalf of the judge. If the materials showed that a civil

---

3 Clark, H.R. (2002). *Community, Trade, and Networks: Southern Fujian Province from the Third to the Thirteenth Century* (p. 3). Cambridge University Press.

4 Bernhardt, K. & Huang, P.C.C. (1994). Chapter One: Civil Law in Qing and Republican China: The Issues. In *Civil Law in Qing and Republican China* (pp. 1–12). Stanford University Press.

5 Chan, P.C-H. (2012). The Enigma of Civil Justice in Imperial China: A Legal Historical Enquiry. *Maastricht Journal of European and Comparative Law*, *2*(19), 318–332.

claim had not been considered by any of the public officials vested with the requisite power, the judge could decide to suspend the proceedings of the case.[6]

Despite numerous cases of abuse perpetrated by these persons in the exercise of their judicial and police powers, local people, especially villagers and merchants, preferred not to turn to *yamen* (衙門).[7] Instead, they preferred to resolve their disputes through their local institutions of people's justice, including family clans or merchant associations, based on the principles of business trade, charters of trade guilds, corporate codes of merchants, or local customs. Ordinary people considered these customs to be fairer than court decisions since the judges often handled civil cases on the basis of a legal doctrine of "human compassion". This doctrine arose from the basic Confucian principle of "*ren*" (仁 meaning benevolence or humaneness), which prescribed taking the side of those in a difficult financial situation. Under this doctrine, the judges often sided with the debtor and, at best, only partially satisfied property claims, even if the defendant's fault was obvious and the creditor's claims were fully justified.[8]

1.2. The Institution of Lay Assessors in the People's Republic of China

The main form of people's justice in modern China is the institution of lay assessors, which was borrowed by the Chinese communists from the Soviet Union[9] and tested in the Chinese Soviet Republic (1931–1934) and in a number of Soviet regions of China during the Second Sino-Japanese War (1937–1945). In asserting the need for such an institution, the Chinese officials often refer to Ma Xiwu (1899–1962), chairman of the Supreme Court's branch in one of those regions, who said that "<…> the introduction of courts with people's assessors can not only attract the masses to participate in national governance, but also increase the people's sense of community and political responsibility, which will place court proceedings under the supervision of the people."[10] Ma Xiwu's efforts to implement the principles of "people's justice under the leadership of the Communist Party of China" were supported by Mao Zedong, who then used those principles to create the judicial system of socialist China. In a similar vein, the scientific and political circles of modern

---

6 Danshin, A.V. (2017). The State and Social Mediation in Traditional China. *Bulletin of Kemerovo State University, 3*(3), 74. (In Russian).

7 A government office in the county towns of traditional China; a residence of local officials where they received visitors and carried out legal proceedings.

8 Brockman, R.H. (1981). IV Commercial Contract Law in Late Nineteenth-Century Taiwan. In J.A. Cohen et al. (Eds.), *Essays on China's Legal Tradition* (pp. 99–102). Princeton University Press.

9 Zihui, A. (2016). Improving the People's Legal System of China Based on the Reforms of the Legal System of Russia. In *Development of Russian-Chinese Relations: New International Reality: II International Scientific-Practical Conference, Dedicated to the 70th Anniversary of Victory in World War II (Irkutsk, September 21–22, 2015)* (p. 14). Baikal State University Publishing House. (In Russian).

10 Chinese Practice of the People's Assessors System: Authoritative Release-Supreme People's Court of the People's Republic of China. https://www.court.gov.cn/fabu-xiangqing-374801.html. (In Chinese).

China often discuss the need to develop "Ma Xiwu's Way of Judging" (*maxiwushenpan fangshi*, 马锡五审判方式), which is based on the people's idea of honesty and justice. For example, an article posted on the website of the Supreme People's Court of the People's Republic of China describes the system of people's assessors as a "manifestation of justice for the people."[11]

After the formation of the People's Republic of China (PRC) in 1949, the Second All-China Conference of Justice Workers (1953) emphasized "an urgent need for a gradual introduction of permanent elected lay assessors to have equal rights with judges."[12] This was partially enshrined in the first Constitution of the PRC (1954), in which Article 75 stated that "by law, people's courts considered cases using a system of people's assessors."[13] The day after the Constitution came into force, a law was passed on the organization of people's courts that mandated the participation of lay assessors in courts of first instance in all cases, except for "simple civil and minor criminal cases" (Arts. 8 and 9).[14] Although the law did not specify that lay assessors were to have equal rights with judges during a trial, such was the assumption arising from both the spirit of the Constitution and the practice of the "democratic dictatorship of the people," which was being implemented in all spheres of socialist society. The widespread participation of lay assessors in the PRC's judicial system was interrupted by the Great Proletarian Cultural Revolution (1966–1976) which destroyed all democratic judiciary institutions, including the publicity of trials, the right to defense, equality of all nations and nationalities in court, etc. The institution of people's assessors was replaced by "courts of the masses," with thousands of spectators participating in "citation proceedings," where court decisions were based on excerpts from the works by Mao Zedong, rather than on law.[15]

The institution of people's assessors was restored in the "Law of the People's Republic of China on the Organization of People's Courts," which was adopted in 1979 and is currently still in force. According to Article 38 of its first edition, citizens of the PRC who have reached the age of 23 can be elected as people's assessors who are designated "members of courts of first instance that have equal rights with judges."[16]

---

[11] Inherit and Develop the "Maxi Five Trial Methods" in the New Era. https://www.court.gov.cn/zixun-xiangqing-217661.html. (In Chinese).

[12] Maksimova, O. (2022). Book Review: Ch. 1. In A.V. Vinogradov et al. (Eds.), *The Modern Chinese State. Vol. 1: Basic Institutions of State Power and Management* (pp. 773–903). Institute of Far Eastern Studies. (In Russian).

[13] Kuznetsov, D.V. (Comp.). (2014). *Constitutional Acts of China: An Anthology* (p. 99). Blagoveshchensk State Pedagogical University. http://istfil.bgpu.ru/

[14] *Law on the Organization of the People's Court of the People's Republic of China (1955) (adopted by the first session of the National People's Congress of the First Convocation of the People's Republic of China on September 21)* (p. 8). Gosyurizdat. (In Russian).

[15] Troshchinsky, P.V. (2018). *Evolution of the Legal System of the People's Republic of China* (p. 54). (In Russian).

[16] Organic Law of the People's Courts of the People. https://www.court.gov.cn/jianshe-xiangqing-962.html. (In Chinese).

This was a development of the collegiate court, which had already been tested in China, where a panel consisting of two non-professional judges (people's assessors) and a professional judge decided on questions of both fact (*quaestio facti*) and law (*quaestio juris*). Although the 1978 Constitution, which was in force at that time, had no mention of people's assessors, a possibility of involving them in the administration of justice arose from Article 41, which established that "representatives of the masses participate as experts in the administration of justice" and also that they "should be involved in the judicial process for discussion and proposals."[17] The currently effective Constitution of the PRC adopted in 1982 has no mention of people's assessors either, but it does state that "the organization of people's courts is provided for by law" (Art. 129).[18] This reference pertains to the "Law of the People's Republic of China on the Organization of People's Courts," which mandates the institution of people's assessors.

An important stage in the development of the institution of people's assessors was outlined in the "Five-Year Plan for Reforming the People's Courts in 1999–2003" published by the Supreme People's Court of the PRC in 1999. It resulted in the "Decision of the Standing Committee of the National People's Congress on Improving the System of People's Assessors", whose preamble stated that it was adopted "in order to ensure the participation of citizens in trials".[19] This document launched pilot programs in dozens of Chinese cities and provinces which revealed the need for certain adjustments to the institution of people's assessors. In particular, questions were raised about changing the age and educational qualifications, as well as the selection procedure, the number of people's assessors, and other aspects. The greatest debate, however, was over the choice between two options for the future. One approach would be to further develop a well-established system of the collegiate court, in which judges and people's assessors would have equal rights, including in matters of decision-making or sentencing. Alternatively, an institution of jurors could be introduced, where jurors worked independently from judges and passed their verdict only on questions of fact (offense) or guilt. Although the document above only provided for the first option, the latter has been widely used in the modern world.

The results of those discussions were reflected in the "Law of the People's Republic of China on People's Assessors"[20] adopted by the Standing Committee of the National

---

[17] Constitutional Acts of China. http://istfil.bgpu.ru/. (In Chinese).

[18] Constitution of the People's Republic of China (adopted at the Fifth Session of the Fifth National People's Congress on December 4, 1982, and promulgated and implemented by the announcement of the National People's Congress on December 4, 1982). http://www.gov.cn/guoqing/2018-03/22/content_5276318.htm. (In Chinese).

[19] Decision of the Standing Committee of the National People's Congress on Improving the People's Assessors System (adopted at the Eleventh Meeting of the Standing Committee of the Tenth National People's Congress on August 28, 2004). http://www.npc.gov.cn/zgrdw/npc/lfzt/rlyw/2017-12/13/content_2033668.htm. (In Chinese).

[20] People's Assessment Law of the People's Republic of China (The Second Meeting of the Standing Committee of the 13th National People's Congress on April 27, 2018). https://ru.chinajusticeobserver.com/law/x/peoples-assessor-law-20180407/chn. (In Chinese).

People's Congress on April 27, 2018. According to Article 2 of this law, it was not only a right but also a duty of Chinese citizens to participate in court proceedings as people's assessors. Article 15 mandated that a collegiate court with people's assessors consider all criminal, civil, or administrative cases that are complex in nature and of great social importance, attract wide public attention, and affect group or public interests, as well as other cases "requiring the participation of people's assessors in the trial" in courts of first instance. Additionally, the courts of first instance may involve people's assessors, which are often referred to in China as "judges without a robe", in any other cases should this be desired by the defendant in a criminal case, the plaintiff or defendant in a civil case, or the plaintiff in an administrative case (Art. 17). Candidates serving as people's assessors must meet the following requirements: be Chinese citizens, abide by the Constitution and laws of the People's Republic of China, have high moral standards, be physically able to perform their duties, have at least secondary (previously, higher) education, and be at least 28 years old (Art. 5). Candidates ineligible to serve as people's assessors are members of the Standing Committee of the National People's Congress, court staff, prosecutors, employees of national security agencies, lawyers, and notaries (including former lawyers and notaries who were banned from practice), as well as "other persons who are not suitable for performing the functions of people's assessors by virtue of their duties." In addition, bad debtors, ex-offenders, those who were removed from civil service, or those who committed serious violations of the law and discipline that could undermine confidence in the judicial system, etc. are also ineligible (Arts. 6 and 7).

People's assessors are selected in a multi-stage process. First, candidates are randomly selected from among the permanent residents in their area by local justice bodies together with basic people's courts and public security services. The number of these candidates should be at least five times as many as the required number of assessors. Another group of candidates is made up of those citizens who have personally applied or have been recommended by public associations or urban (rural) committees. Their number should be within one-fifth of the total number of candidates. All of the candidates are required to take a special qualifying examination. Based on its results, a register is compiled from which people's assessors are selected by lot. Their number must be at least three times the number of judges in a court. The lists of selected persons are sent to the standing committees of local people's congresses, which then officially appoint them as people's assessors (Arts. 8–11). For a particular case, people's assessors are randomly selected from the list of those appointed by local authorities (Art. 19). According to the provisions of the Supreme People's Court adopted in 2019, when experts with special knowledge are required to participate in court proceedings, they can be randomly selected from a separate list of people's assessors with such knowledge. One assessor may participate in a maximum of thirty cases per year.[21]

---

21 Interpretation of the Supreme People's Court on Several Issues concerning the Application of the "People's Assessors Law of the People's Republic of China." https://www.court.gov.cn/zixun-xiangqing-154792.html. (In Chinese).

People's assessors are elected for five years without the right to be re-elected (Art. 13). During this term, they undergo special training "as necessary" and those who have special achievements in judicial work are recommended for various rewards (Arts. 25–26). Furthermore, people's assessors retain all social benefits associated with their primary employment and are provided with subsidies to cover transport, food, and other expenses incurred by them in connection with their work in courts. Safety is also guaranteed to them and their close relatives (Arts. 28–31).

The most notable innovation in the current law on people's assessors is that it establishes two types of collegiate courts in the judicial system of the PRC: one consisting of one judge and two assessors and the other consisting of three judges and four assessors (Art. 14). This innovation is referred to as a "specific feature of the Chinese system of people's assessors"[22] in the official document of the PRC Supreme People's Court entitled the "Chinese Practice of the System of People's Assessors" adopted in October 2022. First, the two types of collegiate courts differ in their size (three people and seven people, respectively). Second, only a panel of seven people can consider criminal cases with a punishment of more than ten years, life imprisonment, or the death penalty, as well as civil and administrative cases with large social consequences, such as those involving land requisition and demolition of buildings, environmental safety, food and drug safety, etc. (Art. 16). However, the main difference lies in the scope of the powers of people's assessors in these collegiate courts.

In a three-member panel, people's assessors have equal rights with the judge. This means that they can freely express their opinion and vote on matters of both fact and law. In a seven-member panel, people's assessors can speak freely on any issues, but they can vote only on matters of fact, being excluded from decision-making or sentencing (Arts. 21–23).

Thus, the "distinctive specific feature" of the Chinese legal system is that in addition to having preserved and improved the system of people's assessors borrowed from the Soviet Union, which modern Russia has abandoned, China has also incorporated an element of the institution of jurors that is widespread throughout the world, wherein people's representatives can only pass a verdict of guilt or innocence. However, since they pass such verdicts together with professional judges, rather than separately, this practice cannot be considered a real "trial by jury." It is interesting to note that a fairly harmonious combination of "trial by jury" and "trial by Schöffen" was practiced in pre-revolutionary Russia during the counter-reforms of the judicial system of the 19th century, when "both models of lay participation in justice co-existed but only in criminal trials."[23] In China, however, the people's

---

[22] Chinese Practice of the People's Assessors System: Authoritative Release-Supreme People's Court of the People's Republic of China. https://www.court.gov.cn/fabu-xiangqing-374801.html. (In Chinese).

[23] Gavrilova, A. (2023). People's Participation in Justice in Modern Slavic States. *Bulletin of Kemerovo State University*, *7*(1), 74. (In Russian).

representatives considered not only criminal but also administrative and civil cases. The existence of two main forms of lay representation in the legal system of one country makes this system quite unique among modern states. China is currently "testing" this system for its viability, and it has already shown some positive results. In particular, the quality of court work has improved as a result of raising the minimum age of people's assessors from 23 to 28, as well as a continuous development of their qualifications and the provision of regular moral rewards. The social strata of "judges without a robe" have significantly expanded as a result of lowering the educational qualification from a higher degree to general secondary schooling, as well as providing people's assessors with financial support. There are currently 53.9% of men and 46.1% of women among people's assessors, with 88.3% of them having a secondary education or higher degree. In terms of employment, 41.7% of them work at enterprises and institutions, 36.4% are engaged in local governments and public organizations, and 21.9% are peasants or self-employed.[24] In the last ten years, the number of lay assessors in China has tripled, reaching more than 327,000 as of March 2023.[25] In 2018–2022, China's collegiate courts considered about 8.79 million civil cases, 780,000 administrative, and 2.15 million criminal ones, with more than 23,000 cases considered by seven-member panels. According to these statistics, over the past five years, Chinese courts with people's assessors have considered four times more civil cases than criminal ones, which is one of the most important achievements of the ongoing reform of this institution.[26]

China is currently searching for an optimal system of people's assessors while reforming its entire judicial system. Recently, at the 20th National Congress of the Communist Party of China, President Xi Jinping emphasized that while inheriting "the best achievements of traditional Chinese legal culture," it is also necessary to "create, at an accelerated pace, a fair, highly effective and authoritative socialist judicial system", since "fair justice is the last line of defense that ensures social equality and justice."[27]

---

24 Chinese Practice of the People's Assessors System: Authoritative Release–Supreme People's Court of the People's Republic of China, 2022. https://www.court.gov.cn/fabu-xiangqing-374801.html. (In Chinese).

25 Work Report of the Supreme People's Court–March 7, 2023 at the First Meeting of the 14th National People's Congress. http://www.npc.gov.cn/npc/c30834/202303/e1abfbee8ef3493291db5ab4-cf60fcf9.shtml. (In Chinese)

26 Chinese Practice of the People's Assessors System: Authoritative Release–Supreme People's Court of the People's Republic of China, 2022. https://www.court.gov.cn/fabu-xiangqing-374801.html. (In Chinese).

27 Jinping, X. (2022). *Carrying High the Great Banner of Socialism with Chinese Characteristics China*. https://www.fmprc.gov.cn/rus/zxxx/202210/t20221026_10792071.html. (In Chinese).

2. Lay Participation in Justice: Russian Experience

2.1. Justice Administration in Pre-Revolutionary Russia

The history of lay participation in justice can be traced back to the pre-state tribal system, when justice was administered by the elders of a clan or a tribe. As statehood was established in Rus', those functions were delegated to the prince and other privileged people. However, since the Old Russian state was an early feudal monarchy with remnants of the tribal system, it preserved such forms of lay participation as *veche* (a popular assembly in Ancient Rus') and *verv* (a community in Ancient Rus'). Yet, *veche,* which was represented by people, acted as a court only in high-profile cases (involving high-ranking officials, etc.), while *verv*, which was represented by an elder or a council of elders, considered only low-profile cases (e.g., land disputes in the community), increasingly giving way to the administrative court.

As the Muscovite state became centralized, it unified its judicial policy and made justice an exclusive function of the state. However, lay participation in justice was maintained at the local court level. For example, Article 38 of the Sudebnik (code of law) of 1497 forbade governors from administering justice without the *zemstvo* headman or best people elected by the community. After the *guba* and *zemstvo* reforms, justice was administered with the participation of so-called "cross kissers," headmen and best members of the community who swore an oath by kissing the cross. They actually performed the functions of lay assessors, and their presence, in addition to the officials appointed by the tsar, was mandated by the Sudebnik of 1550.

During the judicial reforms of Peter I, who, in fact, began to form the judicial branch of power, the court gradually became professionalized. This partly reduced the importance of people's participation in justice, which was still practiced in class courts. For example, the city magistrate courts of 1723–1724 included burgomasters (literally, "master of the town") and local councilors elected by the community. City magistrates served as courts for city dwellers, while military courts, or *Kriegsrechts*, were based on lay participation, predominantly from the military.

In 1775, Catherine II adopted the "Statute on Provincial Administration in the All-Russian Empire" (hereinafter, the Statute), one of the fundamental laws that institutionalized the collegiality of courts represented by professional judges and lay assessors. According to the Statute, the number of assessors depended on the court instance (first or second) and class affiliation. In particular, Chapter 14 of the Statute stipulated that two chairmen and ten assessors sit in the upper *zemstvo* court, distributed evenly to consider criminal and civil cases. Assessors were elected every three years by the *uyezd* assemblies of nobility from the nobles who permanently resided, or were on permanent service, in the *uyezd*. Similarly, the noble court of first instance, or the *uyezd* court, also consisted of a permanent judge and two assessors elected by the assemblies of nobility.

Chapters 20 and 22 of the Statute established the election of local councilors and assessors every three years to represent the urban community (comprising lower middle class and merchants) in city magistrates' courts (four councilors) and provincial magistrates' courts (totaling six assessors, three for the civil department and three for the criminal department).

According to Chapters 23 and 24 of the Statute, assessors for the upper courts (ten assessors, five for civil and five for criminal cases) and lower courts (eight assessors, including two for the lower *zemstvo* court and two for the orphan's court) for state peasants (as well as economic, palace, and possession peasants) were elected from impeccable representatives of the community subject to the respective courts, from nobles or learned people, from officials, or *raznochintsy* (intellectuals not belonging to the nobility).

Although the judicial model established by Catherine II was class-based, it was similar to the German mixed model of justice which, in some German lands, was represented by a single panel of crown judges and several assessors. Catherine's judicial system, with some changes introduced by Paul I and Alexander I, survived until the reforms of Alexander II.

The Judicial Statutes of 1864 advanced the judiciary and legal proceedings and introduced a new model of lay participation in justice. In particular, they replaced Catherine's courts of lay assessors with jurors. Most importantly, unlike his predecessors (Peter I and Catherine II), who had made the first attempts to separate the court from the administrative power, Alexander II actually managed to fully implement this principle by declaring judicial independence. We agree with N. Efremova that "in the absence of a formal constitution, the Judicial Statutes constituted the foundations of the judiciary in Russia, albeit without officially recognizing the separation of powers, having taken the first practical step towards a constitutional monarchy."[28]

The election of jurors was no longer class-based; instead, they were elected from local residents of all classes aged 25 to 70 who had permanently resided in one *uyezd* for at least two years.

Unlike the former courts, which administered justice in both criminal and civil cases, jurors were now restricted to only considering criminal cases, particularly those involving the deprivation or restriction of rights along with determining the main punishment (e.g., hard labor, prison camp, etc.), which was assessed based on the gravity of the criminal act.

However, acquittals in political cases, which fell into the category of especially serious criminal cases, coupled with the unstable political situation, eventually led to counter-reforms that withdrew many of the democratic principles of the Judicial Statutes. One of them, the law "On the Jurisdiction of the Proceedings on Crimes against the State" of 9 May 1878, transferred the jurisdiction of authority

---

[28] Efremova, N.N. (2019). Constitutional Foundations of the Judiciary in the Russian Federation as a Factor in the Progress of the Domestic Organization of Justice. In *Constitution and Social Progress. Second Prokopiev Readings: Proceedings of the International Scientific and Practical Conference* (p. 33). Immanuel Kant Baltic Federal University Publishing House. (In Russian)

over criminal cases involving the opposition to official power or other criminal acts against the interests of the monarchical regime from the jurisdiction of district courts that used jurors to that of judicial chambers.[29] According to A.F. Koni, since judicial chambers included representatives of certain classes, Russia returned to the model of German Schöffen courts, with the only difference being that their scope of cases was significantly expanded.[30]

The administration of justice with the participation of jurors in pre-revolutionary Russia was primarily based on the classical model of a jury trial.[31] Jury trials were conducted in district courts, which were the courts of first instance in a particular district of the judicial area. They were not held in courts of appeal. Jurors were selected from the list by lot, and it was their duty to serve on the jury.

During the preparation for a trial, the jurors could be challenged "without any explanation." Both the prosecution and the defense had the right to challenge, and they could file up to six challenges each. At the beginning of a trial, the jury was composed of twelve jurors and two alternates.

The jurors sat separately from the crown judges, but they had a right to examine physical evidence and ask questions through the presiding judge regarding all the circumstances of the case. The law banned jurors from leaving the courtroom and collecting information on the case independently outside the court session.

The jurors were entitled to deliberate and vote in private, separately from the professional judges, under the guidance of a jury foreman. Before moving to the deliberation room, they received instructions from the presiding judge on the essential circumstances of the case and its legal grounds. The jurors answered questions of fact that had to be reflected in the jury's verdict, for example: Has a crime been committed? Is the defendant guilty? Did the defendant act with intent? If not, do they deserve leniency?

There was no rule that obliged the jury to reach a unanimous decision. Disagreements were resolved by a majority of votes, and when the votes were equally divided, a decision was made in favor of the defendant.

If the jury passed a verdict of not guilty, the presiding judge immediately declared the defendant free from trial. In case of a guilty verdict, the court pronounced a judgment after hearing the prosecutor's conclusion regarding the punishment, the civil plaintiff's demands, and the defense lawyer's petition for mitigation of punishment, while also taking into account the jury's opinion on leniency. However, if the crown court (which comprised three professional judges) unanimously

---

29 Nemytina, M.V. (1999). *Courts in Russia: Second Half of 19th – Early 20th Centuries* (p. 85). Diss. (In Russian).

30 Koni, A. (1894). Introductory and final reports on the jury trial and on the trial with class representatives under the leadership of the Meeting of Senior Chairmen and Prosecutors of the Judicial Chambers on December 29–31, 1894. *Journal of the Ministry of Justice*, *4*, 38. (In Russian).

31 Nasonov, S.A. (2015). European models of the proceedings in the trial by jury: Trial by jury in Georgia (comparative legal studies). *Journal of Foreign Legislation and Comparative Law*, *6*(55), 164. (In Russian).

recognized that the jury convicted an innocent person, they decided that the case be presented to a new jury, the decision of which was to be final.

The Statute of Criminal Proceedings of 1864 did not provide for an appeal against a sentence based on the jury verdict. Only a cassation appeal was allowed if there was a clear violation of the law or its misinterpretation, as well as a violation of the legal procedure or the authority's frame of competence.

2.2. The Soviet System of Justice

The Soviet system of justice was formed within the Leninist concept of the proletarian people's court, which involved the participation of all workers in the administration of justice, even those without a complete general education, let alone a law degree.

The Marxist-Leninist concept aimed to de-ideologize the bourgeois element in the justice system, thereby rejecting the pre-revolutionary judicial system, including jury trials. These changes were reflected in Decrees on the Court No. 1, 2 and 3 which introduced the people's court and institutionalized lay assessors.

While the new system of justice was being established, the Soviet regime used some elements of the former model of people's participation. For example, Decree on the Court No. 2 of February 15, 1918, stipulated that decisions on criminal cases be made by a panel of twelve regular assessors and two alternates under the chairmanship of one judge. Later, the Regulations on the People's Court of the RSFSR dated 30 November 1918 differentiated between the numbers of lay assessors based on the gravity of the offense. In particular, extremely serious criminal offenses were considered by a people's judge and six lay assessors, while other criminal and civil offenses were considered by a people's judge and two lay assessors. Notably, lay assessors were involved not only in criminal but also in civil proceedings.

The Statute on the Judicial System of the RSFSR, which was adopted during the New Economic Policy in 1922, established a regular collegiate panel of a people's judge and two lay assessors for all courts of first instance, including the Supreme Courts, to hear both criminal and civil cases. This composition remained unchanged throughout the whole Soviet period.

Regulatory acts adopted at different times established the following requirements for lay assessors. First, lists of lay assessors and their elections were based on the principle of gender equality. Secondly, they were elected by groups at the place of work or at the place of residence, and they could only be released from their duties if challenged by the voters or on the basis of a court decision. Thirdly, the minimum age was first determined by the right to vote granted at the age of 18, and later, it was raised to 23 years (as per the USSR Law "On the Judicial System of the USSR and its Constituent and Autonomous Republics" of August 16, 1938) and 25 years (under the Framework Legislation on the Judicial System of the USSR and its Constituent and Autonomous Republics of December 24, 1958). Finally, there was a reputational criterion that stated: politically unreliable citizens were deemed ineligible for participation in justice (e.g., those deprived of the right to vote or excluded from public and professional organizations for misconduct) followed subsequently by citizens with a criminal record.

The procedural role of lay assessors in court was determined by procedural codes, including the Civil Procedure Codes of the Russian Soviet Federative Socialist Republic (RSFSR) of July 10, 1923 and June 11, 1964 and the Criminal Procedure Codes of February 15, 1923 and October 27, 1960. All of these codes equated people's judges with lay (people's) assessors: "the word 'judge' refers to people's judges and people's assessors".

Since lay assessors had no legal skills, the judge was obliged to provide them with all of the necessary explanations of the general and legal issues of the case prior to its consideration.

The fundamental difference between court proceedings with lay assessors and jury trials is that lay assessors discussed a case (criminal or civil) and voted on it in a deliberation room under the guidance of the presiding judge. None of the collegiate court members had the right to abstain from voting, and each question had to be answered in the affirmative; the judge voted after the assessors in order to prevent his influence on them. The decision was made by majority vote.

The presiding judge or one of the lay assessors had the right to draw up a judgment or a decision to be signed by every member of the collegiate court, even the judge or a lay assessor who had a dissenting opinion.

To summarize, the institution of people's assessors in the Soviet period performed three important functions. Firstly, they administered justice in collegiate courts of first instance, both in criminal and civil proceedings. Secondly, they exercised people's control over justice and enforcement proceedings. Thirdly, they performed educational and preventive activities related to legal education, re-education of offenders, and public prevention of crime.

2.3. Jury Trials in Modern Russia

In modern Russia, the main form of people's participation in justice is the possibility of a jury trial for certain criminal offenses. The return to the pre-revolutionary model of jury trials was declared in the Concept of the Judicial Reform of the RSFSR dated October 24, 1991 and institutionalized in Article 123 of the Constitution of the Russian Federation. Until 2003, however, lay participation in justice mainly had a symbiotic nature since the changes in the Civil Procedure Code (1964) and the Criminal Procedure Code (1960) of the RSFSR, which were in force in the 1990s, allowed for several court compositions ranging from only professional judges to panels with people's assessors in civil and criminal cases, as well as jury trials in criminal cases at the request of the accused. The institution of people's assessors was finally abolished by the Civil Procedure Code of the Russian Federation and the Criminal Procedure Code of the Russian Federation. Lay participation in civil proceedings was abolished on February 1, 2003, and in criminal proceedings, from January 1, 2004.

The analysis of pre-revolutionary and modern Russian legislation points to the continuity of the pre-revolutionary model of legal proceedings with jury trials. Although the majority of the features are common for both models, there are some distinctive characteristics of the modern criminal process.

Both models share some general eligibility criteria for jurors, namely the minimum age of 25, the absence of a criminal record or criminal charges, the absence of any medical contraindications on physical and other grounds, and the ability to speak the language in which the proceedings are to be conducted.

The modern model, however, excludes certain categories from jury service, namely public officers, people holding elected positions in local governments, in the justice system, and law enforcement agencies, as well as those involved in professional legal activities (such as lawyers and notaries), military personnel, and clergy.

Some of the requirements regarding those eligible to serve on a jury for were also waived, primarily due to their datedness or no longer being relevant. For example, those excluded from certain societies and noble assemblies or those under guardianship for profligate spending were formerly ineligible for jury service. Property and gender qualifications were also abolished.

The majority of juror's rights, nevertheless, have largely remained unchanged, including the right to study all the circumstances of a criminal case and examine material evidence, to ask questions through the presiding judge, and seek clarification on legal norms. The limitations are also the same: jurors cannot leave the courtroom, communicate with anyone other than the court members before passing a verdict, collect information on the case outside the court session, or disclose any details of deliberation and voting (Arts. 333 and 335 of the Criminal Procedure Code of the Russian Federation).

Similar to the pre-revolutionary era, in modern Russia also jurors have to answer the same questions of fact: "Has it been proven that the act took place? Has it been proven that this act was committed by the defendant? Is the defendant guilty of committing this act?" If the defendant is found guilty, the question is raised whether he or she deserves leniency. However, it is important to note that unlike the Statute of Criminal Proceedings of 1864, the Criminal Procedure Code of the Russian Federation provides for a possibility of asking further particular questions, in addition to the three main questions above, to establish whether there were any circumstances that affected the degree of the defendant's guilt or changed its nature, including those that could entail the release of the defendant from liability (Art. 339).

The order in which the judge gives instructions to the jury and the procedures for the jury's deliberation, voting, and passing a verdict are almost the same as in the former model (Arts. 340–343 of the Criminal Procedure Code of the Russian Federation). In particular, after hearing the instructions from the presiding judge, the jurors retire to the deliberation room, without professional judges, to issue a verdict. The deliberation is chaired by a jury foreman. The voting process is open and priority is given to a unanimous opinion. If the jury cannot reach a unanimous opinion, they can decide by majority vote on each issue, and in case of a parity of votes, they accept the answer that is in favor of the defendant. A guilty verdict is issued with a majority of votes on all three main questions. However, a verdict of not guilty is issued if a negative answer to any of the main questions was given by at least four jurors in a republican supreme court, a regional court, or any other court within the respective jurisdiction, or by at least three jurors in a district court or a garrison military court (Art. 343 of the Criminal Procedure Code of the Russian Federation).

Furthermore, the actions of the presiding judge after the verdict is announced have also remained unchanged (Arts. 346–351 of the Criminal Procedure Code of the Russian Federation). In case of a verdict of not guilty, the defendant is declared acquitted and, if in custody, is immediately released from it in the courtroom (Arts. 346 and 347 of the Criminal Procedure Code of the Russian Federation). In the case of a guilty verdict, the court has to resolve other legal issues (such as qualifying the offense, passing the sentence, resolving any civil claims, and hearing arguments from the parties). The presiding judge, however, may decide to dissolve the jury and arrange for this criminal case to be considered by a different court if he or she recognizes that "the guilty verdict was passed against an innocent person and there are sufficient grounds for issuing a verdict of not guilty since the fact of the crime has not been established or the participation of the defendant in the crime has not been proven." This decision is final and cannot be appealed.

However, there are certain differences in the judicial proceedings between a jury in pre-revolutionary and modern Russia. The fundamental difference is that now the defendant has to file a motion for a jury trial, while the Statute of Criminal Procedure of 1864 established such proceedings *a priori* for a certain category of criminal offenses.

Another difference from the pre-revolutionary legislation is the possibility of posing both unmotivated and motivated challenges to prospective jurors based on their questioning in order to identify any circumstances that might prevent a person from participating in a jury trial, with the first questioning conducted by the defense side. This rule is in contrast to the right of unmotivated challenges, where priority was given to the prosecution (Art. 328 of the Criminal Procedure Code of the Russian Federation).

The rules regarding the number of jurors have also changed. Initially, the jury institution was restored with a classic composition of twelve jurors and two alternates. Later, however, Federal Law No. 190-FZ of June 23, 2016, which introduced certain amendments to the Criminal Procedure Code of the Russian Federation, reduced the number of jurors to eight in the republican Supreme Courts, regional courts, and other courts within the respective jurisdiction, and to six jurors in district courts.

The above law also expanded the category of criminal offenses that can be tried by a jury. Initially, these were the crimes that could be punished by life imprisonment or the death penalty. Now, this category also includes those crimes for which a prison sentence may be imposed with alternative terms.

Also new is the procedure for dissolving the jury due to its composition bias. The jury can be dissolved before it is sworn in if the judge satisfies a motion filed by one of the parties about the jury's inability to issue an objective verdict due to specific peculiarities of the criminal offense (Art. 330 of the Criminal Procedure Code of the Russian Federation). In this case, the court resumes the preparations for a jury trial of the criminal offense as stipulated in Chapter 42 of the Criminal Procedure Code of the Russian Federation.

Finally, the pre-revolutionary and modern laws differ slightly in their appeal proceedings against sentences handed down by a court with a jury trial. For instance, the pre-revolutionary law only allowed for a cassation appeal on the basis of a clear violation of the direct meaning of the law or its misinterpretation, as well as a violation of legal proceedings or the court's competence. There was no possibility for revision au fond if the verdict's legality, validity, or fairness were called into question. The rule was that "the sentences pronounced by a district court with a jury trial are final." Although a form of appeal was introduced in the Criminal Procedure Code of the Russian Federation by Federal Law No. 433-FZ of December 29, 2010, the grounds for canceling or changing a court decision on appeal (Art. 389.15) are, in fact, the same as the grounds for pre-revolutionary cassation, i.e. a significant violation of the criminal procedure law, a misapplication of the criminal law, or an unfair sentence.[32]

Conclusion

The Chinese institution of people's participation in the administration of justice has its roots in the 3rd century BC, becoming a widespread practice during the reign of the Song dynasty. Imperial China had several forms of lay participation with certain powers delegated to them by district judges. Most often, these individuals were village elders (*qilao*), village policemen (*tibao*), or quasi-officials (*xiangbao*) elected by the community and approved by the local authorities, who independently considered civil lawsuits and collected information on civil or criminal cases on behalf of the judge. The law of that time required that civil lawsuits could be filed only after their consideration by such persons. Although they often abused their powers, ordinary people preferred not to go to courts since the judge could make a decision based on the Confucian idea of humanity and take the side of the debtor, even if it was obvious that the accused was guilty. The absence of a real opportunity to have the defendant fulfill his contractual obligations via a court decision lent weight to the institutions of people's participation in exercising judicial powers and resolving civil law disputes. Such participation became common practice throughout the era of the Celestial Empire, which left a deep imprint on the minds of many generations of Chinese people.

---

32 Nasonov, S.A. (2013). Models of review of sentences not entered into legal force, decided on the basis of jury verdicts in Russia and foreign countries. *Lex russica*, *4*, 379–390. (In Russian).

The institution of people's assessors was the main form of people's participation in justice in the People's Republic of China. Borrowed from the Soviet Union, it was tested in the Soviet Republic of China (1931–1934) and then enshrined in the first Constitution of the PRC in 1954 as an important element of the "democratic dictatorship of the people". In 2018, a new law on people's assessors was adopted, which established the right and duty of a Chinese citizen to participate in the proceedings of people's courts. The participation of people's assessors is now mandatory in the courts of first instance considering criminal, civil, or administrative cases of great social importance. The "specific feature of the Chinese system of people's assessors" in the modern period is that it innovatively combines the features of the "Schöffen system" of people's representation adopted by the Soviet state and some elements of the "trial by jury." Since China is one of the leaders in the increasingly globalized world economy, its centuries-old experience in people's participation in justice still deserves research and attention.

In Russia, unlike China, the institution of lay participation in justice has a chrono-discrete nature, i.e. it has undergone periodic changes in its models. We identified five periods in its development, which gave rise to five models.

The first period is associated with the formation of the Old Russian state. Although non-professional people's courts were still used in certain cases back then, the role of the state in justice administration gradually expanded, which led to a quasi-Schöffen model that was chaotically represented by elected members of the community, mainly at the local court level. Their role was not so much to decide a question of law or fact but to deter the judges from corruption and outright injustice.

The second period started with the "Statute on Provincial Administration in the All-Russian Empire" adopted by Catherine II in 1775. The Statute allowed for civil and criminal proceedings to be carried out by both professional judges and lay assessors who equally participated in making a judgment. Thus, this model was similar to the Schöffen model of lay participation, which originated in the German lands.

The third period is related to the Judicial Statutes of 1864, which rejected the Schöffen model of lay participation and introduced jury trials for certain criminal cases. The Schöffen model, however, was partially reinstated by counter-reforms for specific political and state crimes that could no longer be tried by a jury and were instead considered by the judicial chambers with the representatives of certain classes. Thus, both models of lay participation coexisted in the second half of the 19th century, but only within the criminal process.

The fourth period followed the October Socialist Revolution of 1917 and the subsequent transformation of the political and legal system. This period rejected all bourgeois elements, including those in the justice system, replacing jurors with people's assessors.

The fifth period, which characterizes modern Russia, was introduced by the Concept of the Judicial Reform of the RSFSR dated October 24, 1991. It gradually rejected the entire Soviet past, including people's courts with lay assessors, and reincarnated jury trials for certain categories of criminal cases at the request of the accused, which significantly narrowed people's participation in justice.

Considering the cyclical alternations of the Schöffen model and jury trials in Russian history, we can expect the former to return or both models to coexist, just as they did in the second half of the 19th century and in the 1990s.

The People's Republic of China demonstrates two models of public participation in justice can co-exist, which, in turn, can become a guarantee of constitutional human rights and freedoms aimed at ensuring the legality, justifiability and fairness of a judicial decision. The revival of the institution of people's assessors in the courts of first instance, along with the preservation of proceedings with the participation of jurors in serious criminal cases, will strengthen the democracy of proceedings in accordance with article 32 of the Constitution of the Russian Federation The People's Republic of China experience in creating fair justice through the dualistic model of people's assessors is a clear example of direct democracy, and it can be useful for any state, regardless of the preferences of its political elite and the specifics of national ideology.

References

Bakirova, A.M. (2019). The Role of Councils of Elders and Councils of Biys in the Justice System of the Russian Federation and the Republic of Kazakhstan. In *Constitution and Social Progress. Second Prokopiev Readings: Proceedings of the International Scientific and Practical Conference* (pp. 224–237). Immanuel Kant Baltic Federal University Publishing House. (In Russian).

Bernhardt, K. & Huang, P.C.C. (1994). Chapter One: Civil Law in Qing and Republican China: The Issues. In *Civil Law in Qing and Republican China* (pp. 1–12). Stanford University Press. https://doi.org/10.1515/9780804779272-004

Biryukova, O.V. (2023). People's Participation in Justice: On the Example of the Sheffen Court and the Jury. *Bulletin of the Kemerovo State University. Series: Humanities and Social Sciences, 7*(1), 59–65. http//dx.doi.org/10.21603/2542-1840-2023-7-1-59-65. (In Russian).

Brockman, R.H. (1981). IV Commercial Contract Law in Late Nineteenth-Century Taiwan. In J.A. Cohen et al. (Eds.), *Essays on China's Legal Tradition* (pp. 76–135). Princeton University Press.

Chan, P.C-H. (2012). The Enigma of Civil Justice in Imperial China: A Legal Historical Enquiry. *Maastricht Journal of European and Comparative Law*, *2*(19), 317–337. https://doi.org/10.1515/9781400885831-004

Clark, H.R. (2002). *Community, Trade, and Networks: Southern Fujian Province from the Third to the Thirteenth Century*. Cambridge University Press.

Danshin, A.V. (2017). The State and Social Mediation in Traditional China. *Bulletin of Kemerovo State University, 3*(3), 72–77. http//dx.doi.org/10.21603/2542-1840-2017-3-72-77. (In Russian).

Efremova, N.N. (2019). Constitutional Foundations of the Judiciary in the Russian Federation as a Factor in the Progress of the Domestic Organization of Justice. In *Constitution and Social Progress. Second Prokopiev Readings: Proceedings of the International Scientific and Practical Conference* (pp. 29–34). Immanuel Kant Baltic Federal University Publishing House. (In Russian).

Gavrilova, A. (2023). People's Participation in Justice in Modern Slavic States. *Bulletin of Kemerovo State University*, *7*(1), 74–79. https://doi.org/10.21603/2542-1840-2023-7-1-74-79. (In Russian).

Koni, A. (1894). Introductory and final reports on the jury trial and on the trial with class representatives under the leadership of the Meeting of Senior Chairmen and Prosecutors of the Judicial Chambers on December 29–31, 1894. *Journal of the Ministry of Justice*, *4*, 32–60. (In Russian).

Nasonov, S.A. (2013). Models of review of sentences not entered into legal force, decided on the basis of jury verdicts in Russia and foreign countries. *Lex russica*, *4*, 379–390. (In Russian).

Nasonov, S.A. (2015). European models of the proceedings in the trial by jury: Trial by jury in Georgia (comparative legal studies). *Journal of Foreign Legislation and Comparative Law*, *6*(55), 163–168. (In Russian).

Nemytina, M.V. (1999). *Courts in Russia: Second Half of 19th – Early 20th Centuries*. Diss. (In Russian).

Information about the authors

Anzhelika Gavrilova (Kemerovo, Russian Federation) – Associate Professor, Department of Theory and History of State and Law, Kemerovo State University (33 Tukhachevskogo St., Kemerovo, 650070, Russian Federation; e-mail: anzhik77@mail.ru).

Alexander Danshin (Kemerovo, Russian Federation) – Associate Professor, Department of Theory and History of State and Law, Kemerovo State University (33 Tukhachevskogo St., Kemerovo, 650070, Russian Federation; e-mail: danschin.garant2013@yandex.ru).

ARTICLE IN RUSSIAN

Traditional Reindeer Herding in Russia: Legal Issues of Land Provision and Rational Use

Vladimir Kryazhkov,

National Research University Higher School of Economics (Moscow, Russian Federation)

Традиционное оленеводство в России: правовые проблемы предоставления и рационального использования земель[*,**]

Владимир Кряжков,

Национальный исследовательский университет «Высшая школа экономики»

https://doi.org/10.21684/2412-2343-2025-12-1-161-183

Received: December 7, 2024
Reviewed: January 15, 2025
Accepted: March 1, 2025

---

[*] В настоящей статье понятия «земля», «земли» и «земельные участки» используются в значении, определяемом Конституцией РФ (ст. 9, 36) и Земельным кодексом РФ от 28 октября 2001 г. (ст. 1, 6, 7) (СЗ РФ. 2001. № 44. Ст. 4117). Они совмещаются нами с понятием «оленьи пастбища», которое упоминается в федеральном законодательстве и, по существу, является базовым в оленеводческом законодательстве субъектов Российской Федерации. При этом оленьи пастбища, в нашем понимании, представляют собой особый вид земельных участков (угодий) с естественной растительностью, пригодной в качестве корма для северных оленей, и используемых для круглогодичного и (или) сезонного их выпаса. Указанные пастбища отражают правовые характеристики тех категорий земель, в состав которых они входят.

[**] Автор выражает глубокую благодарность Погодаеву Михаилу Александровичу – заместителю министра по развитию Арктики и делам народов Севера Республики Саха (Якутия), председателю правления Ассоциации «Оленеводы мира» (2009–2019 гг.), кандидату экономических наук, доценту Арктического государственного агротехнологического университета за ценные советы и замечания, высказанные при подготовке настоящей статьи.

Abstract. Legal regulation governing indigenous rights related to the Northern lands and traditional economic activities began to take shape in the late Soviet and post-Soviet periods, when legislators established a special legal regime of land use for indigenous peoples, including for reindeer herding. Later, federal legislation was formulated based on international legal norms and the provisions of the Constitution of the Russian Federation, which guaranteed the rights of indigenous peoples to use the land as a material basis for their traditional activities. This article demonstrates that the current Russian legislation in this regard is merely symbolical, fragmentary, contradictory, and has gaps. The legislation of the Russian regions, in which reindeer herding is developing, partly compensates for the above-mentioned shortcomings. The most complete implementation is seen in Yakutia and the Nenets Autonomous Okrug regions, where land plots are assigned to reindeer owners with the obligation to use the allocated lands in accordance with land management projects and regulations that protect against the depletion of natural resources. This article references both domestic and foreign experience in this area and offers legislative proposals from an ethnocultural perspective that justify the right of northern indigenous peoples to reindeer herding as an integral form of their traditional economic practices. In this context, the free use of lands for reindeer herding should be guaranteed in the regions of traditional dwelling and economic activity; additionally, special regulations should be implemented to ensure the environmentally sustainable use of those lands alongside some adaptation measures that can be taken to protect reindeer herders from climate change. The above-mentioned provisions can be incorporated in land and environmental legislation, as well as in the federal law on reindeer herding.

Аннотация. Правовое регулирование отношений, связанных с правами малочисленных народов Севера на земли и традиционную хозяйственную деятельность, начинает складываться в поздний советский и постсоветский периоды, когда законодатель признал возможным установление особого правого режима землепользования для этих народов, в том числе для ведения северного оленеводства. В последующем с учетом международно-правовых норм и положений Конституции РФ, гарантирующих права коренных малочисленных народов, формируется федеральное законодательство о правах данных народов на пользование землей как материальной основы их традиционной деятельности, включая оленеводство. Констатируется, что в указанном случае оно только символично связано с международными нормами, фрагментарно, противоречиво и имеет пробелы. Законодательство субъектов Российской Федерации, в которых развивается оленеводство, отчасти компенсирует названные недостатки. Полнее всего – в Якутии и Ненецком автономном округе, где за владельцами оленей закрепляются земельные участки с возложением на них обязанностей использовать выделенные земли в соответствии с проектами землеустроительных работ и по правилам, не приводящим к истощению природных ресурсов. Принимая во внимание отечественный и зарубежный опыт, с этнокультурных позиций формулируются предложения по совершенствованию правового регулирования в части: признания права северных народов на оленеводство как вид их традиционной хозяйственной деятельности; гарантирования им в местах традиционного проживания и традиционной хозяйственной деятельности предоставления земель на безвозмездной основе для занятия оленеводством; закрепления специальных правил, обеспечивающих экологически устойчивое использование этих земель оленеводами, и требований, адресованных иным их пользователям; принятия адаптационных мер по защите оленеводов от климатических изменений. Данные положения могут быть отражены в земельном и природоохранном законодательстве, а также дополнительно в федеральном законе об оленеводстве.

Keywords: small-numbered peoples of the North; traditional reindeer herding; provision of land for reindeer herding; rational use of land; land, nature conservation and reindeer herding legislation.

Ключевые слова: малочисленные народы Севера; традиционное оленеводство; предоставление земель для ведения оленеводства; рациональное использование земель; земельное, природоохранное и оленеводческое законодательство.

To cite: Kryazhkov, V. (2025). Traditional Reindeer Herding in Russia: Legal Issues of Land Provision and Rational Use. *BRICS Law Journal*, *12*(1), 161–183.

Table of Contents

Introduction
Введение

Северное домашнее оленеводство (далее – северное оленеводство, традиционное оленеводство, оленеводство) – вид традиционной хозяйственной деятельности коренных малочисленных народов Севера, Сибири и Дальнего Востока России[1]. Оно уже несколько столетий является постоянным занятием ненцев, саамов, хантов, долганов, эвенов, эвенков, чукчей и коряков[2], а также некоторых других северных народов, проживающих в 18 субъектах Российской Федерации: в республиках Бурятия, Коми, Саха (Якутия), Тыва, Забайкальском, Красноярском, Камчатском и Хабаровском краях, Амурской, Архангельской, Иркутской, Магаданской, Мурманской и Сахалинской областях, Ненецком, Ханты-Мансийском, Чукотском и Ямало-Ненецком автономных округах.

По состоянию на 2021 г. в России численность домашних оленей составляет 1,6 млн голов или 60% от мирового поголовья. При этом численность оленей в субъектах Российской Федерации заметно различается[3]. По данному показателю их можно дифференцировать на три группы:

1) в первую группу – с высокими показателями поголовья оленей – входят Ямало-Ненецкий (649 тыс. оленей), Ненецкий (168 тыс.) и Чукотский (125 тыс.) автономные округа, Республика Саха (Якутия) (157 тыс.) и Красноярский край (121 тыс.). Суммарно в названных субъектах находится 80% оленей от их общего числа по стране;

2) вторую группу – со средними показателями поголовья оленей – составляют Республика Коми (92тыс.), Мурманская область (58 тыс.), Камчатский край (48 тыс.) и Ханты-Мансийский автономный округ (34 тыс.);

3) третья группа – это субъекты Российской Федерации с незначительным числом оленей: Амурская и Магаданская области (по 6 тыс.), Хабаровский и Забайкальский края (по 4 тыс.), Республика Тыва (2 тыс.), Республика Бурятия и Иркутская область (менее 1 тыс.).

Оленеводство является единственной отраслью животноводства, полностью базирующейся на естественной кормовой базе – оленьих пастбищах[4]. Общая

---

1 См.: Перечень видов традиционной хозяйственной деятельности коренных малочисленных народов Российской Федерации, утв. распоряжением Правительства РФ от 6 мая 2009 г. № 631-р // СЗ РФ. 2009. № 20. Ст. 2493.

2 См.: *Йернслеттен Й-Л.Л., Клоков К.* Устойчивое оленеводство. Издание Центра саамских исследований. Университет Тромсё, 2002–2003. С. 24.

3 См.: *Калитин Р.Р.* Современное состояние, проблемы северного оленеводства и пути их решения // Российская Арктика. 2021. № 4 (15). С. 29–34; *Михайлова А.* По законам тундры. В северных регионах страны развивают традиционное оленеводство // Агроинвестор. 2021. 4 окт.

4 См.: *Роднина. Н.В.* Арктическое оленеводство в Якутии в условиях промышленного освоения территории: конфликт интересов или перспективы для сотрудничества // Арктика: экология и экономика. 2022. Т. 12. № 1. С. 147.

площадь названных пастбищ по стране составляет 335, 2 млн га (19% земельного фонда страны). Из них 140,0 млн га предоставлено в пользование сельскохозяйственным организациям и еще 5,5 млн га – гражданам, занимающимся оленеводством (т.е. 56,6% таких пастбищ ни за кем не закреплены). По некоторым данным, площадь фактически используемых указанных пастбищ сокращается. Их деградация в разной степени составляет более 250 млн га или 74,6% их общей площади[5]. Подобное положение вещей обычно связывают с тремя основными взаимосвязанными факторами: с переизбытком количества оленей (превышением оленеемкости пастбищ); интенсивным промышленным освоением северных территорий, ведущим к изъятию земель, загрязнению и фрагментации ландшафтов; климатическими изменениями, под влиянием которых меняется покров, качество и разнообразие кормовых ресурсов, сроки и пути маршрутов выпаса оленей[6]. Соответственно, недопустимо вину за состояние пастбищ перекладывать исключительно на оленеводов, требовать от них, как это имело место применительно к ситуации в Ямало-Ненецком автономном округе, радикального сокращения стада или предложения им прекратить данную деятельность лет на 20[7].

С учетом названных обстоятельств рассмотрим некоторые вопросы нормативного регулирования прав малочисленных народов Севера на оленеводство и земли в контексте их рационального (бережного, экологически обоснованного, достаточного для устойчивого развития оленеводства, с нанесением минимального ущерба окружающей среде) использования[8], с пониманием того, что это особый вид рационального использования природных ресурсов, который обеспечивается применением специальных мер.

---

5 См.: *Липски С.А.* Состояние оленьих пастбищ в Арктической зоне Российской Федерации, факторы их деградации и пути по улучшению ситуации // Известия высших учебных заведений. Геодезия и аэросъемка. 2018. Т. 62. № 16. С. 696–697.

6 См.: *Липски С.А.* Указ. соч. С. 697; *Роднина Н.В.* Указ. соч. С. 141–142; *Погодаев М.А.* Влияние изменения климата на традиционный образ жизни и традиционную хозяйственную деятельность коренных малочисленных народов Севера // Современное состояние и пути развития коренных малочисленных народов Севера, Сибири и Дальнего Востока Российской Федерации / под общ. ред. В.А. Штырова. 2-е изд., перераб. и доп. М., 2013. С. 173–288; *Пилясов А.Н., Кибенко В.А.* Феномен предпринимательства в оленеводстве Ямало-Ненецкого автономного округа: оценка ситуации, парадоксы и противоречия, выбор будущего // Арктика: экология и экономика. 2020. № 1(37). С. 127–129.

7 См.: *Ефимов И.П., Калитин Р.Р.* Состояние и проблемы развития традиционного хозяйствования Арктики: северное оленеводство // Арктика-235: актуальные вопросы, проблемы, решения. 2021. № 1(5). С. 45; Ученые: олени могут привести к экологической катастрофе: интервью директора Института экологии растений и животных УрО РАН В. Богданова // https://rg.ru/.

8 В законодательстве отсутствует определение рационального природопользования. В правовой доктрине оно трактуется по-разному. Обстоятельный анализ этого вопроса см.: Правовой механизм обеспечения рационального использования природных ресурсов / отв. ред. Е.А. Галиновская. М.: Институт законодательства и сравнительного правоведения при Правительстве РФ; ИНФРА-М, 2019; *Лунева Е.В.* Право рационального природопользования: доктрина, методология и практика: дис. … докт. юрид. наук. Казань, 2023.

1. The Rights of Northern Peoples to Use Land and Reindeer Herding in the Soviet and Post-Soviet Periods
Права северных народов на пользование землей и оленеводство в советский и постсоветский периоды

В СССР Конституция 1977 г. и Основы земельного законодательства Союза ССР и союзных республик 1968 г.[9], как и предшествующее советское законодательство, не содержали норм относительно специальных прав северных народов, включая право на землю в целях осуществления традиционной хозяйственной деятельности. Земля и другие природные ресурсы находились в исключительной собственности государства и предоставлялись только в пользование, в том числе колхозам, совхозам и гражданам (для ведения подсобного хозяйства). Оленеводство (при численности домашних оленей 2,4 млн голов на 1973 г.) рассматривалось как отрасль сельского хозяйства Крайнего Севера, в которой были заняты северные народности[10].

Основы земельного законодательства Союза ССР и союзных республик 1990 г.[11] вводили положение о том, что в местах проживания и хозяйственной деятельности малочисленных народов и этнических групп законодательством союзных и автономных республик может быть установлен особый режим использования земель сельскохозяйственного назначения, лесного фонда и иных категорий земель, входящих в состав земель СССР (ст.2).Земельный кодекс РСФСР 1991 г.[12], опираясь на эту норму, предусматривал:

– предоставление земельных участков во временное пользование на срок до двадцати пяти лет для ведения северного оленеводства (ст. 14):

– возможность использования земель природоохранного назначения для выпаса оленей (ст. 89);

– предоставление в пользование и передачу в аренду колхозам, совхозам, а также в собственность, владение или аренду гражданам земель лесного фонда для северного оленеводства (ст. 94).

В постсоветский период, когда Россия становится суверенным государством и в полном объеме решает вопросы, связанные с правами малочисленных народов Севера, важное значение в перспективном плане имел Указ Президента РФ от 22 апреля 1992 г. № 397 «О неотложных мерах по защите мест проживания и хозяйственной деятельности малочисленных народов Севера»[13].

---

9 См.: Ведомости Верховного Совета СССР. 1968. № 51. Ст. 489.

10 См.: *Миронов П.Е.* Оленеводство // Большая Советская Энциклопедия. 3-е изд. Т. 18. М.: Советская энциклопедия, 1974. С. 371.

11 Ведомости СНД и Верховного Совета СССР. 1990. № 10. Ст. 129.

12 Ведомости СНД и Верховного Совета РСФСР. 1991. № 22. Ст. 768.

13 Ведомости СНД и Верховного Совета РФ. 1992. № 18. Ст. 1009.

Он в целях обеспечения законных прав и интересов данных народов, сохранения и развития традиционных форм их хозяйствования предписывал исполнительным органам власти республик, краев, областей и автономных округов, в которых проживают северные народы, совместно с их региональными ассоциациями (п. 1):

– определить территории традиционного природопользования, которые являются неотъемлемым достоянием этих народов и без их согласия не подлежат отчуждению под промышленное или иное освоение, не связанное с традиционным хозяйствованием;

– передать бесплатно оленьи пастбища, охотничьи, рыболовные и другие угодья для комплексного использования родовым общинам и семьям из числа малочисленных народов Севера, связанным с традиционными отраслями и промыслами[14];

– определить границы территорий для традиционных видов хозяйственной деятельности малочисленных народов Севера с целью обеспечения неистощительного природопользования.

2. International Legal Standards of Indigenous Peoples' Rights to Lands and Traditional Activities
Международно-правовые стандарты прав коренных народов на земли и традиционную деятельность

Конституция РФ, принятая в 1993 г., гарантирует права коренных малочисленных народов в соответствии с общепризнанными принципами и нормами международного права и международными договорами Российской Федерации (ч. 1 ст. 69). При этом международно-правовые ориентиры в части, касающейся прав коренных народов на земли (территории) и традиционную деятельность, формулирует Конвенция МОТ 169 «О коренных народах и народах, ведущих племенной образ жизни в независимых странах»[15]. Она признает за данными народами права собственности и владения на земли, которые они традиционно занимают; гарантирует им право пользования землями, которые заняты не только ими, но к которым у них есть традиционный доступ для осуществления их жизненно необходимой и традиционной деятельности; требует обращать особое внимание на положение коренных народов, практикующих переложное земледелие (ст. 14); нацеливает правительства на сохранение и развитие традиционных видов деятельности коренных народов (ст. 23).

[14] Данный абзац утратил силу в соответствии с Указом Президента РФ от 25 февраля 2003 г. № 250 // СЗ РФ. 2003. № 9. Ст. 851.

[15] Конвенции и рекомендации, принятые Международной организации труда. 1957–1990. Т. II. Женева, 1991. С. 2193–2207. Данная Конвенция вступила в силу 5 сентября 1991 г. Она не ратифицирована Российской Федерацией.

Декларация ООН 2007 г. о правах коренных народов[16] подтверждает, уточняет и дополняет названные положения:

– юридическое признание права коренных народов на традиционные земли, территории и ресурсы допускается с возможностью иметь их не только в собственности, но и использовать, разрабатывать или контролировать. Причем это должно происходить при соблюдении принципов справедливости и открытости, с учетом традиций, обычаев и систем землевладения коренных народов и с их участием, предусматривать объективную и сбалансированную компенсацию в случае конфискации, отчуждения, занятия, использования или нанесения ущерба указанным землям, территориям и ресурсам (ст. 26, 27, 28);

– гарантируется право коренных народов на сохранение и охрану окружающей среды и производительной способности их земель, территорий и ресурсов. В данном контексте принимаются меры по недопущению без их согласия хранения опасных материалов на этих землях и территориях (ст. 29);

– коренные народы имеют право на свободное занятие своей традиционной и другой экономической деятельностью (ст. 20).

Во взаимосвязи с рассматриваемой проблематикой важно обратить внимание и на то, что мировое сообщество:

– признает большую и традиционную зависимость коренного населения от биологических ресурсов и желательность совместного пользования на справедливой основе выгодами, связанными с использованием традиционных знаний, нововведений и практики, имеющих отношение к сохранению биологического разнообразия и устойчивому использованию его компонентов. Сообразно с этим предлагается обеспечивать уважение, сохранение и поддержание указанных знаний, нововведений и практик, способствовать их более широкому применению с одобрения и при участии носителей таких знаний, нововведений и практик (преамбула, п. jст. 8 Конвенции о биологическом разнообразии[17]);

– провозглашает, что коренное население и его общины призваны играть жизненно важную роль в рациональном использовании и улучшении окружающей среды с учетом их знаний и традиционной практики (принцип 22 Декларации Рио-де-Жанейро по окружающей среде и развитию 1992 г.[18]);

– выделяет коренные народы в качестве общностей, зависимых от изменений климата, и призывает страны руководствоваться не только научными знаниями при выработке социально-экономических и природоохранных стратегий и действий по их адаптации к этим изменениям, но и традиционными знаниями данных народов (преамбула, ч. 5 ст. 7 Парижского соглашения от 12 декабря 2015 г.[19]).

---

16 См.: Декларация Организации Объединенных Наций о правах коренных народов. М.: Кодекс, 2019.

17 Ратифицирована Федеральным законом от 17 февраля 1995 г. // СЗ РФ. 1995. № 8. Ст. 601.

18 См.: Международное публичное право: сборник документов. Т. 2. М.: БЕК, 1996. С. 135–138.

19 См.: Бюллетень международных договоров. 2020. № 4. Документ вступил в силу для России 6 ноября 2019 года // http://www.pravo.gov.ru.

Таким образом, международно-правовая трактовка права коренных народов на пользование землями, если выделить главное, состоит в его признании, по сути, как естественного права, увязанного с традиционностью их проживания на этих землях, составляющих материальную основу для ведения ими традиционной деятельности. При этом традиционные знания и практики данных народов определяются как ценность, что обусловливает необходимость их применения для сохранения биологического разнообразия, рационального использования и улучшения окружающей среды.

3. Federal Legislation on the Right of Indigenous Peoples to Use Lands for Traditional Reindeer Herding
Федеральное законодательство о праве коренных малочисленных народов на пользование землями для осуществления традиционного оленеводства

Российский законодатель по-своему учитывает указанные международно-правовые положения. Базовый закон в системе законодательства о коренных малочисленных народах – Федеральный закон от 30 апреля 1999 г. «О гарантиях прав коренных малочисленных народов Российской Федерации»[20]закрепляет право коренных малочисленных народов безвозмездно пользоваться в местах традиционного проживания и традиционной хозяйственной деятельности данных народов землями различных категорий для осуществления традиционной хозяйственной деятельности и занятий традиционными промыслами, а также права на осуществление контроля за использованием этих земель, на участие в принятии затрагивающих их интересы решений, в проведении экологических и этнологических экспертиз, на возмещение убытков хозяйствующими на «аборигенных» территориях субъектами за ущерб исконной среде обитания коренных малочисленных народов (ст. 8).

Земельный кодекс РФ упоминает пастбища как вид сельскохозяйственных угодий, относящихся к землям сельскохозяйственного назначения, которые, в свою очередь, могут использоваться общинами коренных малочисленных народов Севера, Сибири и Дальнего Востока для сохранения и развития традиционного образа жизни, традиционной хозяйственной деятельности и промыслов (ст. 78, 79).Федеральный закон от 24 июля 2002 г. «Об обороте земель сельскохозяйственного назначения»[21], развивая это положение, определяет, что земельные участки из земель сельскохозяйственного назначения, занятые оленьими пастбищами в районах Крайнего Севера и находящиеся в государственной или муниципальной собственности, могут быть переданы гражданам

[20] СЗ РФ. 1999. № 18. Ст. 2208.

[21] СЗ РФ. 2002. № 30. Ст. 3018.

и юридическим лицам только на праве аренды или на праве безвозмездного пользования на срок не менее чем пять лет (ч. 6 ст. 10).

Лесной кодекс РФ от 4 декабря 2006 г.[22] устанавливает, что леса могут использоваться для ведения сельского хозяйства, в том числе северного оленеводства. Лесные участки для оленеводства, по общему правилу, предоставляются гражданам и юридическим лицам на основании договоров аренды; эти участки могут предоставляться в безвозмездное пользование, если оленеводство осуществляется для собственных нужд; леса могут использоваться в названных целях без предоставления лесного участка, с установлением или без установления сервитута, публичного института (ст. 38).

Практика свидетельствует, что оленьи пастбища могут, кроме названных земель, входить в состав и других категорий земель. Они имеются, например, на землях запаса в Мурманской области (4,4% от их общей площади) и Республике Саха (Якутия) (10%)[23].Если исходить из положений Федерального закона от 14 марта 1995 г. «Об особо охраняемых природных территориях» (п. «е» ч. 1 ст. 15, ч. 4 ст. 24)[24], коренные малочисленные народы не лишены возможности осуществлять выпас оленей на особо охраняемых природных территориях – в национальных парках и природных заказниках. Примером могут служить заказники регионального значения – Вернеполуйский и Собты-Юганский (Ямало-Ненецкий автономный округ), где лицам, проживающим на данных территориях, по результатам научных исследований разрешено содержать поголовье оленей определенной численности без ущерба для местной флоры и фауны[25]. По смыслу Федерального закона от 7 мая 2001 г. «О территориях традиционного природопользования коренных малочисленных народов Севера, Сибири и Дальнего Востока Российской Федерации»[26] оленеводство также может осуществляться на данных территориях, поскольку они образуются для ведения традиционного природопользования и традиционного образа жизни коренных малочисленных народов Севера, Сибири и Дальнего Востока (преамбула, ст. 1, 4, 10, 11).

Земельный кодекс РФ выделяет охрану земель, занятых оленьими пастбищами в районах Крайнего Севера (ч. 9 ст. 13). При этом организация территорий, используемых общинами коренных малочисленных народов Севера, Сибири и Дальнего Востока, рассматривается как особый элемент землеустройства (ч. 1 ст. 68).

---

22 СЗ РФ. 2006. № 50. Ст. 5278.

23 См.: *Липски С.А.* Указ. соч. С. 696–697; *Роднина Н.В.* Указ. соч. С. 143.

24 СЗ РФ. 1995. № 12. Ст. 1024.

25 См.: На Ямале создадут дополнительные условия для сохранения уникальной арктической природы // https://dprr.yanao.ru/presscenter/news/195917/.

26 СЗ РФ. 2001. № 20. Ст. 1972.

Конкретизируя последнее положение, Федеральный закон от 18 июня 2001 г. «О землеустройстве»[27] определяет, что оценка качества земель, являющихся исконной средой обитания коренных малочисленных народов Севера, Сибири и Дальнего Востока, проводится в целях установления продуктивности оленьих пастбищ и наличия биологических ресурсов, необходимых для сохранения традиционного образа жизни этих народов. Внутрихозяйственное устройство, обеспечивающее рациональное использование названных земель общинами данных народов и лицами, относящимися к ним, увязывается с выполнением различных видов землустроительных работ, в том числе по улучшению сельскохозяйственных угодий, освоению новых земель, восстановлению и консервации земель, рекультивации нарушенных земель, защите земель от эрозии, селей, уплотнения, загрязнения отходами производства и потребления, радиоактивными и химическими веществами, заражения и других негативных воздействий (ст. 12, 18)[28].

Таким образом, можно констатировать, что федеральное законодательство содержит отдельные нормы о праве коренных малочисленных народов на пользование землями – преимущественного сельскохозяйственного назначения и лесного фонда –для осуществления оленеводства, именуемыми в подобных случаях и оленьими пастбищами. Данные нормы только символично опираются на международно-правовые стандарты, не согласованны между собой, не дают ясных представлений о статусе и порядке передачи этих земель оленеводам, а также о правилах, на основе которых должно обеспечиваться их рациональное использование. Отчасти в той мере, насколько возможно, названные недостатки компенсируются региональным законодательством и прежде всего законами об оленеводстве.

4. Legislation of the Subjects of the Russian Federation on the Provision and Use of Reindeer Pastures
Законодательство субъектов Российской Федерации о предоставлении и использовании оленьих пастбищ

Конституция РФ выделяет вопросы владения, пользования и распоряжения землей, а также защиту исконной среды обитания и традиционного образа жизни малочисленных общностей в качестве предмета совместного ведения Российской Федерации и субъектов Российской Федерации (п. «в», «м» ч. 1 ст. 72). Это обусловливает возможность участия субъектов Российской Федерации в правовом регулировании оленеводческих отношений, принятии ими,

---

[27] СЗ РФ. 2001. № 26. Ст. 2582.

[28] Схожие положения прописываются в проекте нового Федерального закона «О землеустройстве» (ст. 1, 3, 16), подготовленном Минсельхоз РФ // Новое в российском законодательстве (ежедневно). 4 марта 2025 г. (СПС «КонсультантПлюс»).

в частности, законов об оленеводстве с включением в них норм о правах малочисленных народов Севера на земли, предоставляемые им для осуществления оленеводства.

В настоящее время законы об оленеводстве действуют в 12 субъектах Российской Федерации[29]. В восьми из них закрепляются положения о пастбищах, их охране и рациональном использовании, ответственности физических и юридических лиц, ведущих нетрадиционную хозяйственную деятельность в их границах. Наиболее полно они прописаны в законах Республики Саха (Якутия) и Ненецкого автономного округа.

4.1. Republic of Sakha (Yakutia)
Республика Саха (Якутия)

Закон Республики Саха (Якутия) от 25 июня 1997 г. «О северном домашнем оленеводстве» – первый региональный закон об оленеводстве, ставший в какой-то степени ориентиром для других субъектов Российской Федерации. В нем нашли отражение и вопросы, связанные с оленьими пастбищами. В частности, Законом (ст. 21–25) определяется:

– оленьи пастбища закрепляются за собственниками (владельцами) оленей на основании федерального законодательства и законодательства Республики Саха (Якутия);

– необходимость охраны оленьих пастбищ, которая обеспечивается: возложением обязанностей на оленеводов – физических и юридических лиц – использовать эти пастбища в соответствии с проектами землеустройства и их целевым назначением, вести чередование участков выпаса по годам во всех зонах ведения оленеводства, не допускать потравы оленьими стадами; не нарушать права других пользователей пастбищ и порядок пользования лесами и другими природными ресурсами, не допускать ущерб окружающей среды, ухудшения экологической обстановки;

– запретами на движение тяжелого транспорта на оленьих пастбищах в бесснежное время года, а также за пределами специально выделенных для этой цели трасс;

– установлением требований для субъектов, ведущих хозяйственную и иную деятельность на территории оленьих пастбищ, соблюдать правила пожарной безопасности, хранения, транспортировки, утилизации, удаления, захоронения промышленных отходов, природоохранное законодательство при проектировании и строительстве промышленных объектов, а также возмещать оленеводческим хозяйствам причиненный ущерб.

---

[29] Данные законы см.: Законодательство мира в сфере оленеводства: сборник / сост. С.Н. Харючи, Т.Р. Акчурин. Ханты-Мансийск; Тюмень: Ассоциация «Оленеводы Мира»; ИПЦ «Экспресс», 2021. С. 206–352. Они анализируются с учетом изменений и дополнений по состоянию на август 2024 г.

4.2. Nenets Autonomous Okrug (NAO)
Ненецкий автономный округ (НАО)

Закон НАО от 6 декабря 2016 г. «Об оленеводстве в Ненецком автономном округе» устанавливает:

– предоставление оленеводческим хозяйствам земельных участков из земель сельскохозяйственного назначения, занятых оленьими пастбищами, находящихся в собственности округа или муниципальной собственности, или земельных участков, государственная собственность на которые не разграничена, осуществляется в соответствии с федеральным законодательством и законодательством автономного округа (ст. 5);

– допустимость использования оленеводческими хозяйствами земельных участков, расположенных на территориях других субъектов Российской Федерации, на основе федерального и регионального законодательства, договоров и соглашений автономного округа с другими субъектами Российской Федерации, договоров и соглашений оленеводческих хозяйств с арендаторами и иными правообладателями земельных участков. По согласованию с правообладателями земельных участков может осуществляться движение оленей по смежным земельным участкам (ст. 6);

– требование проводить за счет средств окружного бюджета геоботаническое обследование оленьих пастбищ и разработку проектов внутрихозяйственного землеустройства их территорий; определять оленеемкость пастбищ и сообразовывать с ней численности поголовья оленей (ст. 8);

– нормы, нацеленные на сохранение среды обитания оленей, в соответствии с которыми оленеводами и их уполномоченными представителями может быть инициировано проведение общественной экологической и этнологической экспертизы хозяйственной и иной деятельности, затрагивающей интересы оленеводства, предусматривающие запреты на движение транспортных средств в границах оленьих пастбищ (ст. 7).

Законы об оленеводстве других субъектов Российской Федерации схожим образом регулируют отношения, связанные с предоставлением оленьих пастбищ и их использованием, с включением отдельных оригинальных норм по названным вопросам. В частности:

– Закон Республики Коми от 1 марта 2011 г. «Об оленеводстве в Республике Коми» право оленевода на получение оленьих пастбищ увязывает с созданием им оленеводческого хозяйства. При этом границы земельных участков, используемых под оленьи пастбища и закрепляемых за землепользователями, арендаторами земельных участков, устанавливаются проектами внутрихозяйственного землеустройства (ст. 15);

– Закон Магаданской области от 10 июня 2005 г. «Об оленеводстве в Магаданской области» закрепляет, что лицам из числа малочисленных народов Севера, занимающимся оленеводством, предоставляются территории традиционного природопользования с выделением на безвозмездной основе части данных территорий под оленьи пастбища (ст. 12);

– Закон Ханты-Мансийского автономного округа – Югры от 7 июля 2004 г. «О развитии северного оленеводства в Ханты-Мансийском автономном округе – Югре» устанавливает, что оленьи пастбища предоставляются органами исполнительной власти округа и местного самоуправления лицам, занимающимся оленеводством, в соответствии с действующим законодательством, но при условии обеспечения рационального их использования, недопустимости потерь биологической продуктивности растительного покрова и превышения численности оленей над фактической оленеемкостью пастбищ (ст. 11). Показатели оленеемкости пастбищ определяются уполномоченным органом на основе научных рекомендаций. С ними пользователи пастбищ должны сообразовывать максимальную численность поголовья своих оленей (ст. 6);

– Закон Забайкальского края от 10 октября 2012 г. «О северном домашнем оленеводстве» обязывает оленеводов использовать оленьи пастбища в соответствии с лесохозяйственным регламентом, проектами освоения лесов, чередовать участки выпаса оленей по годам во всех зонах ведения оленеводства (ч. 2 ст. 14), требует соблюдения норм максимальной численности поголовья оленей, что рассматривается как условие рационального использования кормовых ресурсов данных пастбищ (ст. 8).

Таким образом, анализ законодательства оленеводческих субъектов Российской Федерации свидетельствует, что не все из них регулируют отношения по предоставлению и оптимальному использованию пастбищ. А в тех, где это происходит, – делается с разной степенью детализации, но общий дефект состоит в декларативности установлений и отсутствии механизмов, обеспечивающих их реализацию. Подобное положение вещей во многом обусловлено качеством федерального законодательства в рассматриваемой сфере, которое уже несколько десятилетий находится в зачаточном состоянии.

5. Legal Issues of Reindeer Herding That Require Resolution in the Context of Northern Peoples' Rights to Lands and Their Rational Use

Правовые вопросы оленеводства, требующие разрешения в контексте прав северных народов на земли и их рационального использования

Первое. Необходимо нормативно закрепить право коренных малочисленных народов Севера, Сибири и Дальнего Востока на оленеводство как вид их традиционной хозяйственной деятельности. В настоящий момент лица, из числа указанных народов, по факту монопольно занимаются им. Подобное положение вещей, на наш взгляд, должно сохраняться, поскольку оленеводство составляет основу традиционной культуры и образа жизни значительной части северных народов, и юридически обеспечиваться как их исключительное (или преимущественное) право на занятие оленеводством[30]. Дополнительно, возможно, следовало бы, по примеру Норвегии и Швеции[31], установить ограничения и по кругу лиц, наделенных правом владеть оленями, отдавая приоритет тем из них, кто ведет традиционный образ жизни, имеет семейные оленеводческие традиции, соответствующие навыки и знания. Переуступка права на владение оленями допустима, но только по отношению к тем, кто входит в круг субъектов, способных иметь данное право.

Такой подход – этнически ориентированное определение субъектов северного оленеводства – составляет важный элемент оптимизации отношений, связанных с предоставлением и использованием пастбищ.

Второе. Признание права северных народов и лиц, относящимся к ним, на традиционное оленеводство обусловливает их притязания на пользование землями как материальной основы, позволяющей им заниматься этой деятельностью. Данные притязания следует трактовать как вполне естественные: содержание оленей без гарантированного предоставления их владельцам земельных участков – ситуация, при которой право на оленеводство утрачивает смысл.

Для полноты и гармонизации правового регулирования отношений, связанных с предоставлением земель, было бы целесообразно:

– зафиксировать круг субъектов Российской Федерации, в границах которых осуществляется северное домашнее оленеводство (в настоящее время в подобных случаях, как было показано выше, в законодательстве используется не вполне определенное понятие «районы Крайнего Севера»). Это ограничит возможность неупорядоченного распространения оленеводства на иных территориях, конкретизирует территориальные пределы действия оленеводческого законодательства, сфокусирует внимание соответствующих региональных органов публичной власти на решении проблем данной отрасли сельского хозяйства;

– в каждом оленеводческом субъекте Российской Федерации на основе проведенных земельно-кадастровых работ выделять в местах традиционного проживания и традиционной хозяйственной деятельности северных народов земли для занятия оленеводством с обозначением их границ, зон выпаса оленей – летних, осенних, зимних и весенних, миграционных лагерей (становищ),

---

30 Такой подход имеет место в Норвегии и Швеции, где оленеводство рассматривается как особая привилегия саамов, позволяющая им сохранить свою культуру (см.: Саамская конвенция северных стран 2017 г. (ст. 42) // https://www.sametinget.se/105173). Обоснования по этому поводу с привязкой к российской ситуации см.: *Клоков К.Б.* Традиционное природопользование народов Севера: концепция сохранения и развития /под ред. Е.Е. Сыроечковского, А.И. Чистобаева. СПб., 1997. С. 21, 41–42; *Етылин В.М.* Законопроект «О северном оленеводстве» // Олень всегда прав. Исследование по юридической антропологии: сборник статей / отв. ред. Н.И. Новикова. М.: Стратегия, 2003. С. 222–223.

31 См.: Закон Норвегии 2007 г. «Об оленеводстве» (параграфы 9, 10, 32); Закон Швеции 1971 г. «Об оленеводстве» (параграф 1) // Законодательство мира в сфере оленеводства: сборник / сост. С.Н. Харючи, Т.Р. Акчурин. С.43–44, 62–63, 376.

мест спаривания и отела, священных и культовых мест. Допускать при определенных обстоятельствах возможность осуществления оленеводства за пределами указанных мест (традиционных оленеводческих территорий) по специальному разрешению уполномоченного государственного органа;

– исходить из того, что земли, на которых ведется оленеводство, находятся в государственной или муниципальной собственности и передаются гражданам и оленеводческим организациям в безвозмездное пользование[32]. Данные земли распределяются между пользователями при участии оленеводов (их организаций) на основе установленных правил и обычаев. Они могут обретать статус территорий традиционного природопользования. Изъятие и использование земельных участков для несельскохозяйственных нужд допускается, но с учетом ясно выраженного в специальной процедуре мнения оленеводов, результатов экологических и этнологических экспертиз, с выплатой правообладателям земельных участков справедливой денежной компенсации за причиненный ущерб и при сохранении достаточной территории или предоставлении новых равноценных территорий для ведения устойчивого оленеводства;

– признать возможным использование оленеводческими хозяйствами земельных участков, расположенных на территориях соседних субъектов Российской Федерации, на основе договоров и соглашений между этими субъектами, договоров и соглашений оленеводческих хозяйств с правообладателями земельных участков[33];

– гарантировать оленеводам комплексное использование пастбищ, что подразумевает предоставление им прав в пределах данных территорий не только пасти оленей, но и без каких-либо специальных разрешений возводить необходимые сооружения – загоны, клети и т.п., для собственных нужд свободно вести заготовку древесины, сбор дикоросов, охоту и рыбную ловлю.

Третье. Важно зафиксировать правила, обеспечивающие экологически устойчивое использование пастбищных ресурсов. Они должны отражать лучшие практики традиционного оленеводства, учитывать региональную специфику этой деятельности. К таким правилам можно было бы отнести:

---

32 Это, напомню, требование Федерального закона «О гарантиях прав коренных малочисленных народов Российской Федерации». Земельный кодекс РФ (п. 13 ч. 2 ст. 39.10) ограничил право лиц, относящихся к малочисленным народам Севера, на безвозмездное пользование земельными участками только для размещения зданий и сооружений, потребность в которых у оленеводов, ведущих кочевой образ жизни, практически отсутствует. Вместе с тем даже минимальные ставки арендной платы за пользование земельными участками весьма обременительны для оленеводов (см.: Правовая коллизия может оставить оленеводов Арктики без пастбищ // https://tass.ru/).

33 О некоторых подходах по урегулированию подобных отношений двух соседствующих субъектов Российской Федерации – Республики Коми и Ненецкого автономного округа – см.: Глава РК и Губернатор Ненецкого автономного округа обсудили вопросы земельных отношений в области ведения северного оленеводства // https://komi.er.ru/activity/news/glava-rk-i-gubernator-nao-obsudili-voprosy-zemelnyh-otnoshenij-v-oblasti-vedeniya-severnogo-olenevodstva.

– использование пастбищ только на основе предварительного проведения внутрихозяйственных землеустроительных работ, нацеленных на геоботаническое обследование оленьих пастбищ и разработку проектов внутрихозяйственного землеустройства их территорий. Данные работы, как имеющие не только частное, но и публичное значение, целесообразно осуществлять при государственной финансовой поддержке;

– включение в названные проекты землеустройства положений о границах и оленеемкости пастбищ (с учетом выпаса не только домашних, но и диких оленей); сокращении маршрутов кочевания оленей; уменьшении мозаичности пастбищ, а при её наличии –проектировании проходных путей для перегона оленей; чередовании участков выпаса оленей по годам и времени во всех зонах ведения оленеводства; мерах по улучшению состояния пастбищ[34];

– составление пользователями пастбищ планов выпаса оленей с указанием их численности, схем миграции и графиков передвижения, сезонных пастбищ и иных специальных зон, неиспользуемых участков пастбищ, постоянных и временных сооружений, ограничений по времени и видам использования моторизованных транспортных средств. Данные планы (их можно именовать и паспортами пастбищ) позволяют лучше видеть, контролировать и оценивать сложившуюся ситуацию.

В специальном регулировании нуждаются отношения, связанные с введением норм содержания максимальной численности оленей. Этот вопрос актуален, прежде всего, для субъектов Российской Федерации с высокими показателями их поголовья[35]. На текущий момент только в Республике Саха (Якутия) фиксируется рекомендуемая численность оленьих стад[36].Расширяя указанную практику, необходимо исходить из того, что:

– нормирование верхнего предела численности оленей производно от оленеемкости пастбищ, является одним из условий неистощимого их использования и сохранения экологического биоразнообразия; оно способствует в конечном счете сбережению общего количества оленей и их благополучию. При этом, однако, надо учитывать, что оленеемкость зависит от степени деградации пастбищ, обусловленной не только выпасом оленей, но и иными факторам – промышленными и климатическими;

– верхний предел численности оленей закрепляется на определенный срок, то есть их количество, которое могут содержать юридические и физические

---

34 См.: *Липски С.А.* Указ. соч. С. 701.

35 Например, для Ямало-Ненецкого автономного округа, где численность домашних оленей почти вдвое превышает возможности кормовой базы (см.: *Гилева Л.Н.* Организация рационального использования оленьих пастбищ с применением оптимизационных моделей // Научные ведомости. Серия: Естественные науки. 2018. Т. 42. № 3. С. 437).

36 См.: Постановление Правительства Республики Саха (Якутии) от 24 августа 2011 г. № 411 «Об утверждении стандартов размеров стад северных домашних оленей по природно-климатическим зонам ведения оленеводства в Республике Саха (Якутия)» // https://docs.cntd.ru/.

лица на соответствующей территории. В случае превышения названного предела в установленном порядке принимаются меры по сокращению поголовья оленей до максимально допустимого количества[37];

– сокращение численности оленьего стада до необходимого предела не нарушает право северных народов и лиц, относящихся к ним, на традиционное оленеводство (данное право не включает в себя право иметь определенное количество оленей), но при условии, что во внимание принимаются интересы оленевода (занятие оленеводством должно обеспечивать, как минимум, его жизненные потребности при соблюдении имущественных прав) и оленеводческих народов в целом (оптимизация поголовья оленей не должна угрожать их образу жизни и культуре).

Четвертое. Необходимо повышать требования для субъектов, ведущих промышленную деятельность на территории оленьих пастбищ. Дополнительно к тому, что уже сделано в этом направлении в последние годы[38], было бы целесообразно для лучшего совмещения традиционного и промышленного природопользования предусмотреть:

– обязательное проведение этнологической экспертизы промышленных проектов, осуществляемых на территориях традиционного проживания и хозяйственной деятельности коренных малочисленных народов, с целью научного исследования и обоснования влияния изменений исконной среды обитания и социально-культурной ситуации на развитие этноса. Такая устойчивая практика сложилась в Якутии на базе действующего в Республике Закона от 14 апреля 2010 г. «Об этнологической экспертизе в местах традиционного проживания и традиционной хозяйственной деятельности коренных малочисленных народов Севера Республики Саха (Якутия)»[39]. Этот опыт вполне справед-

[37] О том, в каком порядке может происходить сокращение численности оленей, см. положения законов об оленеводстве Норвегии (параграф 60), Швеции (параграф 65a) и Финляндии (глава 3). Нужно признать, что данный вопрос чувствительный, вызывающий споры между оленеводами и органами государственной власти, доходящие до судебных разбирательств. Об этом свидетельствует, например, норвежский случай (см.: *HenleyJ.* Norwegian herder ordered to put down dozens of reindeer in controversial cull // https://www.theguardian.com/world/2017/dec/22/norway-court-clears-way-for-controversial-reindeer-slaughter?CMP=share_btn_url).

[38] Имеется в виду принятие таких актов, как стандарт ответственности резидентов Арктической зоны во взаимоотношениях с коренными малочисленными народами, проживающими и (или) осуществляющими традиционную хозяйственную деятельность в данной зоне (утв. приказом Министерства РФ по развитию Дальнего Востока и Арктики от 23 ноября 2020 г. №181 // СПС «КонсультантПлюс») и Положение о порядке возмещения убытков, причиненных коренным малочисленным народам, их объединениям и лицам, относящимся к данным народам, в результате нанесения ущерба исконной среде обитания коренных малочисленных народов хозяйственной деятельностью организаций всех форм собственности, а также физическими лицами (утв. Постановлением Правительства РФ от 18 сентября 2020 г. № 1488 // СЗ РФ. 2020. № 39. Ст. 6065).

[39] См.: Якутские ведомости. 2010. № 30.

ливо признается как основа для совершенствования федерального законодательства в рассматриваемой сфере[40];

– включение в лицензии, выдаваемые промышленным компаниям на ведение экономической деятельности на территориях традиционно занимаемых и используемых северными народами, обязательств не только по выплате компенсаций за нанесенный ущерб природным ресурсам, но и по проведению необходимых рекультивационных работ на нарушенных землях[41] и содействию в развитии оленеводства;

– правовые гарантии участия представителей малочисленных народов Севера в принятии решений по вопросам, затрагивающим их права и интересы при освоении промышленными компаниями природных ресурсов в местах традиционного проживания и традиционной хозяйственной деятельности данных народов, в том числе по согласованию с ними проектов этих компаний на всех этапах их реализации, предоставлению информации о хозяйственной деятельности и созданию условий для ее контроля, своевременному рассмотрению возникающих претензий и конфликтов.

Пятое. Важно, следуя нормам международного права, в «Климатической доктрине Российской Федерации»[42] признать, что малочисленные народы Севера – общности, жизнедеятельность которых особо зависит от климатических изменений. Целесообразно было бы законодательно гарантировать им право на защиту от названных изменений[43], предусмотрев применительно к традиционному оленеводству:

– ведение на постоянной основе с привлечением оленеводов мониторинга за климатическими изменениями и их влиянием на состояние оленьих пастбищ, доступность и структуру природных ресурсов;

– информирование оленеводов о происходящих климатических изменениях, их динамике и перспективах воздействия на оленеводство;

– усиление контроля и ответственности в ситуации расширяющихся возможностей, позволяющих более интенсивно использовать северные территории – территории проживания и традиционной хозяйственной деятельности

---

40 См.: *Андриченко Л.В.* Современные проблемы реализации государственной национальной политики Российской Федерации: правовой аспект // Журнал российского права. 2024. Т. 28. № 6. С. 15; *Филиппова Н.А.* Этнологическая экспертиза: форматы и перспективы институционализации в российском праве // Государство и право. 2024. № 3. С. 92–93.

41 Данные работы осуществляются в порядке, установленном Земельным кодексом РФ (ст. 12, 13, 39.8 и др.), и Правилами рекультивации и консервации земель (утв. Постановлением Правительства РФ от 10 июля 2018 г. № 800 // СЗ РФ. 2018. № 29. Ст. 4441.

42 Утверждена Указом Президента РФ от 26 октября 2023 г. № 812 // СЗ РФ. 2023. № 44. Ст. 7865.

43 См.: *Гладун Е.Ф.* Конституционно-правовое развитие коренных народов в меняющемся мире: опыт арктических государств: дис. ... докт. юрид. наук. Тюмень, 2024. С. 334; *Гладун Е.Ф.* Климатические права малочисленных народов в странах БРИКС // Проблемы права. 2021. № 4(83). С. 23.

малочисленных народов Севера для развития транспортных систем, недропользования и туризма;

– компенсаторные механизмы, включающие восстановление пастбищ, предоставление новых земель для выпаса оленей, финансовую поддержку в случае их гибели в результате природных катаклизмов;

– сбор, систематизацию, хранение, изучение и распространение традиционных знаний оленеводов о рациональном использовании экосистем северных земель, а также их привлечение в качестве экспертов как носителей этих знаний при принятии управленческих решений, касающихся оленеводства, установления запретов и ограничений по использованию пастбищ[44];

– разработку на федеральном и региональном уровнях государственных программ социально-экономических и природоохранных мер по адаптации северных народов, включая оленеводов, к климатическим изменениям с целью защиты их образа жизни и традиционной хозяйственной деятельности.

Conclusion
Вместо заключения

В 2025 г. заканчивается срок действия Концепции устойчивого развития коренных малочисленных народов Севера, Сибири и Дальнего Востока Российской Федерации[45].Она провозглашает в качестве принципов устойчивого развития этих народов признание земли, других природных ресурсов и благополучия окружающей среды как основы их традиционного образа жизни и традиционной хозяйственной деятельности, а также рациональное использование земель и других природных ресурсов в местах традиционного проживания и традиционной хозяйственной деятельности данных народов. Опираясь на указанные принципы, Концепция к первоочередным задачам, требующим разрешения, относила: установление правового режима охраны территорий традиционного природопользования, предоставление лицам из числа малочисленных народов Севера земельных участков для ведения традиционной хозяйственной деятельности, определение порядка проведения этнологической экспертизы, картирование, оценку природных ресурсов, мониторинг состояния исконной среды обитания и экологической ситуации в местах традиционного проживания и традиционной хозяйственной деятельности северных народов, охрану и рациональное использование пастбищ, а также завершение земельно-кадастровых работ для развития северного оленеводства. Приведенные положения во многом остаются не реализованными. Именно поэтому

---

[44] Об оленеводческих знаниях и их значении в контексте климатических изменений см.: *Погодаев М.А.* Указ соч. С. 275–280.

[45] Утверждена распоряжением Правительства РФ от 4 февраля 2009 г. № 132-р // СЗ РФ. 2009. № 7. Ст. 876.

обсуждаемый проект новой одноименной Концепции до 2036 г.[46] (она объявляется преемственной по отношению к Концепции 2009 г.)актуальными называет подобные же задачи (п. 3, 32, 36, 37).

Поставленные задачи обусловливают необходимость адекватного совершенствования земельного и природоохранного федерального законодательства. Дополнением к нему могло бы стать принятие федерального закона о северном оленеводстве[47] с включением в него выше обоснованных положений, гарантирующих с этнокультурных позиций права малочисленных народов Севера на традиционное оленеводство и земли как материальной основы для такой деятельности, рациональное использование данных земель оленеводами и иными пользователями, а также защищающих оленеводов от климатических изменений. Указанный закон позволит унифицировать региональное законодательство, в том числе в части рассматриваемых отношений.

References

Andrichenko, L.V. (2024). Current issues of the implementation of the Russian state national policy: The legal aspect. *Journal of Russian Law, 28*(6), 5–15. https://doi.org/10.61205/s160565900030513-8. (In Russian).

Efimov, I.P., & Kalitin, R.R. (2021). The state and problems of the development of traditional economic activity in the Arctic: Reindeer husbandry. *Arctic-2035: Current issues, problems, solutions, 1*(5), 44–47. https://doi.org/10.51823/74670_2021_1_44. (In Russian).

Filippova, N.A. (2024). Ethnological expertise: Formats and prospects of institutionalization in Russian law. *State and Law, 3*, 87–96. https://doi.org/10.31857/s1026945224030081. (In Russian).

Galinovskaya, E.A. (Ed.). (2019). *Legal Mechanism for Ensuring the Rational Use of Natural Resources*. Institute of Legislation and Comparative Law under the Government of the Russian Federation, INFRA-M. (In Russian).

Gileva, L.N. (2018). Organization of rational use of reindeer pastures with the use of optimization models. *Scientific news. Series: Natural sciences, 42*(3), 435–445. https://doi.org/10.18413/2075-4671-2018-42-3-435-445. (In Russian).

---

46 См.: https://regulation.gov.ru/Regulation/Npa/PublicView?npaID=151736#.

47 О подобных предложениях см. также: *Куделькин Н.С.* Правовое регулирование оленеводства // Сельское хозяйство. 2022. № 1. С. 27–36; *Погодаев М.А.* Указ. соч. С. 281. При этом, отметим, в общественных дискуссиях представители коренных народов порой высказывают опасения по поводу того, что федеральный закон об оленеводстве может стать чрезмерно жестким регулированием, позволит государству вмешиваться в их частную жизнь. Данные опасения необходимо учитывать при подготовке названного закона (см.: *Новикова Н.И.* Антропологические права (на примере законов о коренных малочисленных народов Севера) // Сибирские исторические исследования. 2024. № 4. С. 65, 67).

Gladun E., & Ahsan D. (2016). BRICS Countries' Political and Legal Participation in the Global Climate Change Agenda. *BRICS Law Journal, 3*(3), 8–42. https://doi.org/10.21684/2412-2343-2016-3-3-8-42

Gladun, E.F. (2021). Climate rights of indigenous peoples in the BRICS countries. *Problems of Law, 4*(83), 20–25. https://doi.org/10.14529/pro-prava210403. (In Russian).

Gladun, E.F. (2024). *Constitutional and legal development of indigenous peoples in a changing world: experience of the Arctic states*. Diss. University of Tyumen Publishing House. (In Russian).

Jernsletten, J-L.L., & Klokov, K.B. (2002). *Sustainable reindeer herding.* Center for Sami Studies, University of Tromsø. (In Russian).

Kalitin, R.R. (2021). Current state, problems of reindeer herding and ways to solve them. *Russian Arctic, 4*(15), 28–39. https://doi.org/10.24412/2658-4255-2021-4-28-39. (In Russian).

Kharyuchi, S.N., & Akchurin, T.R. (Comp.). (2021). *Legislation of the world in the field of reindeer herding: collection*. Association "Reindeer Herders of the World," IPC "Express." (In Russian).

Klokov, K.B. (1997). *Traditional nature management of the peoples of the North: The concept of conservation and development*. Research Institute of Geography of Saint Petersburg State University. (In Russian).

Kudelkin, N.S. (2022). Legal regulation of reindeer herding. *Agriculture, 1*, 27–36. (In Russian).

Lipsky, S.A. (2018). The state of reindeer pastures in the Arctic zone of the Russian Federation, factors of their degradation and ways to improve the situation. *News of higher educational institutions. Geodesy and aerial photography, 62*(16), 592–702. https://doi.org/10.30533/0536-101x-2018-62-6-695-702. (In Russian).

Luneva, E.V. (2023). *The right to rational use of natural resources: doctrine, methodology and practice*. Diss. Kazan State University Publishing House. (In Russian).

Mikhailova, A. (2021). According to the laws of the tundra. Traditional reindeer herding is being developed in the northern regions of the country. *Agroinvestor*, October. (In Russian).

Mironov, P.E. (1974). Reindeer herding. In *Great Soviet Encyclopedia* (3rd ed.). Soviet Encyclopedia. (In Russian).

Novikova N.I. (2024). Anthropological rights (based on laws on indigenous peoples of the North). *Siberian historical research, 4*, 59–77. https://doi.org/10.17223/2312461X/46/2. (In Russian).

Pilyasov, A.N., & Kibenko, V.A. (2020). The phenomenon of entrepreneurship in reindeer herding in the Yamalo-Nenets Autonomous Okrug: assessment of the situation, paradoxes and contradictions, choice of the future. *Arctic: ecology and economics, 1*(37), 122–137. https://doi.org/10.25283/2223-4594-2020-1-122-137. (In Russian).

Pogodaev, M.A. (2013). The Impact of Climate Change on the Traditional Way of Life and Traditional Economic Activities of Indigenous Peoples of the North. In V.A. Shtyrov (Ed.), *Current State and Development Paths of Indigenous Peoples of the North, Siberia and the Far East of the Russian Federation* (pp. 273–288). Federation Council Publication. (In Russian).

Rodnina, N.V. (2022). Arctic Reindeer Herding in Yakutia in the Context of Industrial Development of the Territory: Conflict of Interest or Prospects for Cooperation. *Arctic: Ecology and Economics, 12*(1), 140–151. https://doi.org/10.25283/2223-4594-2022-1-140-151. (In Russian).

Yetylin, V.M. (2003). Bill "On northern reindeer herding." In N.I. Novikova (Ed.), *The deer is always right. Research in legal anthropology: collection of articles* (pp. 222–229). Strategy. (In Russian).

Information about the author

Vladimir Kryazhkov (Moscow, Russian Federation) – Professor, Department of Public Law, Faculty of Law, National Research University Higher School of Economics (20 Myasnitskaya St., Moscow, 101000, Russian Federation; e-mail: vladimir-kryazhkov@yandex.ru).

COMMENTS IN RUSSIAN

On the 30th Anniversary of the Constitution of the Russian Federation: Problems of Reform and Modernization

Viktor Sevryugin,

University of Tyumen (Tyumen, Russian Federation)

К 30-летию Конституции Российской Федерации: проблемы реформирования и модернизации

Виктор Севрюгин,

Тюменский государственный университет

https://doi.org/10.21684/2412-2343-2025-12-1-184-199

Received: November 19, 2023
Reviewed: February 3, 2024
Accepted: December 19, 2024

Abstract. The article analyzes the role and significance of the current Russian Constitution. It examines its advantages and disadvantages that have accumulated over the thirty-year period of its existence. The author also discusses the problems associated with the need to reform and modernize constitutional norms in order to improve legislation. It is noted that the development of national constitutional legislation is impossible without relying on progressive international experience and without taking into account the preservation of social principles and traditional values of its multinational people. The norms of the Constitution are an integral element of the country's national security, a legal guarantor of the preservation of state sovereignty, independent domestic and foreign policy, national and constitutional identity.

Аннотация. В статье анализируются роль и значение действующей Конституции Российской Федерации. Рассматриваются ее достоинства и недостатки, накопившиеся за тридцатилетний период ее действия, проблемы, связанные с необходимостью реформирования и модернизации ее норм в целях совершенствования конституционного права и законодательства. Отмечается, что развитие национального конституционного законодательства невозможно без опоры на прогрессивный международный опыт и без учета сохранения общественных принципов и традиционных ценностей ее многонационального народа. Нормы Конституции являются неотъемлемым элементом национальной безопасности страны, правовым гарантом сохранения государственного суверенитета, независимой внутренней и внешней политики, национальной и конституционной идентичности.

Keywords: Constitution; democracy; human rights; legitimacy; functions; principles; referendum; executive; legislative branches of power.

Ключевые слова: Конституция; демократия; права человека; легитимность; функции; принципы; референдум; исполнительная, законодательная ветви власти.

To cite: Sevryugin, V. (2025). On the 30th Anniversary of the Constitution of the Russian Federation: Problems of Reform and Modernization. *BRICS Law Journal*, *12*(1), 184–199.

Table of Content

Introduction
Введение

Конституция Российской Федерации с момента ее принятия 12 декабря 1993 года, вот уже на протяжении трех десятков лет, является ядром современной российской правовой системы.

С принятием Конституции Российской Федерации страна получила прочный правовой фундамент, позволивший обеспечить политическую, экономическую и социальную целостность государства. Сумела пройти и не вступить в хаос нескончаемых конфликтов регионов, властей, идеологий. Пройти и не обрушить общество, не потерять государственность.

Сегодня, с высоты прожитых при Конституции лет, очень важно спокойно оценить роль и значение Основного закона страны, его соответствие вызовам и реалиям современного мира.

Оценивая достоинства и недостатки действующей Конституции Российской Федерации за прошедшее тридцатилетие после ее принятия, необходимо отметить, что Конституция современной России, как и любая конституция, это особый правовой документ, регулирующий наиболее важные вопросы государственной и общественной жизни страны.

Конституция Российской Федерации является единственным юридическим документом, содержащим нормы всех отраслей права. При этом нормы конституционного права являются основополагающими по отношениям к нормам других отраслей российского права.

Конституция Российской Федерации, как живой документ прямого действия, за прошедшие три десятилетия претерпела существенные изменения. В ее текст постепенно вносились соответствующие изменения и дополнения, продиктованные вызовами времени. За весь период ее непрерывного действия был разработан эффективный механизм внесения изменений и дополнений посредством особых федеральных законов о поправках к Конституции Российской Федерации. Так, например, закон от 30 декабря 2008 года № 6-ФКЗ «Об изменении срока полномочий Президента Российской Федерации и Государственной Думы» увеличил срок полномочий Президента до шести лет, а Государственной Думы до пяти лет. В этом же контексте закон от 30 декабря 2008 года № 7 – ФКЗ «О контрольных полномочиях Государственной Думы в отношении Правительства Российской Федерации»[1] обязал Правительство Российской Федерации предоставлять в Государственную Думу отчеты о результатах его деятельности. На основании закона от 5 февраля 2014 года № 2-ФКЗ «О Верховном Суде Российской Федерации и прокуратуре Российской Федерации» произошли известные изменения в судебной системе Российской Федерации. Закон от 21 июля 2014 года №11-ФКЗ «О Совете Федерации Федерального Собрания Российской Федерации» определил полномочия Президента Российской Федерации по участию в формировании верхней палаты парламента. В 2005 году Государственной Думой Российской Федерации был принят Федеральный закон от 27 декабря 2005 года № 196-ФЗ «О парламентском расследовании Федерального Собрания Российской Федерации»[2], а в 2013 году – «О парламентском контроле».

1 СЗ РФ. 2009. № 1. Ст. 2.

2 СЗ РФ. 2006. № 1. Ст. 7.

1. Results and Discussion
Результаты и обсуждение

Перманентно проводимая на протяжении тридцати лет в Российской Федерации, административная реформа со всей очевидностью показала необходимость дальнейшего изменения конституционных механизмов регулирования функционирования государственного аппарата.

Следует заметить, что без своевременных и решительных изменений в Конституции Российской Федерации невозможно было обеспечить воссоединение России с Крымом, гарантировать защиту прав, имущественных и иных законных интересов русского населения, проживающего на территории Крымского полуострова[3].

Заслуживает отдельной самостоятельной нормативно-правовой и доктринальной оценки конституционные новации 2020 года. Речь идет прежде всего о нормах, устанавливающих требования к лицам, замещающим государственные должности и ряд иных должностей, связанных с реализацией функций публичной власти (в частности, статьи 77–78, 81, 95, 97, 103, 110, 119, 129 Конституции Российской Федерации).

В настоящее время актуальной для конституционного права и конституционного законодательства России остается проблема о соответствии норм международного права и внутринационального права в свете наделения Конституционного Суда Российской Федерации полномочиями по принятию решений о возможности (или невозможности) исполнения решений межгосударственных судебных органов. Основой для принятия такого федерального конституционного закона явилось постановление Конституционного Суда Российской Федерации о признании верховенства Конституции Российской Федерации при исполнении решений Европейского Суда по правам человека (далее – ЕСПЧ).

Следует признать, что изначально сложившиеся непростые отношения между Российской Федерацией и Советом Европы продолжают ухудшаться, но в России они выстраивались и выстраиваются на основе конституционных и международных норм. Юридическое доминирование норм международного права над нормами национального законодательства является следствием общемировой практики современных государств. Россия, как и другие демократические государства современного мира, признает существование международного права и рассматривает его нормы как составную часть собственной правовой системы. В то же время нормы Конституции Российской Федерации являются неотъемлемым элементом системы национальной безопасности страны и правовым гарантом сохранения общественных принципов и традиционных цен-

---

[3] Федеральный конституционный закон от 21 марта 2014 г. № 6-ФКЗ «О принятии в Российскую Федерацию Республики Крым и образовании в составе российской Федерации новых субъектов – Республики Крым и города федерального значения Севастополя» // СЗ РФ. 2014. № 12. Ст. 1201.

ностей ее многонационального народа. Принцип примата общепризнанных ценностей и норм международного права и международных договоров в системе национального права закреплен в пункте 4 статьи 15 Конституции Российской Федерации. Однако в случае несоответствия положений и норм международного договора Конституции Российской Федерации, будут применяться конституционно-правовые нормы и положения последней. Такие дискриминационные решения межгосударственных органов в отношении России, принятые на основе положений международных договоров Российской Федерации, в соответствии с конституционными поправками 2020 года, не подлежат исполнению в Российской Федерации (статья 79 Конституции).

Некоторые европейские ценности изначально были и остаются чуждыми для народов России как многонациональной и многоконфессиональной страны, так и для всего христианского и мусульманского мира. С юридической точки зрения появление в последние годы множества спорных решений ЕСПЧ в отношении России, имеющих явно политический оттенок, неприемлемо, поскольку вторгаются в государственный суверенитет, пытаются влиять на государственную и правовую систему России.

Если оценивать роль и значение Конституции Российской Федерации через ее базовые нормы-принципы (признание правовой свободы человека и гражданина высшей ценностью, равенство всех перед законом, разделение властей, верховенство права, идеологическое и политическое многообразие, легитимность власти, правовое, социальное, федеративное государство, демократизм, неотчуждаемость основных прав и свобод человека и их принадлежность каждому от рождения, государственное единство и территориальная целостность) и функции (организационная, учредительная, юридическая, политическая, идеологическая и другие), важно отметить, что их закрепление в нормах Основного закона страны сыграло исключительно позитивную роль в становлении и усилении нового российского государства и зарождающегося нового гражданского общества в России. Наряду с общественными ценностями и принципами Конституция Российской Федерации определила и закрепила в своих нормах принципы экономической системы: признание и защита равным образом частной, государственной, муниципальной и иной форм собственности; единое экономическое пространство; поддержка конкуренции; свобода экономической деятельности.

Как системообразующий документ Конституция России выполняла и продолжает выполнять организационную функцию, поскольку устанавливает и упорядочивает систему важных общественных отношений, взаимных связей человека, коллектива, государства и гражданского общества.

Созидательная, позитивная роль и значение Конституции Российской Федерации в становлении и развитии российского государства и общества ярко проявляется через ее функции: организационную, учредительную, юридическую, политическую, идеологическую и некоторые другие.

Учредительная функция Конституции Российской Федерации проявляет себя в установлении и юридическом оформлении основ конституционного строя, статуса личности, системы и принципов организации деятельности органов государственной власти и местного самоуправления.

Конституция Российской Федерации, как Основной закон государства, обладает высшей юридической силой и в соответствии со статьей 15 имеет прямое действие. Конституция является основой новой правовой системы России и определяет главные направления развития отечественного законодательства. В этом состоит ее главная юридическая функция.

Идеологическая функция Конституции Российской Федерации закреплена в статье 13, в соответствии с которой в России признается идеологическое многообразие и одновременно запрещается установление какой-либо идеологии в качестве господствующей и общеобязательной, разжигание социальной, расовой, национальной и религиозной розни оказывает непосредственное влияние на духовную жизнь общества. При этом правовое регулирование общественных отношений в идеологической сфере «должно быть умным, осторожным, соотносимым с состоянием, целями и ценностями»[4].

Можно и дальше перечислять достоинства Конституции образца 1993 года. Они есть и их действительно много. Важно другое: Конституция России состоялась несмотря на пессимистические прогнозы, и она продолжает непрерывно действовать вот уже три десятка лет.

В настоящее время по своей структуре, содержанию и форме Конституция Российской Федерации имеет четкую логику построения ее глав и их внутреннюю взаимосвязь.

Так, глава 1 закрепляет основы конституционного строя России. Нормы главы 2 «Права и свободы человека и гражданина» тесно увязаны с нормами главы 1. В частности, закрепляет принцип неотчуждаемости основных прав и свобод человека и гражданина, их принадлежность каждому от рождения (часть 2 статьи 17). В соответствии со статьей 18 Конституции права и свободы человека и гражданина являются непосредственно действующими. Они определяют смысл, содержание и применение законов, деятельность законодательной и исполнительной власти, местного самоуправления и обеспечиваются правосудием. Глава 3 Конституции Российской Федерации посвящена вопросам федеративного устройства и особенностям взаимоотношений федеральных органов государственной власти и органов государственной власти субъектов Российской Федерации. В ней закреплены такие принципы федеративного устройства государства, как государственная целостность и единство системы государственной власти; разграничение предметов ведения и полномочий между органами государственной власти Российской Федерации и органами

[4] Конституционный принцип идеологического многообразия в Российской Федерации: монография / под ред. А.А. Васильева. М.: Юридлитформ, 2017. С. 187–188.

государственной власти ее субъектов; самоопределение народов Российской Федерации.

Перечню высших органов государственной власти посвящена глава 4 Конституции Российской Федерации. Ее открывает Президент Российской Федерации – глава государства и гарант Конституции. В соответствии с внесенными изменениями в Конституцию России от 14 марта 2020 года было законодательно определено место Президента в системе государственных органов власти. В соответствии с частью 1 статьи 110 Конституции Российской Федерации исполнительная власть осуществляется Правительством Российской Федерации под общим руководством Президента. При этом Председатель Правительства Российской Федерации и в целом федеральное правительство подконтрольно главе государства. В соответствии с конституционными полномочиями фактически всю полноту государственной исполнительной власти в стране осуществляет Президент.

В последние годы на различных площадках, в том числе на научных конференциях международного и всероссийского уровней, поднимались и обсуждались актуальные и значимые проблемы конституционного строительства и конституционного законодательства. В рамках данных мероприятий затрагивались вопросы пересмотра структуры и текста Конституции Российской Федерации (в том числе выделение самостоятельных глав, посвященных вопросам избирательного права и гражданства Российской Федерации), введение поста вице-президента, расширение полномочий российского парламента в формировании правительства Российской Федерации, конституционное закрепление права выхода субъекта из состава Российской Федерации, развитие форм прямой демократии на федеральном уровне (в том числе референдума как высшей формы волеизъявления народа), обеспечение защиты и реализации гарантированных Конституцией России прав и свобод человека и гражданина, развитие местного самоуправления и другие вопросы[5].

По вопросам изменения действующей Конституции Российской Федерации в разные годы различными социологическими службами проводились опросы населения. Разброс мнений респондентов оказался большим: от полной замены ельцинской Конституции 1993 года на новую, современную, до сохранения ее стабильности, осторожного внесения в текст действующей Конституции необходимых дополнений и изменений, продиктованных требованиями времени. Так, например, Всероссийский центр изучения общественного мнения (далее – ВЦИОМ) к 10-летнему и 20-летнему юбилею Конституции Российской Федерации проводил специальные социологические исследования. В ходе последнего социологического опроса населения респондентам были заданы такие вопросы: насколько россияне знакомы с Конституцией Российской Федерации; какое

---

[5] *Чеботарев Г.Н.* Конституционно-правовые механизмы формирования единой системы публичной власти в Российской Федерации // Российский юридический журнал. 2020. № 6(135).

влияние на жизнь страны она оказывает; можно ли вносить в ее текст изменения. По результатам опроса были сделаны следующие выводы. Большинство российских граждан (77%) имеют представление о Конституции Российской Федерации, а 18% читали этот документ. В то же время 22% россиян не имеют о ней никакого представления и только 59% знакомы с ее основными положениями. По вопросу влияния Конституции Российской Федерации на жизнь страны большинство (63%) ответили утвердительно. Почти поровну распределились голоса россиян по вопросу поддержки порядка в деятельности государства (30%) и по вопросу гарантий прав и свобод граждан (28%). Практически половина опрошенных российских граждан (47%) считают, что Конституция Российской Федерации должна быть стабильной, а изменения в ее текст могут вноситься только по мере необходимости в редких и исключительных случаях[6]. При этом, по наблюдениям социологов, за последние десять лет тенденция сторонников и противников замены российской конституции на новую существенно изменилась в сторону стабильности. Так, число сторонников изменения Конституции Российской Федерации за период с 2000 по 2012 годы сократилось с 53% до 45%, а число сторонников стабильной Конституции за последние десять лет (2012–2022 годы), наоборот, увеличилось с 35% до 47%.

Конституция Российской Федерации, сохраняя известную стабильность, при всем при этом не должна отставать от запросов развития и вызовов современного мира. В этом смысле ее нормы периодически нуждаются в доработке и совершенствовании. В то же время такие изменения норм конституции требуют известной политической осторожности. Конечно, это вовсе не исключает необходимость приведения положений источников конституционного права с объективными жизненными реалиями, что влияют на суверенитет и национальные интересы Российской Федерации.

Что касается недостатков действующей Конституции Российской Федерации, то они в целом известны. Одни из них требуют срочного решения. Другие могут быть устранены путем внесения точечных изменений в живой текст Конституции.

Представляется, что одним из серьезных и застарелых недостатков действующей Конституции Российской Федерации является отсутствие четкой и внятной позиции законодателя по вопросу всенародного референдума. Федеральный конституционный закон «О референдуме Российской Федерации», к сожалению, не содержит исчерпывающего перечня вопросов, которые выносятся на референдум. Поэтому неясно, какие вопросы могут быть предметом референдума, а какие нет. Хотя Конституция Российской Федерации (часть 1 статьи 3) устанавливает, что носителем суверенитета и единственным источником власти в Российской Федерации является ее многонациональный народ. Часть 3 статьи 3 Конституции называет референдум и свободные выборы выс-

6 Конституция России: менять или не менять? // Пресс-выпуск ВЦИОМ. 2012. Дек. № 2186.

шим непосредственным выражением власти народа. Но на практике это не так. Реального народовластия не существует, поскольку поправкой к Федеральному конституционному закону «О референдуме Российской Федерации» фактически установлен запрет на проведение референдума по вопросам, отнесенным к исключительному ведению соответствующих федеральных государственных органов[7]. В результате российский народ, по ошибке или по недоразумению, вот уже многие годы исключен из процесса изъявления своей суверенной воли.

К числу застарелых и не решенных до настоящего времени вопросов Конституции Российской Федерации относится не равный правовой статус субъектов Российской Федерации. В соответствии с частями 1 и 4 статьи 5 Конституции Российской Федерации закреплен принцип равноправия субъектов Российской Федерации. Но в действительности (и фактически, и юридически) субъекты Российской Федерации не равны, имеют разный правовой статус. Все республики в составе Российской Федерации имеют свою конституцию (часть 2 статьи 66), свой государственный язык (часть 2 статьи 68). Остальным «равноправным» субъектам Российской Федерации ни своей конституции, ни своего государственного языка иметь не положено.

До настоящего времени в Конституции Российской Федерации не устранен крен в пользу исполнительной ветви власти. В связи с чем нарушен баланс сдержек и противовесов. В соответствии со статьей 10 Конституции Российской Федерации государственная власть в Российской Федерации осуществляется на основе разделения на законодательную, исполнительную и судебную. Разделение государственной власти на три ветви предполагает наличие такой системы правовых гарантий, которая исключает возможность концентрации власти у одной из ее ветвей, и в тоже время обеспечивает самостоятельное функционирование всех ветвей власти и одновременно их взаимодействие[8]. По Конституции России (часть 1 статьи 11) в систему органов государственной власти включен Президент Российской Федерации. Он призван координировать эти органы власти и стоит над всеми тремя ветвями власти. Что усиливает крен в сторону исполнительной ветви власти и не соответствует принципу разделения властей. В силу чего с 2019 года в конституционно-правовой науке и структурах государственной власти вновь актуализировалась проблема конституционно-правового статуса Президента Российской Федерации в системе исполнительной власти. Фактически вся полнота исполнительной власти в России находится в руках Президента Российской Федерации и его администрации, а юридическая ответственность возлагается на Правительство Рос-

---

7 Конституционное право и политика: проблемы взаимодействия / отв. ред. С.А. Авакян. М.: Юрист, 2012. С. 17.

8 Проблематика организации публичной власти в России: учебное пособие. Тюмень: ТюмГУ-Press, 2023. С. 65–77.

сийской Федерации. Для устранения данной диспропорции в распределении полномочий и ответственности между ветвями государственной власти необходимо в конституционно-правовой норме четко и ясно закрепить полномочия Президента как главы Правительства Российской Федерации. Для этого необходимо внести в текст Конституции Российской Федерации новую норму: «Исполнительная власть осуществляется Президентом Российской Федерации» с одновременным принятием нового федерального конституционного закона «О Президенте Российской Федерации». Это позволит, во-первых, исключить из текста действующей Конституции Российской Федерации существующие коллизионные и противоречащие ее содержанию нормы. Во-вторых, снизить диспропорции в распределении государственной власти в пользу исполнительной. В-третьих, существенно сократить чиновничий аппарат Правительства и администрацию Президента Российской Федерации (фактически второе правительство страны), разгрузив его от дублирующих функций в практической деятельности и, соответственно, дублирующих структур, включая многочисленный бюрократический аппарат полномочного представителя Президента Российской Федерации во всех федеральных округах. В-четвертых, реально снизить огромную перегруженность этого института государственной власти в стране. В-пятых, повысить персональную ответственность федеральных министров и в целом Правительства Российской Федерации за качество и конечные результаты работы.

Назрела острая необходимость в наделении двухпалатного Парламента Российской Федерации (Совета Федерации и Государственной Думы) конституционными полномочиями по контролю за деятельностью Президента Российской Федерации, Правительства Российской Федерации и федеральными министрами, которых он был лишен изначально. В соответствии со статьей 94 Конституции Российской Федерации Парламент страны является выборным, представительным и законодательным органом государственной власти. К сожалению, российский парламент до настоящего времени как не имел, так и не имеет реальных полномочий по осуществлению контроля деятельности Президента, Правительства и федеральных министров. Несмотря на принятые в 2008 году «косметические» поправки в Конституцию Российской Федерации об ежегодных отчетах Правительства Российской Федерации в Государственной Думе Российской Федерации, а также федеральные законы «О парламентском расследовании» (2005 год) и «Парламентском контроле» (2013 год), российский парламент пока не стал серьезным политическим фактором, какие бы решения он не принимал. В целях защиты российского Парламента от давления исполнительной власти, по мнению депутатского корпуса всех фракций Государственной Думы, необходимо специальной конституционно-правовой нормой установить запрет на право Президента Российской Федерации распускать нижнюю палату Парламента, записав: «Президент Российской Федерации не имеет право распускать Государственную Думу Российской Федерации».

За последние годы не в лучшую сторону претерпел изменения порядок формирования Совета Федерации как палаты регионов. От прямых выборов (1994–1996 годы) до назначения в ее состав по должности глав субъектов Российской Федерации и глав законодательных органов регионов (1996–2001 годы). В результате очередной реорганизации, начиная с 2002 по 2012 годы, в состав Совета Федерации стали назначаться и избираться представители субъектов федерации: по одному от главы региона и, соответственно, от законодательного органа субъекта федерации. В 2009 году были установлены требования к члену Совета Федерации. Теперь кандидат от региона должен быть депутатом соответствующего субъекта федерации, гражданином Российской Федерации, иметь возраст не ниже 30 лет, проживать в данном регионе не менее пяти лет и иметь безупречную репутацию[9]. В результате конституционной поправки 2014 года Президенту Российской Федерации предоставлено право назначения сенаторов в палату регионов не более 10% от общего числа представителей от субъекта Российской Федерации. В 2020 году вновь был изменен порядок формирования Совета Федерации. В результате чего, кроме двух представителей от каждого субъекта федерации, в число сенаторов могут входить представители федеральных структур, а не только регионов, назначаемые напрямую Президентом Российской Федерации. Правда, таких представителей федерального центра не может быть более 30 человек, семь из которых назначаются пожизненно.

Представляется, что в настоящее время Совет Федерации, образованный как палата регионов, в результате сомнительных и не всегда продуманных реорганизаций перестал представлять интересы регионов и, не имея контрольных полномочий и полномочий по принятию федеральных законов, окончательно превратился в придаток федеральной исполнительной власти. Надобность в такой палате отпала. Эта мера позволит повысить авторитет Государственной Думы Российской Федерации как единственного законодательного органа и, соответственно, ответственность депутатов перед избирателями за качество принимаемых законов, разгрузить эту ветвь законодательной власти от ненужной бюрократической волокиты, связанной с прохождением, утверждением (или отклонением) уже принятых федеральных законов чиновниками комитетов Совета Федерации.

К числу актуальных и пока не решенных проблем Конституции Российской Федерации относится проблема закрепления в ее нормах правового статуса народов Российской Федерации. О них в конституционных нормах как не было, так и нет ни одного слова. На данный пробел в Конституции Российской Федерации уже обращалось внимание научной общественности, депутатов Государ-

9 Федеральный закон от 14 февраля 2009 г. № 1-ФЗ «О внесении изменений в отдельные законодательные акты Российской Федерации в связи с изменением порядка формирования Совета Федерации Федерального Собрания // СЗ РФ. 2009. № 7. Ст. 789.

ственной Думы Российской Федерации. Неоднократно бывший лидер ЛДПР В.В. Жириновский предлагал в Преамбулу текста Основного закона страны внести конкретную запись, что «Мы, русские люди и другие народы России, договорились о нижеследующем…» и далее по тексту, чтобы окончательно решить эту проблему[10]. Но отстаиваемая прозападными и примкнувшими к ним политтехнологами размытая и не конкретная, но якобы «толерантная» формулировка «Мы, многонациональный народ и другие народы…» так и осталась в тексте Конституции России. Действительно, и с этим никто не спорит, в России вместе с русским народом живет более 100 народов и народностей. Но договариваться необходимо с титульной нацией, с образующим российское государство русским народом.

Нуждается в разрешении также и давняя проблема разграничения полномочий и предметов ведения между федеральным центром и ее субъектами, закрепленная в статьях 71 и 72 Конституции Российской Федерации. Кроме неоднозначных формулировок данные конституционные нормы фактически носят дублирующих характер.

До настоящего времени, несмотря на продолжительные дискуссии, на конституционном уровне окончательно не решен вопрос о форме правления современной России (президентская, суперпрезидентская, парламентская или смешанная). Принятые поправки к Конституции Российской Федерации от 14 марта 2020 года только усилили позиции Президента России как фактического руководителя исполнительно-распорядительной власти страны.

Особую актуальность в современный период приобретает проблема выявления зависимости источников конституционного права и их иерархии от принятой в Российской Федерации правовой системы. В связи с чем потребовалось переосмысление роли нормативных правовых актов Президента Российской Федерации в регулировании общественных отношений. Данные акты с формальной точки зрения являются подзаконными, так как принимаются в соответствии и во исполнении федеральных конституционных законов и федеральных законов. В то же время нормативно-правовыми актами Президента Российской Федерации довольно часто утверждаются социально значимые федеральные стратегические программы государственного развития. В этих актах Президента Российской Федерации перед федеральными органами исполнительной власти ставятся программные цели и задачи государственного развития на долгосрочную перспективу. Такие акты Президента Российской Федерации становятся основой для законотворческой деятельности как федерального парламента, так и парламентов субъектов Российской Федерации. Поэтому нормативные правовые акты Президента Российской Федерации нельзя отнести к второстепенным, второразрядным подзаконным правовым актам.

---

10 *Жириновский В.В.* Конституция должна защищать права русских людей // Аргументы недели. 2018. 27 июня.

Сложившаяся правотворческая коллизия требует своего немедленного разрешения в конституционном законодательстве. Главным вопросом в данном случае является определение пределов или границ вторжения Президента Российской Федерации в компетенцию федерального законодателя при вытеснении или замещении его в решении соответствующих государственных проблем через принятие своих указов.

Нуждается в переосмыслении и конкретизации в конституционном законодательстве Российской Федерации содержание фундаментальных прав и свобод человека и гражданина, все более зависящих и подпадающих под влияние цифровизации в эпоху информационных технологий.

В частности, Председатель Конституционного Суда Российской Федерации В. Д. Зорькин на полях девятого Петербургского международного юридического форума 16 мая 2019 года, характеризуя актуальность и значимость данной проблемы, ее влияние на фундаментальные права человека в цифровую эпоху, сказал, что «фундаментальные права человека, гарантированные Конституцией и международно-правовыми актами, конкретизируются в законодательстве на каждом историческом этапе развития страны. При этом законодатель призван обеспечить оптимальный уровень такой конкретизации. Он не должен забегать вперед, но и не должен отставать от запросов развития. Очевидно, что наступило время конкретизации прав и свобод человека и гражданина в цифровой реальности»[11].

На необходимость переосмысления содержания основных прав человека и гражданина под влиянием цифровых технологий обращали внимание и другие представители конституционно-правовой науки. Например, С.М. Шахрай предлагает повысить эффективность научных исследований в этом направлении. Приступить к скорейшей разработке и внедрению в конституционное законодательство Российской Федерации норм, направленных на «защиту прав и свобод виртуальной личности» и «обеспечение суверенитета государств в условиях трансграничности цифрового мира»[12].

2. Findings
Выводы

Тридцать лет назад, после распада СССР, новая Конституция России закрепила в своих нормах стратегический курс на построение демократического федеративного правового государства с республиканской формой правления. Это не могло существенным образом не отразиться как на динамичном, посту-

---

11 *Зорькин В.Д.* Право в цифровом мире. Размышления на полях Петербургского международного юридического форума // Российская газета. 2018. № 115(7578).

12 *Шахрай С.М.* Цифровая конституция. Основные права и свободы личности в тотально информационном обществе // Вестник Российской академии наук. 2018. Т. 88. № 12. С. 1075–1082.

пательном развитии и модернизации конституционного законодательства, так и на содержании научных исследований в данной отрасли права.

Актуальность и значимость рассматриваемых в рамках настоящей статьи проблем развития и совершенствования конституционного права и конституционного законодательства Российской Федерации обусловлена последовательным реформированием национальной системы публичной власти, динамичностью ее развития, появлением новых государственных и общественных институтов, насыщенных новыми смыслами и нашедшими свое отражение в многочисленных конституционных поправках последнего десятилетия.

Особенность модернизации и реформирования конституционного права и законодательства в современный период состоит в том, что оно формируется под непосредственным влиянием политических факторов и общечеловеческих ценностей, напрямую зависит от государственно-властных отношений, сложившихся в нашей стране.

Совершенствование российского конституционного законодательства при этом не может осуществляться без учета прогрессивного зарубежного опыта и в отрыве от фундаментальных основ участия граждан в управлении делами государства.

Conclusion
Заключение

На основании вышеизложенного представляется важным и необходимым продолжение процесса дальнейшей осторожной и взвешенной модернизации и корректировки отдельных норм и положений действующей Конституции Российской Федерации с учетом появления новых и более совершенных механизмов правового государства. Достичь целей устойчивого развития современного российского государства в условиях однополярного мира, незаконных экономических санкций и международных конфликтов невозможно без легитимных политических изменений так же, как нельзя оставаться в стабильном правовом поле, постоянно меняя нормы и положения Конституции России и конституционное законодательство.

К числу первоочередных мер, направленных на модернизацию и совершенствование конституционных норм и положений, по мнению ряда известных ученых-юристов, депутатов Государственной Думы Российской Федерации и региональных законодательных органов, высказанных в средствах массовой информации и опубликованных в периодической печати, не потерявших своей актуальности и сегодня, относятся следующие[13]:

1) создание действенных механизмов реализации не только прав и свобод, но и обязанностей граждан;

[13] Конституции России 10 лет: опыт реализации: материалы Всероссийской научно-практической конференции. Тюмень: Изд-во Тюмен. гос. ун-та, 2003.

2) обеспечение правовых гарантий реализации конституционных полномочий Президента, Правительства, Федерального Собрания Российской Федерации, Судебной и надзорной системы Российской Федерации;

3) укрепление и обеспечение реального равноправия субъектов Российской Федерации путем конституционного закрепления их общего и единого правового статуса;

4) отказ от договорных отношений между федеральными государственными органами и государственными органами субъектов Российской Федерации. Допускать заключение таких договоров и соглашений только в исключительных случаях, предусмотренных нормами самой Конституции;

5) наделение полноценными контрольными полномочиями Государственную Думу и Совет Федерации;

6) создание специального федерального контрольно-надзорного органа государства наряду со Счетной палатой;

7) создание независимого федерального государственного органа, осуществляющего следствие по особо важным уголовным делам;

8) реорганизация структуры Судебной системы и создание административной юстиции;

9) включение в Конституцию Российской Федерации специальной главы «О прокуратуре Российской Федерации» с предоставлением ей права законодательной инициативы по вопросам прокурорского надзора;

10) четкое определение и закрепление в конституционной норме прав и обязанностей губернаторов и органов государственной власти субъектов Российской Федерации, включая и их взаимоотношения с федеральными органами государственной власти;

11) точное закрепление в конституционной норме обязанностей публичных органов государственной власти и общественных формирований, должностных лиц и граждан по соблюдению требований законности и ответственности за нарушение режима правопорядка;

12) пересмотр действующей избирательной системы и пресечение законодательными мерами так называемых «избирательных технологий»;

13) введение практик регулярной систематизации (кодификации и инкорпорации) действующего законодательства (на примере свода законов Российской империи) и создание для реализации этой цели специального государственного органа при Парламенте Российской Федерации.

Подводя итог необходимо отметить, что действующая Конституция Российской Федерации не законсервированный продукт, а живой, сложный организм. Как и любой растущий и развивающийся организм, Конституция России на каждом историческом витке своего развития нуждается в совершенствовании и модернизации.

References

Chebotarev, G.N. (2020). Constitutional and legal mechanisms for the formation of a unified system of public authority in the Russian Federation. *Journal of Russian Law, 6*(135). (In Russian).

Kleandrov, M.I. (2021). Russia Needs a New Constitution. *Bulletin of University of Tyumen. Social, Economic and Legal Research, 7*(4), 139–151. (In Russian).

Shakhrai, S.M. (2018). Digital Constitution. Basic rights and freedoms of the individual in a totally information society. *Bulletin of the Russian Academy of Sciences, 88*(12), 1075–1082. (In Russian).

Zorkin, V.D. (2018). Law in the digital world. Reflections on the sidelines of the St. Petersburg International Legal Forum. *Rossiyskaya Gazeta*, 115(7578). (In Russian).

Zorkin, V.D. (2018). Letter and Spirit of the Constitution. *Rossiyskaya Gazeta*, 226(7689). (In Russian).

Information about the author

Viktor Sevryugin (Tyumen, Russian Federation) – Professor, Department of Theoretical and Public Law Disciplines, Institute of State and Law, University of Tyumen (10 Lenina St., Tyumen, 625000, Russian Federation; e-mail: 17041945@mail.ru).

BOOK REVIEW

Multiregional International Law in a Multipolar World?*

Sergey Marochkin,

University of Tyumen (Tyumen, Russian Federation)

Svetlana Racheva,

University of Tyumen (Tyumen, Russian Federation)

https://doi.org/10.21684/2412-2343-2025-12-1-200-207

To cite: Marochkin, S., & Racheva, S. (2025). Multiregional International Law in a Multipolar World? *BRICS Law Journal*, *12*(1), 200–207.

The opposing strengths of universalism and regionalism have become a defining feature of the early decades of the 21st century. Cooperation in addressing the universal issues has sharply slowed down, if not stagnated. The conflict between states, especially the superpowers, has increased and reached its extreme point. States are unsuccessful in addressing and tackling common global problems due to a high degree of mistrust, opposition, and ambitious aspirations. The world is going through times of turbulence and uncertainty, marked by global "tectonic shifts" from a unipolar to a multipolar structure of international society.

International communication tends to shift from universal to group and regional cooperation, resulting in the creation of regional and interregional structures and organizations. Developing countries are actively looking to pursue their own paths that are determined by geopolitical specifics. Eurocentrism has changed its trajectory to the study of different regions, countries, and ethnic groups' peculiarities.

All the above-mentioned tendencies are mirrored in the current impact and functioning of the international legal system, particularly in international law

* Reviewed book: Wiebusch M. (2024). *A Theory on Africanizing International Law* (xxiv + pp. 178). Pretoria University Law Press. ISBN: 978-1-7764485-7-9 (Paperback).

(hereinafter IL). Universal IL is currently in a state of general crisis, faced with the conflict between states and groups of states. Regional and interregional IL now has more opportunities to develop in today's world. There are numerous attempts to explore whether IL should no longer be a legal system 'made in Europe'. There also exist different ways to interpret the understanding of IL from various regional perspectives, such as Third World Approaches to IL and Second World Approaches to IL (TWAIL and SWAIL, respectively), and "Asia's ambivalence" on IL.

Not so much has been written about African IL. The book by Micha Wiebusch, *A Theory of Africanizing International Law,* contributes significantly to understanding the role and place of IL in the legal life of African countries and the essence of the "Africanization of international law" process. From this perspective, it can be interpreted as an additional regionalization of IL.

The book is published by one of Africa's most respected presses, the Pretoria University Law Press, which aims to publish and make available innovative, high-quality scholarly texts on law. The text is preceded by numerous standpoints (reviews) of reputed officials and scholars articulating its significance and relevance, for example: "a sophisticated and thoughtful publication, exploring how international law has been 'Africanized,' what 'Africa' means in this context, the role of the Organization of African Unity and now African Union, and how 'African International law' can provide African solutions to African problems" (*Rachel Murray*); and "an ambitious, erudite, empirically informed, and theoretically rich explication of how the African Union is charting an African – centered vision of an international law that might meet the ambitions, physiological, social and cultural needs and the self-actualization desires of African peoples" (*Karen J. Alter*). One of those reviewers, C.M. Peter, fairly remarks: "... the author proves beyond any doubt that Africa has crossed the bridge from being an object to a proper subject of international law today as of right."

The study's methodological feature is interdisciplinarity – the author periodically resorts to various fields of knowledge such as geography, cartography, arts, the theory of knowledge, the idea of relativity, and even physics, such as Newton's laws. Despite being not so large in volume, the book is very rich in its cited literature and has an extensive bibliography. The author's study of international legal norms, their implementation, and subjects of legal relations is grounded in his extensive knowledge in the field of fundamental sciences, as well as in practical jurisprudence.

Above all, the book is very illustrative – enriched with figures (spirals and panoramas), charts, graphs, schemes, photos, and even a painting. A sophisticated and symbolic artwork for the cover reveals a number of sensibilities that rhyme with the approach and rationale underlying this volume. This is a rare feature for books on law and can be seen as an indisputable advantage. All of this shows that Wiebusch is immersed into the research issue.

A meticulous structure, rigorous research, and effective communication of findings are a beneficial mark of the book. The text consists of the prologue identifying the audience (*Who is the imagined audience?)* and five chapters: The Development of an African International Law (*What does Africanization mean?),* Theorizing African International Legal Knowledge Production (*How to make sense of African international law),* A Geography of African International Law (*Why does African international law matter?),* African International Legal Governance Laboratories (*How does African international law work?*), and The Frontiers of African International Law *(What is the future of African international law?*). Interestingly, every chapter is accompanied by a clarifying question that reflects its main focus and encourages the readers to pursue the answer.

The author acknowledges that he aims to answer the question, "What is African about African IL?" by developing a theory on how and why IL is Africanized. Correspondingly, the objective of the book is to elaborate a framework that lays out a way of thinking about the construction and transformation of international legal agendas to provide solutions to problems that presume, appropriate, and produce a degree of "Africanness."

"Africanization of IL" indicated in the title of the book is a key term of the study, which implies that this process of "Africanization" may be understood as a collective effort to imagine and organize an international legal-political project based on a continentally defined identity.

Wiebusch sets his sights on exploring the various ways in which Africa has become a knowable and manageable space. Respectively, one of the goals of the book is to research the geography of African IL, i.e. to analyze the interrelations between geographical spaces and the people inhabiting them. Within this context, the author prioritizes the development of international legal strategies and programs that help regulate this spatial configuration. The author focuses the reader's attention on the rational nature and technologies utilized in Africa's state and interstate governance. Thus, the study aims to examine how the African Union considers the role of law in the broader process of African governance.

The book begins by introducing the author's comprehension of how African international legal programs and practices are developing, how justifications for the development of African IL occur, and how these justifications are formulated in the intervention programs. Wiebusch proceeds from the fact that these programs and practices collectively represent a complex system of mechanisms, knowledge, strategies, methods, and procedures that help implement the ambitions of the "African project" in the field of IL.

In Chapter 1, *"The Development of an African International Law,"* Wiebusch thoroughly explores "international legal instruments through which ambitions are acted on to create a safe, healthy, and economically and socially prosperous environment for the diverse inhabitants of this space called "Africa". Among them are more than 60 multilateral treaties, where Africa is the subject of legal relations, as well as a significant number of decisions made by international African organizations that provide a sufficient empirical basis for the research and conclusions.

The author aspires both to study the rulemaking of African international organizations and to analyze the implementation of the adopted norms, i.e. the efficacy of law. He entitles his work "A Theory…" but actually focuses on IL expertise and "on the practice of African international law rather than merely analyzing its rules and precepts." This approach deserves attention. The author examines the efficiency of the African Union's main organs' activity by conducting a statistical analysis of the number and pace of these institutions' decision-making and provides a comprehensive picture of the trends in African international law-making. He logically forms a sound conclusion that "over the past half century there has been an increasingly greater 'supply' of African international law."

Chapter 2, "*Theorizing African International Legal Knowledge Production*," is accompanied by a clarifying question "How to Make Sense of African International Law?" and is divided into seven parts: "Legal Relativity Theory," "Redefining the Struggle," "Solutionization," "Hypocrisy," "A *luta continua* Influence Framework," "Guerrilla Lawfare," and "So What," which is the concluding part that reckons up the key assumptions.

The chapter's scope aims to provide a broad view of the essence of African IL and the various principles and conditions underpinning its development. Wiebusch introduces the general framing device as a tool to accentuate the instability of absolute knowledge claims concerning its development and to enhance the reader's understanding of African IL; for instance, the inductive and comparative nature of knowledge production, which provides some of the vital tools to help expose biases and myths about African IL and its operationalization.

Driven by the intention to theorize the knowledge production processes related to the development of African IL, the author considers relativity to be a significant factor as regards the theory of knowledge that can help understand African IL. Specifically, the author states: "a key assumption in this work and one of the consequences thereof is that relativity presupposes reference points with which certain relations are established."

M. Wiebusch clarifies the key tenets of his viewpoint on this, introducing and explaining the logical interconnections of all the conceptual building blocks in a reasoned manner. In an attempt to do this, the author provides meaningful insights into the core principles of knowledge production – observation, induction, and comparison – to facilitate a clear comprehension of the African IL's evolution. In particular, he dwells upon the nature of knowledge, presumes it all to be inductive and comparative, and explicates that the inductive nature of knowledge presupposes its creation through perception. He then proceeds to state that all knowledge is comparative "in the sense that it is through comparison that we know something is *new* or that something is *different*."

Logically, the author establishes law as a knowledge product as well as other social constructs and concepts and clarifies its three-step structure. The first step is an inductive recognition of certain patterns (of physical behavior); the second is the stabilization of the meaning of these patterns (develop laws of physics); and the third is the deduction of other ideas and actions (conduct experiments and devise alternative forms of application).

It is worth emphasizing that the author's assumption of the inductive and comparative nature of knowledge correlates to the idea of "relativity" that essentially means that "all knowledge and production of new knowledge is only possible in relation to what was known before". Onward, the author analyzes the determinants of high and low quality of knowledge production and lists among them the scope of observation (large or narrow), ability to gather information (significant or minimal), competence to make distinctions between information (considerable or limited), and competence to establish relationships between information (considerable or limited). Having estimated the determinants, the author deduces that

> the speed and the value of knowledge depend on the quality and the quantity of induction and comparison processes. The larger the scope of observation and the ability to collect vast amounts of information, and the greater the aptitude to make relevant distinctions among these masses of information and establish relationships among these organized categories of information, the higher the quality and usefulness of the knowledge resulting from these operations.

The author assumes the fight for equality to be impossible and inevitably biased and outlines the approach that centers on "the process of continual identification of 'problems' or sites of inequality that are subjected to deliberate constructive thought and action to avoid or mitigate the endurance of these particular forms of inequality." Wiebusch suggests a shift from "the notion of inequality and the structural conditions shaping the absence of equality" to a "deliberate study of a solution-focused approach oriented towards addressing inequalities." Instead of focusing on inequality as an *outcome*, he proposes taking aim at the *process* of creating states of inequality.

The author devotes the conceptual building block Solutionization to the advancement of the approach that postulates the necessity "to transcend the ubiquitous habit in academia to problematize." He conducts a thorough examination of the axioms regarding the indeterminacy of the future and the relative uniqueness of the human being and concludes that

> taken together, they lead towards a more productive process of solution generation (solutionization) oriented towards avoiding or mitigating mistakes rather than prescribing fixed sets of positive action.

He then discusses what constitutes a "mistake", analyzes the way it is determined, and advocates the value of mistakes as essential learning tools. To conclude Chapter 2, he focuses on the concept of "law" and rejects a unidimensional conceptual understanding of law as simply a tool to shape the social world and simultaneously be shaped by it, and instead holds a unique standpoint - a three-dimensional (3D) approach to law including norms, actors, and processes that create a framework to understand how law operates and develops. It is characterized by "a triple capacity as having a normative role (with distributive effects), a procedural role (with decisional effects), and an institutional role (with constitutive effects)". Upon closer examination, the author advances a controversial idea of law as an amoral instrument that is beyond moralistic judgment. In line with his conception, law itself, like any other instrument, can be utilized in the service of or in the achieving of some objective; therefore, it cannot be estimated as good or bad, right or wrong. The quality of the objectives can be morally evaluated, but law as a tool can be assessed in terms of its efficiency and effectiveness in achieving these objectives.

Having readily acknowledged that his views cannot be universally shared, he remains persuasive and clarifies that his "preference lies with more transparency about the instrumental feature of law, exposition of the ends to be achieved, and open declarations about what the role of law is in achieving those goals." The author elucidates that this "teleological view of law, in the sense of analyzing what its purpose is," provides more clarity about the ideals held by those who operationalize law; therefore, it facilitates the understanding of how and why law develops and, in particular, how and why African IL develops.

We do not agree with such a "technical" or "instrumental" role of law as just a tool. In suggesting this approach to understanding the nature of law, Wiebusch willingly or unwillingly mixes two different meanings and notions of law and inserts misunderstanding. He discusses statutory (positive) law (such as acts of legislation and IL treaties), which is developed by authorities for "achieving their objectives." All things considered, the laws of a state (statutes) cannot convey the essence of "law itself" as a criterion of morality, equality, and justice. Nevertheless, laws (legislation) can still serve as an "efficient" tool in the hands of state powers. In authoritarian (totalitarian) states, they can even serve as a "hammer" upon people. However, they have nothing to do with law, or in other words, these laws are not law. The very principle of "the rule of law" means the supremacy of the basics of law over state authority and its laws.

In summing up the essences of the second chapter, M. Wiebusch brings to life the idea of empowerment that stems from conscious reflection and critical perception of various norms and practices; it is grounded on a detailed study of African IL's past and present and is accompanied by a thoughtful analysis of the mistakes. In compliance with the author's standpoint, it "uncovers unintended consequences of African international law programs and practices" and "opens space to imagine new frames of thought for further innovation, critique and action."

Chapter 3, "*A Geography of African International Law*," answers the question "Why Does African International Law Matter?" by consistently pursuing the idea of the socio-economic nature of law, i.e. the idea that law can be studied and understood only in the context of the society and time it was in force. The author thoroughly explores the examples of the United Nations Models and (O)AU equivalents' imitations in regard to norms and institutions. He states that this significant extent of emulative practices challenges the narrative of "African solutions to African problems" and "suggests a tension between the (O)AU's desire to devise solutions tailored to local circumstances and the heavy influence of foreign ideas that may or may not be suitable to those contexts. There are no universal forms of law". In the author's opinion, the adoption of foreign legal regulation models "will lead to unfavorable distortions and transplant rejections." Meanwhile, Wiebusch dwells in detail on two forms of African international legal innovations, namely, new regulatory innovations and those that are aimed at expanding the scope of developments in the already-existing international legal acts.

Chapter 4 titled "*African International Legal Governance Laboratories*" focuses on the question "How does African International Law Work?" and is divided into two parts: "Governing Africa" (encompassing sub-sections "legislation," "judicialization," and "technocratization") and "The Performance of African International Law" (covering sub-sections "norms," "actors," and "processes"). In the final section "*So What*," the author summarizes the key ideas of the chapter in the context of the book's purpose – further clarifying and elucidating the ways and means by which African IL develops. Additionally, his identification of a few key biases and challenges in the field of African IL is especially valuable, as it promotes further research.

Undoubtedly, no research work is absolute since it is a journey rather than a "golden finish." This book also contains some shortcomings, gaps, and unbalances as well as areas for improvement and development. Here we mention just a few. It is worth noting that certain legal instruments of the African Union receive unequal coverage. In sub-section "*1.1. Legalization*," the author identifies treaties, decisions of authoritative institutions, and other documents as well as provides a full-fledged analysis of these treaties and other documents. As for the decisions of the bodies, Wiebusch refers only to the statistics, merely noting that "it is beyond the scope of this book to adequately give a full overview" of them. It also appears that in Chapter 2 the author provides a much too redundantly extensive analysis of such theoretical issues as "a mistake, responsibility, accountability, and influence," distracting the readers' focus from the essentials of Chapters 3 and 4.

We believe that theorizing through a review of different measurement and assessment methods, institutional practices of "knowledge generation," and a wide range of performance indicators would be more illustrative if applied to practice and life. This is a reasonable assertion given Wiebusch's extensive practical experience as a senior legal officer at the African Court on Human and Peoples' Rights and a constitutional expert for African Union Election Observation Missions.

Last but not least, taking into account that he mentions some African treaties and human rights institutions, one of the proper realms for such an application seems to be the human rights issue. There are various universal and different regional approaches (European, Eurasian, American, etc.) to the concept and mechanisms of this issue. What is the position of African IL in this regard? At the very least, this can be an opportunity to develop this book further.

In the end, M. Wiebusch has done a good job, having examined, analyzed, and described one of the multiregional (continental) aspects of modern international law, while having also made a new contribution to IL theory.

Information about the authors

Sergey Marochkin (Tyumen, Russian Federation) – Professor, Centre for International and Comparative Legal Studies, University of Tyumen (6 Volodarskogo St., Tyumen, 625003, Russian Federation; e-mail: s.y.marochkin@utmn.ru).

Svetlana Racheva (Tyumen, Russian Federation) – Associate Professor, Institute for Social Sciences and Humanities, University of Tyumen (23 Lenina St., Tyumen, 625003, Russian Federation; e-mail: s.s.racheva@utmn.ru).

BRICS Law Journal

Учредитель:
ФГАОУ ВО «Тюменский государственный университет»

Главный редактор: Е.Ф. Гладун

Volume 12 Issue 1 (2025)

16+

Зарегистрировано Федеральной службой по надзору
в сфере связи, информационных технологий
и массовых коммуникаций 14.03.2017.
Регистрационный номер ПИ № 77-69105

Дата выхода 21.04.2025
Формат 70х100 1/16. Объем 12,9 п.л.
Цена свободная.
Тираж 250 экз.

Адрес редакции, издателя:
ФГАОУ ВО «Тюменский государственный университет»
625003, г. Тюмень, ул. Володарского, 6
Тел. +7 (3452) 597429

Отпечатано в полном соответствии
с качеством предоставленных материалов
в ООО «Фотоэксперт»
109316, г. Москва, Волгоградский проспект, д. 42,
корп. 5, эт. 1, пом. I, ком. 6.3-23Н