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An independent, professional peer-reviewed academic legal journal.

Aims and Scope

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

The *BRICS Law Journal* is published in English and appears four times per year. All articles are subject to professional editing by native English speaking legal scholars.

Notes for Contributors

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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 two months.

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

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CHIEF EDITOR'S NOTE ON SUPREME COURTS IN THE BRICS COUNTRIES

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The BRICS countries have different judicial systems, but all of them have supreme courts as the highest court for all the national courts.

The highest court in **Brazil** is the Federal Supreme Court. Its history begins in 1808, in colonial times, when the House of Appeals was founded. Today it consists of eleven justices, all of whom are approved by the Federal Senate and appointed by the President of Brazil.

The Supreme Court acts as the constitutional court as well as an appellate court. It has the power of judicial review of the unconstitutionality of federal and state laws. In the area of appellate procedure, it has ordinary appeal jurisdiction as well as extraordinary appeal jurisdiction.

Brazil also has the Superior Court of Justice, which consists of thirty-three judges. The Superior Court has jurisdiction over non-constitutional questions of federal law, for which it is the final instance in such cases.

In **Russia**, the Supreme Court was established in 1923 as the Supreme Court of the USSR, and in 1992 it began to function as the highest court of the Russian Federation.

Depending on the case, the Supreme Court may handle appeal, cassation and supervisory cases, as well as act as a court of first instance. One of the tasks of the Supreme Court is the harmonization of judicial practice. In carrying out this task it reviews and analyzes court practice, and as a result of this activity it may issue clarifications and interpretations of the law.

The Court consists of 170 judges, including the Chief Justice and chairmen of six chambers. The six chambers are: an Appeal chamber, a Judicial chamber for penal cases, a Judicial chamber for civil cases, a Judicial chamber for economic cases, a Judicial chamber for administrative cases and a Military chamber.

The Plenum of the Supreme Court consists of all judges of the Supreme Court. The Plenum deals with the most complicated matters regarding the functioning of the general jurisdiction courts and the administration of justice. The Plenum reviews and clarifies information on the application of legal practice and decides matters on the introduction of legal initiatives as well as on requests to the Constitutional Court of the Russian Federation regarding constitutional law and the verification of other legal acts. The Plenum also approves the composition of the judicial chambers, the panels and the secretary of the Plenum, and the Scientific and Consulting Council under the Supreme Court of the Russian Federation. The Prosecutor General and the Minister of Justice can participate in the Plenum sessions. They or their substitutes have the right to make correspondent introductions to be heard during the Plenum sessions. They also have the right to express their opinions on the matters in discussion. Plenum sessions should be organized to take place at least once every four months.

The Presidium of the Supreme Court is the highest and the final judicial instance for cases viewed under general jurisdiction. The Presidium consists of the Chief Justice and his deputies. Among the members of the Presidium of the Supreme Court are some of the most respected judges of the Supreme Court. The total number of Presidium members is thirteen. The composition of the Presidium is approved upon introduction by the President of the Russian Federation, based on the presentation of the Chief Justice and a positive resolution by the Highest Qualification Panel of judges. The Presidium of the Supreme Court hears cases when the majority of its members are present. The Supreme Court has original jurisdiction in certain cases. Those cases include: challenges to individual acts of the Federal Assembly and decrees by the President of Russia and the Government of Russia; challenges to delegated legislation of governmental agencies; termination of political parties and all-Russian NGOs; challenges to actions of the Central Electoral Commission of Russia when organizing presidential elections, State Duma elections or referendums. The Supreme Court may also hear criminal cases against members of the Federation Council of Russia and the State Duma, and federal judges at its discretion. Presidium sessions should be organized to take place at least once each month.

The highest court in **India** is the Supreme Court. It was established in 1950. The Court has thirty judges who are appointed by the President of India and who may hold their position until the mandatory retirement age of sixty-five. Court proceedings are conducted in English only and are regulated by the Constitution of India (Art. 32) and the Supreme Court Rules (1966).

The Supreme Court acts in different manners. First, it settles disputes between the Union and the States or between the States. In regard to this jurisdiction it can also examine the legality of the laws enacted by Federal and Regional authorities. Second, it considers appeals against judgments of the High Courts of the States and acts as the highest court of appeals for all the judgments. Third, it has the power and responsibility of interpreting the Constitution of India.

In **China**, since 1949 the Supreme People's Court has acted as the highest court in the land. The Court consists of 340 judges; the President and Vice-President of the Court are appointed by the National People's Congress.

The Court has jurisdiction in a number of matters. It can act as a court of first instance as well as an appeal and supervisory instance over the judgments of the local people's courts and special people's courts. An important authority it has is approval over all death sentences. The Court also gives explanations in respect of concrete laws, similar to the Russian Supreme Court.

The Supreme People's Court does not have jurisdiction over Hong Kong and Macau; they have separate court systems owing to their autonomous status.

In **South Africa**, the highest court is the Supreme Court of Appeal. The Court was established in 1997, at which time it replaced its predecessor the Supreme Court of South Africa, which had performed its functions from 1910 to 1997. The Court has twenty-three judges, all appointed by the President of South Africa. The Supreme Court of Appeal may consider only appeals and does not act as a court of first instance.

ARTICLES

THE DECENTRALIZATION METHOD AS A TOOL TO IMPLEMENT SOCIAL INITIATIVES OF CITIZENS IN MULTINATIONAL STATES

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In this article the decentralization process and decentralization method are reviewed. Decentralization is the process of redistributing or dispersing functions, powers, people or things away from a central location or authority. While centralization, especially in the governmental sphere, is widely studied and practiced, there is no common definition or understanding of decentralization. The meaning of decentralization may vary in part because of the different ways in which it is applied. In this article the concepts of decentralization are researched. Decentralization in any area is a response to the problems of centralized systems. Decentralization in government, the topic most studied, has been viewed as a solution to problems such as economic decline, government inability to fund services and the general decline in performance of overloaded services, the demands of minorities for a greater say in local governance, the general weakening legitimacy of the public sector, and global and international pressure on countries with inefficient, undemocratic, overly centralized systems. The authors also research the issues of personal federalism and the subsidiarity principle.

Keywords: decentralization method; subsidiarity; multinational state; delegation of powers; citizens' participation in state affairs.

Recommended citation: Dawid Bunikowski & Kseniya Ivanova, *The Decentralization Method as a Tool to Implement Social Initiatives of Citizens in Multinational States*, 4(1) BRICS Law Journal 7–25 (2017).

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Introduction

The aim of this article is to shed light on the decentralization method as a tool to implement social initiatives of citizens in multinational states. After some theoretical, mostly legal-political considerations concerning decentralization are presented, the article will focus on particular cases (Russia, France, the UK). Comparatively speaking, this is to find sound institutional inspiration for Russia's decentralization. At the end, a model for decentralization in multinational states (having in mind, first of all, Russia), including concrete actions, will be proposed.

At the dawn of mankind power was associated with the society as a whole. Problems of everyday life were solved by a council of leaders of families and elders, and compliance was expected from all adult members of society. Gradually power was institutionalized and the personification of power appeared, transforming it into public authority. The inheritance of power and its absolutization took place through gradual limitation and then complete denial of the right to self-government and the expression of the will of ordinary members of society.

But at a certain stage of social development absolutism sparks a crisis, giving life to the ideas of constitutionalism, separation of powers, elected officials and control over their activities. In fact, in the public consciousness the idea of the need to increase the opportunities of the citizens to participate in their government, including through public initiatives, is born.

Unfortunately, up to now Russian reformers have not considered citizens' initiatives a significant social force. Major economic and social transformations of society have been built with little or no reliance on constructive social initiatives. This seriously undermines the credibility of the government. But to effectively implement any reforms it is fundamentally important to have the support of the population, including the so-called "third sector."

The third sector encompasses public (non-governmental) organizations and associations of various forms, which are independent of the state and created by citizens for the implementation of initiatives and activities of a non-commercial nature seen as self-realization of their aims, to achieve a beneficial social change which is significant for society as a whole. This is a new public resource and a public initiative, by which we mean not only the legal form of organization (association, non-profit partnership, and so on), but also those groups, including professional, which carry out and ensure the implementation of socially important functions.

In different countries in the world different terms are used for the third sector, for example:

– Civil society (Brazil);
– The voluntary sector (United Kingdom);
– Sector associations (Germany);
– Civil structures (Egypt);
– Additional sector (India);
– Third system (Italy);
– Tax-exempt sector (U.S.);
– Social sector (France);
– Social Corporation (Japan).

In the absence of public participation and control, reforms lead to the result that the authorities lose their ability to effectively perform their functions. In this case, no one is immune from the desire of agencies to expand their competence (optionally together with its increase), have as many powers and privileges as possible, but at the same time reduce their liability to a minimum.

We believe it is in the third sector that the conditions and prerequisites for the development of civil society are shaped, and it is through the active participation of citizens that the effective implementation of community initiatives are realized.

As a result of reforms without the participation of citizens social tensions develop in the search for a way out of political detente, creating a split society; sharp stratification occurs. The decline in the standard of living of the majority of the population leads to the formation of differentiated social strata, the interaction between them is small. In Russia in 1996, the income of the richest 10 percent and the poorest 10 percent of citizens differed by a factor of 13. According to Rosstat, in 2013 the incomes differed by a factor of 16.2.[1]

[1] Distribution of Total Cash Income and Cash Income Characteristics of Differentiation (Nov. 20, 2016), available at http://www.gks.ru/free_doc/new_site/population/bednost/tabl/1-2-2.htm.

Where is the new fulcrum? This question worries the authorities and the people. Up to now, the installation of public administration reform has been dominated by the ideology of authoritarianism. People with problems were treated as regulatory objects and not as subjects of their own lives – subjects of self-organization, self-employment and mutual support. Currently, however, the situation has changed radically.

The right of citizens to participate in managing state affairs is becoming increasingly important; the political activity of citizens is growing, which means increasing the number of community initiatives.

For more effective development of the institute of social initiatives and for dialogue between the authorities and society, many European countries apply the principle of decentralization.

Decentralization begins with the realization that government – at every level – is not infallible. Imperfection is a fact of life that applies to everything that governments do – even to programs of decentralization. At a time when departments are dealing with many other urgent demands for reform, it is inevitable that improvements will be made when it comes to decentralizing power. The important thing is that as well as maintaining the pace of change, we should be willing to learn from the experience of those to whom power is devolved and make decentralization the genuinely cooperative process that it should be.

However, such instruments differ in countries with a federal form of ruling.

1. Concepts of Governing in Federal States

If federalism is considered as a strictly legal concept, which is more characteristic of the European tradition, it can be identified with federal rule, that is to say, with a federal state as the type of state structure under which the central and regional governments directly rule over the people with each government acting independently within its respective and constitutionally determined jurisdiction and independently coordinating its relationships with other governments, while the remaining authorities belong to the governmental bodies of the subjects (i.e. the constituent parts of the federation, e.g. provinces, regions, states, etc.).

On the other hand, when considering federalism as a political concept, which in fact is done in the Anglo-American tradition, it is defined as a way of political organization which unites separate states into one, all-embracing political system, in which the power of the central government and the regional governments is shared in such a way as to protect their existence and authority.[2]

In spite of different approaches, both of these concepts single out constitutionally determined political balance as an integral element of the federal system. It is this

[2] *See* Daniel J. Elazar, *American Federalism: A View from the States* (New York: Thomas Y. Crowell Company, 1966).

element of balance which transforms federalism into the basic institutional principle of the vertical distribution of powers aimed at ensuring mutual restriction and control of different levels of government in particular, and the political system in general. The modern world is too complicated to be described only within the limits of one concept or within the framework of one scientific stream. Ethnic conflicts hold the potential danger of escalating onto a much bigger and broader scale putting at risk entire nation states, and even civilizations. Thus, Samuel P. Huntington suggests the complex synergetic point of view: the synthesis of the humanities such as political science, jurisprudence, cultural studies, interpersonal communication theory, etc.[3] Complicated ethnic conflicts may be resolved only in that way. Therefore, this is the issue of the work: the existence of ethnic conflicts in multinational states, some of them continuing over centuries. The goal is in finding an effective way of solving the problem of the potential dangers of ethnic conflicts in federal multinational states by using the method of decentralization and the synthesis of different social and legal sciences.

2. Decentralization – the Notion and Essence of It

Within the framework of the described basic approaches decentralization may be defined as a set of principles and institutional mechanisms accepted as laws (not constitutions) which delegate certain governmental authorities to the lower-level bodies of power, local communities or decentralized units.

Thus, decentralization is a process of redistribution or transfer of functions, powers, from the center to lower levels of government. At the same time, although decentralization, especially in the government sector, is widely studied and practiced, there is no common definition or understanding of decentralization.[4]

The sense of the notion "decentralization" may vary somewhat because the different ways to use it in any area is a centralized solution.

Decentralization in public administration is the most studied mechanism and is regarded around the world, especially in European countries, as the best way to solve problems such as economic recession, government inability to fund public services and the resulting reduction in the effectiveness of their implementation, demands of local communities for more participation in local government, general

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[3] Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (Feb. 20, 2017), available at http://www.knigka.su/english/fiction_literature/5714-the_clash_of_civilizations_and_the_remaking_of_world_order.html.

[4] Pierre Tifine, *Droit administratif français* 19 (Saarbrücken: EJFA (Editions juridiques franco-allemandes), 2012).

weakening of the legitimacy of the public sector, as well as international pressure on a country's inefficient, undemocratic, over-centralized systems.[5]

A United Nations Development Programme (UNDP) report noted:

> A large number of developing countries and countries with economies in transition started in one form or another… [a] decentralization program. This trend is accompanied by increased interest in the role of civil society and the private sector as partners of governments to find new ways of providing services to the public... these events, as we have noted… [occur] mainly due to the active participation of citizens and the private sector in the management of [the] State.

Thus, decentralization can be defined as a set of principles and institutional mechanisms established by laws that delegate some authority to subordinate government authorities, local authorities, local communities.

3. Decentralization and Subsidiarity – Cooperation of Principles

Decentralization is closely connected with the notion of subsidiarity which presupposes the transfer of functions (or tasks) to the lowest levels of the social order capable of their execution. For efficient operation of the principle of separation of powers and in areas of its application, the "principle of subsidiarity" must be observed, the essence of which lies in the adequate distribution of power between the center and the subjects of the federation, taking into account their ability to solve effectively all problems arising in the given historical period in the region and in the country as a whole. In the narrow sense, the principle of subsidiarity presupposes the solution of problems at the level of their appearance. Power should be distributed in such a way that various regions, comprising the state, could function and deal with the problems in respect of their welfare independently; yet, the nation as represented by the federal government could exist as a whole and have all the authorities necessary to provide for all its needs.

Cultural, linguistic and religious minorities as a whole require a certain autonomy within several areas such as education, cultural activity, religion or even, to some extent, structural autonomy within the boundaries of their territories. They prefer to discuss problematic issues with representatives of their own group who will

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[5] Decentralization: the generalized approach of development. UN Economic and Social Council, Bottom-Up Approaches and Methodologies to Develop Foundations and Principles of Public Administration: The Example of Criteria-Based Organizational Assessment, Report of the Secretariat, E/C.16/2005/3, January 31, 2005 (Nov. 20, 2016), available at http://unpan1.un.org/intradoc/groups/public/documents/un/unpan019917.pdf.

most probably better understand and be able to solve them. Minorities often try to create conditions for economic prosperity on their own territory, at the same time establishing lasting international relationships with the people of the same cultural background and protecting their uniqueness at the national (state) level. As a consequence, they demand legal guarantees of the fact that their interests will also influence the process of decision-making within the framework of the legislative, executive and judicial powers.

When minorities mainly reside in a certain local region, such problems can be easily solved exactly with the help of territorial decentralization. However, when one region is inhabited by several minority groups, as, for example, in the far north of Russia, decisions based on the principle of territorial "belongingness" will hardly put an end to the problems. This in fact is a seriously challenging problem in Russia, because Russia is one of the most multinational states in the world. Its population includes more than 100 major and minor nationalities differing in their origin, language, culture and life-style but united by common history. Twenty-two nations of over one million people each form 96.3 percent of the country's population. Thirty more nations ranging from 100,000 to 1 million people each comprise 3.4 percent of the population. There are also tens of indigenous nations in the north, Siberia and in the Far East. Art. 69 of the federal Constitution uses the term "small peoples" (small nations). Thus, about 0.4 percent of the remaining population falls within the several tens of other nations.[6]

4. System of Personal Federalism

A certain innovation in dealing with this problem can be stated in the system of personal federalism accepted in Belgium between the end of the 1970s and the beginning of the 1980s, which delegates power not only to its territories but also to language communities.

Though personal federalism is not a widespread form of government in modern Europe, it has long been applied in the Middle East, in Lebanon particularly. It is the so-called "federalisme integer" (corporate federalism), where decision-making power belongs to cultural communities, that is, to their representatives, regardless of their geographic location. In the future, this type of federal organization, ignoring the territorial entity, offers more acceptable legislative and constitutional mechanisms for all those multinational, multilingual or multi-religious societies in which different minorities can occupy one and the same territory (area). However, this method is good only for the states with a relatively small area and a limited number of nationalities. For countries such as Russia this practice is not suitable at the present stage of their legal and national development.

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[6] Statistics (Nov. 20, 2016), available at http://www.gks.ru/wps/wcm/connect/rosstat_main/rosstat/ru/statistics/population/demography/#.

5. Applying the Decentralization Method in Russia

The problem of decentralization is an especially burning issue in large multinational states where the most typical national conflicts and clashes between communities of citizens of different nationalities highlight the necessity of an effective distribution of powers. The preservation of the national entity will always be the priority posing a major dilemma: either tight control of all levels of the power hierarchy, where decisions are made exclusively at the top, or delegation of some authorities (powers) to local governments, allowing them to pass legislation specifically for their region with the view to reducing national hostility.

Contemporary national government has become extremely complicated and centralized with excessively bureaucratized and anonymous officials. The information process is becoming more and more complex. Officials at the central level often lack sufficient understanding and knowledge of the regions to be able to appreciate the ideas coming from remote areas or consider the consequences that their decisions have at the local level. Here, on the side of the center, exists administrative obscurity, arrogance and ignorance.

Federal and other decentralized systems accelerate and optimize the information process. Local authorities are able to protect the interests of their populations and are not obliged to strive for compromise regarding their relations with other regions. They can promptly react to problems and find solutions which better serve the interests of the populations of their regions. This type of governmental organization proves to be more rational, as the authorities do not waste time, energy and human resources on the implementation of their decisions. It is a more flexible system, as it allows autonomous decision-making. It is also a more creative system, as local experience allows avoidance of mistakes which might lead to negative consequences at the state level. Those mistakes that have already been made locally are easier to deal with than those made at the state level.

In the Russian Federation, the problem of developing a constructive dialogue between the authorities and society is currently particularly acute which, in turn, poses the problem of using state power to reduce social tensions. Therefore, improvement of federal relations and decentralization are among the priorities of the national policy of the state.

Modern public administration has become very complex and centralized, with a highly bureaucratic and anonymous staff. Information has become more complex as well. Officials at the central level often lack the awareness and information needed to properly assess the proposals that come from remote areas or the effectiveness of the decisions taken at the central level in relation to what is happening on the ground at the more local level.

But optimization of federal relations cannot be achieved by just any means whatsoever, for example, by turning national republics into provinces or turning "krais" and "oblasts" (Russian administrative units) into republics. (Traditionally in Russia, republics are formed on the basis of ethnic identity; "krais" and "oblasts" are formed on a territorial basis.) The uniqueness of Russian federalism lies in the combination of both ethnic and territorial principles. It is this "contradiction" which stands out while at the same time declaring the constitutional equality of the subjects of the Russian Federation and equal distribution of the spheres of power. We are witnessing a never-ending argument concerning equality of the national republics and the regional areas called "oblasts." Equality does not imply absolute identity. Therefore, the question of how to achieve equality and preserve uniqueness remains on the agenda in the process of institutionalization of federalism in Russia.

6. French Experience in Applying the Decentralization Method

The issue of decentralization has appeared in the past experience of a number of European countries, including France. In the mid-1800s, Alexis de Tocqueville wrote that the French Revolution began with "the desire for decentralization... [but became], in the end, the expansion of centralization."[7]

France is traditionally represented as a paradigm of a unitary state. The traditional French system of "territorial control" is based on the principle of uniformity of administration throughout the country. It recognizes the supremacy of the central state interests over the interests of individual parties, individual groups and communities.

Thus, in France a system was formed with the vertical hierarchical model of organization of powers in which public policy is carried out by public institutions and administrative bodies; it is implemented by government agencies and local governments and subject to the agreement of the prefect – the representative of the French State in the departments. In practice, the relationship "center-periphery" has always been much more flexible than this model implied.

However, it was only in 2003 that a constitutional reform made permanent the role of local and regional authorities, securing in Art. 1 of the French Constitution the principle that "the state organization is decentralized," and extending this principle not only in the regions and municipalities, but also in the overseas departments and territories in all French administrative divisions.[8]

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[7] Vivien A. Schmidt, *Democratizing France: The Political and Administrative History of Decentralization* 22 (Cambridge: Cambridge University Press, 1990).

[8] Constitution de la République française (Nov. 20, 2016), available at http://www.assemblee-nationale.fr/connaissance/constitution.asp.

The reform was extended by four laws:[9]

– Act 2003-705 of August 1, 2003, concerning local referendums: it clarifies issues of local referendums and establishes conditions for mandatory and optional referendums.

– Act 2003-704 of August 1, 2003, on experimentation by administrative units: it establishes the conditions for experimentation.

– Act 2004-758 of August 1, 2004, on income distribution for the administrative divisions: it determines the revenues collected from the administrative units and establishes a minimum share which they can keep.

– Act of August 13, 2004, concerning the powers and responsibilities of local authorities: it specifies the new powers transferred by the central government to local authorities.

After this reform, and application of the decentralization method to operate in France, the level of discontent with the authorities by the population was significantly reduced, the rating of trust in government increased, and the possibilities for the implementation by the population of various social initiatives increased substantially.

7. Pros and Cons of the Decentralization Method in the Case of Diversification of Powers

Decentralized systems make the process of information interchange faster and more efficient. Local authorities can protect the interests of their populations, and are not required to find a compromise as regards the differing interests of other regions. They can quickly react and find a solution that is acceptable to the people of their regions. It is more flexible, because it allows making decisions independently, as well as being more creative, because local experience can be used to avoid mistakes that may lead to serious consequences at the national level; also, mistakes that have already been made are easier to rectify.

At the same time, in determining the competence of the authorities at various levels it is important to avoid duplication of functions, therefore important powers are to be full and exclusive.

Implementation of state powers should be performed, if possible, by territorial authorities, which are the closest to citizens. Decentralization is a complex process that goes beyond purely structural reforms. In the words of Elazar, "Partnership is a key aspect of decentralization. It involves the distribution of real power between several centers, which should by treaty develop mechanisms of interaction with each other to achieve common goals."

Such a federal democracy makes the availability of unlimited powers belonging only to one of the levels of the complex government unthinkable. Consequently,

[9] Tifine 2012, at 31.

the powers of any federal state should be divided between different levels of government. Thus, decentralization implies an approximation to the ideal model of separation of powers by the gradual empowerment of regional authorities with a wide range of powers, to subordinate them to the national state territory.

Decentralization is a difficult process going far beyond structural reforms. It can reduce national hostility between nationalities within the state, extirpate poverty, solve ecological problems and improve the health-care system, education and technological development. Moreover, it is able not only to improve the management and operation of social services but also to promote the functioning of social organizations, the private sector and international organizations. Decentralization brings state officials closer to ordinary people and enhances the work of local social programs and services. The problem is only to ensure that all interested parties can and will speak their minds.

Federal relations as a form of democratic organization of society through the decentralization of the system of government allow not only to get directly down to the solution of the problem of ethnic minorities in Russia but also to distribute economic and power authorities, and spheres of jurisdiction between the center and the regions, keeping the balance of core interests of both at the center and in the subjects of the Russian Federation.

The harmonious development of statehood of the republics-subjects of the Russian Federation is the main condition for preservation of the regional and ethnic variety of Russia. At the same time, decentralization and the clear and legally established distribution of spheres of power and authorities in the system of state power, supported by legal agreements, are the so-called guarantees of the balance of interests of the Federation and its subjects. Contrasting symmetries and asymmetries of the subjects of the Federation, tendencies in the sphere of complex federal relations, concerning the essence of the problems of state organization in the transitional period, can and must be perceived by the public only in the context of constitutional unity and the entity of the Russian Federation. Taking into account the complexity and ambiguity of the problem, the incredible confusion and diversity of the approaches, and the stereotypes about the Russian model of federalism existing in our society, the aforesaid postulates must remain firm in the process of establishing a stable present and a happy future of the federal state.

Nonetheless, decentralization can have its disadvantages. In some cases a poorly performed distribution of power can only cause ethnic conflicts and a desire by some groups to take more power than the others.

An almost ten-year-old experience of federal relations in Russia shows that uncontrolled, chaotic decentralization of the system of state territorial government has negative consequences for the country's future. Many negative consequences were the result of the neglect of the regional component by the federal center. The absence of a clear understanding of the essence and principles of federalism and specificity of the process of decentralization led to the fact that the process

of creating the basis for the real federation was of a rather contradictory nature. As pointed out by many experts, the management of social-economic and other processes was performed with the help of methods typical for a unitary state and confederation rather than for a federation.

In the legal context, federalism can be identified with federal government, i.e. a federal state as a type of a complex governmental structure where political balance between the central government and the subjects is maintained constitutionally. According to Elazar, "Federative democracy makes absolute sovereignty of one of the levels of the complex governmental bodies impossible. The federative state and federative units have different bases for legitimacy. The principle of people's sovereignty underlying it refers to various 'peoples' – the people of the federation and the people of each federative unit respectively." Under such a definition, sovereignty in any federal state must be divided between different governmental levels, as it was claimed by Madison and Hamilton. It cannot serve as the basis for legitimacy of absolute power for either of the two governmental levels. Thus, decentralization presupposes some movement towards this ideal model of power distribution by gradual delegation of a wide spectrum of authorities to the regional bodies of power on their subordinate territory.

8. Decentralization as an Instrument of Solving the Separation Issue

It is worth mentioning one more problem arising in any federal state – the problem of separation. Mainly because of its existence, the body of the central power is not eager to delegate part of its authorities to the regions, fearing an increase in separatist movements there. This apprehension is not groundless. In 1847, Catholic cantons of Switzerland established a union called "Sonderbund" and wished to separate, which led to the "guerre du Sonderbund." The secession of the southern states led to civil war in the United States. The same problem caused civil war in the former Yugoslavia. The Soviet Union and Czechoslovakia disintegrated peacefully. Today Russia faces this problem, as does Canada, and other countries as well.

Politicians and constitutional lawyers have been arguing for centuries as to whether federal units have the right to separate from the center or not. An affirmative conclusion to this issue would contradict the fact that all members of the federation are somehow parts of the central government, whose consent is necessary to legalize the act of separation. Another argument, challenging the right of separation, states that separation concerns not only the interested member of the federation, but also the federal state itself.

On the other hand, many federal states have an argument for the right of separation in the preamble to their constitutions: contractual relationships of the federal members and the fact that the new federation was formed by member states.

In other words, the federal state is created usually only by the free will of its member states that, thus, realized their original sovereignty.

In fact, the problem of separation cannot be solved merely by legal means. There are exceptional situations where traditional legal decisions are not applicable. For instance, there is no point in insisting on the preservation of the federation in the event all its members – or some of them – should openly express their desire to separate. However, unilateral separation even supported by the fundamental right of the people to self-determination should always consider and respect the same rights of the peoples residing in the federation. Moreover, we should realize that nowadays there are almost no such territories where only one nation of people or ethnic group lives. Therefore, the right to self-determination of a new national minority within the states newly formed as a result of separation from federations should also be respected. Consequently, reference to the right to self-determination can be made only in the situation where all the interested peoples are ready to compromise in order to find suitable solutions to the problem.

For example, in 2015 pro-independence parties in Spain's richest region, Catalonia,[10] pushed ahead with a historic plan for an independent state within eighteen months. Spain's economic crisis had hit Catalonia hard, leaving it with 19 percent unemployment (compared with 21 percent nationally). The region, which makes up 16 percent of Spain's population, accounted for almost 19 percent of the Spanish GDP, but there was a widespread feeling that the central government took much more than it gave back. This sense of injustice fueled the independence campaign.[11]

However, the non-binding poll of November 2015 was based on the relatively low turnout of 2.2 million voters out of a potential 5.4 million.

The coalition of two major separatist parties, which won this year's regional elections, relied on the support of a radical left-wing party, CUP, to secure its majority in the Catalan parliament. Even then, they fell short of a majority of voters, with 48 percent support.

So instead of the secessionists taking control over the regional parliament, the Catalan opinion on secession appears quite divided.[12]

In contrast we have the remarkable example of Scotland, whose government initiated moves to hold a new referendum on independence from the UK after the "Brexit" vote.[13] First Minister and Scottish National Party (SNP) leader Nicola Sturgeon

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[10] Simon Harris, *Catalonia is Not Spain: A Historical Perspective* (Nov. 20, 2016), available at http://www.verkami.com/projects/9656-catalonia-is-not-spain-a-historical-perspective.

[11] *Id.*

[12] *Catalonia's Push for Independence from Spain*, BBC, November 11, 2015 (Nov. 20, 2016), available at http://www.bbc.com/news/world-europe-29478415.

[13] Here and after, about the Brexit vote, the information and statistics were taken from Alastair Jamieson, *Scotland Seeks Independence Again after U.K. "Brexit" Vote*, NBC News, June 24, 2016 (Feb. 20, 2017), available at http://www.nbcnews.com/storyline/brexit-referendum/scotland-could-seek-independence-again-after-u-k-brexit-vote-n598166.

said officials would plan for a "highly likely" vote on separation from the rest of the UK. The Scots voted 62 percent to 38 percent to remain in the EU, according to the Brexit results, in contrast to the overall UK-wide result of 52 percent to 48 percent in favor of quitting the bloc. In addition to this, a majority of voters in Northern Ireland also voted to remain in the EU, suggesting the UK faces internal constitutional upheaval as well as a contentious divorce from Brussels. The issue in Scotland is that the people are saying they are now faced with being taken out of the European Union against their will. A key argument in the 2014 poll was that Scotland's continued membership of the UK would also safeguard its future in the EU. A new vote could see a significant swing towards Scottish independence. "We've got a united country in Scotland which wants to be part of Europe, and in the manifesto it said if Scotland was dragged out of Europe against the will of the Scottish people, then the Scottish Parliament should have the right to hold another independence referendum," said Sturgeon's predecessor, Alex Salmond.[14] His view was echoed by many in Scotland, including Harry Potter author J.K. Rowling, who tweeted, "Scotland will seek independence now," adding that British Prime Minister David Cameron's legacy "will be breaking up two unions."[15] However, a new independence campaign would face fresh headwinds; in particular, Scotland's oil-dependent economy has been severely dented by a collapse in global oil prices since the last referendum. In addition, Alex Salmond predicts that Scotland would likely have to join the euro currency zone in order to re-enter the EU as an independent nation, raising the prospect of a cross-border currency divide within Britain even though two-thirds of Scotland's economic output is to the rest of the UK. Separation from the rest of Britain would end three centuries of shared history and would be the biggest constitutional upheaval since the Act of Union in 1707.[16]

The Brexit results and the possibility of the new referendum in Scotland will probably have a great influence in Northern Ireland, whose relationships with the British people traditionally and historically have been "difficult." How all separatist tendencies will turn out – only time will tell. We believe, though, that separation will lead to the growth of economic and social risks.

Therefore, in spite of the existing threat of separation of the regions, the central body of power should always remember that the best guarantee of state unity is not total control over the people, but their desire to live together on the same territory, their perception of themselves as a unified nation. For this purpose it is vital to eliminate ethnic conflicts and to allow the regions certain independence in questions of providing for their basic needs.

At the same time, in the UK it is necessary to mention the term "devolution." In the context of devolution understood as a form of decentralization that depends on the

14 Jamieson, *supra* note 13.

15 *Id.*

16 *Id.*

statutory delegation of powers from the British Parliament to govern at a subnational level, such as a regional or local level, like, say, the National Assembly for Wales, we can point out that the case of Wales is a bit different.

Wales was incorporated within the English realm in the 16th century and has the same legal system that is binding in England.[17] Our impression is that the Welsh people and politicians focus on the idea of cultural autonomy. First of all, this means an appreciation of the Welsh language in education. Secondly, it relates to strong participation in decision-making processes on solving problems concerning local issues, such as economic development, transport, housing, tourism, etc. We should add that Wales won some political autonomy at the end of the 20th century.

However, the competencies of the National Assembly are strictly limited and enumeratively expressed. In this sense, Scotland's situation is completely different.[18] This institutional difference derives from the different legal traditions: Wales, like England, is a common law country, whereas Scotland is a civil law country. Also, Scotland was not incorporated within the English realm, but – that said – was deliberately joined and united with England on the grounds of the Acts of Union of 1706–1707. Both sovereign states created one kingdom with the name of Great Britain. This institutional difference does not mean that in the future Wales will not decide to "fight" for real self-determination and independence. The national (and Celtic) identity of the Welsh people remains very strong (and the English are ethnic Anglo-Saxon, not Celtic).

However, Wales voted "yes" in the Brexit referendum as did England. In our opinion, the reason is that the decision was clearly based on economic arguments, the feeling of injustice and lack of social cohesion or simply on rejecting the establishment in Westminster, which had failed to improve the quality of life in Wales. This has nothing in common with the process of the Welsh devolution.

Paradoxically, some notions about independence for London as an independent city-state have recently been put on the table by many Londoners.[19] Originally, the new major of the capital of the UK expressed his interest in a very deep decentralization and more power for London as a city (but this was stated before the referendum). However, after the Brexit vote his statement was clear: London will not become an independent state,[20] but remain the capital city. Of course, London

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17 *See* Donald Gregory, *Wales Before 1536: A Guide* 152 (Gwynedd: Gwalch, 2008).

18 *See* Colin Turpin & Adam Tomkins, *British Government and the Constitution: Text and Materials* 252–253 (7th ed., Cambridge: Cambridge University Press, 2012).

19 James O'Malley, *Petitioning Mayor of London Sadiq Khan. Declare London Independent from the UK and Apply to Join the EU* (Feb. 20, 2017), available at https://www.change.org/p/sadiq-khan-declare-london-independent-from-the-uk-and-apply-to-join-the-eu.

20 Richard Hartley-Parkinson, *No, London will not Become an Independent State after Brexit*, Metro.co.uk, June 28, 2016 (Nov. 20, 2016), available at http://metro.co.uk/2016/06/28/no-london-will-not-become-an-independent-state-after-brexit-5970878.

is very cosmopolitan and the quality of life seems higher there than in many areas of England and Wales. Still, the notion of independence for London remains very controversial and reminds us of the status of many Hanseatic cities in the Middle Ages. But this is not in the English or British tradition.

Determined decentralization forces the central government into a conscious consideration of what its own role should be. The irony is that in a centralized system no such thought is required: central control is the norm and local control the deliberate exception – it is a decentralizing government that has to define the extent of its power. Inevitably, this exposes us to charges of inconsistency when we do decide to reserve particular powers at a national level. Yet, far from being embarrassed about these decisions, for example, in the UK they found a way to actively encourage debate over which fourteen powers belong at the national level and which powers belong at the local or personal level.[21] Furthermore, by giving local institutions the right to bid to exercise any power not expressly reserved as the exclusive domain of the central government, the process of defining the role of the center could – and, indeed, should – be used to drive the process of decentralization.

Conclusion

To sum up, what is necessary is that plans concerning decentralization should be strategic and not strictly pre-planned. Decentralization must be a flexible process providing freedom of action in case of various unexpected situations.

It is worth mentioning that many theorists and politicians support decentralization. For example, the libertarian thinker Hoppe supports such a process that should be understood as a way to make Europe "a thousand Liechtensteins."[22] On the other hand, it was one of the greatest legal philosophers in Europe (and Scottish nationalist) Neil MacCormick's dream to make Scotland a part of the "federal" UK which could be a part of the "federal" European Union. Also many Catalan nationalists believe more in the EU's support for their claims concerning independence than in Madrid's good faith and will to cooperate. Obviously, support for decentralization comes also from many liberal political thinkers and their environment. They think that decentralization is closely related to democracy, municipal self-government, and even the principle of the separation of powers or the rule of law. Such thinking was expressed, for example, in the Polish Constitution.[23]

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[21] Rt Hon Greg Clark MP, *Decentralisation: An Assessment of Progress* (London: Department for Communities and Local, December 2012) (Nov. 20, 2016), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/16593/Decentralisation_an_assessment_of_progress.pdf.

[22] *Hans-Hermann Hoppe on War, Terrorism, and the World State: Interview*, Québécois Libre, December 7, 2002 (Nov. 20, 2016), available at http://www.quebecoislibre.org/021207-8.htm.

[23] The Constitution of the Republic of Poland of April 2, 1997 (Nov. 20, 2016), available at, http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm.

The key question is whether decentralization will stoke centripetal or centrifugal forces. We argue that a well-designed reform that decentralizes power and resources to a level below that of major social or regional cleavages is most likely to identify local government with issues of efficiency and service provision, as opposed to social identity and grievance. Such a decentralization can undermine secessionist movements by peeling away layers of support from citizens whose demands can be satisfied by more limited measures of autonomy. In practice, a key factor will be the regional specificity of elite interests. To support national integrity, regional elites must be made to have more to lose than to gain from national schism, so that they do not invest in politicians, parties and events (including violent ones) that promote national breakup. Complementary reforms promoting a single internal market for goods and services, and improved infrastructure and transport links, can help convince elites that continued access to national markets and policy-making trumps dominance of local resources and power. Such reforms can also facilitate the flow of people and ideas across an economy, binding it together from the bottom up. By reducing secessionist tensions, decentralization designed in this way should also reduce the threat of conflict in a society. Strong local accountability mechanisms combined with strong national safeguards of minority rights can help by aligning the incentives of leaders with those of local citizens, preventing subnational governments from ignoring or oppressing local minorities. These should be paired with electoral measures that support open, competitive local politics on a level playing field, and campaign finance regulations that support transparency and fairness, thus promoting power-sharing.

To ensure its success, the mass participation of citizens and all interested parties is necessary. In addition, it is important to understand that not all governmental functions should be delegated to the regions. Keeping in mind the principle of subsidiarity, governmental functions can be delegated only if doing so is important for the achievement of the set goals and existing guarantees of their realization.

The assessments also allow us to draw some conclusions as to government's overall progress under each of six actions:

Action 1: Lift the burden of bureaucracy. There has been widespread action across government to reduce bureaucratic burdens, including centrally coordinated initiatives. Furthermore, it will simplify the welfare system and ensure that the system always incentivizes work and that work always pays. Nonetheless, this is unfinished business. For example, the introduction of the Data Lists makes it easier for local government to be clear as to what information is required by the central government – but it also exposes the fact that the extent of these data demands should be reduced even further.

Action 2: Empower communities to do things their way. Through the Localism Act and other decentralizing reforms, the government is giving individuals and communities important new rights. However, additional rights should be enacted to give local people access to powers, resources and information still monopolized by the center.

Action 3: Increase local control of public finances. The removal of the great majority of ring-fences is an important step towards localizing control over finances. Nonetheless, little has been done so far to reduce the proportion of public funding that is determined and raised centrally or to put those resources directly into the hands of communities.

Action 4: Diversify the supply of public services. The government has taken some important first steps to diversify supply, and initiatives on public service mutualization will reinforce this. Work to map barriers to entry will help foster a level playing field. Some departments are also pushing ahead on the choice agenda.

Action 5: Open up government to public scrutiny. For example, in Russia with the launch of the Open Data Law in February 2009, all government departments have Open Data Strategies that set out how they will seek to release information in more open and useful forms.

Action 6: Strengthen accountability of local people. Choice (*see* action 4) is the main way of increasing accountability in the case of "individual" services like adult social care. But when it comes to "collective" services like neighborhood policing, the key is the development of new forms of democratic accountability. A good example is that democratic accountability mechanisms now need to be demonstrated across a wider range of public services. Government should take some steps to ensure appropriate accountability to the parliament of decentralized systems.

Though decentralization is basically a political process, it will not be successful if the regions do not receive relevant financial and other resources. Decentralization is a complicated process requiring tolerance and attention. Yet, it promises to be an important mechanism for government improvement, and steady and dynamic development of the state.

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GENEVA SECURITIES CONVENTION AND RUSSIAN CIVIL LEGISLATION REFORM: COMPARATIVE PERSPECTIVES

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The Russian Parliament has modified the Civil Code recently. This reform has also covered the regime of uncertificated securities. Under the modified Civil Code (RCC) uncertificated securities do not constitute chattels but claims and other rights against the issuer. The legislator has also precised such issues as the methods of transfer and the creation of an interest upon those securities (Art. 149.2 of the RCC), the protection of the titleholder including the rights of a bona fide purchaser (Art. 149.3 of the RCC) and the liability of an intermediary resulting from the loss of the records (Art. 149.5 of the RCC).

In 2008, in Switzerland, the Parliament has adopted the Federal Intermediated Securities Act (FISA). The present Act has introduced a new object to the Swiss legal order: an intermediated security. The intermediated securities are distinguished from those in paper form and from the immobilized securities. The Swiss delegation has participated actively in the preparatory works that resulted later in the adoption of the UNIDROIT Convention on Substantive Rules for Intermediated Securities, also known as Geneva Securities Convention. However, this Convention has not been ratified by Switzerland.

The author analyzes the key issues of the reform in relation to uncertificated securities. We examine in particular whether the provisions governing the regime of uncertificated securities under the modified Civil Code of the Russian Federation have become more compatible with Geneva Securities Convention. Finally, we will try to explain why this Convention is not in force and whether the Russian Federation and Switzerland could ratify it.

Keywords: Russian law; uncertificated securities; intermediated securities; Swiss law; Geneva Securities Convention; legal reform; comparative law; security; UNIDROIT.

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Introduction

In 2013 the Russian Parliament has completely revised the provisions governing the regime of uncertificated securities. The legislator had several purposes. Firstly, it was necessary to determine the legal regime of those securities. The judicial authorities considered them as chattels while some legal scholars estimated that uncertificated securities constitute claims against the issuer. Pursuant to the Explanation Report prepared by the Russian Parliament, the second purpose was to clarify the methods of disposition.[1] Finally, the legislator intended to accord a better protection to a bona fide purchaser of those securities.

In 2008, the Swiss Parliament has adopted the Federal Intermediated Securities Act (FISA). This act introduced a new object in the Swiss legal system: an intermediated security.

At the international level, UNIDROIT has drafted the Convention on Substantive Rules for Intermediated Securities, also known as Geneva Securities Convention.[2] Although this Convention tried to harmonize the regime of intermediated securities at the international level, it is not in force currently. It is important to mention in this respect that neither Russia nor Switzerland have ratified this Convention.

We are going to analyze the questions raised above in this paper profoundly. In particular we are going to explain why the "uncertificated security" under Russian law corresponds to those that figure in Swiss law: "intermediated security." Secondly

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[1] Пояснительная записка к проекту федерального закона № 47538-6 "О внесении изменений в части первую, вторую, третью и четвертую Гражданского кодекса Российской Федерации, а также в отдельные законодательные акты Российской Федерации" [Explanatory Report of the Draft Federal Law No. 47538-6 "On Modification of Chapters I, II, III and IV of the Civil Code of the Russian Federation and other Laws"] (Jan. 11, 2017), available at http://base.garant.ru/58024598/.

[2] UNIDROIT Convention on Substantive Rules for Intermediated Securities, adopted by the Conference on October 9, 2009 (Jan. 11, 2017), available at http://www.unidroit.org/english/conventions/2009intermediatedsecurities/convention.pdf.

we intend to check the compatibility of the Geneva Securities Convention with the relevant provisions of the modified Civil Code of the Russian Federation (RCC). Finally, we will try to explain why the Geneva Securities Convention is not in force at the moment and discuss the future perspectives of this Convention.

1. Intermediated Security vs Uncertificated Security under Russian Law

Intermediated securities constitute a legal and linguistic novelty. One should distinguish intermediated securities, which are held by the licensed financial intermediaries at the proper accounts from those in paper form. Intermediated securities do not have physical form. They are transferred by means of book entries at the accounts. The Geneva Securities Convention defines intermediated securities as "*securities credited to a securities account or rights or interests in securities resulting from the credit of securities to a securities account*" (Art. 1(b)). The drafters of this Convention tried to unify two different approaches: the first part of this definition ("*securities credited to a securities account*") is quite common for civil law countries while the second one ("*rights or interests in securities*") reflects common law tradition. The Convention does not explain the legal nature of these securities.

We estimate that despite terminological differences, the term "uncertificated securities" which exist under Russian law, perfectly match the term "intermediated securities" which figure in the Geneva Securities Convention. In fact, uncertificated securities constitute claims which are transferred by means of assignment. Under Russian law it is not the case. The term "uncertificated security" was imported to Russian legal system from the Uniform Commercial Code (UCC).[3]

As for the legal doctrine, we should mention that the majority of legal scholars considered that such securities are claims ["обязательственные права"].[4] Thus we cannot apply the principle of vindication to those securities. However, we should mention that some lawyers (for example, former judge Vladislav Dobrovolsky) estimate that uncertificated securities could be vindicated.[5]

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[3] Суханов Е.А. О понятии и видах вещных прав в российском гражданском праве, 12 Журнал российского права 42–50 (2006) [Evgeny A. Sukhanov, *The Definition and the Types of Rights in Rem in Russian Civil Law*, 12 Journal of Russian Law 42–50 (2006)] (Jan. 11, 2017), also available at http://base.garant.ru/5332987/.

[4] *See in particular* Российское гражданское право: Учебник. В 2 т. Т. I: Общая часть. Вещное право. Наследственное право. Интеллектуальные права. Личные неимущественные права [Russian Civil Law: Textbook. In 2 vol. Vol. I: General Part. Property Law. Inheritance Law. Intellectual Rights. Personal Non-Property Rights] 330 (E.A. Sukhanov, ed., Moscow: Statut, 2010).

[5] Добровольский В. О практической ценности дискуссии по вопросу о виндикации акций, 8–9 Акционерный вестник 31–41 (2007) [Vladislav Dobrovolsky, *On the Question of Vindication of Shares in Uncertificated Form*, 8–9 Shareholder's Review 31–41 (2007)] (Jan. 11, 2017), also available at http://base.garant.ru/5409077/.

It is important to indicate that there are two different opinions in Russia on the problem of uncertificated securities. This problem comprises two main questions. Firstly, we should determine what constitute the tem security or in Russian ["Что следует понимать под термином "ценные бумаги"?]. Secondly, do we apply the principle of vindication to uncertificated securities? [Применим ли принцип виндикации к бездокументарным ценным бумагам?]. Unfortunately Russian courts have replied positively to the second question. What about the first one, we remind that in Russia there are two main groups of scholars: those who estimate that we should distinguish paper from securities from uncertificated (in other words, uncertificated security is a not a security *stricto sensu*) and those who consider that the term "security" comprises also "uncertificated securities." The first group of scholars consider that the term "security" ["ценная бумага"] comprises only paper form securities. This group is represented by professors: Evgeny Sukhanov and Vadim Belov.[6] The opposite opinion is expressed by Dmitry Murzin.[7] Experts belonging to the documentary concept consider that we cannot apply the principle of vindication to uncertificated securities while the second group which is known as ("uncertificated theory" ["бездокументарная концепция"]) estimates the contrary.

The Russian legislator has followed the second approach in the reformed RCC. Pursuant to Art. 142 of the RCC the term security comprises both paper form and uncertificated securities. The modified RCC (Art. 142) states that: "*Securities are documents which respect the relevant legal requirements… also considered to be securities: claims and other rights*" ["Ценными бумагами являются документы, соответствующие установленным законом требованиям и удостоверяющие обязательственные и иные права…"]. Thus, the RCC follows the second approach ("uncertificated theory") and establishes one single definition of security for both in paper-form and for those which are dematerialized. The same time, the courts have unfortunately continued to apply the principle of vindication concerning the uncertificated securities (Art. 149.3, para. 1).[8] We could illustrate the above mentioned as follows:

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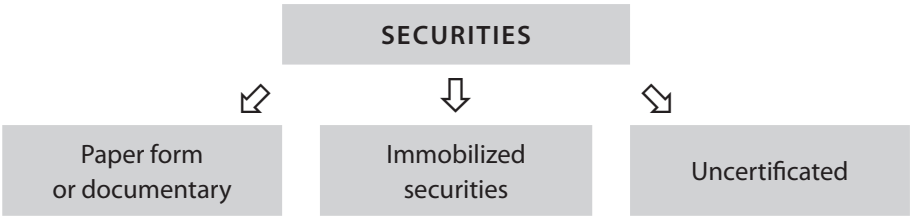
[6] Шевченко О.М. Правовое регулирование деятельности по организации торговли на рынке ценных бумаг. Новации российского законодательства и актуальные проблемы: Монография [Olga M. Schevchenko, *Legal Regulation of Activities Organizing the Commerce at the Securities Market. The Novelties in Russian Legislation and Actual Problems: Monography*] (Moscow: Prospekt, 2015) (Jan. 11, 2017), also available at http://base.garant.ru/57354204/.

[7] *Id.*

[8] Постановление Арбитражного суда Московского округа от 29 февраля 2016 г. по делу № А41-8897/2011 [Decision of the Commercial District Court of the Moscow Region with Regard to Case No. A41-8897/2011 of February 29, 2016] (Jan. 11, 2017), available at www.garant.ru.

Scheme I. Securities under the modified RCC



In Switzerland, the Parliament has introduced a new object into its legal system: an intermediated security. This object in question combines pursuant to the Explanatory Report ["Message relatif à la loi fédérale sur les titres intermédiés et à la Convention de La Haye sur les titres intermédiés"] the features of a chattel and a claim.[9] It is a *sui generis* object.[10] It is neither a claim nor a chattel. Swiss law distinguishes a paper-form security [papier-valeur] (Art. 965 of the Swiss Code of Obligations) from an uncertificated one [droit-valeur; Wertrecht] (Art. 973c of the Swiss Code of Obligations) which is transferred by means of assignment.[11] Finally, Swiss law distinguishes intermediated security which is regulated by the special legislative act: FISA. The Federal Tribunal has ruled that one could not claim for the vindication of intermediated securities.[12] The principles of the Law of obligations apply.[13]

In 2015 the FISA was modified. In particular, Art. 3 was completed by the substantial para. 1[bis] that prescribes the following:

> Any Financial Instrument or any right in Financial Instrument the conservation of which is governed by foreign Law attributing them the comparable function, are also considered as intermediated securities within the meaning of the present Act.[14]

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9 Message relatif à la loi fédérale sur les titres intermédiés et à la Convention de La Haye sur les titres intermédiés du 15 novembre 2006, at 8841 (Jan. 11, 2017), available at https://www.admin.ch/opc/fr/federal-gazette/2006/8817.pdf.

10 *Id.*

11 *See* Loi fédérale complétant le Code civil suisse (Livre cinquième : Droit des obligations) du 30 mars 1911 (RS 220) (Jan. 11, 2017), available at https://www.admin.ch/opc/fr/classified-compilation/19110009/index.html.

12 ATF 138 III 137 consid. 5.2.1.

13 *Id.*

14 Art. III, para. 1[bis] of the FISA in French: "*Sont également considérés comme des titres intermédiés au sens de la présente loi tout instrument financier et tout droit sur un instrument financier dont la conservation est soumise à un droit étranger qui lui reconnaît une fonction comparable.*"

It seems important for us to mention at this stage, that this provision was prescribed by the Preliminary Project [Avant-Projet].[15] It was not included in the Final draft. In 2015 the Swiss legislator has modified the FISA. Some Swiss scholars consider that the absence of this provision did not previously hamper to recognize instruments governed by foreign Law as intermediated securities.[16] The above mentioned provision establishes three conditions: 1) Financial Instrument or any right in this Instrument, 2) Conservation is governed by foreign Law, 3) Foreign Law should attribute to this Instrument or right in it the comparable Function. One could ask the question whether Russian uncertificated securities could be considered as intermediated under Swiss law? In our opinion the answer is positive. For instance, we have securities issued by a Russian Issuer and held at the account within a Russian financial intermediary. In that case we automatically satisfy the second requirement as the relationship between the holder and the intermediary is usually governed by the Russian law. As for the first criterion, we should look for the definition of financial instrument in the Project of the Federal Law on Financial services [Loi sur les services financiers (LSFin)]. The Project provides that the term financial instrument includes intermediated securities and uncertificated securities [droits-valeurs] (Art. 3(c)). We estimate that uncertificated securities certainly fulfill the first requirement. Finally, we should analyze whether uncertificated securities under Russian law fulfill the "comparable function." One may ask what constitute "comparable function" within the meaning of Art. 3 of the FISA?

For the moment there is neither official nor doctrinal interpretation of this term. In order to answer this question, we should examine the definition of intermediated securities pursuant to Art. 3 of the present Act. Under the FISA the definition of intermediated securities have the following elements: (1) personal or corporate rights against an issuer which (2) are of a fungible nature, (3) have been credited to a securities account, and (4) may be disposed of by the account holder in accordance with the provisions of the Act.[17] As for the uncertificated securities under Russian law, the RCC (Art. 142, para. 1) defines them as "*claims and other rights which are fixed in the decision of issue or in another act of the person who issued those securities according to the legal requirements. The execution and transfer of those rights and claims is possible only pursuant to Article 149 of the present Code.*"[18] As we see, there are

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[15] Joël Leibenson, *Les actes de disposition sur les titres intermédiés* 93 (Zurich: Schulthess, 2013).

[16] *Id.*

[17] Hans Kuhn et al., *The Federal Intermediated Securities Act (FISA) and the Hague Securities Convention (HSC)* 164 (Berne: Stämpfli, 2010).

[18] Art. 142, para. 1 in Russian: "*…Ценными бумагами признаются также обязательственные и иные права, которые закреплены в решении о выпуске или ином акте лица, выпустившего ценные бумаги в соответствии с требованиями закона, и осуществление и передача которых возможны только с соблюдением правил учета этих прав в соответствии со статьей 149 настоящего Кодекса (бездокументарные ценные бумаги).*"

at least two common criteria: rights and claims against the issuer and the methods of transfer. We are going to analyze the latter criterion in the next Chapter of the present paper. Despite the remained requirements (fungibility and credit to the securities account) are not expressly mentioned in the above quoted definition, in our opinion, they are completely fulfilled. Russian uncertificated securities are held at accounts "depo." In order to transfer, the holder should always apply to the relevant duly licensed intermediary (Arts. 29 and 51.6 of the Federal Securities Market Act[19] (FSMA)). As for the fungibility, we remind that this concept was developed by the law of obligations.[20] For example, the goods are fungible if they are caracterised by quantity, weight, etc.[21] Some Swiss scholars consider that the concept of fungibility in relation to intermediated securities leans on those that applies to chattels.[22] In the Geneva Securities Convention we find the following term: "securities of the same description" ["titres de même nombre de même genre"] (Art. 1(j)). This term was defined as

> (j) securities are "of the same description" as other securities if they are issued by the same issuer and:
>
> (i) they are of the same class of shares or stock; or
>
> (ii) in the case of securities other than shares or stock, they are of the same currency and denomination and are treated as forming part of the same issue.

As we see, the concept of fungibility is also adopted by the Geneva Securities Convention. Finally we should answer whether this concept covers Russian uncertificated securities? In our opinion, the answer is positive. According to Art. 149.3, para. 1 of the RCC the holder which was illegally deprived of his uncertificated securities may claim for the restitution of the securities of the same description and of the same quantity from the person at the account of whom those securities were credited [возврат такого же количества соответствующих ценных бумаг]. For the moment there is no official interpretation of this provision. In our opinion the legislator followed the concept of fungibility.

Finally, uncertificated securities governed by Russian law could be recognized as intermediated under Swiss law pursuant to Art. 3, para. 1[bis] of the FISA and

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[19] Федеральный закон от 22 апреля 1996 г. № 39-ФЗ "О рынке ценных бумаг," Собрание законодательства РФ, 1996, № 17, ст. 1918 [Federal law No. 39-FZ of April 22, 1996. On the Securities Market, Legislation Bulletin of the Russian Federation, 1996, No. 17, Art. 1918].

[20] Kuhn et al. 2010, at. 166.

[21] Lucia Gomez-Richa & Joël Philippe Gérard Veuve, *Les titres intermédiés et leurs instruments financiers sous-jacents*, 1 Gesellschafts- und Kapitalmarktrecht 8 (2010).

[22] *Id.*

according to Art. 1(b) of the Geneva Securities Convention. We do not see any obstacles in this respect. The above mentioned analysis is also applicable in relation to immobilized securities within the meaning of Art. 148.1 of the RCC. This Article prescribes that pursuant to the Law or in compliance with the order established by the Law, documentary or paper-form securities may be immobilized, i.e. deposed for a consignation to the person who is entitled by the Law to affect the consignation of documentary securities or (and) the registration of rights upon securities. The transfer of rights upon immobilized securities and the exercise of rights attested by those securities are regulated by Arts. 149–149.5 of the present Code unless otherwise provided by the Law.

It is important to mention that apart from the definition under the FISA, the Swiss legal order contains another one in the Private International Law Act (PIL).[23] This definition is provided by Art. 108a. The above mentioned Article prescribes that intermediated securities constitute securities held with an intermediary within the meaning of the Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary (Hague Securities Convention).[24] The Convention defines securities held with an intermediary as "*means the rights of an account holder resulting from a credit of securities to a securities account*" (Art. 1(f)). Swiss scholars explain that the definition in "Hague Securities Convention" is broader than in the FISA.[25] Do uncertificated securities under the modified RCC satisfy that definition? We answer affirmatively. We support this conclusion by making reference to the professor Florence Guillaume who explains that: "*In order for a security to be held with an intermediary, it must be entered in an indirect holding system by being credit to a securities account held with an intermediary*".[26] Secondly, we refer to the Explanatory Report on the Hague Securities Convention: "*The Convention applies only to securities credited to securities account; it does not apply to the rights held directly from the issuer by a person who is a registered holder of securities in records maintained by or for the issuer or who is in physical possession of certificates representing the securities. So until securities are first credited to a securities account, thereby entering the intermediated system, the Convention does not apply in relation to them.*"[27] We could deduct from the

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[23] *See* Loi fédérale du 18 décembre 1987 sur le droit international privé (LDIP) (RS291) (Jan. 11, 2017), available in French or German at https://www.admin.ch/opc/fr/classified-compilation/19870312/index.html.

[24] *See* Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary of July 5, 2006, Hague Conference on Private International Law (Jan. 11, 2017), available at https://assets.hcch.net/docs/3afb8418-7eb7-4a0c-af85-c4f35995bb8a.pdf.

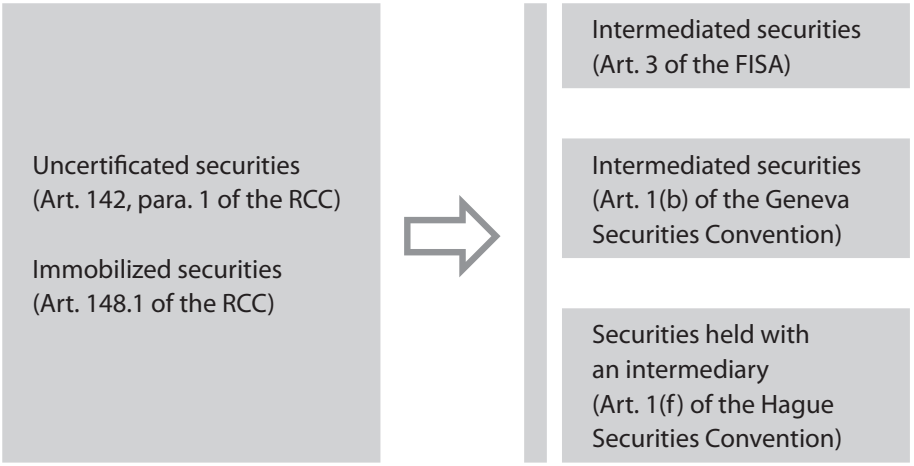
[25] Kuhn et al. 2010, at 12.

[26] *Id.* at 36.

[27] *See* Explanatory Report on the Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary of July 5, 2006 (Jan. 11, 2017), available at https://www.hcch.net.

above mentioned several conditions that uncertificated security under the RCC to satisfy. First, our Russian law uncertificated security should be credited to a securities account. Secondly it should function within the intermediated system or an indirect system. We find the confirmation of those arguments in the RCC (Art. 149, para. 2 and Art. 149.2, paras. 1 & 2). Issuers do not hold those securities themselves. It is made by mean of dully licensed intermediaries. The constitutive moment of transfer pursuant to the RCC is the credit of the uncertificated securities at the account. From the moment of the credit the acquirer enjoys all the rights in relation to those securities. Thus we affirm that uncertificated securities under the RCC respect the requirements of Art. 1(f) of the Hague Securities Convention. The same affirmation is also true in relation to immobilized securities under Art. 148.1 of the RCC. The definition that figure in the Hague Securities Convention was inserted in the Geneva Securities Convention (Art. 1(b)). We represent our conclusions as follows:

Scheme II. Russian law correspondent term within the meaning of Art. 3, para. 1[bis] of the FISA



2. Transfer of Intermediated Securities: Russian Law, Swiss Law, and the Geneva Securities Convention

Uncertificated securities according to Art. 149.2 of the RCC are transferred by debits and credits. The intermediary makes proper entries [écritures] at the accounts. In fact he debits the securities from the account of the seller and credits them to the account of the buyer. As we see, Russian legislator is in compliance with the requirements of Art. 9 of the Geneva Securities Convention. This method of disposition is called by the professor Luc Thévenoz "*the golden standard of the holding*

pattern worldwide."[28] It means that this method should be available in all countries which are going to ratify the present Convention. We mention in this respect hat Russian and Swiss legal orders are in compliance with the Convention.

As for other methods we should mention that they are used mainly for creation of interests. The State is entitled to choose among three existing options pursuant to Art. 12 of the Geneva Securities Convention: a designating entry, a control agreement and a grant of an interest in favor of the relevant intermediary. In order to represent the methods chosen, we decided to draft the following scheme:

Scheme III. Methods of disposition under Russian law, Swiss law, and pursuant to the Geneva Securities Convention

	Methods of disposition	**Swiss Law**	**Russian Law**	**Geneva Securities Convention**
1	Debits and credits	+	+	+
2	Control agreement	+	–	+
3	Designating entry	–	+	+
4	Security interest in favor of the relevant intermediary	+	–	+

As we see Russian legislator decided to choose only one option among three available: the designating entry. According to Official Commentary on the Geneva Securities Convention a designating entry is described as an "*entry in a securities account whereby specific intermediated securities (or the securities account as a whole) are 'earmarked' for the purpose of signaling the existence of an interest in favor of someone other than the account holder."*[29] The Commentary distinguishes between two types of control available under this option: the positive and the negative. The latter means that the relevant intermediary may not comply with the instructions of the account holder regarding the securities in question without the consent of the grantee.[30] The modified RCC and the FSMA (Art. 51.6, para. 4) indicate us that the legislator has followed the latter approach. According to the FSMA (Art. 51.6, para. 4), the grantor is not entitled to dispose of the pledged securities without the consent of the grantee unless otherwise provided by the agreement or by the Federal law.

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[28] *Intermediated Securities – The Impact of the Geneva Securities Convention and the Future European Legislation* 138 (P.-H. Conac et al., eds., Cambridge: Cambridge University Press, 2013).

[29] Hideki Kanda et al., *Official Commentary on the UNIDROIT Convention on Substantive Rules for Intermediated Securities* 83 (Oxford: Oxford University Press, 2012).

[30] *Id.*

Art. 149.2, para. 3 of the RCC prescribes that "*the pledge or any other interest in uncertificated securities or limitation of the use of those securities enters into force after the person responsible for registration of those rights* [that means relevant intermediary] *makes an entry of pledge, of interest or of any other limitation at the account of the holder or at other account under operation of law.*" The above mentioned provision confirms our statement that Russian legislator has chosen designating entry as a method of granting interests. The modified RCC allows also to grant an interest by means of debits an credits. The modified legislation prescribe that the interest could enter into force by means of credit of securities to the relevant account if the Law so provides.

As for the Swiss law, the FISA has been recently modified due to the adoption of the Financial Market Infrastructure Act.[31] Swiss legislator has replaced the previous term: the constitution of interests [constitution de sûretés] by the new one: «disposition» (Arts. 25 & 26). As we see, the two legislators have chosen different methods for creation of interests. However we should indicate that it is possible under Swiss and Russian legislations to create an interest in securities by means of debits and credits. Contrary to the previous version (former Art. 25 of the FISA), the modified FISA does not expressly prescribe that possibility. The modified RCC provides (Art. 149.2, para. 3 of the RCC and Art. 51.6, para. 2 of the FSMA) that the interest may also be created by means of credit of those securities on the account if the Law so provides.

3. Other Important Issues of the Reform

In the previous Chapters we have analyzed why Russian uncertificated securities could be qualified as intermediated under Swiss law. We have discussed the methods of disposition and concluded that the modified RCC has become more compatible with the Geneva Securities Convention in this respect. There are also other issues that we would like to touch in the present paper. They are: the protection of the titleholder and the problem of bona fide acquisition.

3.1. Protection of a Titleholder under the Modified RCC

As we have already mentioned, till 2013 uncertificated securities were considered to be chattels. Thus, the principles of vindication applied. The Concept of Development of Civil Legislation of the Russian Federation[32] mentioned (para. 1.1.9) that the application

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[31] Loi fédérale sur les infrastructures des marchés financiers et le comportement sur le marché en matière de négociation de valeurs mobilières et de dérivés du 19 juin 2015 (LIMF) (RO2015) (Jan. 11, 2017), available at https://www.admin.ch/opc/fr/classified-compilation/20141779/index.html.

[32] Концепция развития гражданского законодательства Российской Федерации (одобрена Советом при Президенте РФ по кодификации и совершенствованию гражданского законодательства 7 октября 2009 г.), Вестник ВАС РФ, 2009, № 11 [Concept of Development of Civil Legislation of the Russian Federation of October 7, 2009, Bulletin of the Supreme Arbitration Court of the Russian Federation, 2009, No. 11] (Jan. 11, 2017), also available at http://base.garant.ru/12176781/.

of vindication to those securities is inappropriate. The legislator has modified the RCC. Art. 149.2, para. 3 of the RCC provides that the titleholder could claim for restitution of the securities of the same description and of the same quantity.

3.2. The Problem of a Bona Fide Acquisition

The modified RCC has also covered the problem of an innocent or bona fide acquisition. The Code is based in this respect on two criteria: acquisition for value and good faith (Art. 149.3 of the RCC). This approach is in line with Swiss law which follows the same standard (Art. 29 of the FISA). We should however clarify what constitute good faith under the RCC, FISA and Geneva Securities Convention. The Convention is based on "Knowledge Criterion." Art. 18 of the Convention provides that the holder is not protected if he "*knows or ought to know*" the information regarding the title of a vendor. As for Russian law, the test for uncertificated securities is the same that applies to those in paper form unless otherwise provided by Law or flows out of the nature of those securities (Art. 143, para. 6 of the RCC).[33] Russian law uses also the same wording: "*knows or ought to know.*" It also adds that the acquirer is not protected if he illicitly contributed to the termination of the rights of an initial holder (Art. 147.1, para. 4 of the RCC). Thus, the RCC is in compliance with the Geneva Securities Convention.

4. Future Perspectives of the Geneva Securities Convention and Conclusions

For the present moment the Geneva Securities Convention is not in force. Although UNIDROIT tried to use functional approach, which consider the differences between common law and civil law systems, only one country has ratified this Convention: the Republic of Bangladesh.[34] The approach did not describe the legal nature of institutions.[35] Thus, national legislators are free to define it. We could ask whether the attempt of UNIDROIT to harmonize the law of securities was successful? Even though, the Convention is not in force, we answer affirmatively. We remind once again that neither Russia nor Switzerland ratified it despite participating at the UNIDROIT working groups. Swiss authorities even hosted the delegation in Geneva.

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[33] *See* Агешкина Н.А., Баринов Н.А., Бевзюк Е.А., Беляев М.А., Бирюкова Т.А., Вахрушева Ю.Н., Гришина Я.С., Закиров Р.Ю., Кожевников О.А., Копьёв А.В., Кухаренко Т.А., Морозов А.П., Морозов С.Ю., Серебренников М.М., Шадрина Е.Г., Юдина А.Б. Комментарий Гражданскому кодексу Российской Федерации. Часть первая от 30 ноября 1994 г. № 51-ФЗ [Natalya A. Ageskina et al., *Commentary of the Civil Code of the Russian Federation. Chapter I of November 30, 1994 No. 51-FZ*] (SPS "Garant", 2014) (Jan. 11, 2017), available at http://base.garant.ru/57518292/.

[34] Available at http://www.unidroit.org/fr/etat-geneva-convention.

[35] *See* Luc Thévenoz, *Intermediated Securities, Legal Risk, and the International Harmonisation of Commercial Law*, 13 Stanford Journal of Law, Business, and Finance 416 (2008).

Swiss scholars acknowledge that the Convention has influenced the drafting of the FISA and affirm that "*FISA can also be seen as a possible model for implementation of the Convention in a civil law jurisdiction.*"[36] In that case we formulate the question as follows: If the legislator is already compatible with the Convention should he ratify it? We don't think so. As we see, the Geneva Securities Convention served as a guideline for national legislators. In particular, Russian legislator has modernized the provisions of the RCC in compliance with this Convention. However it is highly unlikely that either Russian Federation or Switzerland ratify the Geneva Securities Convention.

As for the Russian civil law reform we affirm that in relation to "uncertificated securities" it was completely unsuccessful. Although the formulations in the RCC coincide with those in the FISA and with the Geneva Securities Convention *we regret to affirm that Russian legislator has adopted those provisions without a systematic rethinking of the concept of security*. In our opinion the term "uncertificated security" should be replaced to "intermediated security." The ratification of the Geneva Securities Convention seems necessary to us. We share the documentary concept [документарная концепция] of securities and consider that it is important to distinguish "paper-form securities" from those that are dematerialized. Thus we propose to introduce a specific Chapter devoted to intermediated securities in the RCC. As we have already described, in French there are special wordings that designate different legal institutions: paper-form security – "papier-valeur", uncertificated security – "droit-valeur" and intermediated security – "titre intermédié". The issue that may arise at this stage is not even legal but terminological. It would be difficult to eliminate the Russian wording: "ценная бумага". However it is not of primary importance how we call it. In our opinion the legislator and the Courts should grant a distinct legal nature to those securities. *They constitute neither claims nor chattels.* The approach pursued by the Swiss legislator is quite helpful in this respect. *The intermediated security should become a new object of the Russian civil law.*

Finally, the vindication cannot be applied neither to "uncertificated securities" nor to those "intermediated." As we have analyzed, the Swiss Federal Tribunal has ruled that intermediated securities cannot be vindicated. In Russian some scholars prudently affirm that although "*the legislator has precised the conditions of vindication… The method described in Art. 149.3 is closer to the condiction.*"[37] Following the approach of the Swiss Federal Tribunal, we consider that the rules of the unjust enrichment should apply to the restitution of those securities.

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[36] *Intermediated Securities*, *supra* note 28, at 309.

[37] Коммерческое (предпринимательское) право: Учебник. В 2 т. Т. 1 [*Handbook of Commercial (Business) Law: Textbook. In 2 vol. Vol I*] 675 (V.F. Popondopolo, ed., 5th ed., St. Petersburg: Prospekt, 2015).

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I deeply thank the professor Luc Thévenoz (professor at the University of Geneva) for prolific and serious discussions regarding the compatibility of two legal orders at question. This certainly helped me to improve the present article.

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SOME LEGAL ASPECTS OF THE JUSTICE AGAINST SPONSORS OF TERRORISM ACT

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Following the lead of the U.S. Senate on May 17, 2016, the House of Representatives of the United States of America unanimously adopted the Justice Against Sponsors of Terrorism Act (JASTA), which will allow victims of terrorism to bring class actions against any state directly or indirectly involved in terrorist acts against American citizens. U.S. president Barack Obama attempted to impose his veto against this legislation, but was overridden by both houses in September, 2016. As a result, the Act entered into law, risking a real revolution in international law with potentially very serious political consequences.

While it may be anticipated that those countries directly complicit in terrorism will see their assets – including their sovereign assets in the United States – seized to finance the compensation of the victims, such prosecutions will undoubtedly also involve European countries, many of which have themselves been targeted by terrorism. This is especially likely when their nationals are involved in terrorist acts.

There is now a great risk that U.S. law will unilaterally modify several fundamental principles of international law, such as the sovereign immunity of states, creating genuine legal conflict in which victims of terrorism will seek redress from all states, including allied nations or countries that have themselves been victims of terror.

Keywords: the Justice Against Sponsors of Terrorism Act (JASTA); the Foreign Sovereign Immunities Act (FSIA); jus cogens; sovereign immunity; foreign state; terrorism; Vienna Convention on the Law of Treaties; territoriality; state immunity principle; principles of law.

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Table of Contents

Introduction

International law may be divided into two periods: before and after the establishment of the United Nations. During the first period, states made agreements with each other, and sought to resolve disputes on the basis on customary law. In the second era, international mechanisms under the umbrella of the UN play a crucial role in dispute resolution. The UN Charter is based on three fundamental principles: the immunity of states, the immunity of international institutions, and diplomatic and consular immunity. It is "an instrument by which members both assert their sovereignty."[1] Also, the doctrine emphasizes: "An equal has no power over an equal… sovereigns are equal as juridical bodies and have no authority to use their own courts to sue other sovereigns without the consent of the latter."[2]

The draft law was prepared by two senators, one Republican, one Democrat. It enables the families of people killed in the September 11 attacks to bring legal action against the states held liable for these terrorist attacks. It was adopted in the U.S. Senate in May 2016. After that adoption, it was submitted to the House of Representatives and was also adopted there. The Draft was voted in for a second time

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1 *See* Winston P. Nagan & Aitza M. Haddad, *Sovereignty in Theory and Practice*, 13 San Diego International Law Journal 451 (2012).

2 *See* Winston P. Nagan & Joshua L. Root, *The Emerging Restrictions on Sovereign Immunity: Peremptory Norms of International Law, the U.N. Charter, and the Application of Modern Communications Theory*, 38 North Carolina Journal of International Law 376 (2013).

and adopted by majority to become an act of U.S. law. By this act, the U.S. recognizes the right of its citizens to bring remedial action against those states and statesmen held responsible for the September 11 terrorist attacks.[3] This situation could cause a domino effect and powerful states are likely to bring legal action against weak states in their own jurisdiction. It is important to bring JASTA on to the international legal agenda, assess all aspects of the legislation and influence public opinion to ensure the U.S. cannot operate in contravention of international law.

In this study, we will examine JASTA from the perspective of general legal principles.

The Justice Against Sponsors of Terrorism Act (JASTA) violates the fundamental principles of international law and is a result of the substitution of law with power. This Act will have a negative effect on the United States of America and the Kingdom of Saudi Arabia, and could also trigger a domino effect that will unfortunately affect other states. JASTA opens the way for powerful states to exercise control over other states and attempt to take what they want.

1. About JASTA

JASTA is a law passed by the United States Congress that amends the federal judicial code to narrow the scope of foreign sovereign immunity. Specifically, it authorizes federal court jurisdiction over a civil claim against a foreign state for death or physical injury to a person, or damage to a property that occurs within the United States as a result of: (1) an act of international terrorism, and (2) a tort committed anywhere by an official, agent or employee of a foreign state acting within the scope of that employment.

1.1. From FSIA to JASTA

JASTA was recently passed by the U.S. Congress and became part of U.S. law. The United States' existing Foreign Sovereign Immunities Act (FSIA) has included an exception relating to terrorism since 1976.[4] Sec. 1605A of the FSIA states that a foreign state shall not be immune from suits seeking money damages for personal injury or death caused by certain acts of a foreign government.[5] However, the Act posts several exceptions to this rule, which, *inter alia*, include cases where:

– The foreign state has waived its immunity;

– The claim is a specific type of admiralty claim;

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[3] *See* Tobias Ackermann, *New U.S. Legislation Allows Lawsuits Against States Allegedly Involved in Terrorism: Implications for the International Law on State Immunity*, Bofaxe, Nr. 490E, September 30, 2016; Patricia Zengerle, *Senate passes bill allowing 9/11 victims to sue Saudi Arabia*, Reuters, May 17, 2016 (Mar. 10, 2017), available at http://www.reuters.com/article/us-saudi-usa-congress-idUSKCN0Y8239.

[4] Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891, § 1602 et seq.

[5] 28 U.S. Code § 1604.

– The claim involves commercial activities;
– The claim implicates property rights connected with the United States;
– The claim arises from tortious conduct that occurred in the United States;
– The claim is made pursuant to an arbitration agreement;
– The claim seeks money damages against a designated state sponsor of terrorism for injuries arising from a terrorist act.

In the FSIA, this provision is limited to countries that the United States designated as state sponsors of terrorism (currently Iran, Sudan, and Syria).

The exception that is most relevant to our purposes is the exception of state-sponsored terrorism. This exception was introduced into the FSIA and it was amended in 2008. It reads:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case… in which money damages are Sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by and official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.[6]

The conditions of these exceptions can be formulated as follows:

1. the foreign state had been formally designated as a state sponsor of terrorism at the time of (or as a result of) the act in question;

2. the claimant or victim was a U.S. national, a member of the armed forces, or an employee or contractor of the United States government acting within the scope of that employment; and

3. for acts occurring in the foreign state concerned, the state was given a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration.[7]

Among other things, JASTA amends the FSIA by adding a new terrorism exception that is not limited to designated state sponsors of terrorism. A tort action seeking money damages may be brought against a foreign state because of international terror acts occurring in the U.S. or of a tortious act of this state (or its agents) occurring abroad but creating damage in the U.S.

JASTA now removes this limitation, making it possible for U.S. Citizens to sue any foreign state for its support of terrorism, regardless of whether that state is

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6 28 U.S. Code § 1605A.

7 *The Foreign Sovereign Immunities Act: A Guide for Judges*, Federal Judicial Center, International Litigation Guide (2013), at 63 (Mar. 20, 2017), available at http://www2.fjc.gov/sites/default/files/2014/FSIAGuide2013.pdf.

a designated sponsor of terrorism. This also strips foreign governments of their Sovereign Immunity in U.S. courts, even if they are not designated state sponsors of terrorism. Furthermore, this legislation would permit litigation against countries that have neither been designated by the executive branch as state sponsors of terrorism, nor taken direct actions in the United States to carry out an attack there. The consequence of JASTA most probably will, if one considers the structural elements of U.S. tort law, strip all foreign governments of immunity from judicial process in the United States, based solely upon allegations by private litigants that a foreign government bears responsibility for a terrorist attack inside the United States. This would literally override customary international law with U.S. law in U.S. Courts. However, it contains a limitation: it excludes tort claims based on an omission or an act that is merely negligent. Congress makes mention of this limitation, *argumentum a contrario*, in the official reasoning of JASTA when it refers to "persons, entities, or countries that knowingly or recklessly contribute material support or resources."[8]

1.2. The Implications of JASTA for the U.S.

The key problem with JASTA lies in its enforcement. Since the assumption of immunity would continue to be the predominant principle elsewhere, any court decision in the U.S. would not be recognized in other countries. As a result, the judgments could be carried out only within the U.S. This will prompt prudent countries to avoid potential liability by removing their assets and investments from the U.S. to prevent their confiscation. This could cause enormous economic damage to the U.S.[9]

If the U.S. limits the immunity of other sovereign states, it will become vulnerable to a reciprocal loss of immunity in those same countries. However, we should not forget that nowadays the U.S. is among the nations with the biggest presence worldwide. First and foremost, in recent decades it has had a huge active military presence in the Middle East. Under the same definition of terrorism used by JASTA, it is not difficult to frame some of the actions taken by the U.S. – e.g. drone attacks – as acts of terror, and make the U.S. government vulnerable to civil claims.[10]

2. From the Standpoint of International Law

Problems and disputes between states are settled by the well-established principles of *jus cogens*. Professor Lassa Oppenheim stated that there exist a number

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[8] S. 2040 – Justice Against Sponsors of Terrorism Act, 14th Congress (2015–2016), Sec. 2, paras. 6, 7 (Mar. 10, 2017), available at https://www.congress.gov/114/plaws/publ222/PLAW-114publ222.htm.

[9] *See* Albi Kocibelli, *State Immunity, JASTA and Its Implications to the U.S.*, Michigan Journal of International Law, October 27, 2016 (Mar. 10, 2017), available at http://www.mjilonline.org/state-immunity-jasta-and-its-implications-to-the-us/.

[10] *Id*.

of "universally recognized principles" of international law that rendered any conflicting treaty void, and therefore, the peremptory effect of such principles was itself a "unanimously recognized customary rule of International Law."[11] States do not violate these fundamental international rules of law because they are peremptory. In the late 1960s, the Vienna Convention on the Law of Treaties was adopted. The definition of peremptory rules is given in Art. 53 of the Convention: "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." That means a treaty is no longer an international legal document, if, at the time of its conclusion, it conflicts with the norms of *jus cogens*, which are peremptory in nature.[12] If states ignore or violate those principles, they are violating the general principles of international law.

2.1. Territoriality and the State Immunity Principle

Until the end of the 19th century, immunity was absolute, and proceedings could not be instituted against a foreign state under any circumstances. Since the early 20th century, a distinction has arisen between sovereign activities (*acta jure imperii*), for which States enjoy jurisdictional immunities.[13]

Immunity from the jurisdiction of foreign states is a complex and sensitive issue. It affects the right of access to a legal judgment, the equality of individuals in the exercise of this right, the sovereignty of states, and public international law.[14]

The Lotus case enshrined the very basic principle of international customary law: the principle of territoriality. The first principle of the Lotus case stated that jurisdiction is territorial: a state cannot exercise its jurisdiction outside its territory, unless an international treaty or customary law allows it to do so.

> Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside

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11 *See Oppenheim's International Law. Vol. 1: Peace, Introduction & Part I* (R. Jennings & A. Watts, eds., 9th ed., Harlow, Essex, England: Longman, 1992).

12 *See* Kamrul Hossain, *The Concept of Jus Cogens and the Obligation under the U.N. Charter*, 3 Santa Clara Journal of International Law 75, 76 (2005).

13 *See* Ian Sinclair, *The Law of Sovereign Immunity. Recent Developments*, 167 Collected Courses of the Hague Academy of International Law 113, 133 (1980).

14 Régis de Gouttes, *L'évolution de l'immunité de juridiction des Etats étrangers* in *Rapport de la Cour de cassation 2003* (Mar. 10, 2017), available at https://www.courdecassation.fr/IMG/pdf/Rapport_2003_optimise.pdf.

> its territory except by virtue of a permissive rule derived from international custom or from a convention.[15]

A state may exercise its jurisdiction within its territory, on any matter, even if there is no explicit rule of international law allowing it to do so. In this context, states have a broad measure of discretion, which is only limited by the prohibitive rules of international law. This is the second principle of the Lotus case.

> It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable. This discretion left to States by international law explains the great variety of rules which they have been able to adopt without objections or complaints on the part of other States… In these circumstances, all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.[16]

According to the principle of territoriality, a foreign state cannot impose its jurisdiction outside its territory. When it comes to national territory, a foreign state meets another obstacle of international law: state immunity in cases arising from breaches of *jus cogens* comes from a personal-jurisdiction-type immunity which absolutely prevents one state from involuntary subjugation to the jurisdiction of another state, even for *jus cogens* violations.[17]

According to the principle of foreign state immunity, one state is not subject to the full force of the rules applicable in another state; the principle bars a national

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[15] S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), at 45.

[16] *Id*. at 46, 47.

[17] *See* Thomas Watherall, *Jus Cogens and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence*, 46 Georgetown Journal of International Law 1202 (2015).

court from adjudicating or enforcing certain claims against foreign states. This immunity is applied to legal proceedings against the foreign state itself, its organs and companies, and its agents.[18]

State immunity, while being forum dependent, has long been recognized as an obligation under customary international law. The International Law Commission first undertook to identify and codify state practice on sovereign immunity in 1977.[19] Also, it is worth mentioning that sovereign immunity had two dimensions at both national and international levels. The international community has pursued various endeavors to codify the law on sovereign immunity, but until now only the European Convention on State Immunity (ECSI) has entered into force.[20] The UN adopted the UN Convention on Jurisdictional Immunities of States and Their Property in 2004. The Convention, which is not yet in force, adopts a restrictive theory of immunity. This restrictive theory is adhered to by most countries, with only a few exceptions.[21]

Generally, the commercial activities of states have been the most significant exceptions to the rule. However, there has been controversy over the extent of this application, especially in cases where the extent of damages is substantial. In this regard, one of the most recent cases adjudicated by the ICJ in 2012 is Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening). Between 2004 and 2008, in multiple civil suits, Italian courts found Germany responsible for crimes against humanity during World War II, thus ordering Germany to pay compensation to Italian victims.[22] Germany brought a claim to the ICJ alleging it was a "territorial tort

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18 *See* Neringa Toleikytė, *The Concept of State and the Main Challenges* in *The Interaction of National Legal System: Convergence or Divergence*, International conference of PhD students and young researchers, Vilnius University Faculty of Law, April 25–26, 2013 (Mar. 10, 2017), available at http://www12007.vu.lt/dokumentai/Admin/Doktorantų_konferencija/Toleikyte.pdf.

19 The UN General Assembly decided in 1977 to include the topic in the work programme of the International Law Commission. *See* Burkhard Heb, *The International Law Commission's Draft Convention on the Jurisdictional Immunities of States and Their Property*, 4 European Journal of International Law 270 (1993).

20 *See* Jasper Finke, *Sovereign Immunity: Rule, Comity or Something Else?*, 4 European Journal of International Law 857 (2011).

21 The Convention was adopted by General Assembly Resolution 59/38, December 2, 2004. Even though 28 states have signed the treaty, only 21 have ratified it so far. In accordance with Art. 30 which reads as follows: "1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations. 2. For each State ratifying, accepting, approving or acceding to the present Convention after the deposit of the thirtieth instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification, acceptance, approval or accession" (Mar. 10, 2017) available at https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=III-13&chapter=3&lang=en.

22 Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, p. 99, para. 45. *See also* Alberto Costi, *L'arrêt de la Cour internationale de justice dans l'affaire des immunités juridictionnelles de l'État* in *Hors-série juin 2015 – Mélanges en l'honneur de Jacques-Yvan Morin* 268 (Montréal: Société québécoise de droit international, 2015); Nagan & Root 2013, at 379; Finke 2011, at 857; Sevrine Knuchel, *State Immunity and the Promise of Jus Cogens*, 9 Northwestern Journal of International Human Rights 156 (2011).

exception in international customary law that excludes state acts from jurisdictional immunity if they breach *jus cogens* norms and held that the judgments ordering Germany to pay compensation violated international law."[23]

As the ICJ noted

> this amendment has no counterpart in the legislation of other States. None of the States which have enacted legislation on the subject of State immunity has made provisions for the limitation of immunity on the grounds of the gravity of the acts alleged.[24]

Indeed, the ICJ made following significant remarks in its judgment:

> In the Court's opinion, state practice in the form of judicial decisions supports the proposition that state immunity for acts *jure imperii* continues to extend to civil proceedings for acts occasioning death, personal injury or damage to property committed by the armed forces and other organs of a state in the conduct of armed conflict, even if the relevant acts take place on the territory of the forum state.[25]

2.2. Does JASTA Conform to International Law?

The former version of the FSIA can be said to fit into the framework prescribed by customary law. It provides exceptions for waivers, commercial activity and insurable personal risk described by international law. Actually, the FSIA went beyond the framework given by international law; it provided no state immunity for money damages sought for "personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency."[26] However, this exception was limited. It applied only to states designated as a state sponsor of terrorism at the time of or as a result of the act in question. Further, for acts that occurred in the foreign state concerned, that state was to be given a "reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration."[27]

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[23] *See* Kocibelli, *supra* note 9.

[24] Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), *supra* note 22, para. 88.

[25] *Id*. at 77.

[26] United States Code, 2012 Edition, Vol. 4, Title 8, Aliens and Nationality, to Title 10, Armed Forces, Section 101–1414, at 650.

[27] Foreign Sovereign Immunities Act, *supra* note 4, § 1605.

With the enactment of JASTA, the U.S. adopted a radical exception to the principle of state immunity. Actually, the United States argued that the state immunity rule pertains essentially to international comity, and does not constitute truly binding law. The U.S. Supreme Court removed the rule of state immunity from the realm of legal order in some of its decisions. In the leading case of Verlinden B.V. v. Central Bank of Nigeria, the Supreme Court stated that the granting of immunity is "a matter of grace and comity on the part of the United States."[28] Similar language is also found in later decisions. In Altman, the Supreme Court again held that the practice of barring suits against foreign governments on jurisdictional grounds was "a matter of comity."[29]

This is not a persuasive argument since this immunity is derived from the basic principle of the sovereign immunity of states, a proposition that belongs to the fundamental axioms of the entire edifice of international law and is also reflected in Art. 2(1) of the UN Charter. States are duty-bound to respect one another. No member of the international community is authorized to sit in judgment over another sovereign member; accordingly, most writers view the jurisdictional immunity of states as a genuine rule of positive customary law.[30]

According to these explanations, JASTA is not fit for international law. Hence, the European Union declared that it considers JASTA contrary to international law.

3. From the Standpoint of General Legal Principles

JASTA not only fails to conform with the general principles of international law, it also fails to comply with general legal principles, such as the prohibition on the abuse of rights, and principles of non-discrimination, fairness and vested interests. Hereinafter, we will examine JASTA in the light of these general legal principles (the good faith principle, liability rules, criminal law, procedural law and Enforcement law).

3.1. Concerning the Principle of Good Faith

Good faith is one of the fundamental principles of law. It obliges to parties agree to use their rights within a framework of good faith. JASTA explicitly violates the principles of sovereignty, equality principle, peaceful settlement, non-interference in domestic affairs, individual criminal liability, and the right to a fair trial.

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[28] *See* Carlos Manuel Vázquez, *Altmann v. Austria and the Retroactivity of the Foreign Sovereign Immunities Act*, 3 Journal of International Criminal Justice 212 (2005).

[29] *Id*.

[30] *See* Christian Tomuschat, *National Institutions and State Immunity*, 4 Vanderbilt Journal of Transnational Law 1117 (2011).

3.2. In Terms of Criminal Responsibility

The principle of individual criminal responsibility is one the fundamental principles of criminal law. This principle applies not only to criminal liability but also to remedial actions. The September 11 attacks were not a military attack by one state on another. It is obvious that it was a terrorist attack. Terrorist attacks take place in almost every country in the world (the civilized world faces a grave threat from terrorism[31]). However, up to now, states have not attempted to prosecute other states in their jurisdiction. If a statesman representing any other state was involved in this attack, that country would be liable for the damages caused by this act of terrorism. However, there is no evidence or allegation in respect of any statesman.

3.3. In Terms of Liability

In terms of international responsibility, an internationally wrongful act is considered to be imputable to a state only if it is the action of an individual or group that is recognized under that state's domestic legal system as an agent of the state, a public institution, an autonomous public institution or a territorial public authority, and which acts in that capacity. The internationally wrongful act of an organ acting *qualitative qua* is thus considered to be attributable to the state, even where it is not possible to confirm either the position of the organ in that state's division of powers or internal hierarchy or, in the case of manifest incompetence, an excess of power in a broader sense that would be reflected in the actions of the organ of state. Moreover, the same principle means that the conduct of an individual or a group of individuals acting outside of the legally recognized framework of a state's activities cannot be attached to any state on the basis of the international legal order, of internationally wrongful actions conducted by one of its organs, nor on the occasion of any act of a private individual.[32] It is worth pointing out that international law does not distinguish between contractual and tortious, so that any violation by the state of any obligation, from whatever origin, leads to state responsibility, and therefore a duty of compensation.[33]

The International Court of Justice in the Corfu Channel case considered the question of Albanian civil liability for the mining of the Corfu Channel and the subsequent damage to two British naval vessels that struck those mines. In discussing whether the United Kingdom could demonstrate that Albania was responsible for laying the mines, the Court ruled:

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[31] *See* Abraham D. Sofaer, *On the Necessity of Pre-emption*, 14 European Journal of International Law 210 (2003).

[32] Jacques Lenoble, *Responsabilité Internationale des Etats et Controle Territorial*, 16 Revue Belge du Droit International 96 (1981–1982).

[33] Milka Dimitrovska, *The Concept of International Responsibility of State in the International Public Law System*, 1 Journal of Liberty and International Affairs 8 (2015).

> The fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion.[34]

JASTA violates the general principles of liability law. It sets forth rules that order other states to compensate losses suffered by victims. However, states impose and collect taxes in order to provide for the security of their own country. If they fail to fulfill that fundamental duty, they alone shall be responsible. As a result, the U.S., regardless of the nationality of the terrorists, is the only state liable in respect of the September 11 attacks.

3.4. In Terms of Procedural Law

In JASTA, no states are identified by name. On the other hand, it is obvious that this act was adopted by the U.S. to put pressure on states implicated in the September 11 attacks. An American citizen, who lost his/her partner through a terrorist act, has brought legal action in a U.S. court. According to JASTA, U.S. victims may bring legal action against another state before a U.S. court. However, bringing legal action against a foreign state in another state's jurisdiction violates the general principles of procedural law.

Jurisdiction: The jurisdictions of courts over international issues are determined by international contracts. In these contracts, parties are only limited to legally recognized bodies and individuals; the legal capacity of states is not accepted.[35]

Furthermore, under the principle of universal jurisdiction, a state can sue the perpetrators of certain crimes, regardless of where the crime was committed and regardless of the nationality of the perpetrators or victims. This kind of legal provision serves to prevent serious crimes, such as war crimes or crimes against humanity,

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[34] Corfu Channel case, Judgment on Preliminary Objection, I.C.J. Reports 1948, p. 15, at 18.

[35] Under State contract, State could have a legal capacity. According UNCTAD, the state contract is defined "as a contract made between the State, or an entity of the State, which, for present purposes, may be defined as any organization created by statute within a State that is given control over an economic activity, and a foreign national or a legal person of foreign nationality. State contract contains a forum selection clause that refers disputes exclusively to domestic courts and tribunals." *See* UNCTAD Series on Issues in International Investment Agreements, States Contracts, at 3, 39 (New York and Geneva: United Nations, 2004).

going unpunished. In particular, it aims to ensure that inhabitants of the most unstable areas of the world can still enjoy legal protection. Universal jurisdiction is mandatory under international law, but it is limited in its extent and applies only to certain crimes: genocide, crimes against humanity, extrajudicial executions, war crimes, torture and forced disappearances. Indeed, countries which have acceded to various conventions to protect fundamental rights are obliged by these same conventions to repress the most serious crimes.[36] The fact is that, where there is no regulation on the matter in question, it requires the consent of all parties in the case to determine which court has jurisdiction. It is obvious that a defendant state would not accept the sovereignty and the jurisdiction of a U.S. court. Thus, without all parties clearly consenting to the jurisdiction of the court, any proceedings could easily be regarded as illegal.

Impartiality: First of all, the Oxford English Dictionary defines "impartial" as "not partial; not favouring one party or side more than another; unprejudiced, unbiased, fair, just, equitable."[37] In judicial procedural law, one precondition for any case is an impartial and independent court. If a court has any connection to an interested party that could influence subsequent proceedings, that court cannot be regarded as impartial.[38] In concrete cases brought under JASTA, it is obvious that the competent court would side with the plaintiff. In such cases, courts should not start any proceedings because these would be faulty from the beginning.

Equality: Equality before the law is one of essential principles of the legal system. It is enshrined in international and domestic law through declarations and conventions. Common law (as in the U.S.) also recognizes the principle of equality as fundamental to the rule of law.[39] In the case of Green v. the Queen, Britain's High Court characterized the pivotal nature of the principle of equality before the law, recognizing that "equal justice embodies the norm expressed in the term equality before the law."[40] The principle of equality of arms has come to mean that parties should have the same rights and obligations under the law of jurisdiction. In concrete cases, when one of the parties (the plaintiff) is directly under the auspices of the

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[36] Xavier Philippe, *The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh?*, 88 International Review of the Red Cross 377, 387 (2006).

[37] Oxford English Dictionary 700 (J. Simpson, E. Weiner, eds., 2nd ed., Oxford: Clarendon Press, 1989). *Cited in* Charles Gardner Geyh, *The Dimensions of Judicial Impartiality*, 65 Florida Law Review 498 (2013).

[38] The judicial partiality, is derived from four categories, which can be organized: 1) judges who have personal interests in case outcomes; 2) judges who have relational interests in case outcomes; 3) judges who have political interests in case outcomes; 4) judges who have personal biases for or against case participants that are unattributable to the judges' personal, relational, or political interests. *See Id*. at 499.

[39] Anthony Hopkins, *Equality before Law: The Importance of Understanding the Experience of "Others" in the Criminal Justice System* 17 (Thesis, Canberra: University of Canberra, 2015).

[40] Green v. the Queen (2011) 244 CLR 462, 472–73. *Cited in Id*.

United States, the other party (the defendant) is declared guilty by the United States even before the commencement of any action. In these circumstances, it is impossible to speak of any equality between the parties of the case.

The presence of parties to be heard by a competent court: The right to be present is a fundamental principle of the law in civilized societies. It states that the accused must be present at the trial, and the imposition of sentence must also be announced in the presence of the defendant. Anyone accused of a crime must be present at the trial so that he or she can participate in a meaningful and informed manner in the criminal proceedings.[41] This becomes problematic when it is not clear to how to inform defendant nor how to arrange the presence of defendants in concrete cases.

Defense: One of the main elements of a fair trial is defense. The rights of the defendant are part of the core of fundamental rights.[42] Affording the defense these rights is not intended to automatically deter the legislator, because where there is no provision for a defense, there can be no fair proceedings. But how can a local court sit in judgment on a foreign state that has equal sovereign rights? Assuming that a defendant would not surrender its own sovereignty, how would a court hear a case if it was impossible to hear the submissions of one party? To do so would be a severe violation of the principle of equality of the parties.

The law of evidence: The common-law system, as used in the United States, has certain requirements about the standard of evidence.[43] Federal Rules prohibit "the introduction at trial of other crimes, wrongs or acts to prove the character of a person in order to show action in conformity therewith."[44]

Also, consider the likelihood that a defendant (e.g., a head of state) is notified of a case and responds by declaring that the court does not have jurisdiction in this matter and, thus, there is no reason to bring a case for the defense before that court. In this eventuality, the defendant will be deemed to deny the plaintiff's claims. Since it is not possible to prove a negative case, the plaintiff would be obliged to demonstrate that the September 11 terrorist attacks were carried out by the state apparatus of the Kingdom of Saudi Arabia. How would the plaintiff prove this? Will the court examine all records, including those of the security forces of the Saudi Arabian state in order to determine their role? When it is necessary to have expert

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41 Fawzia Cassim, *The Right to Meaningful and Informed Participation in the Criminal Process* (Thesis, Pretoria: University of South Africa, 2009).

42 Henri Roussillon, *Contrôle de constitutionnalité et droit fondamentaux, l'efficacité des droit fondamentaux* in *L'effectivité des droits fondamentaux dans les pays de la communauté francophone* 371, 379 (Paris: EDICEF-AUPELF, 1998).

43 James B. Jacobs, *Admissibility of the Defendant's Criminal Records at Trial*, 4 Beijing Law Review 120 (2013).

44 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* (2006), § 404.21[1][a]; Advisory Comm. Note to 1991 404(b); Fed. R. Evid. 403. *Cited in Id*. at 121.

contributions, from which country will those experts be appointed? Would these experts only be chosen from other U.S. citizens?

In conclusion, any attempt to use these provisions to resolve a dispute between two equal states using the legal system of one state alone would be seen as null and void in terms of international law.

3.5. With Regard to the Execution of a Verdict

At the end of any proceedings brought under JASTA, the judgment of a U.S. court would also encounter several problems. First of all, the execution of any court decision requires the use of legal powers – including the use of force – against the guilty party. In common-law legal systems, administrative divisions such as provinces, territories, or federated states regulate the enforcement of any judgment. For example, in California, a party which does not receive prompt payment of damages awarded must begin a judgment enforcement process in order to collect the money or property that it is entitled to under the judgment.[45] If a U.S. court orders that Saudi Arabia must pay compensation, the execution of the court order requires the use of legal powers against Saudi Arabia, in accordance with the rules. Executive offices in charge of the execution of court decisions may request assistance from local security officers (policemen) if the debtor refuses to pay. In this case, though, the "debtor" is a state, and it is impossible to use any legal powers against a debtor state because the principle of territoriality limits the authority of any local security organization to the territory of its country. In matters relating to foreign states, international rules of law must be applied. And in international law, except for a limited number of exceptions, it is forbidden for a state to use force against another state.

4. Examples of Application

In UK, in the case of Regina v. Horseferry Road Magistrates' Court (*Ex parte Bennett*), Bennett claimed that he was brought to UK from South Africa in contravention of the Return of Criminals code 1989, and in breach of international law. The House of Lords ruled that the court verdict was unauthorized because the government broke international law to bring Bennett before an English court.[46] The Lords' ruling also engender several other issues. The Law Lords were vague as to whether there is a duty to refuse to exercise jurisdiction over an individual who has been brought unlawfully before a court or whether that court merely has the discretion to do so.[47]

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[45] The Superior Court of California, County of Orange, Collecting the Judgment – Plaintiff (Mar. 20, 2017), available at http://www.occourts.org/self-help/smallclaims/collectingthejudgment.html.

[46] Regina v. Horseferry Rd. Magis. Ct. (Ex parte Bennett), [1994] 1 App. Cas. 42 (Eng. H.L. 1993). *See* Paul Michell, *English-Speaking Justice: Evolving Responses to Transnational Forcible Abduction after Alvarez-Machain*, 29 Cornell International Law Journal 383 (1996).

[47] *Id*. at 471.

It should be noted that JASTA is not the first piece of legislation that permits a plaintiff to file a case against another state before U.S. courts. It is not unusual for a U.S. court to reach a ruling that runs counter to the principles of international law. For example, in the Alvarez-Machain case,[48] a U.S. court decided that the illegal abduction of a suspect (a citizen of Mexico) from Mexico to the USA did not affect the jurisdiction of the court.[49]

Where a state breaches international law, other states may refuse to recognize this breach. For example, in 1931, Japan occupied Manchuria and established a new government named Manchuko under its control. Japan called for other states to recognize Manchuko. However, the U.S. declared that it would not recognize this because of the Paris Treaty of 1928, which forbids the use of force in the service of national interests. This stance is known as the "Stimson Doctrine."[50]

JASTA could set an example to other nations and the U.S. may be vulnerable to the greatest losses from this. It is known that the U.S. is responsible for several coups in many countries. For example, there is no doubt that U.S. is behind the coups of 1960, 1980, and February 28 coups, and it is rumored that the U.S. is behind the July 15 coup attempt. If the U.S. implements JASTA, then it must accept that the other counties have the right to promote comparable regulations that would enable their citizens to file actions against the U.S. before their own courts. This Act, which is against the fundamental principles of law, has the potential to cause chaos all over the world in the near future.

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[48] "On April 2, 1990, around 7:45 p.m., Dr. Humberto Alvarez-Machain was relaxing in his office in Guadalajara, Mexico, having just finished treating a patient. Suddenly, five or six armed men burst into his office. One showed him a badge that appeared to be that of the Mexican federal police. Another placed a gun to Dr. Alvarez-Machain's head and told him to cooperate 'or he would be shot.' The men then took Dr. Alvarez-Machain to a house where he was forced to lie on the floor face down for two or three hours. His captors shocked him several times with an 'electric shock apparatus' and injected him twice with a substance that made him feel 'light-headed and dizzy.' Later, Dr. Alvarez-Machain was transported by car to Leon, where he and his captors boarded a plane headed for El Paso, Texas. When they arrived in El Paso on April 3, agents of the U.S. Drug Enforcement Agency (DEA) were waiting to arrest Dr. Alvarez-Machain for his alleged involvement in the 1986 torture and murder of DEA agent Enrique Camarena. The kidnapping of Dr. Alvarez-Machain from Mexico was a state-sponsored international abduction. The United States, through its paid agents, removed a foreign national from his country and brought him to the United States to stand trial." *See* Jonathan A. Gluck, *The Customary International Law of State-Sponsored International Abduction and United States Courts*, 44 Duke Law Journal 612, 613 (1994).

[49] Derek C. Smith, *Beyond Indeterminacy and Self-Contradiction in Law: Transnational Abductions and Treaty Interpretation in U.S. v. Alvarez-Machain*, 6 European Journal of International Law 6 (1995).

[50] The Stimson Doctrine was named for United States Secretary of State Henry Stimson. Stimson had conflicting impulses towards idealism and acute pragmatism. The Stimson Doctrine was an expression of his restricted idealism. The Stimson Doctrine emerged as the response of the United States and the League of Nations to Japanese Conquest of Chinese Territory in 1931. This conquest was in breach of Japan's Obligations under the Kellogg-Briand Pact (Pact of Paris), the League of Nations Covenant and the Nine Power Treaty. *See* John Trone, *The Stimson Doctrine of Non-recognition of Territorial Conquest*, 9 Queen Law Journal 160 (1996).

Conclusion

By amending the FSIA, JASTA authorizes the U.S. courts to judge foreign governments based on allegations that the actions of those governments make them responsible for terrorism-related injuries on U.S. soil. This threatens international relations, which is why many countries disapprove of the legislation and have raised their concerns.

With its large international presence – greater than any other country – the U.S. benefits from sovereign immunity more than most. JASTA could have indirect consequences for the U.S. if other countries pass similar laws.

Terrorism is an international threat that now faces the entire world. It is essential that international diplomacy promotes new discussions and develops updated international principles to reflect this reality. But JASTA neither helps to bring the perpetrators to the justice nor improves the effectiveness of counter-terrorism. It merely seeks to pin the actions of terrorists on individual states. Trying to hold a foreign government accountable before American private courts is a politically motivated gesture. Rather than serving the aim of peace or finding genuine solutions, it merely results in international law becoming politicized.

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IMPACT OF THE RECENT REFORMS ON INDIAN ARBITRATION LAW

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In order to give effect to the UNICITRAL Model Law on Arbitration and due to radical change in its economy as the result of the 1991 New Economic Policy (NEP) India enacted the 1996 Arbitration & Conciliation Act. This Act provides a pragmatic legal basis for resolution of commercial disputes outside the court procedures. It circumscribes the older laws and consolidates multiple legal norms dealing with arbitration. However, the experiences in application of this Act for the last 20 years suggest that it needs to be amended as it contains serious drawbacks primarily due to poor legal technique which necessitated excessive judicial interventions and judicial overreach having led to resentment among those willing to resort to alternative dispute resolution under this Act while keeping the seat of Arbitration in India. Several attempts were made by the successive governments aiming at amending the 1996 Act. Yet all those attempts failed. Finally the present Union Government under the leadership of the Prime Minister Mr. Narendra Modi was able to bring in sweeping changes in existing arbitration law. These changes were carried out with the commitment of the Government in doing business in India through the Ordinance route and proper legislative procedures which finally led to the amendments having come into force on January 1, 2016. This paper attempts to analyse the key changes brought through the 2015 Amendment Act and their impact on the application of arbitration law in India. Moreover, the authors overview the prospects of India to acquire the preferred position in International Commercial Arbitration in the future as envisioned by the present Modi Government.

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Introduction

The 1996 Arbitration & Conciliation Act (hereinafter "the 1996 Act") was first promulgated by way of issuing an Ordinance as a step in urgent economic reforms necessitated by new economic policy. 20 years later another ordinance was introduced, i.e., the 2015 Arbitration & Conciliation (Amendment) Ordinance, which amended the 1996 Act in order to bring it in line with international standards. For the last few years, arbitration has become an optimal choice for resolution of commercial disputes. However, over the last two decades the process of arbitration in particular in *ad hoc* domestic disputes becomes more alike the adversarial proceedings in India. Accompanied by high costs due to insufficient amount of trained and qualified arbitrators this dispute resolution process caused a growing sense of annoyance among its users. Due to these and other problems in application of the 1996 Act, the amendments were discussed by public authorities which are necessary in order to fill in its gaps and minimize the opportunities for its misinterpretation. Reports and suggestions where given by many bodies aimed at amending the 1996 Act. However, those suggestions could not sustain the pressing needs of modern practice. Two attempts were made to amend the 1996 Act in 2001 and in 2010, both unsuccessful and having not led to the Act being amended.

However, through the Ordinance the present Government took a robust step towards reinstating confidence of individuals and firms in investors and business community which is significant for optimizing the procedures of business transactions. The Ordinance included proposals of the Law Commission Report No. 246, released in the year 2015, which is a pre-cursor to this Ordinance[1] and subsequent Amendment Act. The Amendment Act also introduces unique provisions which have not so far been mentioned in leading arbitration statutes. Some of these provisions provide for extraordinary measures and other peculiar issues with *ad hoc* domestic arbitration including, e.g., the time limit for completing arbitration and arbitrators fees. The Amendment Act mandates that every arbitration held in India must result in an award within 12 months of the arbitral tribunal being constituted, with parties having the right to give an extension to it by another 6 months through mutual consent. Otherwise the mandate of tribunal terminates unless the court extends it imposing such conditions as it considers appropriate. The court can also penalize arbitrators by ordering reduction of their fees at the time of granting such extension. It is also the right of the court to change one or all the arbitrators at the time of granting extension. Moreover, the Amendment Act introduces other significant changes which cause a significant departure from the law having existed before, or clarify controversies, or confirm the rules which had evolved through judicial interpretations. This paper analyses the key changes brought by the Ordinance which had passed through the Parliament route, received the assent of the President of India on December 31, 2015, and been promulgated in the Official Gazette on January 1, 2016.

1. Applying Provisions of Part I for a Foreign Seated Arbitration

After the case of *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*[2] (BALCO Judgement) which puts a complete bar on Indian courts to exercise jurisdiction over foreign seated arbitrations. According to this judgment, on the basis of Sec. 2(2) of the 1996 Act, all the provisions under the Part I of the Act would apply when the arbitration is seated in India, and Indian courts cannot invoke any provisions under Part I of the Act with respect of foreign seated arbitration. Due to this practical difficulties were arising, especially with regard to granting interim injunction in a foreign seated arbitration by Indian courts.

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[1] By virtue of Art. 123 of the Constitution of India, the President of India is empowered at any time, except when both Houses of Parliament are in session, if he is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinance as the circumstances appear to him to require. Further, Ordinance promulgated under this Article shall have same force and effect as an Act of Parliament.

[2] (2012) 9 SCC 552.

To overcome this situation, a provision was included in Sec. 2(2) which grants to Indian courts jurisdiction in the context of seeking interim injunction in a foreign seated Arbitration, as well as assistance in collecting evidence in a foreign seated arbitration or making appeal for court orders.[3] However, this provision applies only if the parties express an agreement to use it. Noteworthy is the fact that the expression "only" has not been included in the mentioned Sec. 2(2) of the 1996 Act. The lack of the word "only" in the text of the Act was the primary cause for disagreements between the parties in the case of *Bhatia International v. Bulk Trading SA*.[4] That case led to the BALCO Judgement[5] where the Supreme Court of India held that the expression "only" in Art. 1(2) of the UNICITRAL Model Law had been used in view of the exceptions impressed upon in the said Article through the proviso. Since the said provision was lacking in the Act, the word "only" was not required in such a situation. Yet since the provision had been added it appears unjustified that the word "only" remains omitted and leading to unnecessary complications.

2. Court References to Arbitration and Widening the Meaning of Arbitration Agreements

The meaning of an arbitration significantly diminishes if the courts are allowed to adjudicate on the same subject matter. Therefore, the principal 1996 Act included provisions for referral mechanism when a judicial authority addressed with an arbitrable dispute had been required to refer the parties to arbitration upon an application of the party. However, it was dependent on several requirements which seriously impeded the process of issuing such court references. In particular, the party submitting an application should have submitted an original or a certified copy of the arbitration agreement to the court. However, the 2015 Act amended Sec. 8 having made this provision more pragmatic allowing "persons claiming through or under parties"[6] to apply for referral to arbitration which is in line with Sec. 45 even though the opinion of the judge is different. The amendment widened Sec. 8(2) by providing that if the original arbitration agreement or its certified copy is not available with the party applying for a reference to arbitration under sub-sec. (1), and

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[3] "Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act."

[4] (2002) 4 SCC 105.

[5] *Supra* note 2.

[6] Sec. 8(1): "A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that *prima facie* no valid arbitration agreement exists."

the said agreement or certified copy is retained by the other party to that agreement, the applying party shall file such application alongside with a copy of the arbitration agreement and a petition to the court to call upon the other party to present the original arbitration agreement or its duly certified copy to the Court.

The amended Sec. 8 provides that the court can deny a reference to arbitration if it finds that no *prima facie* valid arbitration agreement exists. This power is different from the one stipulated by Sec. 11 and only prescribing examination of existence of the agreement. Considering applications under Sec. 11 of this Act does not presuppose delving into the issues of validity of such agreement. Different requirements set forth by Secs. 8 and 11 of the Act open avenues for nuanced judicial interpretation. In case of denial of reference under Sec. 8 a judicial appeal is possible under Sec. 37 of the Act. If the court does not refer the parties to arbitration, the arbitral tribunal can still exercise *kompetenz-kompetenz* under Sec. 16. Such legal ambiguity runs the risk of undermining the *kompetenz-kompetenz* rule under Sec. 16 by taking away the power of the arbitral tribunal.

3. Interim Injunction

It is not unusual for a party after obtaining an interim measures prior to commencement of the arbitration to simply sleep over the matter. This issue has been raised in many cases before the Supreme Court first in the case of *Sundaram Finance Ltd. v. Nepc India Ltd.*[7] providing that "before passing the interim order the court must be satisfied about existence of arbitration agreement and the applicant's 'manifest intention' to take the matter to arbitration. Court must pass a conditional order to ensure the effective steps are taken by the applicant for commencing the arbitration proceedings." Later in *Firm Ashok Traders v. Gurmukh Das Saluja*[8] the Supreme Court held that "under Section 9 of the Arbitration Act, the court should make sure that arbitral proceedings are actually contemplated or manifestly intended and positively going to commence within a reasonable time. The time gap between the filing of the Section 9 application and the commencement of arbitral proceedings should not be such as to destroy the proximity of relationship between the two events. The party cannot sleep over its rights under Section 9 and not commence arbitral proceedings." The rules given effect through the Supreme Court judgements are nowadays codified under the 2015 Amendment Act also specifying details regarding the time limit in which arbitration proceedings shall commence by inserting sub-clause 2 to Sec. 9 through the Amendment Act.[9]

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[7] (1999) 2 SCC 479.

[8] (2004) 3 SCC 155.

[9] "Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine."

In order to reduce court interventions and to restrict the courts' power to grant interim injunction after the constitution of arbitral tribunal, sub-clause 3 of Sec. 9 was introduced providing that "once the arbitral tribunal has been constituted, the court shall not entertain an application under sub-section (1), unless the court finds that circumstances exist which may not render the remedy provided under Section 17 efficacious." Through this provision the opportunities for the courts to deal with such applications are not excluded during the arbitration proceedings. However, the courts can grant injunctions only in exception circumstances. To give effect to this provision, the powers of arbitral tribunals has been equated with the powers of the court in giving interim injunction during the arbitration proceeding or at any time after making the arbitral award but before it is enforced, in accordance with Sec. 36 by inserting sub-clause 1 to Sec. 17 of the 2015 Amendment Act.[10] Furthermore, the interim order passed by arbitral tribunals is enforced in the same manner as an order of the court, i.e., through insertion of sub-clause 3 to Sec. 17 of the Amendment Act.[11]

This change is a positive development as it reduces court interventions with regard to granting interim injunctions, particularly during arbitration proceedings and after the delivery of award but before it is enforced. Since arbitral tribunal is the best instance to deal with the matter and it would be most appropriate that this power is exercised solely by the tribunals. Yet before the said amendments the arbitral tribunals did not have powers as courts to grant interim injunctions, the orders of tribunals were lacking legal force and the parties should have addressed the courts for interim injunctions. Since the amendments came into force the tribunals' power in line with the powers of courts is no more dependent on the choice of the parties but is a non-derogable provision. It will, therefore, minimize

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[10] "17. (1) A party may, during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to the arbitral tribunal –

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient, and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it."

[11] "Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908, in the same manner as if it were an order of the Court."

judicial intervention in granting injunctions during the stages of arbitration process, provided under Sec. 17.

4. Appointment of Arbitrators

Appointment of arbitrator(s) is the prerogative of the parties which they appoint on mutual consensus. Another contentious issue in the principal 1996 Act was the provision regarding appointment of arbitrator or arbitrators in case of a deadlock between the parties. In such cases, a party under Sec. 11 of that Act was entitled to approach the Chief Justice of the High Court of India as for domestic arbitration; Chief Justice of the Supreme Court as for international commercial arbitration; or any person or institution designate by the Chief Justice. However this appointment by the Chief Justice of the High Court/Supreme Court had become complicated as shown in two judgements of the Supreme Court of India. In the first judgment, i.e., *Konkan Railway Corpn. Ltd. & Anr. v. Rani Construction Pvt. Ltd.*[12] the Supreme Court held that the Chief Justice's or his designator's order under Sec. 11 nominating an arbitrator is not an adjudicatory order and the Chief Justice or his designate is not a tribunal.[13]

However, this decision of the Supreme Court was overruled in the case of *S.B.P & Co*. v. *Patel Engineering Ltd.*[14], where the Court held that the power exercised by the Chief Justice of the High Court or the Chief Justice of India under Sec. 11(6) of the 1996 Arbitration & Conciliation Act is not of an administrative nature but it is a judicial power. It further held that while appointing arbitrators the Chief Justice is also empowered to decide on "his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators" and such a decision is final. This judgement was fundamentally flawed as it not only took away the power of arbitral tribunal to decide the validity of the arbitration agreement under Sec. 16 of the 1996 Act but also to make the order passed under Sec. 11 of the Act a judicial order that can hence be subject to appeal – which was beyond the legislative intent of the Act.

The 2015 Amendment Act attempted to nullify also the effect which was created by this case by the Supreme Court. The Act introduced a limitation in sub-sec. (6A) providing that the Supreme Court or the High Court shall limit its examination only with the existence of an arbitration agreement, and not with other issues such as, e.g., live claim, qualifications, conditions for exercise of power, etc.[15]

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[12] AIR 2002 SC 778.

[13] *Id.*, para. 31.

[14] (2005) 8 SCC 618.

[15] "The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement."

The second case, i.e., the Patel Engineering case provided that hat the Chief Justice can delegate his/her power under Sec. 11 of the 1996 Act only to another judge of that court but not to any other person or institution considered to have judicial powers as judicial power can only be delegated to judicial authority. However, the 2015 Amendment Act took this aspect into account and specified in a new sub-sec. (6B) that "[T]he designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court."

Thus, one of the main problems revealed under application of the said Sec. 11 is whether the function of the Chief Justice under this Section is an administrative function or a judicial function. The 2015 Amendment Act has ultimately solved this issue by replacing the "Chief Justice" with the "Supreme Court or High Court". The provision incorporated in sub-sec. (8) of this Sec. 11 required a prospective arbitrator to submit a declaration following Sec. 12 of the Act.[16] This provision ensures that a prospective arbitrator who due to his/her schedule may not be able to carry out an expedite arbitral proceedings will not be appointed. Another important addition was included in sub-sec. (14) of Sec. 11 stipulating that the High Court can formulate rules for the purpose of determining the fees of the arbitrators.[17] This provision which could possibly incorporate a fixed fee for ad-hoc arbitrations is unique for Indian legislation as matters relating to arbitrators' fees is not usually covered by any statutes in other states.

Moreover, new Fifth Schedule and Seventh Schedule were added in the 2015 Amendment Act. The Fifth Schedule touches upon the issue of independence and impartially of the arbitrators and lists the grounds justifying doubts in their independence or impartiality. Another list of grounds is stipulated by the Seventh Schedule and entails relationships between arbitrators and the parties or the counsel making an arbitrator ineligible for appointment. These two schedules listing grounds for challenging arbitrators are influenced by the IBA Guidelines on Conflict of Interest in International Arbitration. The 2015 Amendment Act also prohibits parties to agree in advance and appoint an arbitrator who had previously been an employee of either of the parties. These provisions ensure independence and impartiality of arbitrators to be appointed and the equal opportunities for parties to have a say in the appointment process regarding their arbitrators.

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[16] "The Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court, before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of section 12, and have due regard to –

(a) any qualifications required for the arbitrator by the agreement of the parties; and

(b) the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator."

[17] "For the purpose of determination of the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal, the High Court may frame such rules as may be necessary, after taking into consideration the rates specified in the Fourth Schedule."

5. Time Limit for Arbitral Award

An entirely new Sec. 29A was introduced in the 2015 Amendment Act which stipulates a time limit for rendering an award in every arbitration process in India. The default time limit for making such and award should be provided within a period of 12 months starting from the date when the arbitral tribunal enters upon the reference. Here enter upon the reference means that from the day when the arbitrator(s) receive their letter of appointment in writing.[18] Parties may extend this period by consent for another period not exceeding 6 months.[19] If the award is not made within the prescribed time period of 12 months or within the mutually acceptable period, the mandate of the arbitrator(s) terminates unless the time period has been extended by the court on the basis of either an application by the party or due to a sufficient cause and on such terms and conditions which may be imposed by the court prior to or after the expiry of the period specified.[20] However, these rules are fortified by a provision, according to which if the court while granting the extension finds that proceeding delayed for reasons attributable to the arbitral tribunal, it may order a reduction of fees of arbitrator(s) not exceeding 5 percent for each month of such delay. However, the extension of period referred to in sub-sec. (4) may be granted upon an application of the parties and only due to sufficient cause and on such terms and conditions that may be imposed by the court. Under this Section the court can impose actual or exemplary costs upon any of the parties.[21] However, such a carrot and stick approach may not be conducive in every matter and can lead to unnecessary litigation before the courts which are already overburdened with other cases and may not be in a position to deliver judgment within the sixty days' time frame as prescribed under this Section.

6. Fast Track Arbitration

The 2015 Amendment Act also introduces a fast-track arbitration procedure to resolve disputes provided that such option is exercised prior to or at the time

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[18] "29A. (1) The award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference.

Explanation. – For the purpose of this sub-section, an arbitral tribunal shall be deemed to have entered upon the reference on the date on which the arbitrator or all the arbitrators, as the case may be, have received notice, in writing, of their appointment."

[19] "29A. (3) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months."

[20] "29A. (4) If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period."

[21] Sub-sec. (8) to Sec. 29A.

of appointment of the arbitral tribunal. Its Sec. 29B[22] offers an option for expedite arbitration process. Pursuant to Sec. 29B(1), parties can agree to have their dispute resolved by in a fast track procedure which, according to Sec. 29B(4), requires the award to be made within 6 months starting from the date when the arbitral tribunal enters upon the reference. However, it is left to the parties to claim for such fast track arbitration. This provision could have more significant meaning if would also have provided for mandatory reference of cases involving smaller claim to such fast track arbitrator for speedier justice.

7. Imposition of Costs

The cost regime where "costs follow the event" which is practised internationally has been introduced in the 2015 Act in a new Sec. 31A. As follows from the explanation to this Sec. 31A(1), the costs are not limited to legal fees but also include travel expenses, witness expenses, and so on.[23] The imposition of costs also extends to every litigation arising from arbitration which had been addressed to by virtue of

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[22] "(1) Notwithstanding anything contained in this Act, the parties to an arbitration agreement, may, at any stage either before or at the time of appointment of the arbitral tribunal, agree in writing to have their dispute resolved by fast track procedure specified in sub-section (3).

(2) The parties to the arbitration agreement, while agreeing for resolution of dispute by fast track procedure, may agree that the arbitral tribunal shall consist of a sole arbitrator who shall be chosen by the parties.

(3) The arbitral tribunal shall follow the following procedure while conducting arbitration proceedings under sub-section (1):

(a) The arbitral tribunal shall decide the dispute on the basis of written pleadings, documents and submissions filed by the parties without any oral hearing;

(b) The arbitral tribunal shall have power to call for any further information or clarification from the parties in addition to the pleadings and documents filed by them;

(c) An oral hearing may be held only, if, all the parties make a request or if the arbitral tribunal considers it necessary to have oral hearing for clarifying certain issues;

(d) The arbitral tribunal may dispense with any technical formalities, if an oral hearing is held, and adopt such procedure as deemed appropriate for expeditious disposal of the case.

(4) The award under this section shall be made within a period of six months from the date the arbitral tribunal enters upon the reference.

(5) If the award is not made within the period specified in sub-section (4), the provisions of sub-sections (3) to (9) of section 29A shall apply to the proceedings.

(6) The fees payable to the arbitrator and the manner of payment of the fees shall be such as may be agreed between the arbitrator and the parties."

[23] "*Explanation*. – For the purpose of this sub-section, "costs" means reasonable costs relating to –

(i) the fees and expenses of the arbitrators, Courts and witnesses;

(ii) legal fees and expenses;

(iii) any administration fees of the institution supervising the arbitration; and

(iv) any other expenses incurred in connection with the arbitral or Court proceedings and the arbitral award."

this amendment. Furthermore, it provides that an amount awarded by an arbitral tribunal will, unless otherwise specified by the arbitral tribunal, carry interest which shall be 2 percent more than the current rate of interest per annum from the date of the award to the date of payment.

8. Limiting the Scope of Setting Arbitral Award Aside

The new amendments primarily seek to clarify the meaning of public policy under Sec. 34 of the 2015 Act regarding the scope of review that courts should enter in, which remained a matter of concern for the last few years. Particularity after the decision in *ONGC v. Saw Pipes Ltd*.[24] and *ONGC v. Western Geco*[25], the explanation to Sec. 34(2)(b) clarified that an award is in conflict with the public policy of India only if, firstly, making of the award was induced or affected by fraud or corruption or was in violation of Sec. 75 or Sec. 81; or, secondly, it contradicts the fundamental policy of Indian law; or, thirdly, it contradicts the most basic concepts morality or justice. Moreover, an explanation specifies that in order to avoid any doubt, the test as to whether there is a contradiction with the fundamental policy of Indian law shall not entail a review on the merits of the dispute. Awards in arbitrations exclusively between Indian parties can be challenged on the ground of patent illegality but only if it is "on the face of the award" and without entering into a merits review and without re-appreciation of evidence.[26] A time limit has also been fixed to dispose-off the application filed under sub-sec. (6) of Sec. 34 of the 2015 Amendment Act[27] to minimize the delay in the disposal of such applications.

9. Issues Requiring Further Determination

Having removed many ambiguities, the 2015 Amendment Act still left several areas of concern unaddressed. Some of these major issued of concern are discussed below as the authors consider them urgent and requiring to be officially addressed.

9.1. Emergency Arbitrators

In India before the constitution of Arbitral tribunal the parties in arbitration process approach the courts under Sec. 9 of the Act for interim injunction. Although

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[24] AIR 2003 SC 2629.

[25] (2014) 9 SCC 263.

[26] Sub-section (2A) to Sec. 34: "An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award: Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence."

[27] "An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party."

approaching the court for urgent interim relief before constitution of arbitral tribunal is a common practice, however approaching court is not considered as the best practice in a dispute involving arbitration as the primary reason to refer the dispute to arbitration is to avoid the rigours of the court system. Institution across the Globe introduce provisions for appointment of emergency arbitrators. For instance, under the 2013 Hong Kong International Arbitration Centre (HKIAC) Rules a party may seek emergency relief prior to the constitution of the arbitral tribunal. Such an application, if accepted by the parties, has to be decided in a time-bound manner by the HKIAC, following their rules. The same rule applies to cases involving other prominent institution arbitrations including the London Court of International Arbitration, the International Chamber of Commerce and the Singapore International Arbitration Centre. However, the 2015 Amendment Act is less elaborate with respect to addressing the issue of interim measures despite the fact that it reiterates a seminal objective of "minimal intervention of the courts in the arbitration." Needless to mention that if the Indian arbitration law fails to provide opportunity for utilizing emergency arbitrators the parties have no other option than addressing their disputes to the courts of law for immediate relief which does not meet the objective of the 2015 Act.

The Law Commission of India in its 246th Report which had acted as the precursor to this 2015 Amendment Act recommended amending this Act so that to provide statutory recognition for the concept of emergency arbitrators.[28] This amendment was intended to be introduced in Part I of the Act defining an arbitral tribunal as a sole arbitrator or a panel of arbitrators. The change that the Law Commission of India had put forward suggested broadening the definition of "arbitral tribunal" so that it would include provisions for appointment of emergency arbitrator or arbitrators under any institutional rules only. At the same time such a recommendation was not extending to *ad hoc* arbitration by the Law Commission of India. However, since this suggestion was not incorporated in the 2015 Amendment Act it still should be considered, at least by legal scholars.

9.2. Arbitrability of Disputes Involving Fraud

In its 246th Report the Law Commission of India recommended changes to Sec. 16 of the Arbitration Act, in order to empower the arbitral tribunals to resolve disputes invoking serious issues in applying law, i.e., complicated issues of fact-finding or allegations of fraud, corruption etc. True, the provisions of Secs. 8 and 11 of the Act were amended to the effect that the parties will be referred to arbitration "[N]otwithstanding any judgment, decree, or order of the Supreme Court..." Yet in order to overcome the

[28] Law Commission of India, Report No. 246 – Amendments to the Arbitration and Conciliation Act, 1996 (2014), at 37 (Mar. 10, 2017), available at http://lawcommissionofindia.nic.in/reports/Report246.pdf.

conflicting judgments by the Supreme Court on whether or not questions of fraud are arbitrable, recommended changes to Sec. 16 of the Arbitration Act are desirable as they make this provision clearer while entitling arbitral tribunals with more powers. In the case of *Radhakrishnan v. Maestro Engineers*[29] a two-judge bench of the Supreme Court held that issues of fraud are not arbitrable. However, the Judge of the Supreme Court while considering an application under Sec. 11 of the Arbitration Act in *Swiss Timing Ltd. v. Organising Committee, Commonwealth Games*[30] held that the judgment in the Radhakrishnan case is *per incuriam* and therefore can't constitute a fair rule of law. When the parties stand before an arbitral tribunal, contrary to Secs. 8 or 11 of the Arbitration Act, and the arbitrator's jurisdiction is challenged by a party alleging that there are questions of fraud involved in dispute, it appears that the tribunal bound by the Radhakrishnan judgment should consequently find a lack of powers to consider questions of fraud. However, recently the Supreme Court of India in *A Ayyasamy v. A Paramasivam & Ors*[31] without overruling the Radhakrishnan judgment tried to clarify the debate. It held, firstly, that allegations of fraud are arbitrable unless they are serious and complex in nature and, secondly, unless fraud is alleged against the arbitration agreement, there is no impediment in arbitrability of fraud. Finally, it held that the decision in the Swiss Timing case did not overrule the Radhakrishnan. The judgment differentiates between "simplicitor fraud" and "serious fraud" concluding that while "serious fraud" is best left to be determined by the court, "simplicitor fraud" can be decided by the arbitral tribunal. Amending the said Sec. 16 consistent with the recommendations made by the Law Commission Report would help avoiding such contrivances. Yet the legislator opted not to use this opportunity.

Conclusion

The Ordinance Act and now the Amendment Act mark a change in legal thinking and legal practice. Such changes are significant steps towards optimizing arbitration procedure and arbitration jurisprudence as legal amendments gave many lacunas of the principal 1996 Act away nullifying judicial decisions that impeded proper application of arbitration rules in India. However, a note of caution is attached to these developments, i.e., the amendments require too short time frame for application of various rules in the arbitration process which are difficult to comply with in practice and running the risk of ending in unavoidable judicial dispute resolution. At the same time, clear-cut provisions encouraging institutional arbitration in India are still lacking while the said amendments repeat the details which are otherwise practised by the parties or institutions. Moreover, the experience of few other legislation in

[29] (2010) 1 SCC 72.

[30] (2014) 6 SCC 677.

[31] AIR 2016 SC 4675.

India (on other subjects) having time-line have not succeed in the past. It is doubtful that the time limits as prescribed by the 2015 Amendment Act would be followed by the courts of law in India which are already overburdened with pending cases and lacking adequate infrastructure as well as the necessary amount of judges. Yet apparently, much still depends on the approach of the courts of law dealing with matters subjected to arbitration in meeting the objectives of the 2015 Amendment Act. A next round of amendments can possibly consider this concern after analysing the effects of the recent changes.

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COMMENTS

INDIAN REGULATIONS ON ETHICS AND THEIR IMPACT ON COURT CASE BACKLOGS

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The paper aims to explore the role of ethics regulations on the backlog of cases in the state of Uttar Pradesh, India. There, there are many local practices which hinder the disposal of cases in the courts. The paper examines several, beginning with the theoretical training in ethics at the law schools and its impact in practice. The paper then explores the legal status of strikes and how they are conceived by lawyers in delaying the disposal of cases. Next it deals with adjournments in the courts and unravels the myriad frivolous reasons cited in seeking adjournments, as well as how, despite statutory limitations, courts succumb to the pressure of the Bar in granting them. The author echoes concern for creating transparency, efficiency and a system that inspires integrity, and argues for the need to rethink and redesign the whole system and create independent tribunals to enquire into lawyers guilty of professional misconduct.

Keywords: case backlog; court delays; ethics regulations.

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Introduction

The state of Uttar Pradesh is the most populous state in India with seventy-five districts under eighteen subdivisions. The 2011 census stated a mammoth 200 million as the population of the state. The state has the highest case backlog

with around 4.8 million cases pending in different courts. This constitutes around 23 percent of the total nationwide pendency – which is estimated at around 20 million cases.[1] While the national average of case burden is 1,350 cases per judge, in the state of Uttar Pradesh it is double, at around 2,500 cases per judge.[2] Out of these 4.8 million cases, around 0.63 million have been pending for more than ten years.[3] The courts in Uttar Pradesh dispose of around 44,571 cases each month, which is five times higher than the national average.[4] Two major reasons which are frequently given to explain the delayed disposal of cases are: the smaller number of judges and the lack of accountability, which significantly reduce the efficiency in the system. The 245th Report of the Law Commission was assertive in tone and clear in objective when it emphasized that for paving the way for "access to justice," a constitutional obligation, it was imperative to "increase judges' strength," reach a "breakeven" point and "dispose of the backlog in a 3-year timeframe".[5] Agreeing to this, in October 2015, a seven-judge panel of the Allahabad (Uttar Pradesh) High Court directed the state government to increase the total number of judges in the subordinate courts by 25 percent so as to expeditiously dispose of the pending cases.[6]

The Bar Council of India (BCI) Rules on Professional Standards and Etiquette spell out a number of ethical duties, the breach of which constitutes professional misconduct. In addition to preserving the nobility of the profession, it is also intended that cases be expeditiously disposed of and access to justice secured. The evolution of the legal system has witnessed a narrative counter to the envisaged outcome. This paper attempts to examine that nexus.

1. Researchers and Data Collection

A team of three people conducted the field research over a span of four months. All team members were part of the Clinical Legal Aid Society at the Jindal Global Law School, Delhi, India. Data collection took place from December to January 2015–2016 and May to June 2016. The data were collected from two districts of

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1 Shobhit Mathur & Nomesh Bolia, *Twenty Million Cases are Still Pending: In India's District Courts, a Crisis is Revealed*, Firstpost.com, April 5, 2016 (Feb. 20, 2017), available at http://www.firstpost.com/india/twenty-million-cases-still-pending-in-indias-district-courts-a-crisis-is-revealed-2712890.html. *See also* Arvind Chauhan, *UP Tops the List of Pending Cases in Courts across India*, The Times of India, November 2, 2015 (Feb. 20, 2017), available at http://timesofindia.indiatimes.com/india/UP-tops-the-list-of-pending-cases-in-courts-across-India/articleshow/49632177.cms.

2 *Id.*

3 *Id.*

4 *Id.*

5 245th Report of the Law Commission of India (July 2014), at 54 (Feb. 20, 2017), available at http://lawcommissionofindia.nic.in/reports/Report245.pdf.

6 Chauhan, *supra* note 1.

Uttar Pradesh. Data collection was done using ethnographic observations – using interviews with respondents – on various questions relating to ethical regulations. The interviews were conducted primarily on court premises and in the offices of lawyers and judges.

2. BCI – The Regulator of Ethics Has Failed the System

"Quality" is the catchword which must form the bulwark of the legal profession. So expounded the Law Commission of India in its 184th Report while granting recognition to new law schools.[7] The Law Commission was mindful of the deterioration in the quality of lawyers and the role the ethical regulator had in this development. While acknowledging that the Bar Council was culpable in contributing to the compromise in the *quality of education*, the Law Commission cast more serious aspersions on the functioning of the Bar Council, in paras. 8.6 and 8.7 of the Report, wherein it observed:

> 8.6. There are again complaints that some inspections are cursory and colleges which are badly run are given clean chit while colleges which are running well and whose students have consistently obtained first ranks in the University or whose students have consistently been selected by reputed universities in UK and USA for post graduate studies, are disaffiliated.
> 8.7. There are indeed several court cases filed by managements against the Bar Council of India and while no doubt some have been dismissed, some have been allowed with critical observations against the manner in which inspections were conducted or disaffiliation proposed. The law reports of the High Courts are evidence to these facts.

However, the situation has not changed much since these critical observations were made by the Law Commission in its 184th Report in 2002. A recent disagreement between the BCI and the Faculty of Law, Delhi University (one of the finest law schools in the country) touches upon the point. When recently the BCI disaffiliated the Faculty of Law, Delhi University, the Dean of the Faculty took serious issue with the BCI, and referred to the Report as "silly" and to the members as "jokers."[8] The character of the issue can be comprehended by the statement of the Dean when he said:

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[7] Law Commission of India, Dec. 2002, 184th Report on the Legal Education & Professional Training and Proposals for Amendment to the Advocates Act, 1961 and the University Grants Commission Act, 1956. On page 77 of the 184th Report, the Law Commission of India observed: "In India, we do require a good number of law schools but they must produce students who have received legal education of sufficient quality" (Feb. 20, 2017), available at http://lawcommissionofindia.nic.in/reports/184threport-parti.pdf.

[8] *Will not Bow: Delhi University Dean Rails against BCI "Jokers" Again Refusing Accreditation over "Small Idiotic Things*," Legally India, February 4, 2015 (Feb. 20, 2017), available at http://www.legallyindia.com/Law-schools/delhi-university-to-show-cause-why-it-deserves-recognition-after-bad-report-card.

> There are 1,200 law colleges which they [the BCI] do not inspect. No single class happens at those law colleges. So many things are there in relation to faculties of law and in relation to law education.[9]

2.1. Consequential Conception of Ethics v. Formative Ethics

If taken on record, 1,200 colleges is a staggering number. This begs an inquiry into a deeper question related to what is referred to in this paper as the consequential conception of ethics and formative ethics. The theoretical notion of ethics forms the basis of the consequential conception of ethics in India. The theoretical notion of ethics is motivated by the guiding principle that a theoretical course on ethics would suffice in installing a "master key" to unlock all ethical dilemmas encountered by law students. The Bar Council's committee on legal education, which sets the syllabus for law schools, in its wisdom, has prescribed a course on ethics to be taught in the final semester at the law school. It is observed that by the time a student reaches the final semester there is a clear lack of motivation to study a course which does not align with the student's area(s) of interest.[10] This deters achieving the desired outcome. There is a need to redesign the system on how we think about ethics in the law schools. This consequential conception of ethics has clearly failed to offer any cogent impetus in creating a fair legal system. The prospective inquiry must subsume claims related to bridging the chasm between ethical formulations within law schools and the creation of a fair legal system. The following study is illustrative of our failed institutional endeavour. The concept of formative ethics appeals much. The question of design, that it deals with, requires ethical values to be blended with the courses and training across the law schools. This may allow enthused interest to be sustained, with a long-lasting impact on the outcome intended to be achieved, of creating a fair legal system. A "rule"-driven system may be easily circumvented, but a "principle"-driven system, which has a stronger appeal to rationality, may not be.

2.2. Survey in Uttar Pradesh

A pilot study of 200 lawyers was taken up across the districts of Allahabad, Kanpur, Lucknow and Varanasi, all in the state of Uttar Pradesh. The surveys at Allahabad and Lucknow are complete while they are still underway at Kanpur and Varanasi. The study aimed at exploring the nuances of interface between discourse related to professional ethics at the law school and its impact in the courts. In the first part of the study the intention was to explore the impact of ethical regulations on the conduct of lawyers, and hence the questions were designed accordingly. Most of

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9 *Will not Bow*, *supra* note 8.

10 Author's note: The survey was conducted during my last two classes on Professional Ethics in 2015 and 2016, comprising a total of 120 students, and around 115 expressed lack of motivation to study a course on Professional Ethics in the final semester.

the lawyers seemed appalled at the shoddy implementation of ethical regulations, which is something looked into later in this paper.

As alluded to earlier, there is all-pervasive scepticism regarding the quality of legal education in India, hence the lawyers were asked whether they had been taught any courses related to professional ethics. Forty lawyers at Allahabad and thirty at Lucknow answered the question in the negative. However, the remaining ten lawyers at Allahabad and twenty at Lucknow had been taught a course on professional ethics.[11] Almost none of them, though, could answer as to the content of the course taught to them.

The thirty lawyers who had received training were asked whether they were aware of the Bar Council of India Rules on Professional Standards and Etiquette under the Advocates Act, 1961. Forty-five lawyers from Allahabad and forty-eight from Lucknow were aware of some Bar Council rules that governed them, but they did not know the exact titles of the regulations. The lawyers were asked about the content of the BCI Rules on Professional Standards and Etiquette – to which forty lawyers at Allahabad and forty-five at Lucknow gave generic answers. They did not seem to be aware of provisions related to contingency fees, conflicts of interest and duty towards the client, either. One of the respondent lawyers said:

> The state departments are never interested in disposals. They even delay our compensation. The inordinate delay is inevitable.[12]

However, two lawyers at Allahabad and one at Lucknow were aware of the provisions under the BCI Rules on Professional Standards and Etiquette.

2.3. Three-Pronged Approach – Content, Compliance and Consequence

The dismal portrayal of the lawyers' understanding of the content on professional ethics is disappointing. The survey adopted this three-pronged approach to build upon our understanding of the impact of professional ethics on the conduct of lawyers. It is disturbing to observe that around 70 percent of the lawyers surveyed had not studied any courses related to professional ethics/formation, especially when this is a mandatory requirement as prescribed by the BCI committee on legal education. It was equally shocking to note that around 85 percent of lawyers had no idea of the mandatory BCI Rules on Professional Ethics and Standards. The survey clearly marks the problem at the inception stage – of imparting education at the law schools – where compulsory requirements related to professional ethics courses are clearly not fulfilled.

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[11] The responses were sought from the respondents in the months of December and January of 2015.

[12] Interview with the research team on December 10, 2015.

3. Practice of Strike and the Backlog of Cases

The word "right" associated with strikes by lawyers in India is oxymoronic. The public value of "administration of justice" and the parallel liberty of "access to justice" are agreed to be quintessential aspects of the Indian legal system.[13] A lawyer is obligated to always "fearlessly uphold the interest of his client" under the preamble to the BCI Rules on Professional Standards and Etiquette. The spirit is given due place under clause 15 of the Rules, which provides:

> It shall be the duty of an Advocate fearlessly to uphold the interests of his client by all fair and honorable means without regard to any unpleasant consequences to himself or any other.

The moot question is: When legal principle, statutory duty and constitutional right all speak in one voice against the strike by lawyers, then why do lawyers go on strike? And if they do, then, what sanctions are imposed on them for resorting to such an illegal practice? There have been instances where planned and coordinated strikes have been conducted by lawyers. But the disciplinary authorities are in dire straits. The lawyers at Jodhpur have been persistently observing strike on the last working day of every month for the past thirty-nine years. This is to protest the creation of a High Court bench at Jaipur, eventually leading to the sharing of clientele of the lawyers between both cities.[14] The district court in Meerut (western Uttar Pradesh) has been observing strike every Saturday for the past fifteen years.[15] This again is done in view of their demand to create another bench of the Allahabad High Court in Meerut.[16] It is the "public utility flavour"[17] which distinguishes the practice of law from other professional activities. It is against this background, contextually, that the duties of lawyers to litigants and courts must be interpreted.[18] The fundamental liberties of life and profession are subject to reasonable restriction under the Indian

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13 For a detailed understanding of liberty of access to justice, *please see* Sushant Chandra & Nityash Solanki, *Legal Aid in India: Retuning Philosophical Chords*, 2(2) BRICS Law Journal 68–85 (2015).

14 *Jodhpur Lawyers Protest Demand for HC Bench in Udaipur*, The Times of India, August 15, 2009 (Feb. 11, 2017), available at http://timesofindia.indiatimes.com/city/jaipur/Jodhpur-lawyers-protest-demand-for-HC-Bench-in-Udaipur/articleshow/4895325.cms.

15 *Can the SC Do Anything about Frequent Strikes by Lawyers?*, Mint, October 6, 2015 (Feb. 20, 2017), available at http://www.livemint.com/Politics/DlQyJ9qcsdrC9k99DDO0VJ/Can-the-SC-do-anything-about-frequent-strikes-by-lawyers.html.

16 *Decision on HC Bench in Western UP after Delhi Polls*, The Hindu, February 1, 2015 (Feb. 20, 2017), available at http://www.thehindu.com/news/national/other-states/decision-on-hc-bench-in-western-up-after-delhi-polls/article6843040.ece.

17 Indian Council of Legal Aid and Advice v. Union of India (1995) 1 SCC 732.

18 Ex. Capt. Harish Uppal v. Union of India 1994 SCC Supl. (2) 195.

Constitution. The Supreme Court of India has categorically held that there is no right to strike by lawyers.[19]

3.1. Strike in Uttar Pradesh

The survey formulated few questions on strike and its role with regard to the backlog of cases. The survey sample comprised interviews with 200 lawyers.[20] Additionally, this time ten judges were interviewed in order to hear the view from the other side.[21] The interview began with a generic question on what they thought about the appropriateness of strikes. Thirty lawyers at Allahabad and twenty-five at Lucknow justified going on strike, whereas twenty lawyers at Allahabad and twenty-five at Lucknow disagreed with the concept of strike. Those who agreed with strikes were asked a couple of attached questions. The first question dealt with what reasons would they give for justifying strikes; and the second dealt with how long, according to them, a lawyer should be permitted to go on strike. As part of a second sub-question, they were given the following options – a few hours, one day, a few days or until their demands were met. Fifteen lawyers at Allahabad and twenty at Lucknow justified going on strike mostly on the grounds of making themselves heard or expressing their grievances before the authorities, and they thought strike was the most convenient way of doing so. They believed any demand with numbers on their side could be easily obtained. One of the ex-secretaries of the Bar Association said:

> The authorities have a deaf ear and they dictate everything they wish to. Strike is the most effective way of getting our demands realised.[22]

The remaining responses were more contextual and varied depending upon the purpose for which the strike was called. But most of the remaining responses could be grouped under "getting demands fulfilled" by the authorities. This ranged from getting compensation for an aggrieved lawyer to getting medical insurance to not letting a parallel High Court bench set up in any other district. To the second sub-question on the duration of a strike, twenty-six lawyers at Allahabad and twenty-two at Lucknow specified that they did not mind continuing a strike until their demands

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19 Ex. Capt. Harish Uppal v. Union of India 1994 SCC Supl. (2) 195.

20 The responses were sought in the months of May and June 2016.

21 Author's note: We also went to watch the proceedings at the Central Administrative Tribunal in Civil Lines at Allahabad during the month of January 2016. In the first proceeding, we arrived at 10 a.m. – the scheduled time when the Tribunal should be seated and commence proceedings. However, the Bench sat at 12.30 p.m. instead. There was a commotion, though. We asked a few lawyers about the commotion and we were told that "reference" had happened. "Reference" is a local customary practice of lawyers wherein they mourn the death of another lawyer by boycotting all legal work for a day. The President of the Bar made a speech about the deceased lawyer before the Tribunal, and after that the Chairperson of the Tribunal also made a speech mourning the death of the deceased.

22 Interview given to the research team on June 15, 2016.

were met by the authorities, while a minority of responses favoured continuing a token strike for a few hours, one day, or even a few days.

The second set of questions dealt with their awareness of the laws on strike and punishment. The lawyers were asked whether they knew about the laws relating to strikes. Thirty-eight lawyers at Allahabad and twenty-four at Lucknow knew that there was no right to strike and that it was illegal to do so. However, only three lawyers at Allahabad and seven at Lucknow could recall the exact Supreme Court judgments on strikes. The lawyers were also asked about the punishment that might be imposed in case of a strike. Almost none had any idea about the punishment. Questioned further on this aspect, those who responded said that the state Bar Council almost never took any action against the lawyers and if the High Court initiated a contempt proceeding, then they let off lawyers by accepting a simple apology. Hence, the lawyers had no idea about the nature of possible punishment.

The third set of questions dealt with understanding the perspective of lawyers on the plight of litigants and their views on the administration of justice. They were asked whether a strike would lead to increasing the backlog of cases. A surprising forty-five lawyers at Allahabad and forty-three at Lucknow said that it would.

It was observed that the institutional design clearly made lawyers insensitive to the plight of litigants. The lawyers had an external view of the litigants' distress, but clearly failed to appreciate their objective right to speedy justice and the importance of the public value of the administration of justice. The chasm between how the courts view strikes and how lawyers view them was clearly visible.

4. Frequent Adjournments and the Backlog of Cases

The adjournment culture has diminished the efficiency of the courts and hindered the liberty of speedy access to justice by litigants. There have been all sorts of reasons offered – from bleak to cogent – and sometimes no reasons at all for seeking adjournments. The character of the issue can be gauged by a recent observation made by a sitting Judge of the Indian Supreme Court who, on the absence of an Additional Solicitor General of India, observed:[23]

> Two Supreme Court judges have no other job but to come and sit here and stare at the clock and watch time ticking by…

The adjournment, originally with the cult status of an "art," has been reduced to a "delaying strategy" by counsels at court. The mockery accentuates when the

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[23] Murali Krishnan, *Two SC Judges Have No Other Job But to Sit and Stare at the Clock – SC to Additional Solicitor General in Drought Case*, Bar and Bench, April 7, 2016 (Feb. 20, 2017), available at http://barandbench.com/two-sc-judges-no-job-sit-stare-clock-sc-comes-heavily-centre-asg-pinky-anand-absence-drought-case/.

lawyers do not empathize with the plight of the litigants. This only adds insult to injury. The culture of adjournment besieges every small court proceedings known. It is sought when the witness has to depose, when documents are to be filed, when counter affidavits or rejoinders have to be filed, when a lawyer is ill, when a lawyer is travelling, and so on for an unlimited number of specious excuses. The statutory scheme clearly proscribes granting more than three adjournments and further clearly demands a "specific reason" for granting one.[24] But to no avail. There is lax enforcement of this provision by the courts. An attempt that was made to analyse the culture of adjournment in Uttar Pradesh is described next.

4.1. Adjournment in Uttar Pradesh

Ten judges each at the Allahabad and Lucknow High Courts were surveyed in order to understand the reasons for adjournments. The responses could be marshalled under the following five categories:

a. The lawyers were not adequately prepared.

b. The lawyers were ill.

c. The lawyers were out of station for official work.

d. A family member of a lawyer was ill.

e. Someone passed away in the family of a lawyer.

The judges were asked which reasons were cited most frequently by lawyers and to rate these reasons on a scale from one to five. The most often cited reason for seeking an adjournment in the courts was for illness. Eight judges said this. The second most cited reason was "out of station" for official work. This was stated by seven judges. Eight judges mentioned "inadequate preparation" as the third most cited reason for seeking an adjournment.

Next, questions were asked of lawyers in both of the districts. These questions were related to their ethical responsibility regarding adjournment. They were asked whether they felt justified in seeking frequent adjournments. Forty lawyers at Allahabad and forty-five at Lucknow said they never sought frivolous adjournments. When asked the reason for seeking an adjournment, most of the responses given were fell under the following two categories:

a. Engagement in other courts, and these were fresh matters.

b. Illness.

It was curious to observe that only a negligible number of the lawyers cited other reasons for seeking adjournments than were given by the judges. One of the lawyers responded:

> You have to justify the fee that you take from your client. You can't leave him in the doldrums. I see nothing wrong in appearing in fresh matters if it conflicts with a listed one.

[24] Krishnan, *supra* note 23.

Ten lawyers at Allahabad and seventeen at Lucknow said they never sought frivolous adjournments and refused to cite a reason. Twenty lawyers at Allahabad and nineteen at Lucknow said they never sought frivolous adjournments and gave "appearance in other courts" as the most frequently used reason for seeking an adjournment. Ten lawyers at Allahabad and nine at Lucknow said they never sought frivolous adjournments and cited illness as the most frequently used reason for an adjournment.

However, ten lawyers at Allahabad and five at Lucknow, on the strict condition of anonymity, did confess that sometimes frivolous adjournments were sought from the court. But they said this was always done in the best interest of the client. By this they meant not putting the matter up for hearing before an "unfavourable court" constituted acting in the best interest of the client. A lawyer in a second appeal took few adjournments where a question of law had to be framed for the appeal to be admitted. He deliberately was getting the matter adjourned. He responded:

> If we wouldn't have sought the adjournment from the court, then the court would have certainly dismissed the matter on account of [a] weak substantial question of law. Hence, we waited until a favourable judge was there and got the appeal admitted.

In the Allahabad High Court, it takes around twenty years for a hearing to commence in the admitted second appeals. Until then, the status quo has to be maintained. The same lawyer was further asked what if he requested the court to dispose of the matter expeditiously. He responded:

> That certainly could be done. In fact many tried doing this earlier by filing an application before the Chief Justice's court and the Chief Justice consented to it. This led to inundation of similar application before the Chief Justice and he had to take a policy decision of not admitting anyone's application for expeditious disposal of second appeals. It should be decided only in due course.[25]

There were instances of mutual cooperation between judicial officers and members of the Bar in adjourning the proceedings too.[26]

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[25] Interview given to the Research Team on May 20, 2016.

[26] Author's note: Following the events mentioned earlier, *supra* note 21, we heard a number of lawyers murmuring about the whereabouts of the deceased lawyer and the most insidious comment was what occurred next – when a prominent member of the Bar asked the others in a light vein whether the others had ever seen the deceased practise in the court. To which they all laughed and then dispersed.

Our next visit to the Tribunal was marked by another "reference," when the members mourned at the demise of a retired Chief Justice of India – Mr Justice S.H. Kapadia. The proceedings were again adjourned for the day.

We observed that members of the Tribunal were extremely casual, with no sense of efficiency and time. The Bar was equally reluctant, with no sense of efficiency and ethical responsibilities.

5. Sanctions or Rather the Lack Thereof

The royal debate between Hart and Austin portrays the oblique picture of the professional conduct of lawyers. The lack of proper education, proper training, understanding of laws and the screening process to join the Bar are all responsible for the frequent instances of professional misconduct in Uttar Pradesh. A critical reflective attitude towards ethical norms may not work out given the poor educational system and screening process.

In such a situation a sanction-driven approach may cater to ensuring professional conduct amongst lawyers. A retired Supreme Court Justice, Mr Justice Markandey Kathju, once observed in open court the following, regarding an appeal that had come to his court from the High Court of Uttar Pradesh: "There is something rotten at Allahabad (Uttar Pradesh) High Court."[27]

The idea behind taking the powers away from the High Court and vesting them in an independent regulator was to ensure the independence of the legal profession.[28] The ideal of independence has clearly damaged the integrity which was intended to be protected. It was a holy balance which was intended, and not independence at the cost of integrity and efficiency. This has already been pointed out by many distinguished jurists, namely, that the disciplinary committee of the Bar Council has failed the country and there is a need to devise a system that admits the claims of efficiency, transparency and integrity along with independence.

There are voices calling for the creation of independent tribunals for adjudicating professional misconduct of lawyers. This would ensure keeping a check on bias in conducting transparent disciplinary proceedings.

5.1. Consumer Protection Act

The National Consumer Commission came out with a decision clearly roping in "services" by lawyers, under the Consumer Protection Act, 1986. The Commission picked up this line of reasoning from the nature of "services" rendered by doctors and argued that if the services rendered by doctors – being professionals – could be adjudicated positively by the National Consumer Commission, then there could not be any reason why services rendered by lawyers could not also be.[29] However, this was appealed before the Supreme Court, which stayed the matter indefinitely.

This clearly reflects the need to rethink the sanctions imposed in instances of professional misconduct by lawyers.

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[27] *Something Rotten in Allahabad High Court: Supreme Court*, The Times of India, November 26, 2010 (Feb. 20, 2017), available at http://timesofindia.indiatimes.com/india/Something-rotten-in-Allahabad-High-Court-Supreme-Court/articleshow/6994988.cms.

[28] Law Commission of India, Oct. 1978, 75th Report on Disciplinary Jurisdiction under the Advocates Act, 1961 (Feb. 20, 2017), available at http://lawcommissionofindia.nic.in/51-100/report75.pdf.

[29] D.K. Gandhi v. M. Mathias, III (2007) CPJ 337 (NC).

Concluding Remarks

The lack of integrity on the part of the Bar is clearly at the heart of the nexus between rules on professional ethics and the backlog of cases in the state.

For formative ethics to play a stellar role in embedding norms of professional ethics, the principles of ethics must be blended into courses and practical training across all the years of study and training in the law schools. This would ensure that crucial norms of professional ethics are discussed and debated and that they shape the practical understanding of the applicability of the law against the backdrop of a solution-oriented approach. The absence of any adequate recourse against going on strike by lawyers under the BCI Rules on Professional Standards and Etiquette is deeply troubling. There have been recurring suggestions made to the BCI to incorporate a rule against striking and for a strike to be recognized as "professional misconduct." The entry to the Bar must be made tougher and process-oriented institutions must be put in place to maintain a continuous check, ensuring efficiency and transparency in the functioning of the Bar. India stands at the crossroads of a transformation wherein debates on the entry of foreign law firms into India are incessant. This would certainly entail a deeper commitment from Indian stakeholders to ensure transparent, efficient and fair processes are in place. Any changes that are brought about must be directed in this way.

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WTO ACCESSION OF BRICS COUNTRIES: THE CHINESE EXPERIENCE

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The stages of reforms under the influence of requirements of the World Trade Organization are considered on the basis of an analysis of Chinese legislation. Four stages of preparation by the People's Republic of China for accession to the WTO within which there was a transformation of the legal system of China from 1982 to 2001 are described. The sources of Chinese lawmaking are presented and systematized as the basis of the economic legislation of the PRC at the stage of preparation for inclusion of China in the WTO. Attention is drawn to the particularities of the power organization of the Chinese state, in which there is no separation of powers into three branches: legislative, executive and judicial. This, in turn, allows to mark the feature in the economic sphere of legal regulation in China connected with the existence of the rules established by the Supreme National Court as a source of law. To represent the dynamics of normative-legal regulation of foreign trade activities, China has used the system of dialectical and universal methods of knowledge; general scientific methods (induction and deduction) and techniques (analysis and synthesis); as well as a special method – formally-legal. The identified course and direction of changes in legal support of domestic and foreign economic processes in China suggests the possibility to consider the experience of China in the promotion of Russia in the international trading community.

The authors propose that the entry of China into the WTO is of interest to the BRICS countries as long as China achieves optimal utilization of the WTO's external economic opportunities. In addition, China has established a legally solid basis for the development of market relations in the state.

Keywords: China; national legislation; WTO accession; market economy; foreign trade activity.

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Introduction

China's entry into the World Trade Organization (WTO) on December 11, 2001 marked the beginning of a new era of economic development and global changes in the economic and social life of the country. To meet accession requirements, China had to accept a broad range of obligations and this influenced the legal regulation of the most important spheres of the country's life. China's integration into the international trade system required economic changes and the transformation of legal support of reform processes. The history of China's accession to the WTO reflects the stages of reform of national legislation in accordance with international trade cooperation requirements.

1. Stages of China's Entry into the WTO

The beginning of China's entry into the international trading community occurred with the signing of the General Agreement on Tariffs and Trade (GATT) on October 30, 1947 by the Kuomintang Government to become a member, along with twenty-three other countries, of GATT/WTO.[1] The People's Republic of China (PRC) began participation in GATT/WTO bodies as an observer (without a right to vote) only in 1982. At this time the priority was given to the formulation of program documents in which the course and direction of further economic development were defined and the specific priority of Chinese economic growth objectives was listed. In the sphere of innovation, this relates to the PRC's Science and Technology Development Program for 1978–1985 and Program 863.

A number of laws and regulations were passed and put into effect. To widen the exchange of engineering information with other countries and to advance international economic cooperation, the PRC adopted the Act "On Joint Chinese and Foreign Companies Limited by Shares" at the Second Session of the National People's

[1] Up to 1949, China was represented in GATT by the Kuomintang Government. After the founding of the PRC in 1949 the new government was absent from GATT participation, though never withdrawing its claim to status as an original contracting party to the agreement. In 1986, China decided to resume a position in GATT and obtained the status of observer. When first applying for accession to GATT, China hoped for automatic (unconditional) restoration of membership in the organization. But, all together, the negotiation process with GATT/WTO lasted 15 years (1986–2001).

Congress (NPC) of the 5th Convocation held on July 1, 1979. As per this Act, foreign companies, enterprises and other market participants (both legal entities and natural persons) are allowed to establish and enter into joint national ventures in China upon authorization by the Chinese government. The Act stipulated the obligation of the Chinese government to protect the economic rights of foreign members of joint ventures in general and in respect of investments and profit share in particular, all of which was required to be set down in articles of association, contracts and agreements subject to compulsory approval by the Chinese government.

This stage (first period, 1947–1982) was necessary for preparation by China to become a member of the world economic community and subject of international economic and legal regulations. The adoption at this time of legislative acts with economic content by the Chinese government was aimed at the liberalization of foreign trade and foreign economic activity in order to improve China's path to accession to the WTO.

Starting in the early 1980s we can note the following stage of movement by the PRC towards WTO membership (second period, 1982–1987). The admission of the PRC in 1982 to GATT without a right to vote was accompanied by new requirements for China. These requirements related to access for American service companies to the Chinese market and thus also directly related to domestic policy issues of China development. In order to resolve the situation, the number of Chinese GATT/WTO negotiation members had to be increased. If only the Ministry of Foreign Trade and Economic Cooperation together with the Customs Committee participated in negotiations at the start, in 1982–1987 other interested bodies and agencies joined in as needed.[2] The general public had almost no information on the process of negotiations on GATT/WTO accession.

Simultaneously, Chinese economic legislation (laws and regulations) was aligned with the prospects of development of the market economy in the country. In 1983, to ensure implementation arrangements of PRC Act "On Joint Chinese and Foreign Companies Limited by Shares" (1982), the State Council of the PRC published the decree "On Application of PRC Act on Joint Chinese and Foreign Companies Limited by Shares" (September 20, 1982). The decree stipulated the procedures for the establishment and registration of joint ventures, legal forms and authorized capital, methods of authorized capital payment, management bodies, and application of technologies, land allocation rights, purchase and sale, taxation, currency control, fiscal bookkeeping, employment, trade unions, duration of activity and liquidation procedures and dispute settlement.[3]

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[2] Liang Wei, *China's WTO Negotiation Process and Its Implications*, 11(33) Journal of Contemporary China 683–719 (2002).

[3] Later these regulatory acts were amended (January 15, 1986, December 21, 1987, June 22, 2001, January 8, 2011, February 19, 2014) (Feb. 25, 2017), available at http://pavel.bazhanov.pro/translations/chinaeconomiclaw/china_sino_foreign_equity_enterprise_implementation/.

Almost simultaneously with this decree, the State Council adopted and approved "Rules of Registration and Regulation of Activity of Permanent Representations of Foreign Companies in the PRC." These rules were published by the Central Office of the PRC Commerce and Industry Administration in 1983.[4]

"General Provisions of Civil Legislation of the PRC" and PRC Act "On Companies with Foreign Capital" were signed at the Fourth Session of the National People's Congress of the 6th Convocation held on April 12, 1986 to "regulate civil relations due to requirements on development of social modernization… and taking the real national situation into account." One section of the "General Provisions" was dedicated to the application of legislation in civil relations of China with the rest of the world.[5]

From the standpoint of legal support of the development of the national economy, PRC Act "On Companies with Foreign Capital" (latest edition, 2000) is of interest. By this Act the PRC gave impulse to the development of the Chinese economy and added one more step to the deepening and widening of foreign economic cooperation, including in fields relating to engineering. A concrete result was that foreign investors (companies and other business units or natural persons) were given an opportunity to establish companies in China through the use of foreign capital.

At this stage, then, China shifted from permission to establish joint companies limited by shares, to the opening up of the opportunity to establish companies fully based on a foreign investor's capital. A fundamental condition for establishing such companies was an obligation to a positive influence on the development of the national economy of the PRC. Priority was to be given to companies with foreign capital that applied state of-the-art technologies and exported products.

The PRC Customs Code was adopted at the Nineteenth Session of the Permanent Council of the National People's Congress (NPC) of the 6th Convocation held the next year on January 22, 1987. The Code marked one of the crucial turns of direction in the modernization of the economic development of China – the "facilitation of foreign economic ties in commerce, research and development and cultural exchange."[6]

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[4] Today this document is invalid due to adoption of a new one in 2011 which stipulates the procedure for accreditation, registration of changes and liquidations of representative offices of foreign companies – Directive "On Registration of Representative Offices of Foreign Companies" (Order of PRC State Council No. 584). This new document became the basic legal act that determines the procedure for the establishment of representative offices of foreign companies in China and the procedure for registration, alteration of registration and annulment of registration (Feb. 25, 2017), available at http://pavel.bazhanov.pro/books_publications/publications/representative_office_registration_new_rules_2011/.

[5] General provisions of PRC Civil Law, adopted at the Fourth Session of the National People's Congress of the 6th Convocation held on April 12, 1986 (Feb. 25, 2017), available at http://chinalawinfo.ru/civil_law/general_principles_civil_law.

[6] PRC Customs Code, adopted at the Nineteenth Session of the Permanent Council of the National People's Congress of the 6th Convocation held on January 22, 1987, amended under Directive "On Amendment of the 'Customs Code of the People's Republic of China'", adopted at the Sixteenth Session of the Permanent Council of the National People's Congress of the 9th Convocation held on July 8, 2000 (Feb. 25, 2017), available at http://chinalawinfo.ru/economic_law/law_customs/law_customs_ch1.

China's desire to join the WTO engaged with the necessity to harmonize national legislation with WTO requirements and to align legislation with international norms of market economy countries. That is why the first articles of many legal acts adopted at the WTO accession preparation stage contained the following purpose of legal regulation – assistance in market economy development.

A GATT working group to study China's WTO accession application was created in 1987, and this started long and complicated negotiations on China's accession to the WTO, and it also helps to identify the third stage of this process.

During this (third) period in China's process of accession to the WTO (1988–1994) (up until GATT became the WTO) there were nineteen meetings of the GATT working group on China's accession. As a result of the actions of the Chinese government on June 4, 1989 in putting down the pro-democracy protests in Tiananmen Square, the hardline stance of Western countries against China's accession complicated the negotiation process. Shortly afterwards, in 1990, within the scope of the meetings of the working group there followed discussions on the economic policy of the PRC. In 1993, China presented its version of the Memorandum on National Foreign Trade System.

It should be pointed out that to hasten its accession to GATT by the end of 1994 China fulfilled almost all requirements. These requirements related to, among others, the creation of a unified taxation system and a unified floating national currency exchange rate, the decrease in the direct planning of foreign trade, the decrease in the number of goods for compulsory licensing and quota allocation, and the canceling of direct export subventions.

Economic legislation was improved in the second half of the 1980s to the beginning of the 1990s. PRC Act "On Cooperation Joint Ventures of Chinese and Foreign Capital"[7] was adopted at the First Session of the NPC of the 7th Convocation held on April 12, 1998. The purpose of the Act was to broaden economic cooperation and the exchange of engineering information with foreign countries. This Act defined the general requirements for the establishment of joint ventures in the PRC based upon the mutual participation of Chinese and foreign companies (cooperation companies). Cooperation joint ventures in the PRC became an alternative to the joint company limited by shares or a company with 100 percent foreign capital.[8]

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[7] PRC Act "On Contractual Joint Chinese and Foreign Ventures" amended under Decision "On Amendment of PRC Act 'On Contractual Joint Chinese and Foreign Ventures'" at the Eighteenth Session of the Permanent Council of the National People's Congress of the 9th Convocation held on October 31, 2000.

[8] PRC Act "On Cooperation Joint Ventures of Chinese and Foreign Capital" adopted at the Second Session of the National People's Congress of the 5th Convocation held on July 1, 1979; amended by Decision "On Amendment of PRC Act 'On Joint Chinese and Foreign Capital Ventures Limited by Shares'" taken at the Third Session of the National People's Congress of the 7th Convocation held on April 4, 1990; amended by Decision "On Amendment of PRC Act 'On Joint Chinese and Foreign Capital Ventures Limited by Shares'" taken at the Fourth Session of the National People's Congress of the 9th Convocation held on March 15, 2001 (Feb. 25, 2017), available at http://chinalawinfo.ru/economic_law/law_equity_joint.

Together with the new laws previously adopted, Acts were modified in accordance with the necessity to take into account the development of a market economy in China. PRC Act "On Joint Chinese and Foreign Companies Limited by Shares" was amended in 1990 to widen international economic cooperation and the exchange of engineering information in the PRC. Decree "On Application of PRC Act on Joint Chinese and Foreign Companies Limited by Shares"[9] was also amended. Implementation arrangements in respect of the Act "On Joint Chinese and Foreign Companies Limited by Shares" were amended by Temporary Direction "On the Duration of Activities of Joint Chinese and Foreign Companies Limited by Shares" (1990). This Temporary Direction was aimed to determine cases where joint companies limited by shares should or should not set a time-limit on their activities.

On the way to a market economy it was important to normalize the establishment and activities of companies and to support the legal rights and interests of the companies, members (shareholders), and creditors. For this purpose, PRC Act "On Companies"[10] was adopted in 1993. This Act regulated the establishment in the PRC of limited liability companies and joint-stock limited liability companies. These legal forms are the most requested for business activity in today's China.

The implementation arrangements of this Act were set forth in Directive "On Registration of Authorized Capital of Companies" that referred to authorized capital and payment of shares in authorized capital. Later, in 2004, the business profile of companies was clarified by Direction "On Registration of Corporate Business Profile"[11] and rules for registration of the establishment, changes and annulment of registration, due to being struck off the Business Register (limited liability companies and joint-stock limited liability companies) were detailed in Directive "On Business Registration."[12]

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[9] Decision "On Amendment of PRC Act 'On Joint Chinese and Foreign Capital Ventures Limited by Shares'" taken at the Third Session of the National People's Congress of the 7th Convocation held on April 4, 1990 (Feb. 25, 2017), available at http://chinalawinfo.ru/economic_law/law_equity_joint.

[10] PRC Act "On Companies" adopted at the Fifth Session of the Permanent Council of the National People's Congress of the 8th Convocation held on December 29, 1993; first amendment was made by Decision "On Amendment of PRC Act 'On Companies'" taken at the Thirteenth Session of the Permanent Council of the National People's Congress of the 9th Convocation held on December 25, 1999; second amendment was made by Decision "On Amendment of PRC Act 'On Companies'" taken at the Eleventh Session of the Permanent Council of the National People's Congress of the 10th Convocation held on August 28, 2004; edited by Decision of the Eighteenth Session of the Permanent Council of the National People's Congress of the 10th Convocation held on October 27, 2005 (Feb. 25, 2017), available at http://chinalawinfo.ru/economic_law/law_company.

[11] Order of Central Government Office of Commerce and Industry Administration of the People's Republic of China, No. 14-2004 (Feb. 25, 2017), available at http://pavel.bazhanov.pro/translations/chinacivillaw/china_enterprise_business_scope/.

[12] Directive "On Registration of Companies" (edited February 19, 2014) (Feb. 25, 2017), available at http://pavel.bazhanov.pro/translations/chinacivillaw/china_company_registration_regulation_statut/.

PRC Act "On Foreign Trade"[13] adopted in 1994 played an important role in the further development of a market economy. The Act stipulated key rules relating to the access of companies to foreign trade activity, export and import of products, technologies, international trade in services, protection of intellectual property rights, foreign trade investigations, foreign trade assistance, and legal protection measures and also stipulated legal liability for foreign trade offenses.[14]

Legislation improvement measures to create and improve Chinese market mechanisms for the economy were taken between 1987 and 1994. But the anticipated accession failed, mainly due to the unwillingness of United States to grant China developing country status in the WTO. The growth of Chinese products exports in the early 1990s alarmed American business leaders, who were extremely angry with the violations of intellectual property rights in the People's Republic of China.

According to the United States International Trade Commission, 2009 report, in the U.S. the biggest losses from illegal intellectual property use were found in the copyright area: from $10.2 to $37.3 billion; furthermore, illegal use of trademarks: $1.4 to $12.5 billion. From $0.2 to $2.8 billion was lost from illegal use of patents; from $0.2 to $2.4 billion was lost from misappropriation of trade secrets.[15]

Violation of intellectual property rights is still widespread in China despite the best efforts of the government. In addition, China signed the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement); furthermore, the PRC is a party to all major international agreements in the field of intellectual property (Paris Convention for Protection of Industrial Property since 1985, Madrid Agreement Concerning the International Registration of Marks since 1989, Berne Convention for the Protection of Literary and Artistic Works since 1992, the Protocol Relating to the Madrid Agreement since 1995, and the World Intellectual Property Organization Copyright Treaty since 2007).

The acute need for improving intellectual property rights protection mechanisms in China led to the necessity of improving the quality of this sector's legal regulation at the national level. A number of laws of the PRC have been adopted in this area, namely on trademarks (1982, as amended in 1993, 2001 and 2013), on patents (1984, as amended in 1992, 2000 and 2008) and on copyright (1990, as amended in 2001 and 2010).

Legal regulation of copyright and related rights in China is also carried out on the sub-legislative level. There are the regulations of the State Council of the PRC[16] and

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[13] PRC Act "On Foreign Trade" adopted at the Seventh Session of the Permanent Council of the National People's Congress of the 8th Convocation held on May 12, 1994 and amended by Decision taken at the Eighth Session of the Permanent Council of the National People's Congress of the 19th Convocation held on April 6, 2004 (Feb. 25, 2017), available at http://chinalawinfo.ru/economic_law/law_foreign_trade.

[14] *Id.*

[15] Available at http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_146029.pdf.

[16] "On Application of the Trademark Law of the PRC" (State Council of the PRC Decree No. 651, as amended in 2014).

departmental acts of the Main State Directorate of the Administration for Industry and Commerce of China, the State Administration for Intellectual Property of China, and others.[17]

An important role in ensuring the protection of copyright is played by the explanations of the Supreme People's Court of China that are devoted to consideration of civil and administrative cases dealing with patents. They are as follows: Provisions of the Supreme People's Court of China on Several Issues of Application of Law when Considering Patent Litigations, Explanation of the Supreme People's Court of China on Several Issues of Application of Law in Patent Infringement Litigations, and Several Provisions of the Supreme People's Court of China on Application of Legislation in Stopping Patent Rights Violations before Commencing a Suit.

There is also the Explanation of the Supreme People's Court of China on Several Issues of Application of Law in Civil Suits Dealing with Well-Known Trademarks. This explanation clarifies the rules for application of the Law of the PRC on Trademarks and Regulations on Recognition and Protection of Well-Known Trademarks by the people's courts. The Explanation of the Supreme People's Court of China on Issues of Legislation and Jurisdiction Limits in Trademark Cases clarifies the rules of jurisdiction in respect of trademark-related lawsuits, and it contains some rules of application of the Law of the PRC on Trademarks in connection with the amendments of 2001.

It should be noted that while reforming economic legislation, legislation in the sphere of intellectual property rights protection and establishing new institutions, China was seeking collaboration with the WTO and at the same time creating a model of "governing in harmony with multilateral institutions" to achieve its national development objectives.

The period from 1995 to 2001 was the final stage of the negotiation process, a dynamic period in China's path to accession to the WTO. It was during this period of time that GATT transformed into the WTO; also, China's negotiations, now with the WTO, became more complicated. The difficulty in the negotiation process centered around the main question, On what terms will China join the WTO? That is to say, is China a developed or developing country? The answer remained unresolved. Western countries led by the United States were of the common mind that China should not be given the exclusive right of preferential status of a developing country in contravention of provisions of WTO agreements. The position of the United

[17] Regulations on Recognition and Protection of Well-Known Trademarks dated July 3, 2014, Regulations on Registration and Regulation of Collective and Certification Trademarks dated April 17, 2003, Trademark Testing and Trademark Review Standards dated December 31, 2005, Trademark Review Rules as amended on May 28, 2014, Regulations on Trademark Essence Verification as of February 8, 2007, Regulations on Application of the Copyright Law of the PRC (State Council of PRC Decree No. 633, in force since March 1, 2013), Regulations on Collective Management of Copyright (State Council Decree No. 429, in force since March 1, 2005), as well as departmental acts of the State General Administration of Press, Publication, Radio, Film and Television of China (National Copyright Administration of the PRC before 2013).

States and Western countries was justified by the fact that if admitted to the WTO as a developing country, China would exert influence from inside the organization on global economic processes in favor of the "third world" and its own national interests.

But China continued to insist on developing country status in terms of the agreements of the Uruguay Round of multilateral trade negotiations. At this stage, Chinese negotiation tactics changed: China took up a wait-and-see attitude. As a result, the matter was resolved in China's favor – its admission to the WTO would be with developing country status.

Accepted as a developing country, and under the corresponding provisions of the agreements, as a WTO member China not only received brand new powers, but also retained the reformed previous powers of a global business entity. Among them, it is important to highlight:

– The right to a three–five year transition period for a step-by-step opening of its domestic market, decreasing of import duties, continuation and energizing of overall market reforms;

– Full membership in WTO agreements, which allows, among other actions, to increase exports;

– The right of a developing country to subsidies at the rate of 8.5 percent of product value;

– The right to subsidies for overall domestic production not aimed at export (under the arrangements of agreements with the WTO);

– The right to preserve the system of state trading, including the government's right to price key products;

– The right to preserve limits while opening the service industry to foreign capital;

– The right to export duties for more than 80 groups of products involving protection of national resources of the People's Republic of China;

– The right to exercise quality check of import and export outputs;

– The right to protect and raise above market competition levels branches of the national economy connected with national security and thereby not open to foreign capital (defense industry, publishing, film industry, etc.).

Accession negotiations became active again after Chinese-American relations warmed and the exchange of visits of U.S. and PRC presidents in 1997–1998. An important factor in the revival of the negotiations process of that time was the high-powered lobbying of the U.S. Congress by American business leaders involved in business operations in the Chinese domestic market.

Following the signing of the agreement with the United States in 1999, one of the still unsettled matters pertained to permanent, most-favored nation treatment (MFNT) for the PRC. The United States did not intend to automatically extend MFNT to the PRC in trade even after its accession to the WTO. The United States advocated

the idea of keeping the Jackson-Vanik Amendment to the U.S. Act "On Trade" of 1974 in force. In any event, the problem was resolved in the favor of China. Later, a bilateral agreement between China and the European Union was signed, in May 2001. In December of that year China was admitted to the WTO as a full member.

The fourth period (1995–2001) in China's process of accession to the WTO had the particularities of legal support of Chinese economic development. First of all, national legislation was vigorously updated. Previously adopted laws were further detailed by regulations. A number of rules and regulations appeared in 1995, some of which are listed below.

"Detailed Rules of Application of PRC Act 'On Cooperation Joint Ventures of Chinese and Foreign Capital'" clarified some provisions of PRC Act "On Cooperation Joint Ventures of Chinese and Foreign Capital." These rules related to elaboration of procedures on the establishment and liquidation of cooperation in joint ventures, payment of contributions, arrangement of management bodies of joint ventures, and procedures of profit distribution among members.[18]

Temporary Directions "On Some Matters of Establishment of Joint-Stock Limited Liability Companies with Foreign Capital" adopted by the PRC Ministry of Foreign Trade and Economic Cooperation (today, the PRC Ministry of Commerce) determined requirements for newly established joint-stock companies with foreign capital and procedures of transformation of existing companies into joint-stock companies with foreign capital.[19]

Temporary rules "On Regulation of Representation of Foreign Accounting Companies" adopted by the PRC Ministry of Finance in 1996 (still in force) defined the procedures for the establishment of representative offices of foreign accounting companies (including accounting companies with origins in Hong Kong, Macao, and Taiwan).[20]

Some Directions "On Change of Share Participation of Members of Companies with Foreign Capital" were adopted in 1997 to clarify rules of registration of changes in allocation of interests to members of companies with foreign capital.[21]

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[18] Detailed rules of application of PRC Act "On Cooperation Joint Ventures of Chinese and Foreign Capital" (2005) (Feb. 25, 2017), available at http://pavel.bazhanov.pro/translations/chinaeconomiclaw/china_sino-foreign_cooperation_enterprise_law_implementation/.

[19] Temporary Directions "On Some Aspects of Establishment of Joint-Stock Limited Liability Companies with Foreign Capital" adopted in 1995 by the PRC Ministry of Foreign Trade and Economic Cooperation (Feb. 25, 2017), available at http://pavel.bazhanov.pro/translations/chinaeconomiclaw/china_foreign-invested_joint_stock_companies/.

[20] Temporary Directions "On Regulation of Representation of Foreign Accounting Companies" adopted in 1996 by the PRC Ministry of Finance (Feb. 25, 2017), available at http://pavel.bazhanov.pro/translations/china_accounting/china_foreign_accounting_firms_representative_offices/.

[21] Some Directions "On Change of Share Participation of Members of Companies with Foreign Capital" adopted in 1997 (Feb. 25, 2017), available at http://pavel.bazhanov.pro/translations/chinaeconomiclaw/china_foreign invested_enterprise_equity_change/.

PRC Act "On Contracts" dated March 15, 1999[22] seems to be the most important for economic modernization. It became a principal Act governing the conclusion of contracts in the PRC between equal civil law subjects. Act "On Contracts" determined key principles of contractual law, general provisions for conclusion, execution and termination of contracts, and specific rules referring to several types of contracts.[23] The Act was adopted to protect the legal interests of contractual parties for such contracts so as not to affect the social or economic situation in the country and to promote social cohesion and modernization.[24]

Furthermore, in 2000 the "List of Priority Branches for Foreign Investments in Western and Central Regions" was first elaborated. The List defined the types of activities where foreign investments are encouraged in the western and central regions of the country.[25]

2. System of China's "Economic" Law

It should be pointed out that the change of legislation is one of the directions of structural reform of the economy at any stage of national development. Legal support of economic reforms should be documented by laws and regulations. The content of legal acts reflects the search for optimal models of modernization of the economy in order to introduce an open economic order. Rules that govern titles, competition, money turnover, finances, taxes, foreign economic activity, etc. are reflected in legal forms and enforced by legal instruments. Thus, enlargement of the basis for economic growth poses a governmental challenge related to the improvement of the quality of legal regulation of the economy.

Economic legislation of China includes different types of legal acts.[26]

1. PRC Organic Law.

2. Acts (laws and other acts adopted by the National People's Congress and the Permanent Council of the National People's Congress). For example: *General*

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[22] PRC Act "On Contracts" adopted at the Second Session of the National People's Congress of the 9th Convocation held on March 15, 1999 (Feb. 25, 2017), available at http://chinalawinfo.ru/civil_law/law_contract.

[23] *Id.*

[24] Современное право Китайской Народной Республики (обзор законодательства 1978–2010 гг.). Часть 1: 1978–2001 гг. [*Contemporary Law of the People's Republic of China (Legislation Review 1978–2010). Part 1: 1978–2001*] (Moscow: IFES RAS, 2012) (Feb. 25, 2017), also available at http://istina.msu.ru/media/publications/book/97d/49d/3401367/SV_Pravo_KNR_ch.1_2012..pdf.

[25] The 2013 edition of this document is in force (Feb. 25, 2017), available at http://pavel.bazhanov.pro/translations/chinaeconomiclaw/china_western_central_regions_foreign_investment_encouraged_industries_catalogue/.

[26] Information on examples of legal and regulatory economic acts of the PRC was obtained from Pavel Bazanov's website (Feb. 25, 2017), available at http://pavel.bazhanov.pro/translations/chinalaw_list/.

provisions of PRC Civil Law, PRC Civil Code/PRC *Act* "On Civil Process," PRC *Act* "On the Struggle against Unfair Competition" (1993), etc.; *Decision* of the Permanent Council of the National People's Congress "On Creation of Intellectual Rights Courts in Beijing, Shanghai and Guangzhou."

3. State Council Acts (Acts of the Central People's Government). For example: "*List* of Investment Projects approved by the Government" (2014); *Direction* "On Application of PRC Act on Joint Chinese and Foreign Companies Limited by Shares" (1983, edition 2014); *Temporary Direction* "On Value Added Tax" (1994, edition 2008); *Provision* "On Control of Foreign Investments Distribution" adopted by PRC State Council (2002); "*Detailed rules* of application of PRC Act on Cooperation Joint Ventures of Chinese and Foreign Capital" (1995); "*Rules* of Partnerships Registration" (edition 2007); "Project of Arbitration Institutions Rearrangement" (1995); Some *recommendations* of PRC State Council "On Further Performance of Works on Use of Foreign Investments" (2010); *Notification* of Chancellery of PRC State Council "On Creation of System of Safety Control of Consolidations and Mergers of Chinese Companies by Foreign Investors" (2011).

4. Official Acts (regulatory acts of ministries and agencies of the PRC State Council). For example: "*List* of Branches for Foreign Investments" (2015); *Direction* "On Registration of Authorized Capital of Companies" (2014); *Temporary Direction* "On Duration of Joint Companies Limited by Shares of Chinese and Foreign Capital" (1990); *Some Directions* "On Change of Share Participation of Members of Companies with Foreign Capital" (1997); "*Rules* of Invoices Regulation" (adopted by Central State Tax Office of the PRC (CSTO PRC)) and *Detailed rules* of Application of "Rules of Invoice Regulation" (2013); *Temporary customs rules* on "Regulation of Companies' Solvency" (adopted by Central Customs Office of the PRC (CCO PRC), 2014); *Detailed rules* of Regulation of State Trade upon Import of Crude Oil, Oil Products and Fertilizers; *Notification* of PRC Ministry of Public Security and State Office of PRC Commerce and Industry Administration "On Prohibition of Establishing of Debt Collecting Companies."

5. Judicial interpretations (interpretations of the Supreme People's Court and the Supreme People's Prosecutor's Office). For example: *Direction* of the Supreme People's Court "On Some Aspects of Administrative Hearings in Foreign Trade"; *Some Directions* of the Supreme People's Court "On Limitation of High Consumer Expenses of Debtors" (2010, edition 2015); *Interpretation* of the Supreme People's Court "On Limits of Enforcement of Law and Jurisdiction upon Hearing of Trademarks Cases" (2001); *Recommendations* of the Supreme People's Court "On Equal Legal Protection of Non-governmental Economy for Assistance in Sound Development of Non-governmental Economy" (No. 27-2014); *Notification* of the Supreme People's Court "On Some Matters of Enforcement of Arbitration Decisions Issued in Hong Kong" (Notification No. 415-2009).

It should be noted that a distinctive feature of legal regulation in the PRC is the existence of a specific source of law – rules set by the Supreme People's Court. This is related to the arrangement of government authority in which there is no separation

of powers among the legislative, executive, and judicial branches. Together with other branches of power, the judicial branch in China can also give interpretations in addition to delivery of justice. In the years of Chinese membership in the WTO, judicial practice related to the protection of intellectual property rights constantly has improved. The legislative activity of the Supreme People's Court allows the determination of the direction of development of law enforcement practice in the most important fields of government control.

6. International agreements (international agreements and contracts concluded by China with Russia and agreements between the PRC and the Specific Administrative District Hong Kong, Specific Administrative District Macao and Taiwan). For example: *Agreement* between the People's Republic of China (PRC) and the Specific Administrative District Hong Kong (SAD Hong Kong, Xianggang) on Close Economic Partnership (2003).

We can see that since preparations for accession to the WTO and even today Chinese legislation includes several categories and many legal acts; legislation includes both laws and regulations. Different spheres of economic activity of the country have received the attention of specific legal regulation.

As a rule, regulations ensure government control of a specific sphere of the economy and generally are adopted following enactment of a law. Thus, PRC Act "On Joint Chinese and Foreign Companies Limited by Shares" was adopted at the Second Session of the NPC of the 5th Convocation held on July 1, 1979. Within four years (1983), to ensure successful application of this Act, Norms and Rules on application of PRC Act "On Joint Chinese and Foreign Companies Limited by Shares" was adopted.

Directions, rules, recommendations, notifications, etc. contain procedures on the registration of joint ventures, arrangement of corporate management, land use, and so forth. Thus, legal regulation leads to elaboration and adoption of a rule or regulation that ensures implementation arrangements. For example, after PRC Act "On Partnerships" (1997) was adopted, Regulation Measures for establishing partnerships in the PRC by foreign companies and natural persons (2010) were elaborated; and Customs Code/PRC Customs Law (1987) was followed by adoption of Norms and Rules "On Customs Protection of Intellectual Property Rights" (2003).

A different lawmaking strategy is applied to tax relations where an advance regulation is used. First, regulations (temporary norms and rules/temporary directions) are adopted for an indefinite period of time. Many temporary norms and rules adopted in different periods of time are still in force in the PRC: Temporary PRC Norms and Rules "On Natural Resources Use Tax" (1994), "On Urban and Urban District Lands Tax" (1988), "On Property Assignment Tax" (1997), etc. The application of such norms and acts is then analyzed. Following analysis, the regulation either becomes a law or not.[27] This particularity of legal regulation of tax relations allows

[27] *Севальнев В.В.* Правовое регулирование налогообложения инновационного сектора КНР: Автореф. дис. … канд. юрид. наук [*Sevalnev V.V.* Legal Regulation of Taxation and Innovation Sector of the PRC: Abstract of PhD Thesis] 12 (Moscow, 2012).

the Chinese lawmaker to make the domestic laws more stable, and thus the legal norm in this case is the result of law enforcement practice approbation.

It is necessary to highlight the positive dynamics of Chinese legislation based on specifics of regulated spheres and deep analysis of existing norms. In the last stage of negotiations on the accession of the PRC to the WTO (the second half of the 1990s – early 2000s), the tax system was reformed and measures on encouraging foreign investments were taken. This was accompanied by important laws and directions "On Speedup of Technical Progress," "On Stimulation of Technological Solutions Implementation," "On Stimulation of Small- and Medium-sized Business," "Rules for State Bonuses Award in Technological Sphere," a set of measures related to implementation of the "Government Program of Middle-term and Long-term Development of Science and Technology for 2006–2020."

A national legislation alignment process was activated beginning in the early 2000s.[28] The harmonization of the use of economic and legal instruments for Chinese and foreign companies was continued. And the influence of WTO norms on Chinese national legislation became obvious. It was WTO accession that determined the necessity of implementation of the organization's requirements into economic activity in the PRC. Thus, China elaborated the legal support of industry, trade, innovative activities, and attraction of foreign investors ("On Value Added Tax Charged from Companies with Foreign Investments and Foreign Companies," PRC Act "On Contracts" 1999, Currency Control norms and rules, etc.).

Conclusion

The contemporary political situation is changing. Economic sanctions now have political origin. New priority directions of national security defined in January 2015 by the Central Politburo of the Communist Party of China require constant improvement of economic and legal instruments. Analysis of legislation shows the steady motion of China to market economy development. Alignment of national economic legislation with WTO requirements allows China's entrance into the unified legal space of foreign economic activity.

Side by side with WTO obligations accepted by China we can highlight harmonization of national legislation with international norms of market economy countries, and China has implemented them regularly. Furthermore, in terms of China's admission to the WTO, legislation and delivery of justice had to be reformed. The necessity of reforms was justified by improvement in transparency, unification of application of Chinese legal rules and the judicial review process.[29]

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[28] Jizeng Fan, *Constitutional Transplant in the People's Republic of China: The Influence of the Soviet Model and Challenges in the Globalization Era*, 2(1) BRICS Law Journal 50–99 (2015).

[29] Karen Halverson, *China's WTO Accession*: *Economic, Legal, and Political Implications*, 27(2) Boston College International & Comparative Law Review (2004) (Feb. 25, 2017), also available at http://lawdigitalcommons.bc.edu/iclr/vol27/iss2/6.

In this way, the Chinese experience of many years, from 1982 to 2001, to accession to the WTO passed through several stages. China did its best over the course of this time to get the most advantageous developing country member status in the WTO.

Despite stringent requirements and opposition during the negotiations on China's accession to the WTO, China made good use of the WTO's economic area resources in its own interests and created a relatively stable legal base for market relations development. It should be mentioned that China has learned how to use WTO legal instruments for the realization of its own national interests. For instance, in 2011 Chinese lawyers proved through the use of the WTO legal framework that the United States subsidized chicken output production. As a result, Beijing interdicted imports of this output from the United States to China, in strict accordance with WTO rules. The reality is that colossal correction work was conducted by China in order to bring Chinese legislation into line with WTO rules. On the whole, 1,400 laws were passed, 559 repealed, and 197 legal acts amended.

In order to carry out China's obligations as a member of the WTO, domestic administrative legal instruments and rules needed amendment. In twenty-five departments and state committees belonging to the Chinese State Council, in provinces, independent areas, and in cities of central submission a centralized check of laws and regulations was conducted.

In the Chinese experience we are able to see how strengthening the role of market legislation can change the model of state governing. New legal acts promoted change in the work of the Chinese government towards an increase in its efficiency. By reforming its economic legislation China has taken significant steps towards the development of market legislation and market economy.

Thus, this study concludes that the People's Republic of China managed to create a stable legal basis for the development of market relations in the state after admission to the WTO. Approximation of Chinese economic laws and the legal rules of the WTO was accomplished by means of three actions: implementation of WTO rules into Chinese legislation; references to WTO norms; and the presence of legal acts, which do not conflict with WTO rules. Economic legislation was the first to transform as Chinese companies needed protection of their rights and interests after entering into the international market.

We distinguish three major legal acts that influenced the development of foreign trade and foreign economic relations of China most of all after joining the WTO. Firstly, the 1994 law on foreign trade determined major rules of foreign trade for Chinese companies. Secondly, the Chinese law on enterprises backed by foreign capital stimulated the development of the Chinese market economy, and foreign economic and technical collaboration with foreign enterprises. Thirdly, the 1987 Customs Code determined and settled significant aspects of the modernization of Chinese economic development, including the necessity "to assist foreign economy connections and trade, scientific, technical and cultural exchange."[30]

[30] PRC Customs Code, *supra* note 6.

When the reforms of Chinese legislation took place it is important to take into account that WTO regulations had already become a part of Chinese national laws, which regulated foreign trade, investment, agriculture, the protection of Chinese companies, equalization of their rights and conditions when entering foreign markets, etc. WTO rules were implemented into national Chinese legislation to set up a united legal space for foreign trade relations. Taking into consideration the economic and legal measures undertaken by China and the results obtained afterwards, we can assume that China's entrance into the WTO was successful. And considering a number of similar geopolitical and economic characteristics, we can also designate these measures as useful for study and use in Russia.

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BOOK REVIEW NOTES

BRICS GLOBAL PERSPECTIVES*

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In 2001, the world began talking about the BRICs – Brazil, Russia, India and China – as a potential powerhouse of the world economy. Today, the BRICS (South Africa became a member of the bloc in 2010) and their activities are one of the most discussed issues in global economics and international politics. The acronym "BRICs" was initially formulated in 2001 by economist Jim O'Neill, of Goldman Sachs, in a report on growth prospects for the economies of Brazil, Russia, India and China – which together represented a significant share of the world's production and population. There are two opposite views on the BRICS bloc nowadays – from regarding the countries as the rapidly emerging economies and political powers that will be the "strategic pillars" of a renewed international system by 2050 to denying the BRICS have any real potential to become a true driver in the global arena.

In *Do the BRICS Still Matter?* Marcos Degaut, a political adviser at the Brazilian House of Representatives and former intelligence officer at the Brazilian Intelligence Agency, who holds a master's degree in international relations and a bachelor's degree in international law from the University of Brasilia, brings in-depth analysis and profound study to address the background and future of the BRICS, focusing on the countries' social, political, economic and cultural characteristics. The book provides the reader with a penetrating discussion of the BRICS countries' common

* Reviewed book: Marcos Degaut, *Do the BRICS Still Matter?* (Washington, DC: Center for Strategic and International Studies, 2015).

features and differences, strategic culture and foreign policy, and comes to the conclusion that the BRICS are not likely to deliver a new international system due to a number of evident disparities.

The goal of Degaut's study is to contribute a critical reasoning of the BRICS's strengths and weaknesses, to examine some of the bloc's constructive dimensions, with the core point referring to the political and economic relations among its members and to prove that existing cooperative actions are not efficient as to lead to a significant change in world power distribution.

It is Degaut's strong belief that the BRICS group remains primarily rhetorical, not concrete, and lacks palpable achievements leading to its survival and dominance in the global arena, though this statement may be quite controversial, taking into the account the real achievements of the BRICS group that can be traced in recent years.

The introductory section of the book offers an analysis of the term "BRICS" and a description of the initial steps in economic performance and the political sphere the BRICS countries took to become known worldwide. The concept of "BRICS" is thoroughly unveiled via a summary of O'Neil's and other researchers' ideas on the BRICS bloc and its economic development. To render his observations more illustrative, the author supplies data in a table showing G7 and BRICS economic results, namely GDP annual growth rates in 2003–2008. The BRICS figures are impressive when compared to the weak economic performance of G7 nations, proving that the BRICS countries have a "remarkable opportunity to coordinate their economic policies and diplomatic strategy not only to enhance their position as a grouping in the international economic and financial system, but also to be a stabilization factor in the world economy as a whole." However, the author argues that in the years that followed the BRICS group has made little progress toward building collective identity, creating an institutional apparatus and, it can be added, proposing meaningful legal mechanisms aimed at regulating specific activities and target actions to achieve set goals.

Moving forward, in his first section the author examines some of the common features shared by the BRICS as well as some of their differences. The research explicates relative deficiencies and strengths of the countries and demonstrates to what extent these characteristics may affect their mutual relations with the world. The second section is an analysis of the reasons for and outcomes of the BRICS cooperation models. The third section explains the author's reasoning on the BRICS countries' strategic cultures and foreign policies. The author presents his ideas on each country's individual motivation for joining the BRICS and assumptions they might have on being a part of the BRICS bloc. The third section demonstrates an interesting and original approach which, *inter alia*, seems the most open to discussion.

Referring to the similarities of the BRICS countries, the author draws the reader's attention, first, to their size and population, expanding domestic markets and huge

labour resources which are mostly unused. His second outcome in this section is that all five countries have exhibited impressive economic growth in recent years. The third feature the countries have in common is the important role they play in their respective regions. And, lastly, according to the author and other researchers, they "are all undergoing a military modernization effort aimed at preserving their strategic interests." In the same section the negative common characteristics are pulled together, including corruption problems, high rates of illiteracy and poverty, inequalities in regional economic income, dependence on commodities exports and foreign investment, and relatively small openness to the global economy. The author considers these characteristics to be the main barrier to effective collective action and global dominance.

BRICS cooperation is the focus of the author's attention in the next section. It is true that the BRICS have become a platform for dialogue and cooperation not only in economic, financial and development sectors, but also in the political sphere. This section explains in more detail that the BRICS members have presented a convergence of interests on a number of important issues – support for a multilateral trading system, conservative attitudes on sovereignty and opposition to the use of military power, among others. To depict the cooperation mechanisms more distinctively, the author underlines the milestones in the process, describing the most meaningful BRICS summits and noteworthy results. The mentioned initiatives have proved to be effective attempts to exhibit coordination and to set up the agenda for global economic and political governance of the BRICS as a group. However, it would be fair to say that some areas of cooperation remain outside the scope of the research and not highlighted in the book. Just a few examples would include the energy and energy efficiency field, food security and information security, socially vital areas such as international humanitarian assistance and the reduction of natural disaster risks, all of which are constantly in the focus of the BRICS countries' discussions and joint efforts. In addition, in the second section the author criticizes the BRICS joint action on the issues of climate change, future military alliance and strategy at the World Trade Organization which, according to the author, proves the lack of common ground and inability to act as a bloc. As illustrated in other editions, the BRICS nations have undertaken very different role behaviours within climate change governance. In fact, the different perspectives on climate change were apparent before the Kyoto Protocol ending, but since 2012, when a new global agreement was needed to curb emissions, the BRICS countries have taken up voluntary emission reduction targets. In recent years, all BRICS nations have adopted climate change strategies in which they outline the steps to achieve emission reduction goals. This demonstrates that cooperation among the countries in the climate sector is on the rise and on certain issues the BRICS are capable of serving as a useful platform.

In the last section, which is mostly of an analytical nature, the author describes the strategic cultures of the BRICS countries, and their individual political and ideological

preferences with the focus on how the cultural peculiarities may influence each country's position in the BRICS bloc as well as in the global arena.

In this section, China is presented as an apparently paradoxical "dualistic" strategic culture based at the same time on conflict-averse and defensive-minded Confucian-Mencian principles and on current political doctrines which encourage military solutions and nationalism. The author's assumption as to China's reasons for participating in the BRICS is that, "consistent with the principles of peaceful development and international engagement, it can use the group to reduce the impression it is seeking a superpower role in world affairs by emphasizing multilateralism and its status as a developing nation." Having got enough political and economic weight in the globalizing world, China might become rather hesitant to acquiesce to the common interests and priorities of its BRICS partners.

Two basic characteristics of the Brazilian strategic culture, according to the author, are that the country sees itself as a peaceful nation and believes it is destined for greatness. Brazil's top priority is to raise its profile on the international stage in order to have a greater voice in global affairs, and this is the reason for the country's active participation in different international organizations (WTO, IMF, World Bank), the BRICS included. As stated in the book, Brazil sees its BRICS affiliation as a passport to global leadership.

The author's view on Russian strategic culture is that the country tends to use force to achieve its strategic objectives. Another driving force behind Russian foreign policy is its rapid economic growth. "Russian leaderships have fostered democratic values such as freedom of political expression, political pluralism, freedom of speech, and the due process of law, and also have constantly manifested goals of becoming a more significant actor in the international arena." On the other hand, the author underlines that the main elements of Russia's strategic culture are combativeness, competitiveness, political assertiveness and geopolitical ambitions. In the author's opinion, Russia values the BRICS as a pathway to a multipolar world and as a platform to advance the country's geostrategic interests.

The bottom line of Indian foreign policy is a quest for strategic autonomy. The country shows a pragmatic outlook to international relations even while it strongly supports the global trade system, international organizations, and international law and principles. The author summarizes, however, that India "not only lacks the strategic weight required to shape global affairs, but to some extent, it also seems not to have a culture of strategic planning." By joining the BRICS, India may search for some useful instruments to obtain international support and respect.

With the incorporation of South Africa into the "BRICS," the bloc gained more weight, representativeness and legitimacy, as the group has become more credible with regard to protecting the interests of developing nations. For South Africa itself membership in the BRICS has assisted in enhancing its continental leadership in Africa.

In the concluding section, Degaut asserts that the BRICS have become a relevant power on the international stage through economic and political cooperation and by taking important measures to tackle global issues. However, Degaut is convinced that the BRICS countries' efforts and measures are limited in their depth, scope and acceptance, and, as a whole, the group lacks cohesion, resources, common priorities and capacity to shape their own global agenda.

Though much of Degaut's reasoning and conclusions seems to be disputable, the volume should be of real interest to scholars, policymakers and even students engaged in BRICS studies or activities. Degaut provides concise and profound analysis of the BRICS countries' political background and aspirations as well as theoretical explanations and practical examples of what the BRICS countries' perspective is vis-à-vis the global community.

It becomes clear then that today the BRICS are capable of serving as a platform for international cooperation and meaningful action, provided the group can achieve convergence among its members (even with their different priorities and approaches) and, moreover, prepare and present sufficient legal mechanisms which will support the weight of the entire group on the international stage and help in adopting concrete measures for their common agenda.

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