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Front Pages

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Gregory T. Papanikos
President
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Issues on the Protection of Civilians in UN Peacekeeping Operations

By Katsumi Ishizuka•

The Protection of Civilians (POC) is a newly advocated norm in the post-Cold War period. However, it still has several issues and problems to be tackled in UN peacekeeping operations. The cases of Sudan and the DRC convinced of the problem of "filling the gap". That is, one needed to fill the gap in the definition of POC between the UN and non-UN agencies, and between military and civilian staff within the UN. One also suffers from the failure of filling the gap in the attitude towards robustness in the operations between peace enforcement operations and normal UN forces. One also identified the common issues of lack of proactive actions in some cases of UN peacekeeping in the DRC. The case of South Lebanon convinced that UN peacekeeping operations would not have capability to protect the civilians in their operational areas when the states take determination to launch the warfare bypassing UN troops.

Keywords: *Protection of Civilians (POC); Peacekeeping operations; United Nations (UN); Responsibility to Protect (R2P)*

Introduction

In the post-Cold War period, the international community has identified an overwhelming number of cases of war crimes and related human suffering, including the brutal killing of civilians, torture, and sexual violence in the midst of internal armed conflicts. United Nations (UN) peacekeeping operations have been required to be the main and presumably the best solution to the brutal conflicts. As a result, the concept and norm of "Protection of Civilians" (POC), have emerged as one of the efforts of the international community to prevent such serious war crimes and human suffering. UN peacekeeping operations have adopted such concept in their missions. In fact, POC was encouraged to apply to the tasks of UN peacekeeping operations, as a result of independent inquiries into the failure to prevent the crime of ethnic cleansing in Rwanda and Srebrenica in 1994 and 1995, respectively.

POC would not be compatible with such a current norm if UN peacekeepers end up watching helplessly while war rages, even if their main tasks are literally supposed to "keep the peace". Meanwhile, more than two decades have passed since such a norm has been required to comply with in UN peacekeeping operations. One is wondering if it still has its efficacy, applicability and even legitimacy in UN peacekeeping operations.

This paper will focus on the principle of POC in UN peacekeeping operations. One has identified a number of issues which should be tackled. First of all, this article

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will introduce the basic questions on POC in applying to UN peacekeeping operations. The first question is simply on who should take the responsibility to protect the civilians in UN peacekeeping. The international community or the host government? The second question is on the relevance of POC with the traditional principles of UN peacekeeping operations of local consent, impartiality and a minimum use of force. The second part of this article will deal with three case studies of POC in UN peacekeeping operations. The first two cases are ones in Sudan (UNAMSIL and UNMIS) and the DRC (MONUSCO) operating in the post-Cold War period, and the other is one in South Lebanon (UNIFIL) operating since the Cold-War period.

Who should take the responsibility to Protect the Civilians, the International Community or the Government? The Relevance with Responsibility to Protect

According to the Global Centre for the Responsibility to Protect, the POC refers to measures that can be undertaken to ensure the safety of civilians during times of armed conflicts and which are rooted in obligations under International Humanitarian Law (IHL), refugee law and human rights law. Under IHL, not only states but also non-state armed group have obligations towards the protection of civilians. Humanitarian organisations including the UN and NGOs have a subsidiary role to press parties to an armed conflict to uphold their protective responsibilities and alleviate human suffering when parties to the conflict fail to do so.[1] Therefore, POC has a legitimacy in the legal aspect.

In the UN Charter, the prohibition on the use of force is set out in its Article 2 (4).[2] Likewise, Article 2 (7) of the UN Charter also prohibits the UN from interfering in matters essentially within the domestic jurisdiction of states.[3] The international community has valued state sovereignty since the Treaty of Westphalia in 1648. The state has exclusive jurisdiction over its territory. Therefore, in UN peacekeeping operations, the host state should have primary legal responsibility for the protection of civilians.

Meanwhile, in the post-Cold period, the international community has identified numerous internal conflicts, including ones in Sierra Leonne, Sudan, the DRC etc., which resulted in brutal war crimes and the following humanitarian casualties. The growing prominence of human rights in international law led some argument that a state is apparently failing to protect its own civilians from widespread violations and that even a state itself committed the war crime against its own populations. Thus, other states and international organisations such as great powers and the UN can be justified in intervening for the humanitarian purpose.

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[1]Global Centre for the Responsibility to Protect, "The Relationship between the Responsibility to Protect and the Protection of Civilians in UN Peacekeeping", April 2018, at 1.

[2]United Nations Charter, Article 2.4: "*All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".*

[3]United Nations Charter, Article 2.7: *"Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state, or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measure under Chapter VII."*

The above dilemma might be solved by the emerging concept of "Responsibility to Protect", (R2P). This concept was initiated by UN member states in 2005 at the UN World Summit, consisting 3 pillars: Pillar I) every state has the responsibility to protect its populations from four mass atrocity crimes: genocide, war crimes, crimes against humanity and ethnic cleansing; II) the wider international community has the responsibility to encourage and assist individual states in meeting that responsibility; and III) if a state is manifestly failing to protect its populations, the international community must be prepared to take appropriate collective action, in a timely and decisive manner and in accordance with the UN Charter. Therefore, according to the new norm of R2P, the international community or UN peacekeepers can have the legitimacy to protect the civilians instead of the host states.

However, R2P has both positive effects and negative concerns. Alex Bellamy argued that there is a positive connection between the use of the term of R2P by government, the UN and NGOs and the possibility of the Security Council to pass the same issue:

> *In a little over half (53%) of the cases of war crimes or crimes against humanity where RtoP was invoked by any actor, the Security Council adopted resolutions in relation to that crisis. This compares with only 14% of cases where RtoP was not invoked. At face value, this suggests that the Council is more likely to adopt measures when a situation is framed in RtoP terms than in relation to similar events that are not so framed.*[4]

Thus, Bellamy stated in 2015 that Security Council's record in the past five years demonstrated a newly found determination to act on R2P. In fact, the Security Council invoked the norm of R2P three times more frequently in the three years after the so-called "Arab's Spring" in Libya.

However, there would be the native concern over R2P. It is likely that R2P would be abused by political interests of member states. In fact, on R2P there is the chasm of opinion between Global North and Global South, especially the group of 77 (G-77) countries, as well as China and Russia, which have reemphasised the primacy of state sovereignty.[5] This fact implies a significant impact on UN peacekeeping operations since the vast majority of troop contributing states to UN peacekeeping operations are from Global South as well as China.

In fact, as Charles Cater and David Malone pointed out, while R2P remains a useful principle in the Security Council, its use will continue to depend very much on relationship among the major powers and their analysis of complex situations on the ground.[6] Aidan Hehir's view on the causal factors on "an R2P action" in Libya is more radical:

> *[…] it has also been noted that the causal factors which led to the decision to intervene were not related to R2P; these include the unique unpopularity of Gaddafi, the proximity of Libya to mainland Europe, Libya's oil reserves, and most particularly, the statement made by the Arab League on 12 March 2011 calling for military action against Libya. This statement convinced the US to support action, and Russia and China not to oppose it.*[7]

[4]Bellamy (2013) at 340.
[5]Williams (2017) at 542.
[6]Cater & Malone (2016) at 291.
[7]Hehir (2015) at 175.

Likewise, Graham Harrison conducted research on international involvement in Kenya's election, suggesting that influence has not been in new R2P agendas but iterations of long-standing ones in which regional geopolitics is a major concern and the US and EU have been preponderant agencies following their own familiar approaches.[8] Harrison warned the complete absence of any related R2P project in the growing mass violence in South Sudan as well as Mali, Chad, and Northern Nigeria.[9] From the totally opposite viewpoints, states might exploit humanitarian pretexts, abusing R2P in pursuit of other strategic ends.[10]

Selectiveness of R2P was repeated by Abiodun Williams in 2017. He argued that international engagement to prevent or halt R2P would remain conditional on a number of variables, including the complexity of the situation, the risks involved, the potential for success, the international political and financial climate, and the geopolitical importance of the country.[11]

How has the practicability of R2P in UN peacekeeping been? As Thomas Weiss put it, "The main challenge facing the responsibility to protect is how to act, not how to build normative consensus". In this context, Edward C. Luck argued that R2P clearly had produced more questions than answers, and that they were the kind of second-generation questions that speak to how far R2P has come along the road from theory to practice.[12]

POC as Non-consensual. Partial and Robust Operations: The Relevance with Three Main Principles of UN Peacekeeping

Traditionally, UN peacekeeping operations have valued the basic principles of local consent, impartiality, and the minimum use of force. However, the maintenance of the principles in POC of UN peacekeeping operations has been contested since POC are occasionally governed by coercion, partiality, and overwhelming force. It can be said that POC would not be compatible with the norm of respect for state sovereignty, especially when peacekeepers are involved in internal conflicts. In this situation, UN peacekeeping would lose the principle of impartiality which means that peacekeepers themselves become a party to the conflicts. Then, UN operations would become the robust ones based on Chapter VII of the UN Charter, which include "Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression."

In fact, Alex Bellamy has argued the issues of the balance between the principle of consent and POC in UN peacekeeping operations. He pointed out two issues here. First, consensus measures would limit its effect when host governments and their militaries are willing to employ atrocity crimes to prosecute their cause. If so, peacekeeping would become more robust and increasingly become counter-insurgency operations. He pointed out that it is problematic in establishing

[8]Harrison (2016) at 150.
[9]Ibid., at 153
[10]Aistrope, Gifkins & Taylor (2018) at 1-15.
[11]Williams (2017) at 542.
[12]Luck (2005) at 504.

the essence of its doctrine and concepts. Second, even in such coercive operations, peacekeeping's consent requirement significantly limits the populations that can get international protection. Protections subjected to atrocity crimes were never likely to be protected from the atrocity committed by their own government, although basic rights free from atrocity crimes should be universal.[13]

Bellamy stated that there are only three options to address the above issue. The first option is quite negative. It is to recognise that since such coercive humanitarian intervention to protect civilians is not preferable nor ideal, there will be inevitably some civilians who cannot be protected. It is based on the idea that such intervention should not happen. Therefore, the human right to the POC from atrocity crime derives not from universal principle or legal obligation but from the consent of that civilian's government. The second option is to argue that there are radical policy alternatives for POC which do not involve violating a state's sovereignty. For example, POC should be conducted by unarmed civilian personnel, or concerted states should open their borders and encourage people to save themselves from atrocities by fleeing and receiving refuge. However, this option would incentivise atrocity crimes. The third option is back to the original argument; POC should include coercive humanitarian intervention with the use of force without the consent of the state. This activity would divorce from POC in normal UN peacekeeping operations. It is a different way of responding to threats to peoples' lives.[14]All of the above three options have some concern in which one is convinced that POC is not well compatible with the consensus measures in UN peacekeeping operations.

In terms of the use of force in POC, it can be said that there is the increasing militarisation of peacekeeping in the name of protection. The militarisation was encouraged by the Brahimi Report in 2000 which argued that use of force would be necessary to protect civilians. Similarly, UN's Cruz Report in 2017 indicated that there is a sharp increase in UN fatalities in peacekeeping and therefore the report insisted that all peacekeeping should be robust.[15]

However, there was essentially lacking operational clarity and consensus in the early days of the discission on POC. For example, when considering deployment of a UN peacekeeping mission in Sierra Leone, some council members, such as Canada, Malaysia and the Netherlands, were very vocal about the need for a robust mandate to protect civilians, whereas others, such as the US and the UK, suggested that this was already allowed under the rule of engagement and Chapter VII of the UN Charter.[16] Even after the general establishment of the robust mandate for POC in UN peacekeeping, mandate language was not consistent from mission to mission. The mandates for MONUSCO, MINUSMA, MINUSCA and UNMISS revealed little consistency on the POC under threat of physical violence. For example, the POC mandate of UNMISS does not mention the primary responsibility of the South Sudanese government to protect civilians, while other mandates do. The mandate for MONUSCO is also the only one of the

[13]Bellamy (2024).
[14]Ibid, at 237-238.
[15]Ibid, at 232.
[16]Sharland (2019) at 35.

four to focus on geographic locations. The mandate states that several provinces would be the primary focus while retaining a capacity to intervene elsewhere in case of major deterioration of the situation.[17]

In fact, some academia is critical of the current situation of POC in the use of force in UN peacekeeping operations. Alexander Gilder argued although the POC mandate in UN peacekeeping authorises the use of force, numerous missions have not responded to violence committed against civilians with the use of force, such as MONUC and UNAMID. Both of them failed to protect civilians. He stated that peacekeepers have been responding to only 20% of cases where civilian were imminent physical danger or being attacked in the area of deployment. Therefore, there is a question whether peacekeepers need a broader remit of protection. He said that force is almost never used to protect civilians under attack and peacekeeping forces favours a low-profile use of power.[18]

There is an essential question on POC and use of force. The component of POC has been specified in the mandates of most of the current UN peacekeeping operations on the one hand. The mandates of 90% of UN peacekeeping operations now include POC. On the other hand, legal scholars and specialists seldom investigate the legal obligation regarding POC. One should legally clarify how the UN should create POC mandates and the use force to protect civilians. Alexander Gilder argued while upper limits on the use of force are a legal necessity it should also be discussed that a minimum obligation to try to protect would provide further legal clarity and prevent in action where UN peacekeepers are unclear on their legal obligations.[19]

Protection of Civilians in UN Peacekeeping Operations - The Case of Sudan

It was in February 1999 when the first debate on the protection of civilians was held in the UN Security Council, which then adopted a presidential statement expressing grave concern over the civilian toll of conflict casualties. Then the UN Secretary-General was requested by the Security Council to submit annual reports with recommendations on how it could improve both the physical and legal protection of civilians in situation of armed conflict.

In 1999, the UN Mission in Sierra Leone (UNAMSIL) was the first peacekeeping operation mandated to take the necessary action to afford protection to civilians under imminent threat of physical violence. However, ten years after that first Security Council debate, the UN Secretary-General acknowledged that "further efforts to strengthen POC remain crucial" in his report in May 2009. He also identified "human suffering owing to the fundamental failure of parties to conflict to fully respect and ensure respect for their obligations to prevent civilians."[20] He accepted that action on the ground have not yet matched progress

[17]Gilder (2023) at 6.
[18]Gilder (2023) at 2-3.
[19]Ibid, at 5.
[20]UN Document S/2009/277, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, 29 May 2009, para. 4.

in words and the development of international norms and standard. The report pointed out five core challenges in conducting POC by external organisations, one of which was "enhancing protection through more effective and better resourced peacekeeping and other relevant missions."[21]

Therefore, while the concept and norm of POC has a legitimacy with the viewpoint of international law, it can be argued if it has sufficient efficacy and applicability in the real missions of UN peacekeeping operations.

In this context, the writer conducted the intensive research on POC in the United Nations Mission in Sudan (UNMIS).[22] UNMIS was established on 24 March 2005 in accordance with Security Council Resolution 1590 (2005), whose mandate centred on helping to implement the Comprehensive Peace Agreement (CPA). The CPA ended the decade-long conflict between the Government of Sudan, based in the northern part of Sudan, and the Sudan People's Liberation Army/Movement (SPLA/M), supported mainly by people from the southern part of Sudan. The mandate of UNMIS included humanitarian activities, such as promoting human rights and protecting civilians under imminent threat of violence.

In fact, the extensive research on POC identified a number of issues in UNMIS. First, the interpretation and definition of POC in UNMIS was rather limited. In fact, as the official paper explained, UNMIS POC was not only a pilot unit, but also the only protection unit within the Department of Peacekeeping Operations (DPKO). While many other organisations in Sudan that were engaged in the mission of "protection of civilians" existed, both internal and external to UN agencies, their view towards the mission of POC was different from that of UNMIS. For example, UNHCR in Sudan took a very long-term view of protection, focusing on employment generation, and the delivery of services such as sanitation, education, and health care. While these issues were important, the approach was contradictory to that of UNMIS, which focused on short-term issues of physical security.[23]

The view of NGOs towards POC tended to be more similar to that of UNHCR than to that of UNMIS. Furthermore, even within UNMIS, there were a number of separate units dedicated to POC, including those in Protection, Child Protection, and Human Rights, and each of them approached the issue with very different objectives in mind. However, in reality, there was no opportunity for the disparate organisations engaged in POC to meet, exchange, and share information, or discuss opportunities to enhance their own missions of POC.

The second issue with POC in UNMIS was a lack of awareness of the mission mandate's significance at the UN Security Council level, as well as among UNMIS personnel in the operational areas. Hitoshi Nasu claimed that the practice of POC in UN peacekeeping operations developed without much deliberation in the Security Council. For example, in the Council debates, Canada and Japan were strong advocates of the concept of POC. The UK, the Netherlands, Argentina,

[21]Ibid.
[22]Ishizuka (2013).
[23]Refugee International "Sudan; UNMIS Must be More Proactive in Protecting Civilians, *Refugee International Field Report*, January 2009, at 4.

Namibia, Rwanda, and Uganda also enthusiastically supported the inclusion of POC in the mandate of UN and non-UN peacekeeping operations, for example, in ECOMOG, UNAMSIL, and MONUC. However, no other states provided any particular comment on the POC mandate in the Security Council. Of particular note was a lack of enthusiasm in the debate on POC with regard to its relevance with the mandate under Chapter VII of UN Charter.[24]

Likewise, at the field level, awareness or understanding of the mission's civilian protection responsibilities was also limited. In fact, some UNMIS personnel were entirely unaware of the Chapter VII component of the mandate. They believed that protecting civilians from tribal violence fell outside of the mission mandate, and was a distraction from its core business of supporting CPA implementation.[25] They considered that the responsibility for POC lay with the government, particularly the police and other justice sector institutions that promote and defend the rule of law. POC activities by UNMIS, in their view, would result in negative consequences in UNMIS relations with the local people, since even the mere presence of international military peacekeepers tended to create expectations among the locals that they would be protected if violence should erupt.[26] The third issue, closely related to the second, is a lack of proactive action by UNMIS personnel. The rule of engagement (ROE) of UNMIS instructed its troops to "use force only when absolutely necessary to achieve your imminent aim, to protect yourself, your soldiers, UN or other designated personnel, installations, equipment and civilians under imminent threat of physical violence ."[27] Furthermore, the ROE authorised troops to "use force […] to protect civilians under imminent threat of physical violence, when competent local authorities are not in a position to render immediate assistance."[28] The regulation of the use of force in the ROE was considered appropriate because of incidents occurring in Sudan during the UNMIS periods. Nevertheless, many argued that UNMIS should have been more proactive in POC. For example, the report of the Secretary-General in June 2006 stated that hundreds of UNMIS soldiers had been deployed to provide protection mainly to UN installations, personnel, military observers, and logistics staff, but not to civilians.[29]

In May 2008, UNMIS, in fact, faced a major challenge to its willingness to implement its POC mandate. Major conflicts between SPLA/M and the forces of the Sudanese Government broke out on May 13, 2008 in Abyei. The entire population of 30,000 civilians was forced to flee, when irregular forces, a faction of Southern Sudanese, looted and burned civilian homes, including a village that was within 45 meters of the UNMIS compound. After the civilians had fled, the UNMIS mission argued that it lacked a mandate to use force to protect civilian property. Meanwhile, US Special Envoy to Sudan, Richard Williamson, criticised UNMIS

[24]Nasu (2012) at 119-120.
[25]Mailer & Poole (2010) at 15.
[26]Refugee International (2009) at 2.
[27]United Nations, *Sudan's Unified Mission Plan,* Khartoum, UNMIS, E-1.
[28]Ibid, at E-2.
[29]UN Document S/2006/478 *Report of the Secretary-General Pursuant to Resolution 1653 (2006) and 1663 (2006),* 29 June 2006.

for failing to take more robust action to protect civilians in Abyei.[30]

In 2009, the POC Security Concept was developed by UNMIS Force HQ. However, the provisions in the Security Concept were not considered functional. According to the report of the Norwegian Institute of International Affairs (NUPI) on POC in Jonglei State in Sudan, there was little opportunity for proactive action because of the absence of clear operational instructions as to when and how to react to a situation of "imminent threat" against civilians. Therefore, the report argued that any level of commanders in UNMIS tended to simply follow instructions and orders from others.[31]

Thus, the case of UNMIS indicates several significant challenges in terms of the POC in UN peacekeeping operations. The issues of the POC were also identified at other UN operations in Africa. For example, currently, several UN operations are the so-called "stabilisation forces". In such forces, their mandate tasks them to contribute to restoring a maintaining order in a given situation, by protecting a government and its civilians against identified aggressors. They are, therefore, tasked to undertake robust operations, based on Chapter VII of the UN Charter. The examples of the stabilisation forces are MINUSCA in CAR, MINUSMA in Mali and MONUSCO in the DRC. In fact, these three stabilisation missions were amongst four largest UN operations deployed. In other words, the stabilisation forces whose major pillar of the mandate has the protection of civilians, deserves being researched for the analysis of POC in UN operations. In this sense, the writer conducted the research for MONUSCO in the DRC.

Protection of Civilians in UN Peacekeeping Operations- The Case of the DRC

United Nations Organisation Stabilisation Mission in the Democratic Republic of the Congo (MONUSCO) was established in accordance with Security Council Resolution 1925 (2010) on 28 May 2010. "Stabilisation" in MONUSCO meant stabilisation through the protection and promotion of human rights and the promotion of democratisation by means of the process of reliable elections. The purpose of the creation of MONUSCO was to build the state institution which creates security and justice systems and takes accountability for them. Its authorised size was the ceiling of 19,815 military personnel, with 760 military observers and staff officers, 391 police personnel and 1,050 formed police units.[32]

The protection of the Congolese civilians was also a key element of the mandate of MONUSCO. However, it was difficult to conclude that the POC in MONUSCO improved compared with one in the period of MONUC. The term of "stabilisation" in MONUSCO was rather nominal. For example, from 30 July to 2 August 2010 one witnessed a huge scale of systematic rapes sacrificing at least 303 women in Walikale district in North Kivu province, which was located only 30 kilometres from the MONUSCO base. In other words, MONUSCO could not prevent nor stop the systematic rapes conducted by armed factions.

[30]Holt, Taylor & Kelly (2009) at 329-330.
[31]Breidlid & Lie (2011) at 20.
[32]MONUSCO Home pages, http://monusco.unmission.org/

In November 2012, one witnessed the brutal occupation of Goma, the capital of North Kivu province in the eastern DRC, by the M23, the Tutsi-led anti-government armed group.[33] MONUSCO was seriously criticised for its ineffective response in preventing the onslaught.

On 24 February 2013, "the Framework for Peace, Security and Cooperation for the DRC and the Region" was signed by regional powers, which offered a comprehensive approach to the problem. The framework proposed a heavily-armed combat operations commanded by the UN. This framework, which the African Union assisted to put together, was signed in Ethiopia by leaders from the DRC, Angola, Burundi, the Central African Republic, Rwanda, South Africa, South Sudan, Tanzania, Uganda and Zambia. It was signed in the presence of UN Secretary-General Ban Ki-moon, who acted as one of the generators.[34] Thus, the Force Intervention Brigade (FIB) was established by UN Security Council Resolution 2098 (2013) of 18 March 2013. Its mandate included using all necessary means to "neutralise" armed groups which permits it to use force, including deadly force.[35] The FIB, with 3,069 troops", was led by Tanzanian general, and consisted of three infantry battalions, one artillery unit, one Special Forces Unit and a reconnaissance company.

In fact, the FIB contributed to the stabilisation of the eastern part of the DRC. The FIB's first engagement was the fight against the M23. Between July and November 2013, when the FIB, alongside FARDC units, engaged by artillery, aerial attacks, snipers etc. The offensive measures led to the victory on the side of FARDC/ FIB.

Meanwhile, several negative aspects on the FIB were also identified. For example, unlike other regular MONUSCO forces, the FIB was fighting against the anti-government armed groups with FARDC, and therefore was considered to be a party to the armed conflict. A problem is that many armed groups are unable to distinguish and separate the regular MONUSCO forces from the FIB. This situation raises two problems, from operational and legal viewpoints. Operationally, the regular MONUSCO forces, which are less heavily armed, are more physically vulnerable to unexpected attacks from anti-government military factions. From the legal aspect, now MONUSCO including the FIB which lost impartiality, is regarded a party to the conflicts and will have lost the protections afforded to them under international law such as international humanitarian law (IHL), the Convention on the Safety of United Nations and Associated Personnel (SOFA), and the Rome Statute of the International Criminal Law.[36]

While the FIB and FARDC, to some extent, implemented the mandates of neutralizing "several" armed groups, a number of major armed groups were still active, disrupting the local security and damaging "the Framework for Peace, Security and Cooperation for the DRC and the Region". In fact, ADF was still brutal, targeting a number of innocent civilians. According to the Secretary-

[33]The M23 was said to have about 2,000 armed soldiers. Its strength in the past allegedly came from Rwanda.
[34]Gberie (2013).
[35]Sheeran & Case (2014).
[36]Sheeran & Case (2014).

General's report on 30 December 2014, in two months since October 2014 attacks attributed to ADF resulted in the killing of over 250 civilians.[37] This figure increased to 347 in his report on 26 June 2015. On 5 May 2015, a group of suspected elements ambushed a MONUSCO patrol between Oicha and Eringeti, killing two Tanzanian peacekeepers.[38] Meanwhile, FDLR continued committing human rights abuse against the civilian population.[39] In North Kivu province, following operation Sukoda II conducted by FARDC against FDLR, 162 elements had been captured, 62 had surrendered and 13 had been killed. Despite this progress, the command-and-control structures of the group remained largely intact.[40] Some of the FDLR fighters participated in the UN-led disarmament, demobilisation, repatriation and rehabilitation (DDRR) programs. However, most of their fighters and weapons remain at large, and this small gesture may be taken by MONUSCO as a sign of sufficient gesture. Furthermore, MONUSCO and FIB was criticised of their reluctance of going after the FDLR as aggressively as it pursued the M23. Thus, the impartiality of FIB had been questioned. Above all, according to the impression of South African journalist who talked to non-government people in the region, the FIB had not done very much for a nearly a year since its establishment.[41]

Thus, while the FIB was effective in the limited mandate of neutralizing the armed groups in the limited areas for the short term, it is questionable that it will contribute to sustainable peace and protect civilians in the DRC.

Protection of Civilians in UN Peacekeeping Operations - The Case of South Lebanon

Although the words of POC have been newly advocated in the mandate of UN peacekeeping operations since UNAMSIL in 1999, the task of protecting civilians has not been new but been conducted since the early days of UN peacekeeping operations. Such tasks were called "humanitarian assistance" or "humanitarian missions" in UN peacekeeping operations. They were not included in UN mandates, but they have been conducted by UN peacekeepers as their essential duties whether the UN operations were mandated by Chapter VI or Chapter VII of the UN Charter.

The United Nations Interim Force in Lebanon (UNIFIL) was established in 1978 after Israeli invasion in South Lebanon as the retaliation against PLO which claimed responsibility of a commando raid near Tel Aviv in Israel resulting in 37

[37]UN Document S/2014/957 *Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo submitted pursuant to paragraph 39 of Security Council resolution 2147 (2014),* 30 December 2014, para. 17.
[38]UN Document S/2015/486 *Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo,* 26 June 2015, para. 12.
[39]FDLR is the French acronym for the Democratic Forces for the Liberation of Rwanda, originally established by ethnic Hutus who fled Rwanda after participating in the genocide of the Tutsi population.
[40]*Ibid.* para. 13.
[41]Institute for Security Studies, "Is the Force Intervention Brigade neutral?", *ISS Today,* 27 November 2014.

deaths and 76 wounded among the Israeli population. The mandate of UNIFIL in Security Council Resolution 425 (1978) contained confirming the withdrawal of Israeli forces from South Lebanon, restoring international peace and security, and assisting the Government of Lebanon in ensuring the return of its effective authority in the area.[42]

UNIFIL has traditionally provided humanitarian assistance to local population in the area of operations. In fact, humanitarian missions have been consistently demanded since the early periods of UNIFIL. According to Bjorn Skogmo, the humanitarian tasks became even more important in the period between the second Israeli invasion on 6 June 1982 and the Israeli withdrawal from Southern Lebanon in February-June 1985, when UNIFIL could do very little to implement any of the three parts of the original mandate. In this situation, it became essential to give UNIFIL meaningful tasks, both to justify its continued presence and keep up the morale of UNIFIL's troops.[43] In the mid-1980s, UNIFIL cooperated with the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), the United Nations Children's Fund (UNICEF) and the International Committee of the Red Cross (ICRC) in extending assistance to the local people. Humanitarian assistance was extended to the protection of refugees as well as local populations in Lebanon. For example, in 1985, a number of Christian refugees sought safety in UNIFIL, where they received shelter, food and other provisions. The confidence-building value of these operations became an important asset for UNIFIL.[44]

As stated before, in the late 1990s, the advent of the norm of POC in armed conflicts was broadly advocated in the international community. The newly advocated norm promoted the legitimacy of humanitarian assistance in UN peacekeeping operations. Meanwhile, humanitarian assistance by UNIFIL has not always been successful. In April 1996, Israel launched Operation Grapes of Wrath, a 16-day campaign to end the shelling by Hezbollah from South Lebanon. On 18 April 1996, the Israeli troops shelled a compound of the Fijian Battalion's headquarters at Qana which housed about 800 Lebanese refugees.[45] The shelling killed 106 civilians. Israel emphasised that it was Israeli policy to target civilians or the UN. Israel, therefore, rejected any responsibility for it, claiming that "any damage caused to UNIFIL", is "the direct consequence of terrorist aggression and Lebanese collusion." UNIFIL, to much extent, lost credibility due to the incident.[46]

The conflict between Israel and Hezbollah in 2006 prompted the leaders of G8 states and the UN to quickly call the swift deployment of international troops in South Lebanon. Security Council Resolution 1701 (2006) authorised an increase in the strength of UNIFIL to a maximum of 15,000 troops. One pillar of the mandate of "new" UNIFIL II was on the protection of civilians: "to "extend its assistance to help ensure humanitarian access to civilian population and the

[42]The United Nations *The Blue Helmets: A Review of United Nations Peace-keeping* (New York, the United Nations Department of Public Information, 1990), at 111-112.
[43]Skogmo (1989) at 91.
[44]Ibid, at 94.
[45]Williams (1996).
[46]UN Document S/1996/337, *Israel' Shelling of UNIFIL,* 7 May 1996.

voluntary and safe return of displaced persons".[47]

Ray Murphy was critical of the role of UNIFIL and UNIFIL II as civilian protectors, claiming "[…] token reference to the protection of civilians […] did not inspire confidence. […] UNIFIL had traditionally provided humanitarian assistance to the local population in the area of operations. While useful, this could not be described as fulfilling a protection mandate."[48]

Murphy continued:

> *In contrast to relations between the peacekeeping force and local population in the past, initially relations between UNIFIL II and the locals were strained. The Spanish and French contingents, in particular, were reputed to be overtly militaristic in approach and disrespectful of the local population. While peacekeeping is not a popularity contest, maintaining good relations with the local population is essential, especially when tasked with their protection.*[49]

Essentially, there is a simple question, - which plays a more significant role to protect the civilians in South Lebanon, UNIFIL or Hezbollah? In fact, a major concern over the humanitarian assistance mission in UNIFIL is its relations to Hezbollah in Lebanon. When Israel unilaterally withdrew from Lebanon in 2000, Hezbollah filled the resulting power vacuum. Hezbollaha is a Shiite Islamist political party and militant group based in Lebanon. As a political party, Hezbollah and its coalition, referred as March 8, has held 57 of Lebanon's 128 parliamentary seats since the 2009 election. Since October 2016, March 8 received 17 of 30 cabinet positions, thus establishing Hezbollah's consistent influence in Lebanon. Hezbollah has a military presence in 240 villages in southern Lebanon, according to the estimates of the Israeli Defence Forces in 2017. Hezbollah has gained grassroots popularity to integrate itself into local community and Lebanese society.[50] In fact, during the 2006 war with Israel, Hezbollah provided emergency relief services and distributed water, and medicine to Lebanese Shiites and Christians. One Lebanese Shiite, who was interviewed by CNN during the war, said "Hezbollah is doing all the things for the people. I don't know where the government is."[51] Hezbollah said that it spent $300 million for the construction work to repair damaged or destroyed homes. The provision of Hezbollah's essential services has included health care and even veterinarians, which has been a viable alternative to the Lebanese state, enhancing its domestic popularity among the citizens. Hezbollah has created its own educational institutions that parallel to the Lebanese state. Hezbollah first opened the schools in 1993 in southern Lebanon. By 2006, approximately 14,000 students attended Hezbollah's schools. By 2013, the schools were present throughout the state.[52] As a result, as Lise Morje Howard described, UNIFIL's conflict resolution paradigms of funding, inaugurating, and documenting humanitarian projects can be understood as attempts to compete with

[47]UN Security Council Resolution 1701 (2006), 11 August 2006, para. 11.
[48]Murphy (2012) at 391.
[49]Ibid, at 391-392.
[50]Norton (2018) at 1.
[51]Ibid., at 26.
[52]Ibid., at 31

Hezbollah's own humanitarian and social activities in the region.[53] Susann Kassem developed Howard's view:

> *Hezbollah has become a respected and entrenched authority in the south. The reality is that there is little distinction between Hezbollah and the community: Hezbollah is part of the community and not an alien force that can be simply pushed out. In the bigger picture, UNIFIL's ostensible attempt to supplant Hezbollah seems quixotic.*[54]

At the time of writing in October 2024, the warfare between Israel and Hamas and then Hezbollah led to the new stage of the conflicts in the Middle East. In South Lebanon, the number of displaced people reached an estimated 500,000. The Israeli military used its tanks to force entry into a position of UNIFIL and launched attack as firing at the facilities. Five UNIFIL personnel were injured, and 40 contributing states to UNIFIL issued a joint statement condemning the attacks.[55] The current event in the Middle East convinced that UN peacekeeping operations would not have capability to prevent the invasion of host states to their enemy states nor to protect the civilians in their operational areas when the states take determination to launch the warfare bypassing UN troops.

Conclusion

This paper dealt with the emerging humanitarian norm, POC. POC has legality and legitimacy in the current post-Cold War period when one identified a number of war crimes and the following humanitarian crisis. POC can be conducted and supported by another emerging norm of R2P. However, both of the norms could not get the consensus among the international community, especially, in their early periods after the establishment. Furthermore, this article convinced that such norm is vulnerable to the risk that it might be abused politically. It dealt with three cases of POC, in Sudan, the DRC and South Lebanon, all of which exemplified several significant issues and challenges in the tasks of the POC in UN peacekeeping operations. The cases of Sudan and the DRC convinced of the problem of "filling the gap". That is, one needed to fill the gap in the definition of POC between the UN and non-UN agencies, and between military and civilian staff within the UN. One also suffers from the failure of filling the gap in the attitude towards robustness in the operations between FIB and normal MONUSCO forces. Meanwhile, both UNMIS in Sudan and MONUSCO in the DRC had the common issues of lack of proactive actions. Currently, eight out of fourteen UN peacekeeping operations still have POC at the core of their mandates, which means that 96% of deployed peacekeepers are currently tasked with protecting civilians as part of their mission objectives.[56] Mainstreaming the principle of the protection of civilians still seek further improvement to tackle the

[53]Howard (2019) at 124.
[54]Kassem (2017) at 469.
[55]*The Japan News*, 19 October 2024.
[56]lobal Centre for the Responsibility to Protect at p. 2.

above issues.

Meanwhile, the POC in South Lebanon is distinguished from that of Sudan and the DRC. While much of the population is poor and access to humanitarian assistance is important in South Lebanon, they are not seriously dependent on international aids and their plight cannot be compared to that of Sudan and the DRC. However, the outbreak of hostility between Israel and Hezbollah, just like the current situation, would be catastrophic with humanitarian disasters for local civilians, which makes UN peacekeepers and their mission of POC helpless.

POC itself should be respected and valued as the newly emerging international norm in the currently international political and security climate. However, the application of POC to UN peacekeeping operations has limited effect. Protecting civilians normally requires coercive and robust measures, which might have difficulty meeting three principles of UN peacekeeping operations. This problem was identified in all of the cases of this article.

On the whole, the principle of POC was advocated with significant enthusiasm and ambition for the purpose of saving vulnerable people in war-torn situations. It wins absolute legitimacy with the viewpoint of liberalism and humanitarianism. However, this article indicated a number of issues to be tackled after about two decades of their establishment. This is not to say, POC should not have been advocated. Rather, they should be reassessed, modified and improved.

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Abbreviations

ADF: Allied Democratic Forces
CPA: Comprehensive Peace Agreement
DDRR: Disarmament, Demobilisation, Repatriation and Rehabilitation Program
DPKO: Department of Peacekeeping Operations
DRC: Democratic Republic of the Congo
ECOMOG: Economic Community of Western African State Monitoring Group
FARDC: Armed Force of the Democratic Republic of the Congo
FDLR: The French acronym for the Democratic Forces for the Liberation of Rwanda.
FIB: Force Intervention Brigade

ICRC: International Committee of the Red Cross
IHL: International Humanitarian Law
MINUSCA: United Nations Multidimensional Integrated Stabilisation Mission in the Central African Republic
MINUSMA: United Nations Multidimensional Integrated Stabilisation Mission in Mali
MONUC: United Nations Mission in the Democratic Republic of the Congo
MONUSCO: United Nations Organisation Stabilisation Mission in the Democratic Republic of the Congo
NGOs: Non-Governmental Organisations
POC: Protection of Civilians
ROE: Rule of Engagement
R2P: Responsibility to Protect
SPLA/M: the Sudan People's Liberation Army/Movement
UN: United Nations
UNAMID: United Nations-African Union Hybrid Operation in Darfur
UNAMSIL: United Nations Mission in Sierra Leone
UNHCR: United Nations High Commissioner for Refugees
UNIFIL: United Nations Interim Force in Lebanon
UNICEF: United Nations Children's Fund
UNMIS: United Nations Missions in Sudan
UNMISS: United Nations Mission in the Republic of South Sudan
UNRWA: United Nations Relief and Works Agency for Palestine Refugees in the Near East

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The 'Independence' of the Judiciary in Transformative Adjudication in Africa: A South African View?[1]

By Nomthandazo Ntlama-Makhanya[*]

This article is inspired by ***Prince Mbonisi Bekithemba Ka BhekiZulu v President of the Republic of South Africa [2024] All SA 662 (GP)*** *and* ***Electoral Commission of South Africa v Umkhonto Wesizwe Political Party 2024 (7) BCLR 869 (CC)*** *judgments, that emanated from the South African courts. The inspiration is grounded on the nature of the claims that were brought before the courts in that the* ***Prince Mbonisi*** *case challenged the decision of President Cyril Ramaphosa regarding the recognition of the successor to the status of Kingship following the death of the reigning King as exercised through the legal system of customary law. The second matter* ***(MKP)*** *related to former President Jacob Zuma and was at the heart of South Africa's democratic identity in the upholding of the electoral laws regarding the eligibility of potential candidates to Parliament after the National and Provincial Elections that were held on 29th May 2024. The centrality of the two-judgments touched on the core content of judicial independence regarding its aspirations on transformative adjudication. They raised a pertinent question whether the judiciary is 'self-policing' or has the 'ability to self-police' through the 'eagle eye' of the principle of 'judicial independence'. The author argues that transformative adjudication in contemporary Africa strives towards the production of transformative jurisprudence that emanates from the courts. The objective is to respond herein whether 'independence' infuses 'self or ability to police' towards adherence to the rule of law in Africa. As evidenced by the inspiration, the argument will be more biased to South Africa as it is acclaimed as a model of transformative adjudication in Africa.*

Keywords: *Judiciary; adjudication; independence; self-policing*; t*ransformation, integrity.*

Introduction

The year 2024 marks 76 years following the adoption of the Universal Declaration of Human Rights in 1948[2] which has since become integral in the

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[2]Adoted on 10 December 1948 by United Nations General Assembly resolution 217 A (III). Hereinafter 'UDHR'.

democratisation and transformation of the adjudicative role of the courts. This period is of particular importance for the functioning of the judiciary not only in Africa but globally in that it is essential for stability and order in the regulation of state authority. The UDHR has been inspirational in the development of contemporary Constitutions that endorsed the independence of the judiciary that today became critical in transformative adjudication which would in turn give effect to the generation of public confidence in the judicial system.[3] Judicial independence is of paramount importance in the balance of power that is endorsed by the doctrine of separation of powers. The judiciaries of the world subscribe to the code of judicial conduct such as the Bangalore Principles of Judicial Conduct[4] that give substance to the requisites of the UDHR in the endorsement of the independence of the judiciary.[5] The Bangalore Principles are the evidence of the high level of support for judicial integrity.[6] The Bangalore Principles further affirm judicial independence as 'a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects'.[7] However, pertinent questions arise from the 'independence' whether the judiciary is '*policing itself*' and or '*able to police itself*'.

Contemporary Africa adopted Constitutions[8] which protect judicial independence and responded to the prescripts of the global community in ensuring an independent judiciary in its transformative adjudicative process.[9] Recently, the African Commission on Human and Peoples Rights adopted a Resolution on the Appointment of a Focal Point on Judicial Independence in Africa[10] which gives substance to Africa's transformative project on adjudication, particularly the substantive translation into reality of articles 7 and 26 of the African Charter on Human and Peoples Rights. The foundation to these instruments are an indication that African judiciaries should not be passive role players in leading the quest for a transformed jurisprudence that give an overall framework for the needed societal changes of the world.[11]

Africa, particularly South Africa, with its history that was plagued by draconian laws, the judiciary was the yardstick against which to enforce such laws, compromising the significance of the principle of independence and the broader

[3]Hassan (2022).
[4]See David (2023). David, with reference to Francsico de Quevedo on the important of the judiciary in that *'where justice does not work, it is dangerous to be right'.*
[5]See also the influence of the UDHR on the adoption of the Prevention of Crime and Treatment of Offenders held at Milan from 26 August 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 regarding the basic principles on the independence of the judiciary.
[6]See Olowu (2013).
[7]See value 1 of the Bangalore Principles.
[8]See for example and not limited to the Constitution of the Republic of Namibia 1990 with amendments through 2010; Constitution of the United Republic of Tanzania 1977; Constitution of the Republic of Uganda 1995.
[9]Malila (2010).
[10]ACHPR/Res.570 (LXXCII) 2023.
[11]Chandra & Garg (2021).

democratisation through the lens of transformative adjudication.[12] Today, the country prides itself with a transformative Constitution, 1996[13] that is designed not only to uphold judicial independence but bring back and transform the jurisprudence from 'constitutional blankness' in giving effect to the prescripts of human rights laws. Following South Africa's recent national and provincial 2024 elections that were held on 29 May 2024, the courts have proved to be the centre of transformative adjudication through the lens of '*self-policing*' or '*showed ability to self-police*' without any undue influence on its independent role. In this regard, particularly the Electoral Court[14] has showed its ability to '*self-police*' in its adjudicative aspirations to ensure the advancement of the principles of judicial independence. The Electoral Court has remained steadfast in its adjudicative role in ensuring the interpretation of the electoral laws in a way that give content to the meaning and substance on '*self-policing*' for the advancement of the principle of 'independence'.

Of further importance in the context of this article is the nature of the matters that were brought before the courts where the role of the sitting President: President Ramaphosa was tested and reviewed to give substance to the system of customary law[15] that is progressively occupying its constitutional space considering South Africa's history where the system was never recognised and be developed alongside other legal systems applicable in the Republic. The second issue relates to former President Zuma[16] who had been convicted and sentenced to 15 month's imprisonment by the Constitutional Court for contempt of court regarding his failure to appear before the State Capture Commission.[17] The uniqueness of this matter was his inclusion in the list of candidates of his newly established political party (MKP) with a potential to be a member of Parliament if his party could have garnered enough votes and enable him to occupy the seat in the National Assembly. The inclusion was objected by the Independent Electoral Commission[18] in terms of section 47(1)(e) of the Constitution because of his conviction and sentencing. The decision of the IEC was challenged by the MKP at the Electoral Court which was granted against the IEC[19] which then took the matter to Constitutional Court for further determination on the eligibility of the former President to contest and be included in the list of the MKP. The Constitutional

[12]Gordon & Bruce (2006).

[13]The Constitution of the Republic of South Africa, 1996 (hereinafter the 'Constitution').

[14]Established in terms of section 18 of the Electoral Commission Act 51 of 1996.

[15]*Prince Mbonisi Bekithemba Ka BhekiZulu v President of the Republic of South Africa* [2024] All SA 662 (GP), hereinafter '*Prince Mbonisi'*.

[16]*Electoral Commission of South Africa v Umkhonto Wesizwe Political Party* 2024 (7) BCLR 869 (CC) hereinafter '*MKP*'.

[17]See *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption in the Public Sector including Organs of State v Zuma* 2021 (9) BCLR 992 (CC).

[18]Hereinafter referred as 'IEC' established in terms of section 3 of the Electoral Commission Act 51 of 1996 which reads as follows:

(1) There is an Electoral Commission for the Republic, which is independent and subject only to the Constitution and, the law.

(2) The Commission shall be impartial arid shall exercise its powers and perform its functions without fear, favour or prejudice.

[19]*Umkhonto Wesizwe Party v Independent Electoral Commission* [2024] ZAEC 5.

Court overturned the decision of the Electoral Court and found the provision of section 47(1)(e) disqualifying him to be an eligible member of the National Assembly and not even eligible to be included in the party list. Similarly, as is the case with the *Prince Mbonisi* case, the South African judiciary with no experience in transformative adjudication and during the infancy stages of the democracy, particularly in the area of customary law, incorporated the pluralistic character of the country by endorsing its diversity as evident in the preamble of the Constitution, 1996. The incorporation became of substance which is traceable to the Constitutional Court in *S v Makwanyane*[20] when the Court indirectly incorporated the principle of *ubuntu* in its judicial reasoning.

It is drawn from the two cases: *Prince Mbonisi* and *MKP* judgments that courts provided a foresight on the determination of the question raised herein about the judicial 'ability to 'self-police' through the principle of 'independence' framework. The independence of the judiciary and its ability to 'self-police', as to be argued herein, is indicative of the resilience of the judiciary as demonstrated by the Kenyan High Court[21] during the chaotic status of the country when the opposition party refused to accept the presidential election results which were then declared invalid by the court.[22] However, the basic question which lingers over judicial 'independence' is whether 'self-policing' or 'ability to self-police' is an indirect contribution to a transformed adjudicative process? In addition, to what extent does 'self-policing' or 'ability to self-police' advances the principles of judicial independence towards the production of a transformed jurisprudence?

Against this background, this article is inspired by the *Prince Mbonisi*[23] judgment. In this matter, the sitting President of the Republic of South Africa: President Cyril Ramaphosa was found to have violated the prescripts of customary law in the appointment of the successor to the status of Kingship. The second motivation relates to the *MKP*[24] judgment. This matter involved former President Jacob Zuma who, before South Africa's 2024 National and Provincial Elections that were held on 29 May 2024 challenged the decision of the IEC regarding the removal of his name from the list of his newly established political party as a potential member of the National Assembly if his party could have garnered enough votes. This motivation is limited to the electoral matters and not on other matters relating to him that are still pending before the courts of law against the former President.

In essence, the two judgments are a stimulant to the argument herein. A sitting President was found to have acted beyond the scope of his authority and the former President wishing to recontest elections for the National Assembly and found ineligible to hold such office. It is this motivation that enable the article to move from a premise that '*self-policing*' or '*ability to show self-policing*' is a model that is designed and should be interpreted as a measure that advances the principle of judicial independence in transformative adjudication aspirations. The substance of

[20]See Mokgoro, J. in *S v Makwanyane* 1996 (10) 1253 BCLR (CC) paras. 307-308.
[21]Presidential Election Petition No 1 of 2017. See also Mutuma (2021).
[22]See *Odinga v Independent Electoral and Boundaries Commission* [2017] KESC 42 (KLR).
[23][2024] 1 All SA 662 (GP).
[24]2024 (7) BCLR 869 (CC) (*MKP*).

the argument herein relates to the jurisprudence itself and not the scope of authority that exists between the judiciary and the other branches of the state through the application of the doctrine of separation of powers. Therefore, the argument is important for comparative lessons from African judiciaries' response on 'self-policing' in the upholding of the principle of independence for the policing framework.

Viewing Transformative Adjudication through Case Law

Brief Facts

(1) Prince Mbonisi Bekithemba Ka BhekiZulu v President of the Republic of South Africa

The matter entailed an application for the review of the President's decision to recognise King Misuzulu as King of the Zulu nation. It did not entail who should be the King of the Zulu nation, thus, it was based on the review for the procedures for his identification that were allegedly, not in accordance with the Zulu customs and practices. In essence, the application was not a determinant of the eligible heir to the status of Kingship/His Majesty but the process towards the rationality of the identification.[25] The second issue was whether the recognition by the President was lawful in terms of the Traditional Leadership and Khoi-San Act 3 of 2019.[26] The first contention was answered in the affirmative by Madondo AJP at the Pietermaritzburg High Court that King Misizulu is the rightful heir to the throne and needed not be considered in this case as the court was not to sit as one of appeal. The second review application was whether the recognition of the King was in accordance with the Leadership Act.[27]

The substance of the relief sought was for the review and setting aside of the meeting of the Royal Family on 14 May 2021 that was not lawfully constituted and not in accordance with section 8(1)(a) of the Leadership Act read with section 17(3) of the KwaZulu Natal Traditional Leadership and Governance Act 5 of 2005 including the decision of the said meeting.[28] In addition, for the setting aside of the decision of the President to recognise King Misuzulu in publication of Government Notice 1895 in Government Gazette no 46067 of 17 March 2020 in terms of section 8(3)(a) and (b) as unlawful and unconstitutional.[29]

It is not intended to provide an exhaustive factual matrix of this dispute but following the death of King Goodwill Zwelithini KaBhekuZulu on 12 March 2021, at the age of 72 years the question of who would become His successor became the substance of conflict between the Royal Family members.[30] King

[25]*Prince Mbonisi* para 2.
[26]Hereinafter 'Leadership and Khoisan Act, *Ibid.*
[27]*Ibid.*.
[28]*Prince Mbonisi* para 8.
[29]*Prince Mbonisi* para 9.
[30]*Prince Mbonisi* para 10.

Zwelithini was the longest serving reigning King of the AmaZulu nation and after His passing, the traditional Prime Minister: Prince Mangosuthu Buthelezi, who has also since passed on, wrote to the KwaZulu-Natal Premier advising her of the nomination of her Majesty Queen Shiyiwe Mantfombi Dlamini Zulu: the Great Wife as successor following the reading of the King's will which was read on 24 March 2021. Queen Mantfombi did not survive the throne as she also passed on immediately after taking the reigns on 29 April 2021.[31] As noted, this article does not intend to provide a lengthy background on the facts of this case. Thus, of essence and direct relevance is the President's exercise of his constitutional powers in the appointment and recognition of the successor to the throne not only of the King in this dispute but others that were not before the court.[32]

In this matter, considering the President's decision to recognise King Misuzulu as King of AmaZulu on 16 March 2022, the court considered the chronology of events that ensued towards His recognition. The court highlighted the substance of the report of the Mediation Panel that was appointed by the Minister of Cooperative Governance and Traditional Affairs and to provide an insight and recommendations on the resolve of the dispute. It was this report that the President noted the high divisions in the Royal Family in that the Royal Family meeting of the 14th May 2021 was highly contested regarding the way in which the late former Traditional Prime Minister: Buthelezi conducted the said meeting.[33] The President alleged not to have received the document due to an error in His email (Panels' recommendations) but acknowledged the complaint letter that was written to Him by Princess Thembi about the said meeting.[34] In that letter, Princess Thembi made allegations that the 14th May 2021 meeting was called under false pretences with no indications of its intended purpose of identifying the successor to the throne. The President conceded of His foresight on the highly divided Royal Family on the letters written to Him and the requests He made to the Minister and Premier for their assistance on this matter including the recommendations made by the Mediation Panel.[35]

The Court acknowledged the letter written to the President from the applicant's attorneys that it intended to appeal Madondo AJP decision that confirmed King Misuzulu as the legitimate heir to the throne, which is also not the subject of contention in this article as was the case with the Court.[36] Of substance in this application was the letter written by the former Traditional Prime Minister on 12 March 2022 advising the President that the heir would come from the Great House: Queen Mantfombi and the necessary arrangements had to be made for the nomination of King Misuzulu which was done according to customary law and its customs.[37] On receipt of this letter, the President waited for four days and thereafter received another letter from the Minister advising of the support for the

[31]*Prince Mbonisi* paras 10-11.
[32]*Prince Mbonisi* para 37.
[33]*Prince Mbonisi* para 38.
[34]*Prince Mbonisi* para 39.
[35]*Prince Mbonisi* paras 40-42.
[36]*Prince Mbonisi Mbonisi* para 42.
[37]*Prince Mbonisi* para 43.

recognition of King Misuzulu which was based on the judgment of Madondo AJP.[38] Thus, the President relying heavily on the letter of 12th March 2022 from the Traditional Prime Minister, He took the decision to recognise King Misuzulu on 16 March 2022 despite being aware of the intention to appeal Madondo AJP judgment.[39] The Court did acknowledge the 15-day period within which to lodge the application to appeal was still not prescribed and the President did take it into account but instead, went ahead and recognised the disputed recognition. Thus, the appeal application was delivered timeously on the 18th March 2022 before its expiry on 24 March 2022.[40]

In this case, the Court made an emphasis as contended by the parties on the importance of section 8(4) and 5 of the Leadership and Khoisan Act regarding the process to be followed on an allegation of having flouted the due process of identification as prescribed by customary law and its customs. This was also linked to section 59 regarding the dispute itself on the process to be followed on its resolution. The Court drew a sharp distinction on the substance of the two provisions (8 and 59) regarding the procedures to be followed. The Court put an emphasis on section 8 which provides for the process regarding leadership and governance in traditional communities. On the other hand, section 59 deals with the general provisions, particularly with the existence of a dispute and not a mere allegation.[41] The Court gave substance to section 8 and rejected the appointment of the Mediation Panel as not the one anticipated by the Leadership and Khoisan Act.[42] Of course, mediation could have been ideal, but not the appropriate one as it might not have had a binding precedent in that it would have relegated the core content of the law into a 'brotherhood' or 'sisterhood' approach instead of the centrality of the law in resolving the impasse between the Royal Family members. The Court considered the text and purpose of the statute which should not be driven by 'anxiety' in reaching an amicable solution.[43]

The Court stressed the mandatory provision of the statute and found the President to have erred in law on the assessment of what he considered as evidence because it is the investigative committee that is intended by the statute to conduct such an evaluation.[44] Therefore, the Court held that the recognition of King Misuzulu was reviewable in terms of section 6)(2)(d) of the Promotion of Administrative Justice Act 3of 2000 (PAJA) for failing to comply with the requirements of section 8(4) and (5) of the Leadership and Khoisan Act. The Court went further and ordered for the establishment of the Investigative Committee as prescribed by the Leadership and Khoisan Act and not the one contemplated by section 8(1)(c)(ii)(aa) of PAJA.[45]

(2)Electoral Commission of South Africa v Umkhonto Wesizwe Political Party

[38]*Prince Mbonisi* para 45.
[39]*Prince Mbonisi* para 45.
[40]*Prince Mbonisi* para 45.
[41]*Prince Mbonisi* para 50.
[42]*Prince Mbonisi* para 52.
[43]*Prince Mbonisi* paras 52-55.
[44]*Prince Mbonisi* para 60.
[45]*Prince Mbonisi* paras 62-64.

This matter was an appeal against the Electoral Court decision in *Umkhonto Wesizwe Political Party v Electoral Commission of South Africa*[46] that entailed the interpretation of section 47(1)(e) of the Constitution 1996. The core content of the appeal was whether former President Zuma was eligible to be included in the MKP list and stand for election for the National Assembly considering his conviction for contempt of court and his 15 months sentencing by the Constitutional Court. This matter has a long history which complicates the subject of the dispute as it is interlinked with other matters which are not the subject of the argument in this article. For ease of reference, the former President was sentenced to 15 months imprisonment after having failed to obey the Constitutional Court order to appear before the State Capture Commission.[47] It is not the intention to delve into these matters herein but the subject of contention was his qualification to stand for membership to the National Assembly if his party could have gathered enough votes for representation in the National Assembly as it finally proved to have such numbers after the presentation of the outcome of the election results.

However, after having served three months of his sentence which he started on 8 July 2021, the former President was released by the National Commissioner of Correctional Services on account of medical reasons.[48] Such release was declared unlawful and set aside in an appeal which was dismissed by the Supreme Court of Appeal[49] and Mr Zuma had to go back to prison on 11 August 2023.[50] On the same date, the President issued Proclamation Notice 133 of 2023, acting in terms of section 84(2)(j) of the Constitution 1996 and granted remission to more than 9000 prisoners which included Mr Zuma.[51]

It was the release of former President Zuma through the process of remission that was central relating to his eligibility for the National Assembly. The basic question that emanated from this matter was whether the release entailed the review of the original sentence imposed by the court to the three months that was served by former President Zuma. This question became the basis of the interpretation of section 47(1)(e) of the Constitution which disqualifies anyone not only him, but everyone sentenced to 12 months imprisonment without an option of a fine and after the expiry of the five-year period of the sentence.

This article does not intend to focus on other issues raised by this matter but the interpretation of section 47(1)(e) of the Constitution. The Court established two elements that are drawn from this provision in that it entails a substantive disqualification on anyone convicted of an offence and sentenced to more than 12 months imprisonment without an option of a fine from being eligible to be a member of the National Assembly.[52] Secondly, it contains a time frame at which

[46]*Umkhonto Wesizwe Political Party v Electoral Commission of South Africa* [2024] ZAEC 5.
[47]See *Secretary of the Judicial Commission of Inquiry Into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* 2021 (9) BCLR 992 (CC).
[48]*MKP* para 4.
[49]See *National Commissioner of Correctional Services v Democratic Alliance* 2023 (2) SA 530 (SCA).
[50]*MKP* para 4.
[51]*MKP* para 5.
[52]*MKP* para 32.

the disqualification become operational with reference against which conviction or sentence has been determined or the appeal has expired.[53]

The Court unearthed the purpose of the disqualification in that it is designed to maintain the integrity of South Africa' democratisation and to ensure that members of the National Assembly are not the serious violators of the law.[54] The maintenance is endorsed within the framework of the rule of law against the backdrop of foundational values as envisaged in section 1[55] and the direct right to political participation as envisaged in section 19[56] of the Constitution. It also traced back the purpose of the disqualification to section 47(1) that sets out the minimum criteria to be satisfied by the potential candidate to the National Assembly.[57]

The Court linked the purpose of the disqualification to section 30 of the Electoral Act 73 of 1998 which deals with objections on the candidature of any person.[58] In this instance, Mr Zuma's name was objected to be included in the list of his MKP list due to his conviction and sentencing which was upheld by the Electoral Commission. It was the decision of the Electoral Commission that was taken to the Electoral Court for a review wherein the latter Court found the interpretation of section 47(1)(e) not applicable in his stance in that the Constitutional Court as the final court of appeal, the contempt judgment was not

[53]*MKP* para 32.
[54]*MKP* para 38.
[55]The section reads as follows:

1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:
(a)Human dignity, the achievement of equality and the advancement of human rights and freedoms.
(b)Non-racialism and non-sexism.
(c)Supremacy of the constitution and the rule of law.
(d)*Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness*, (author's emphasis).

[56]The section provides that:
1. Every citizen is free to make political choices, which includes the right:
(a)to form a political party;
(b)to participate in the activities of, or recruit members for, a political party; and
(c)to campaign for a political party or cause.
2. Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
3. Every adult citizen has the right:
(a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
(b) to stand for public office and, if elected, to hold office.

[57]*MKP* para 40.
[58]The section provides that:
1.Any person, including the chief electoral officer, may object to the nomination of a: candidate on he following grounds:
(a)The-candidate is not qualified to stand in the election;
(b)[…]·

appealable.[59] Secondly, the effect of remission meant the reduction of the original sentence of 15 months to 3 months which he served.[60]

The Electoral Court was heavily criticised by the Constitution Court for the misinterpretation of section 47(1)(e) by 'subverting the very purpose to be achieved by the said section which meant that a person convicted and sentenced by the Constitutional Court as a court of first and final instance is permanently immunised from the section 47(1)(e) disqualification'.[61] The Court went further to state that the Electoral Court decision meant that 'disqualification will never take place because the conviction and sentence are not to be appealed and the Electoral Court committed fallacy by interpreting the said section as an independent enacting clause, the functioning which is to alter the principal substantive meaning of the clause'.[62] The Court went on to state and used a strong language of 'being compromised by the Electoral Court in that if the same sentence could have been imposed by the Magistrate Court, the disqualification could have stood against Mr Zuma'.[63] The Court further stated that 'on a proper construction of section 47(1)(e) provides that a person who is finally convicted and sentenced to more than 12 months imprisonment is not eligible to contest elections or hold office as a member of the National Assembly'.[64]

In addition, carving out an exception for persons like Mr Zuma on the basis that they did not have the right to appeal their conviction, and sentence subverts the purpose sought to be achieved by section 47(1)(e) and threatens to undermine our democracy. It threatens the integrity of the National Assembly – a body that ought to comprise of individuals who can be trusted to promote and advance the rule of law and constitutional values – and it undermines the confidence that the public holds in the National Assembly. Further, it would threaten the legitimacy of this Court's findings as the apex court.[65]

Without exhausting the facts of this case, the Court as it indicated earlier, held that the purpose of section 47(1)(e) is the maintenance of South Africa's democratic character which is grounded on the universal model of the rule of law.

It is drawn from the facts of the two cases are central to transformative adjudication in that the *Prince Mbonisi* case divided the AmaZulu nation, particularly the Royal Family that is a glue that keeps the traditional community joined together in the regulation of traditional authority. The *MKP* case was highly contentious in that it raised serious political questions relating to South Africa's constitutional and democratic identity on the extent to which the judiciary deal with highly placed individuals who do not have just an influence but a social and political status in the carriage of their duties? Therefore, the uniqueness of the two cases narrows the focus in this article to determine the influence of the principle of judicial independence regarding its 'self-policing' or 'ability to self-regulate' in its

[59]*Umkhonto Wesizwe Political Party v Electoral Commission of South Africa* [2024] ZAEC paras 49-51.
[60]*MKP*, ibid.
[61]*MKP*, at para 60.
[62]*MKP* para 60
[63]*MKP* paras 61-62.
[64]*MKP* para 63.
[65]*MKP* para 64.

aspirations for transformative adjudication. It is in this regard that a review of the meaning of transformative adjudication is discussed as a foundation to the question posed herein on the 'ability to self-police' within the framework of judicial independence.

Courts `in Transformative Adjudication: A Model for 'Self-policing' on the Independence of the Judiciary in Africa?[66]

The transformative aspirations were envisioned long before the attainment of a democratic post-apartheid South Africa. Baxter[67] citing and with reference *In re Willem Kok and Nathaniel Balie*[68] judgment that involved a Griqua Chief and his son. They were suspected by the government of instigating rebellion and had been unlawfully detained in 1879 where the transformative aspirations of the judiciary were envisaged. In this matter, Sir John Henry de Villiers, the Chief Justice at the time rejected the government's interference in the functioning of the courts and held:

> *"it is said the country is in such an unsettled state, and the applicants are reputed to be of such a dangerous character, that the Court ought not to exercise a power which under ordinary circumstances might be usefully and properly exercised. The disturbed state of the country ought not in my opinion to influence the Court, for its first and most sacred duty is to administer justice to those who seek it, and not to preserve the peace of the country. If a different argument were to prevail, it might so happen that injustice towards individual [Blacks] ha[ve] disturbed and unsettled a whole tribe, and the Court would be prevented from removing the very cause which produced the disturbance*".[69] (author's emphasis)

It is this judgment, not even during the apartheid system of governance, dating back to the colonial system of state authority that the courts indicated the potential to advance a quest to 'self-police'. It was the courts that set the tone to indicate the need not to be interfered in their adjudicative role. It was this indication that continues to be grounded on the independence of the courts. It was this independence that enables the determination of an '*eagle view*' on the production of a transformed jurisprudence through the principle of 'independence' that is meant to enhance individual liberties and not to deprive them. Overall, it is this indication, that today, judicial independence is envisaged in contemporary Constitutions in Africa that set a framework for transformative aspirations in adjudication.

The framework for transformative aspirations in adjudication require the production of judgments that will enable the determination of the response to the question posed in this article. It is designed as a response to the question on what constitute transformative adjudication in the context of judicial 'self-policing'.

[66]Self-policing as idiom drawn from Conditt Jr (2001).
[67]Baxter (1985).
[68](1879) 9 Buch 45.
[69]Baxter (1985).

How such context contributes to the advancement of the principle of judicial independence? The questions are prompted by the extent to which the courts may 'self-police' with reference to the evolution of the meaning and substance of transformative adjudication.[70]

The debates are of importance in South Africa's 30 years of democracy that appears to be a model and great influence on the advancement of the principles of 'independence' on African judiciaries.[71] The foundation of transformative adjudication is grounded in Africa's history of constitution-making as drawn from Ndulo[72]. Ndulo identifies the three-stage process of constitution-making in Africa that informed the basis for transformative adjudication. Ndulo points out that these stages entail (i) the first phase took place at independence in the 1960s and was typically led by the colonial power [and] was part of the decolonisation process; (ii) second phase from independence to 1989 [wherein] during this period, constitution amendments to the independence constitutions designed to concentrate power on the presidency. He further argues that this was the period of authoritarian governments in Africa which culminated into one party state systems of governance; (iii) the third stage which runs from 1989 to today is associated with the worldwide wave of democratisation [and] is centred on rebuilding the political community as well as structures that had been distorted by political manipulation and violence during the era of authoritarian rule. As he opines, this was the phase which was also marked by promoting the rights of citizens in the affairs of their own countries and the accountability of governments.[73]

The stages are of particular significance for African judiciaries, especially the South African judiciary of cleansing itself of the apartheid legacy on adjudication in post-apartheid South Africa.[74] The judiciary itself, as a structure of government within the context of its institutional independence, had to infuse the values of the broad principles of transformation to be inclusive of South Africa's pluralistic character in terms of race and gender in its judicial echelons.[75] It is this broad process that enables the determination of the progress made that the focus is not only on the numbers or the biological differences of appointed judges from the diverse communities but the quality of the produced judgments that responds to the question herein on 'self-policing' in advancing judicial independence.

The aspirations of the three-stage process are also traced from the lessons learnt from the UDHR which was foundational to amongst others the adoption of the Basic Principles on the Independence of the Judiciary as indicated above. The substance of independence is captured herein and reads as follows:

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all

[70]Aziz (2023).
[71]Fombad (2017).
[72]Ndulo (2019).
[73]Ndulo (2019).
[74]Sapa (1997).
[75]See section 174(2) of the Constitution.

> governmental and other institutions to respect and observe the independence of the judiciary.
> […]
>
> 6 The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.
> […].

The UDHR influence transmitted to the African continent on the quest for the independence of the judiciary with the African Charter on Human and Peoples Rights requiring:

> State parties to the present charter to guarantee the independence of the judiciary and allow the establishment of national institutions entrusted with the promotion and protection of the rights and freedoms by the present charter.[76]

These principles serve as the pinnacle of state's responsibility towards, ensuring, first, the state's role in protecting the independence of the judiciary. Secondly, for the courts to ensure the fairness in the application of the law. Thirdly, the protection of individual rights in the adjudication of their rights by the courts. Of further importance, not to compromise the principle of judicial independence in the adjudication of the matters before them which entails the incorporation of 'self-policing' in transformative adjudication towards the production of transformative jurisprudence.

The importance of the judiciary cannot be overemphasised as a branch of the state and stands at the epitome of justifying each judgment delivered with concise and substantive reasoning regarding each matter. It is the justification that serve the richness of the jurisprudence in building a culture of justification and accountability, particularly in the context of developing a transformed jurisprudence that is designed to effect societal changes through the lens of the law. Quenot gives substance to this specific role on transformative adjudication in that:

South African courts are therefore important institutions where deliberation and accountability for the fundamental normative commitments of South Africa's constitutional order are fostered. But on the other hand,

> *"a culture of justification also insists on a particular mode of adjudication, of legal reasoning, by the courts* […] . *Transformative constitutionalism requires the exercise of judicial power to be justified as much as any other form of public power.* These two implications of a culture of justification for adjudication are indeed linked. […] the *role of courts as sites of justification of public conduct in terms of the Constitution's normative framework will be undermined if adjudication itself does not reflect a culture of justification,*[77] *(*authors emphasis*).*

[76]See article 26 of the African Charter on Human and Peoples Rights.
[77]Quinot (2010) at 112.

Drawing from Quenot it is evident that judiciaries must move away from the literal interpretation of the text and show willingness to purposefully align it with the vision propounded by the Constitution.[78] As similarly articulated by De Villiers[79] who contends that:

> "*the judiciary can be an essential agent in the transformative process of a country. This is because the judiciary can breathe life into the dry text of a constitution. The judiciary can make a rainbow of the black print. The judiciary can let the silent words of the constitution speak out by resolving disputes based on findings of fact, the application of relevant law, and the exercise of discretion. It can fill in gaps in policies. Handing down a judgement is not a computer-generated exercise. This is because the judiciary is responsible, based on the facts and submissions before it, to declare the law of the land for which it is responsible. The judiciary cannot write a constitution, but it can enliven it. The life-giving ability of the judiciary applies to long established, young and emerging democracies."*[80]

It is drawn from the tone set by De Villiers that the judiciary carries a specific responsibility as an agent of change in giving substance by taking a lead role in '*self-policing*' its transformative aspirations for the promotion of judicial independence. That starts at first by the individual judge exercising the individual independence in the adjudication of the matter before him or her. The second relates to the overall institutional integrity of the judiciary wherein the higher court will exercise the review or appellate role over the decision of the *court a quo*. The interdependence of the two factors is the framework upon which '*self-policing*' is assessed. Broadly, the factors encapsulate the principle of 'independence' that requires the courts to exercise their judicial discretion in a fair and impartial manner. It is this point of departure that serve as a foundation to transformative aspirations in giving substance to 'self-policing' in that judicial officers are to take responsibility in adhering to the prescripts of the new dawn of democracy. This is important for a flourishing adjudication which is grounded on an impartial decision-making process that gives substance to the broader concept of *'justice not to be done but must be seen to be done*'. The concept subjects the judiciary to the 'policing test' which is a main goal for 'independence' in the advancement of personal and institutional independence of the judiciary.[81]

According to De Villiers, 'the transformative role and ability of a court goes deeper and is more multilayered than the age of the constitution under which the courts function. The contention attests positively to the recently established South African Constitutional Court that has since its establishment served as a model of transformative adjudication and invalidated laws and conducts that were not in accordance with the spirit and purport of the Bill of Rights.[82] As De Villiers

[78]See Hoexter (2017).
[79]De Villiers (2023).
[80]De Villiers (2023).
[81]Chandra & Garg (2021).
[82]See for example, the *Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC). In this case and in the early stages of the democracy, the Court incorporated the various legal systems as of equal status in the regulation of state authority and affirmed the rights of South Africa's diverse groups.

further argues, the transformative role of the judiciary 'may arise from a democratisation process; an end to civil war; eradication of socio-economic inequality; recognition of ethno-minority and indigenous rights; accommodation of societal plurality; ensuring equal treatment of all individuals; laying the contours of federal-state intergovernmental relations; upholding constitutional values such as the separation of powers or acknowledging the importance of environmental issues'.[83]

South Africa, that just attained the 30 years of democratic existence after being thwarted by many years of insubordination, 'self-policing' is the process that may be viewed as a measure that is designed as the basis to internalise transformative adjudication within its overall adjudicative aspirations. The adjudication is grounded on transformative constitutionalism as De Villiers further expresses that '*the true test … is whether the courts address the issues that are relevant to a particular society and whether those judgements give rise to practical changes within the society*',[84] (author's emphasis). The judiciary is central in giving meaning to the transformative vision of the Constitution and other related laws. It is the Constitution that seeks to establish a 'just society in healing the divisions of the past'.[85] It is in this regard that Sachs J in *S v Makwanyane*[86] also expressed the need for transformative adjudication wherein traditions, beliefs and values of all sectors of South African society when developing our jurisprudence are to be considered and held:

> "in broad terms, the function given to this court by the Constitution is to articulate the fundamental sense of justice and right shared by the whole nation as expressed in the text of the Constitution. The Constitution was the first public document of legal force in South African history to emerge from an inclusive process in which the overwhelming majority were represented. Reference in the Constitution to the role of public international law [sections 35(1) and 231] underlines our common adherence to internationally accepted principles. Whatever the status of earlier legislation and jurisprudence may be, the *Constitution speaks for the whole of society and not just one".*[87] (author's emphasis*).*

In the 30 years of democracy, lessons learnt for a transformative adjudication design is meant to conceptualise the content and meaning to '*self-policing*' in advancing judicial independence. '*Self-policing*' is today driven by the process and building on the strengths and lessons in advancing South Africa's democratic identity in giving effect by first being the holder of the aspirations of the new dawn of democracy. The judiciary, as a resource of reconstruction and tool for transforming the jurisprudence that emanate from it that is influenced by the values that upholds the Constitution. Through '*self-policing*', the judiciary is better placed to protect its own independence by dismantling any barriers that may compromise the quality of producing socio-political oriented jurisprudence that addresses the

[83]Ibid.
[84]See De Villiers (2023).
[85]See preamble.
[86]1995 (6) BCLR 665.
[87]S. *v Makwanyane*, para 362.

people's human living conditions. '*Self-policing*' considers transparency and accountability amongst other principles in adjudication towards the advancement of judicial independence. However, does it mean 'independence' without transformative ideals in its processes? To what extent does the judiciary have to thread carefully in the exercise of its judicial authority? What amount of 'self-policing' will contribute to 'independence' in transformative adjudicative aspirations?

A South African Perspective on the Significance of '*Self-policing*' in Transformative Adjudication

The two cases that are the subject of the argument herein are foundational to the pertinent question raised about the process which endorses judicial independence in the exercise of its judicial authority. Of particular interest is the fitting of 'self-policing' in advancing the principle of judicial independence. The interest is directly linked to the nature of the dispute where the courts infused 'independence' on their self-policing exercise in adjudication.

The *Prince Mbonisi* judgment touch on the constitutional space that has been attained by the system of customary law in the new dispensation.[88] The substance of the motivation is the procedural disregard of the customary law processes in the nomination of the successor to the late King Zwelithini. The President was found to be at the helm of disregarding the system and its processes and his awareness of the divisions in the Royal Family could have been the basis upon which to determine carefully the extent to which his recognition of King Misuzulu as successor to the throne would impact not only the Royal Family but the Zulu nation at large. In this case, the President is required to 'uphold, defend and respect the Constitution as the supreme law of the Republic and to strive towards the attainment of unity of the nation'.[89] The President's conduct was not a misdirection, but a complete disrespect of the processes involved in the identification of a successor to the status of Kingship. Whilst he also acknowledged and became aware of the high divisions in the Royal Family, he exacerbated those divisions by not 'fighting' for the customary law process that is still progressively rediscovering itself as a constitutional legal system as is the case with other applicable systems in the Republic. The President's conduct was evident in *Chief Avhatendi Ratshibvumo Rambuda v Tshibvumo Royal Family*[90] judgment where the Premier of the Limpopo Province as a member of the provincial executive was also found to have flouted customary principles which became the centre of the dispute as the Court found that the Premier:

> did not exercise his discretion under section 12(2) of the Limpopo Traditional Leadership Act in a lawful manner. The Premier simply recognised Mr Rambuda based on misinformation in the form of a memorandum received from the MEC which incorrectly interpreted a notice of withdrawal of the application by the

[88]See section 211 of the Constitution.
[89]See section 83 of the Constitution.
[90](CCT 255/22) [2024] ZACC 15. Hereinafter *Rambuda*.

> respondents. He did not apply his mind to the matter but acted on the strength of the erroneous facts in the memorandum which rendered his decision reviewable. In terms of the court order dated 24 March 2016, the Premier was mandated to carefully consider the respondents' representations before making any decision. As aptly recognised by the High Court, an examination of the respondents' representations would have alerted the Premier to the existence of a dispute regarding the rightful successor.[91]

There is a link in these cases in that the President and the Premier hold executive powers and authority to protect the different legal systems in South Africa. The Courts in these cases are commended herein in that the President and Premier are not ordinary persons but constitutional beings,[92] who are 'required to, if there is a war, to come out and fight and protect his country'.[93] This is the approach in this case as he was required to adopt a fine comb in his recognition of 'King Misuzulu' and protect the integrity and status of customary law as a legal system that is observed by black South Africans. The misinterpretation from the President of the applicable laws in the regulation and resolve of customary law disputes is a cause of concern. The compromise of applicable legislation (Leadership Act) by the highest office of the land reduced the protection accorded to the system and structures of customary law to 'mere cousins' of the new dispensation. The aspirations of this country are vested in the President which were endorsed in the *EFF* judgement as the Constitutional Court held:

> "the nation pins its hopes on *him* to steer the country in the right direction and accelerate our journey towards a peaceful, just and prosperous destination, that all other progress-driven nations strive towards on a daily basis".[94] (author's emphasis).

It is against this background that the judiciary had to undertake a 'nail-biting' exercise in protecting its independence through the lens of 'self-policing' in the production of a transformed jurisprudence relating to the exercise of executive authority. It is this context that the confidence in the judiciary is strengthened by ensuring not just a pure equal protection, but the full benefit of the law as envisaged in section 9(1) of the Constitution.[95] It is also acknowledged that the constitutional authority as exercised by the courts relating to the constitutional identity of the office held by the President was the thorny subject in this matter. The President had to be reminded of the due process that needed to be followed in the recognition of successors which is also not of benefit to the case at hand but to other Kingships and Chieftaincies on succession of the potential candidates to the throne. The President, as Head of State and Executive is required by section 165(4) of the Constitution not to subject the courts to unnecessary pressure but to protect their

[91]*Rambuda* para 55.
[92]See section 83 on the status and functions of the President and section 125 on the status of the Premier as envisaged in the Constitution 1996.
[93]*Economic Freedom Fighters v President of the Republic of South Africa* 2016 (5) BCLR 618 (CC) hereinafter '*EFF'* para 20.
[94]*EFF* para 20.
[95]The said section provides that "Everyone is equal before the law and has the right to equal protection and benefit of the law".

independence and in this case, he is central in testing the substance of that principle being undermined by Him.

The Court 'pulled its head under the sand' and gave meaning on its independence through its reasoning that is the basis of 'self-policing' relating to the quality of judgment it produced. Particularly in the context of the doctrine of separation of powers under which the branches operate as the judiciary, although at face value is viewed as the weakest link of the other branches, it amasses wide powers in declaring any conduct that is inconsistent with the law to be invalid.[96] It is in situation of this nature that 'self-policing' as a measure of 'independence' becomes of value in producing a constitutionalised transformative jurisprudence in giving effect to the quality of transformed adjudicative aspirations.

In the *MKP* judgement with the after-effects still felt in South Africa after the National Elections with former President Zuma being left out of the slate for eligibility as a member of the National Assembly, the Electoral Court and the Constitutional Court are also commended for stamping their judicial independence in the interpretation of electoral laws to give substance to the overarching question on 'self-policing'. It is expressed herein that that although the Electoral Court was unanimous in its decision regarding the eligibility of former President Zuma, it proffered different reasons and came up with three judgments that became critical on the question raised in this case, that of 'self-policing' and 'independence' in transformative adjudication. The Electoral Court Judges, based on their oath of office, gave effect to section 165 of the Constitution[97] to apply the law without fear or favour in ensuring the integrity of the courts in judicial reasoning.

The foundations of independence which are also framed on individual and institutional independence became a source of what I would refer to as the 'internalised process' of 'self-policing' in the adjudication of the *MKP* judgment. The Constitutional Court established that the Electoral Court misplaced the constitutional identity of the National Assembly and the quality of potential candidates that will represent the electorate in Parliament. The distinct and striking features of the National Assembly were also laid in the *EFF v President* judgment as the Constitutional Court held:

(i) National Assembly, and by extension Parliament, is the embodiment of the centuries-old dreams and legitimate aspirations of all our people.

[96]See section 2 of the Constitution 1996.

[97]The said section reads as follows:

(1) The judicial authority of the Republic is vested in the courts.

(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

(3) No person or organ of state may interfere with the functioning of the courts.

(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

(6) The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.

(ii) It is the voice of all South Africans, especially the poor, the voiceless and the least remembered.
(iii) It is the watchdog of State resources, the enforcer of fiscal discipline and cost-effectiveness for the common good of all our people.
(iv) It also bears the responsibility to play an oversight role over the Executive and State organs and ensure that constitutional and statutory obligations are properly executed.
(v) The willingness and obligation to do so is reinforced by each member's equally irreversible public declaration of allegiance to the Republic, obedience, respect and vindication of the Constitution and all law of the Republic, to the best of her abilities.
(vi) In sum, Parliament is the mouthpiece, the eyes and the service-delivery-ensuring machinery of the people. No doubt, it is an irreplaceable feature of good governance in South Africa.[98]

It is drawn from these principles that the National Assembly is the House of the highest order wherein in the South African context, has been rescued from its own negative accorded status of the supremacy of parliament of the past. Today, the National Assembly requires representatives that will give substance to the democratic ideals of transformation that are transmitted by the courts in the interpretation of the law. The Constitutional Court in *MKP* exercised its 'self-policing' responsibility in protecting not just the status of 'independence' but the quality of jurisprudence that enhances the South Africa's vision of a democratised system of governance. The distinct feature in the *MKP* judgment is the appeal process itself which is fundamental to transformative adjudication and is linked to the broader framework of section 34 of the Constitution which provides for access to justice. Access to justice through the lens of the appeal process presents an opportunity, as in this case, to give meaning and substance to the foundations of transformative adjudication. The oversight role that is played through the appeal process reinforces the self-policing principle on the quality of produced jurisprudence.

The African judiciaries also do not appear to engage in transformative adjudication but are seen to fulfil the advancement of 'self-policing' through the lens of the principle of 'independence'. The Zambian Constitutional Court was put in a pedestal to determine the eligibility of former President Edgar Lungu to stand for the year 2026 presidential elections. In *Michelo Chizombe v Edgar Chagwa Lungu*[99] the Court decided that it will take a full trial court to determine former President Lungu's eligibility to stand for the forthcoming elections to be held in the year 2026 in Zambia. In this matter, Chizomba sought to challenge former President Lungu's participation as 'the Patriotic Party presidential candidate in the elections that were held on 12 August 2021 and his eligibility to participate in future presidential elections on the ground that he has served two terms'.[100] It was contended that former President Lungu held office under the 1991 Constitution and

[98]*EFF* para 22.
[99]2023/CCZ/0021) [2024] ZMCC 14 (9 July 2024). Hereinafter '*Chizomba'*.
[100]*Chizomba* para 2.1.

secondly under the Zambian Constitution as amended by Act 2 of 2016.[101] The foundation of this petition was that 'former President Edgar Lungu was ineligible to seek a presidential election for a third term'.[102] On the other hand, former President Lungu asserted that the issues raised by the petitioner were already ventilated by the courts and the petition was nothing more than an abuse of the court process.[103] Thus, the Constitutional Court reasoned that this matter raised a point of law which is highly contested and is more suited for its merits to be determined at a full trial.[104]

The Ecowas Court of Justice in Abuja *Obianuju Catherine Udeh v Federal Republic of Nigeria*[105] also entered the fray on self-policing for judicial independence and found the Republic of Nigeria to have violated many of the fundamental rights which are included the African Charter on Human and Peoples Rights.[106] In this matter, the applicant held, as they alleged, participated in a peaceful protest with other persons at the Lekki Toll Gate in Nigeria on 20 and 21 October 2020 which was directed at the Special Anti-Robbery Squad, a unit of the Nigerian Police Force as a result of their harassment and brutality which is contrary to their mandate.[107] The respondents averred that the applicants were a group of *hoodlums* (unlawful protesters).[108] The Court considered the issue of jurisdiction and admissibility in the determination of jurisdiction in this matter. to determine its adjudication. The Court relied on General Principle 5(a) of the United Nations Basic Principles of the Use of Force and Fire-Arms by Law Enforcement which requires the use of minimal force in dispersing the crowd and found the rights of protesters to have been violated.[109]

It is not intended to exhaust the case law, but it is evident that the judiciaries in Africa continue to be under immense pressure from members of the public who, in the context of the *MKP* judgment was also politically motivated as the country was in an election mode that was heavily contested. The face of former President Zuma as a forerunner for the MKP campaign became the subject of contention and viewed as being vilified by the governing party at the time through the courts that became a centre of attention regarding the handling of this matter by the judiciary. In this case, the Courts were not swayed by public and political influence in the adjudication of the matters but affirmed the 'independence' by adhering to the principles of upholding the 'rule of law' as a foundational value in transformative adjudication. Similarly, former President Lungu of Zambia, his desire for re-election for a third term is reflective of Africa being mirrored by high profile people that use their influence and social standing to influence public opinion regarding the role of the courts. The judiciary is unique, and its reasoning does not depend on public opinion as the latter is not a final

[101]*Chizombe.*
[102]*Chizombe,* para 2.2.
[103]*Chizomba* para 3.
[104]See *Chizomba*, paras 7.5-7.6.
[105]ECW/CCJ/JUD/29/24. Hereinafter *Nigeria*.
[106]*Nigeria* para 1.
[107]*Nigeria* paras 23-24.
[108]*Nigeria* para 39.
[109]*Nigeria* para 137.

determinant on the quality of reasoning to be proffered by the courts in the production of 'just remedies'.

In *Prince Mbonisi* and *MKP* judgments, including the *Lungu* and *Nigeria* judgments, the principle of 'independence' remained core and the judiciary did not succumb to the litigants holding highest office or with much influence in the country. It is in this instance that the courts are commended for upholding independence, in turn, showing an 'ability to police' themselves without squandering to the highest bidder at the expense of ensuring the advancement of transformative adjudication that gives substance and meaning to the law for South Africa's democratisation process.

The 30 years of transformative adjudication were long given effect during the infancy stage of South Africa's constitutional identity when the Constitutional Court in the *Certification of the Constitution of the Republic of South Africa*[110] judgment showed an ability to '*self-police*' when it declared the legitimacy of the Constitution as in compliance with the 34 Principles that were adopted and served as a framework upon which to test adherence to the post-1994 vision in transforming the various facets of human lives in all systems of governance in the Republic. These judgments are an affirmation of judicial accountability towards the attainment of transformative jurisprudence through the lens of 'self-policing'. The judiciary crafted South Africa's transformative identity which is grounded in the Constitution. It also addressed the issues relating to transformation of the customary law processes, electoral laws for and general rights framework which are of great relevance for South Africa and the African continent.

It is deduced from the discussion of the cases herein that transformative adjudication has the potential to contribute to good governance through the lens of 'self-policing' without which the principle of judicial independence will wade into thin air. South Africans, as evidenced by the *MKP* judgment, contributed to the tensions that had been brewing and public debates about the judiciary being labelled as 'untransformed' and used by the political elite to fight political battles.[111] It is in situations of this nature that the judiciary is commended for showing its 'self-policing' ability in contributing to a transformed adjudication process that is not influenced by public opinion or the status of the office or influence the person holds.

Conclusion

Transformative adjudication has been a thorny subject since the attainment of democracy in post-apartheid South Africa. The quality of jurisprudence produced contributes to the ideals of the new dispensation by effecting the needed societal changes. The cases discussed herein are indicative of the progress made so far which is commended and saw the infusion of 'self-policing' in advancing the principle of judicial independence. It is also acknowledged that transforming the jurisprudence is progressive in nature and requires an independent judiciary that will first internalise its transformative processes. The cases herein are indicative of judicial accountability in 'self-policing' without undermining the main goal of transformation.

[110]*1996 (10) 1253 BCLR (CC).*
[111]Hulme & Pete (2012).

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Business Contracts in Russia – Part 1

By Vladimir Orlov[*]

This article is the first part of a three articles work that handles business contracts in Russia on a general level. As a business or entrepreneurial contract is regarded in the Russian legal doctrine a contract, in which at least one party is a subject of the enterprise activities and by which the rights and duties connected with the enterprise activities have arisen, changed, or terminated. As being the civil law contract, a business contract is subject to the application of the general rules and principles of the civil law regulation. However, its specific nature must be observed, which is transpired through the Civil Code norms concerning the subjects, objects, contracting procedure and content, as well as liability. The specific nature of an entrepreneurial contract is particularly apparent in accepting a commercial custom as a general legal source applicable to it, as well as in special proceedings for resolving disputes between the parties of entrepreneurial contracts, which are regarded as economic disputes to be handled in the arbitrazh court. Business contract regulation in Russia is characterised by growing significance of the judiciary in it and by enlarged dispositivity of the regulative rules. This article will be continued by the presentations on disturbances related to contracting and their consequences (including invalidity of conract) interpretation and fulfilment of contract as well as change and rescission of contract.

Keywords: *contract; entrepreneurial contract; business contract; civil code; dispositivity; commercial custom*

Introduction

The Russian business contract law regulation is the subject of this writing, and it is aimed at updating the text of the chapter that handled the Russian contract law in my book *Introduction to Business Law in Russia* published in England in 2011[1].

Since that, and, particularly in 2012–2015, the Russian business law, including regulation of business contracts, has become at least partly the subject of the intensive legal development, aimed at its further internalisation. Thus, my presentation on the subject, in particular, the occurred amendments to the Russian Civil Code due to their both doctrinal and practical significance for the present development of the Russian legal system has become deserved updating, though the fact that both the legal doctrine and legal practice are still in search of their distinctive shape in Russia.

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[1]For more on the issue *see*, for instance Orlov (2011) at 139-129. The present state of the Russian contract law regulation is introduced, for instance, in Komarov (2022) at 135–185. *See* also, in Russian, Stepanov (2021) and Shablova (2023).

Legal Sources[2]

Contracts, including business contracts, are generally subject to the civil law regulation. The Russian Civil Code that is the main legal civil law source in Russia contains the provisions on how contracts are concluded, on how the obligations arisen on the contract are performed, and on what remedies are to be used in the event of contractual disturbance, including contractual liability rules. In addition to these provisions contained mainly in the Civil Code, and also other federative laws, applicable are in certain cases international law norms. Contract law provisions are sometimes included in other normative acts that are usually called in Russian law substatutory legal acts. Russian contract law is also acquainted with customs (of trade) and the use of standard contract conditions; and application of analogy is also known in Russian civil law[3]. Also, terms (conditions) of contracts are sources of civil law regulation in Russia.

Judicial practice is not regarded (at least traditionally) as a proper legal source, although the decrees of supreme judicial bodies are recognised as having precedential value in Russia; actually, the instructions of the Supreme Court are normative by their nature. In other words, a certain generality and binding force is characteristic of them but, as a matter of fact, only in the circle of its own system. However, the interpretative acts of the Constitution by the Constitutional Court are used to amend and even to abolish the norms that are contradictory with the Constitution wherefor the have to some extend the effect of a legal source. The civil law regulation in Russia is realised also on the non-normative level, for instance, by single law-application acts and usage, course of dealing and course of performance.

Civil law provisions that form the law-based regulation are usually applied voluntarily by the parties of a civil law relation. However, following the law belongs also to the tasks of officials, and law application bodies are obliged to apply legal norms in the event a dispute arises between the parties. The question how obligatory is to follow the concrete legal provision in the contract relation, and particularly in the resolution of the dispute arisen between the parties depends on the character of the provision. The norms that form the basis of the contract law regulation in Russian law are mainly imperative or dispositive.

The concepts of imperative and dispositive norms[4] are well-established in Russian law, and they are used in the Civil Code. According to the rules enforcing the principle of freedom of contract, in the events when a term of contract is provided by a norm which is to be applied as long as the parties have not reached an agreement to the contrary (a dispositive norm), the parties may by their agreement exclude its application or establish a term different from that provided in it, and in the absence of such an agreement the term of the contract is to be determined by the

[2]For more on the issue *see*, for instance, Sergeev (2021) at 30–47.

[3]The analogy of the legal rule and the analogy of the law is applicable in Russia, if the law, contract or custom regulating the relation in case is missing. In applying the norm or law by analogy attention should be paid to the requirements of good faith, reasonableness and justice (Article 6 of the Civil Code)

[4]For more on the issue *see*, for instance, Orlov (2024a) at 29–44.

dispositive norm[5]. In turn, the rules on imperative norms are included in the norm of the Civil Code concerning relation between contract and law, according to which a contract must comply with rules obligatory for the parties established by a law and other legal acts (imperative norms), which are in effect at the time of its conclusion.

The dispositiveness of a legal norm is determined in Russian law in a traditional way, which means that the norm itself expresses the application of it, unless otherwise provided by a contract[6]; such a provision could also cover a number of rules. In the event the expressed provision of the dispositivity or imperativity of the norm that determines the rights and obligations of contractual parties is not contained in it, such a norm ought to be recognised[7] as dispositive or imperative in accordance with the interpretation of its aims[8].

Civil law regulation is performed in Russia also by facultative norms. These mean norms, the application of which requires that parties have agreed on their application, and such an agreement must be expressed in a positive way. Furthermore, also reference norms are known in Russian civil law. By using them generally in contract regulation, the rule regulating certain legal relation (contract) is to be applied to the other, usually similar ones.

In respect of contracts, the provisions of the Civil Code, containing imperative (compulsory) and dispositive legal rules may be generally hierarchised, in accordance with the Civil Code, as follows: the first are imperative norms of the law, and the second are the terms of the contract agreed upon by the contracting parties. The third in contract regulation are dispositive norms which shall be applied in default of the contractual terms, and the fourth are customs (business customs) that are applicable in default of both contractual terms and dispositive norms. In the event a commercial custom or dispositive norm is included in the terms of the contract, it is regarded as a condition of this.[9]

General Principles of Civil Law[10]

The general (basic) principles of the Russian civil law, that form the platform for the contract law regulation are presented in the Russian civil law literature and grounded on the respective rules of the Civil Code[11]. They include the basics of the Russian civil legislation:

- civil law equality,[12]
- inviolability of ownership,[13]

[5]Article 421.4.
[6]Thus, the application of a dispositive legal norm may be excluded, or it may be deviated by them.
[7]According to the Ruling of the Plenum of the Supreme *Arbitrazh* Court no 16 of 14. March 2014 on freedom of contract (Ruling 16).
[8]as an exception to the objective interpretation that is the main rule in Russian law.
[9]Orlov (2024a) at 39–40.
[10]For more on the subject *see*, for instance, Orlov (2011) at 19–23; Shablova (2023) at 19–22 and Butler (2009) at 394–396.
[11]Article 1.
[12]The parties in civil law relation are equal.

- impermissibility of arbitrary interference in private affairs,[14]
- unhindered exercise of civil rights,[15] and
- restoration of violated rights and judicial protection of civil rights,[16] as well as
- freedom of contract[17].[18]

The principle of freedom of contract reflects the principle of dispositiveness that is characteristic particularly for the civil law regulation. According to the Civil Code[19], the subjects of civil law relations acquire and exercise their rights of their own will and in their own interests (at their own discretion). The Civil Code provides directly, based on the Constitution[20], that civil law rights may be limited by the (federal) law to the extent to which it is necessary to protect the constitutional order and public morality, defend the rights and legal interests of citizens and other persons as well as human life and health, and ensure the national defence and security[21]. Thus, no one could be obliged by the law to use his rights. Also, the refusal of a physical or juristic person to exercise his rights is not to entail the termination of these rights, unless otherwise provided by the law[22]. Furthermore, the Civil Code directly obliges the civil law subjects to act (in establishing, exercising, and protecting civil law rights and in performing civil law duties) reasonably and fairly and prohibits the abuse of civil law rights[23].

Related to civil law the principle of dispositivity is implied in freedom of contract grounded on the freedom of the parties' will. The principle generally connotes the liberty of the parties to the contract to define the content of their agreement at their discretion and determine the courts before which and the law according to which any disputes should be governed. In turn, in the Russian international private law, the principle of autonomy of will is expressed in the basic rule regarding the law applicable to the issues belonging to the contract statute. According to Article 1210 of the Civil Code on the choice-of-law-clause, the

[13]No one can be deprived of his property otherwise than by a court decision and on legal grounds.
[14]The ability to interfere in private affairs, including economic activities of civil law subjects, is restricted only to cases provided by the law.
[15]The restrictions in respect of the free circulation of goods, services, and financial assets, may be imposed only by the federal law if this is necessary to ensure safety, the defence of human life and health, or the protection of nature and cultural values.
[16]The possibilities for subjects of civil law relations to defend their rights and legal interests in court procedure, including demands to revoke the meeting's decision; they may also use self-defence and other lawful protection means.
[17]he subjects of civil law have free power to conclude a contract to choose the contracting party and determine the conditions of the contract (Article 421 of the Civil Code).
[18]The general principles of the Russian civil law related to contract relations also include prohibition of abuse of rights and fairness requirements as well as prohibition to benefit from unlawful or unfair behaviour, that are to be considered as the exceptions to the application of general principles.
[19]Articles 1.2 and 9.1.
[20]Article 55.3.
[21]Article 1.2. The Civil Code also includes other instances where the state is empowered to intervene into contract relations.
[22]Article 9.2.
[23]Article 10.

contracting parties may, at the conclusion of the contract (of international character) or thereafter, choose by agreement the law that will govern their rights and duties under the contract. The principle of party autonomy has also been recognised in Russian law of arbitration – where parties may similarly choose the law according to which their arbitration agreement and its procedure (curial law) should be governed.[24]

Subjects of Entrepreneurship[25]

The subjects of entrepreneurship in Russia are defined in the Civil Code, in which also their legal status is determined. They can be divided into individual and collective. Collective subjects practicing business activities or corporations are in general juristic persons, among which are distinct commercial organisations established for business purposes. Enterprise activities are allowed also to non-commercial organisations, however with restrictions. Enterprise activities may be practised also by subjects who are not juristic persons. They include individual entrepreneurs or physical persons as well as certain collective subjects, as for instance, farms. Non-juristic persons are in the Russian law also representative offices and branches of enterprises. Furthermore, the list of participants in business activities in Russia includes also public law subjects.

Objects of Enterprise Activities[26]

The civil law objects and respectively objects of enterprise activities are listed directly in the Civil Code[27], and they are things, including money and securities (commercial papers), other kinds of property such as property rights; works and services; protected results of intellectual activity and means of individualization equated to them (intellectual property); and nonmaterial values.

The civil law objects are divided, according to the Civil Code, into freely alienable, those with restricted alienation, and those which are excluded from circulation. In general, the objects of civil law rights may be freely alienated or transferred from one person to another by way of universal legal succession (inheritance, reorganization of a juristic person), or in another way, unless they are excluded from circulation or limited in this[28]. Among the civil law objects, subject to general alienability strengthened by the law explicitly, are, in accordance with the Civil Code, above mentioned things, other property, works and services, results of intellectual activity and nonmaterial values.

As the objects of civil law are recognised in Russia also property complexes which can consist of immovables and movables and are purported to be used be in

[24]Orlov (2024b) at 72.
[25]For more on the subject *see* Orlov (2015) at 413–414, and Shablova (2023) at 81–90.
[26]For more on the subject *see* Shabolova (2023) at 97–108.
[27]Article 128.
[28]Article 129.1.

whole. These include enterprises and jointly owned dwellings which are considered as immovable property.

Enterprise as a complex of property used for the performance of business activities comprises under Article 132.1 of the Civil Code of all the property (assets) purported for the activities and include things usually regarded as immovables: land parcels, buildings and structures, and as movables: equipment, implements, raw materials, products, choses in action, debts, and also rights to designations individualizing enterprise, its products, works and services (such as firm name, trade and service marks), as well as other exclusive rights, unless otherwise provided by the law or agreement. An enterprise, but also a part of enterprise, may be the object of sale, lease, pledge or other commercial transaction. Enterprise as a complex of property is considered in Russia as immovable property.

Concept of Contract[29]

Contract[30] is understood in the Russian contract law provisions and legal literature, as elsewhere, to mean not only:

- a legal fact which acts as the grounds for an obligation, but also
- a contracting obligation itself and
- a document in which the contracting obligation is reinforced.

As a legal fact which forms the grounds for the obligation law relation, contract is understood as an integration of the expressions of the wills of the parties, alias an agreement on establishing, changing, or terminating civil law relations, together with the rights and duties of their participants. It is expressly provided in the rule of the Civil Code defining obligation and grounds for its origin that obligations arise from contract[31]. As a legal fact contract comprehends a transaction[32] on which obligations are based. In the rule of the Civil Code containing the definition of transaction, it is expressly provided that contract is bilateral or multilateral transaction[33]. Since the concept of contract rests on the concept of transaction, contract is, according to Article 420.2 of the Civil Code, subject to the application of the rules regulating bilateral or multilateral transactions, including the provisions on form and validity of transaction.

As a contracting obligation itself, contract stands for the obligation law relation which arises because of the conclusion of the contract (transaction). The question is of the civil law obligations based on the agreement and it is a continuous and relative

[29]For more on the subject *see* Orlov (2011) at 19–23 and Shablova (2023) at 203–205.

[30]In Russian law, the legal instruments for providing business or private commercial activities are *сделка* that is ordinarily translated as transaction, *договор*, ordinarily translated as contract, and *соглашение*, ordinarily translated as agreement. Also, the term *контракт* is in Russia used generally to mean contract but often with nuances—related, for instance, international sale or public supplies.

[31]Article 307.

[32]About contract as a transaction *see* Braginsky & Vitryansky (1999):146–152.

[33]Article 154.

relation between the debtor and creditor in which the (subjective) rights and duties of the contracting parties exist and are fulfilled. In this sense contract comprehends contract obligations including the contract relation itself and performance of the contract[34]. Contract in this sense comprises the obligations arising from it, and is subject, in accordance with the Civil Code[35], to the application of the general rules regulating obligations.

As a document in which the contracting obligation is reinforced, contract stands for the form of agreement or transaction, in other words a document into which the rights and duties of the parties are written. This concept is, however, rather relative, since the parties' agreement does not necessarily require a single document. However, if such a document is prepared, and in certain cases it must be prepared, it is always named as a contract. In the form of a document, a contract serves as evidence that it has arisen, and at the same as a fixation of its content, in which case the observance of the form requirements is important[36].

The legal definition of contract is contained in Article 420.1 of the Civil Code. It is recognised as an agreement of two or several persons on establishing, changing, or terminating civil law rights and duties. Thus, the legal definition of a contract in the Russian contract law is based on the concept of transaction and comprehends that the contract arises upon the consent of the contracting parties, and that there are the actions mutually agreed by the parties in which their reciprocal and congruent expressions of the will have transpired. Since the concept of contract rests on the concept of transaction, contract is, according to Article 420.2 of the Civil Code, subject to the application of the rules regulating bilateral or multilateral transactions, unless otherwise follows from Civil Code.

Freedom of Contract and Binding Force of Contract[37]

The recognition of contract as the primary ground for the origin of obligations is based on the notion that contractual self-regulation or realization of the autonomy of intention is allowed and its legal force is recognised by the state. In that case the economic content of a commodity exchange act or transaction obtains the necessary legal form for it and its confirmation as well.[38] The allowing of contracting regulation also means the acceptance of the principle of freedom of contract, which transpires in sanctifying that the rights and duties are determined by contract in which the contracting parties have realised their dispositive powers. Freedom of contract is expressly confirmed as a starting point of the civil legislation in the Civil Code[39] and belongs therefore to general principles of Russian contract law. Furthermore, Article 421 of the Civil Code contains the rules directly devoted to

[34]About contract as a legal relation *see* Beklenischeva (2006) at 65.
[35]Article 420.3.
[36]Sergeev (2009) at 838–839.
[37]For more on the subject *see*, for instance, Shablova (2023) at 209–213.
[37]For more on the subject *see*, for instance, Orlov (2011) at 19–23 and Shablova (2023) at 209–215.
[38]Suhanov (2008) at 174–178.
[39]Article 1.1.

freedom of contract in which the concept is clarified. According to the definition of freedom of contract included into Article 421, it comprehends freedom to:

- conclude contract
- determine the character of the contract to be concluded, and
- determine its conditions or content[40].

According to Article 421.1 of the Civil Code, physical persons and juristic persons are recognised as free to conclude contracts. In the first place, this means that both physical persons and juristic persons choose themselves the party with whom they enter into a contract, which means freedom of choice. It also means that compulsion to conclude a contract is not allowed, except in those cases where the obligation to conclude a contract is established in law or by agreement of the parties. The question is of freedom of decision, according to which the contracting parties make their decisions independently of each other if they establish the contract relation between themselves or not. Freedom of decision is confirmed in Russia in the rules of the Civil Code regulating legal capacity of physical persons[41], which contain the list of the civil law rights belonging to them. In respect of juristic persons, and particularly those who practice commercial activity, freedom of decision is presumed without any conditions.

Freedom of contract transpires, according to the Civil Code[42], also in that the parties are free to determine the character of the contract they conclude or to conclude any contract which is provided by the law or not. This means freedom of content and includes freedom of type. Thus, the contracting parties may use any contract model as well as create a new one, if it is not contrary to the law. The parties have the right to conclude a contract, both stipulated[43] or nominate and non-stipulated[44] or innominate (sui generis) by the law or by the other legal acts[45]. However, the rules that regulate individual kinds of (nominate) contracts are not applicable to a contract which is not stipulated by law or other legal acts except for the case where the rules on mixed contracts are applicable. In the absence of such possibility the rules that allow analogy of the legal rule may be applied to individual relations of the parties to a contract[46]. However, it does not concern the imperative rules of the applicable nominate norms, the application of which is necessary for public order reasons (provided that the protected interest is indicated).[47]

According to the legal definition of freedom of contract contained in the Civil Code, the contracting parties are also free to determine the conditions of the contract they conclude. Hence the conditions of the contract are to be defined at the discretion of the contracting parties. This rule is also extended to concern a contract

[40]The concept of contract in the Civil Code may be regarded as based on the freedom of choice and decision as well as the freedom of type and content.
[41]Article 18.
[42]Article 421.2.
[43]or regulated.
[44]or non-regulated.
[45]Article 421.2.
[46]Article 6.1.
[47]*See* Commentary at https://www.zakonrf.info/gk/421/

which is based on the model prescribed by the law as well as a mixed contract or mixed type contract containing the elements of different types of contracts. The rule according to which the content of the contract conditions is to be defined at the discretion of the contracting parties is extended to the extent that the application of the dispositive (discretionary) legal norm may be excluded or deviated, as well as that the legal force of the contract could be extended to concern the relations before the conclusion of it[48]. But if a condition of a contract is not determined by the parties or a dispositive norm, the condition ought to be determined by the customs[49], unless the content of a condition is determined by the law or other legal act[50]. The only limitation to freedom of content imposed in Russian contract law is that the condition which the contracting parties have chosen or defined may not be contrary to the law or other legal act. Thus, the discretion of the contracting parties in respect of the contract conditions is excluded where the content of the respective condition is determined as obligatory in the law or other legal acts[51]. Also, the provisions, that, although not directly contain prohibitions, are aimed to protect important values and interests (the weaker or third party, or of the society directly). as well as balance of contract interests referring to the requirements of reasonableness and fairness.[52]

The general limits of freedom of contract are contained in the rules of the Civil Code on freedom of contract[53], public contract[54], and contract of adhesion (Article 428). These limitations restrict freedom to conclude a contract (freedom of decision and freedom of choice) and determine its content (freedom of content, including freedom of type).

The limits of freedom of contract are also implied by the rules of the Civil Code on restrictions of use of the civil law rights[55]. According to them civil law protection is dependent on the civil rights being exercised reasonably and in good faith. The rules also include the prohibition of the abuse of civil law rights (prohibition of chicanery). In case of failure to observe these requirements, the court may, according to the Civil Code[56] refuse to give legal protection.

The recognition of the legal force of the contractual regulation means the acceptance of the principle not only of freedom of contract, but also of binding force

[48]Restrictions to freedom of contract are imposed by the interests of other subjects of law and of society. In addition, the protection of security as well as natural and cultural objects also provides necessary reasons for such limitations. Freedom of contract is restricted in Russia in the provisions contained in the general rules of the Civil Code (Articles 1, 10 and 422). The limitations to freedom of contract are included also in the rules of the Civil Code regulating different types of contracts. In accordance with the Civil Code, freedom of contract is restricted by prohibitions of certain acts as well as legally prescribed conditions and obligation to contract which may be based on the law or merely agreement. In general, limitations of freedom of contract transpire in the mandatory or imperative norms; the imperative norms known in the Civil Code are the antimonopoly legislation and the norms on consumer protection and price control.
[49]Article 421.5.
[50]Article 422.
[51]Article 421.4.
[52]*See* Stepanov (2021) at 636.
[53]Article 421.
[54]Article 426.
[55]Article 10.
[56]Article 10.2.

of contract, which comprehends the binding effect of contract or the principle *pacta sunt servanda* that means the observance of the contract. In Russian contract law, this principle transpires in the first place in the rules of the Civil Code regulating the performance of obligations, including the means for safeguarding obligations and the obligation to compensate for damages, as well as in the rules on change and rescission of contract, the purport of which is to compel the contractual parties to observe the contract. Binding force of contract is confirmed in the general rule of the Civil Code concerning the performance of obligations, including contract obligation[57], by the requirements that obligations must be performed in a proper manner in accordance with their conditions and the requirements of the law and other legal acts. It is also confirmed in Article 310 of the Civil Code regulating performance of obligations, by the rule according to which unilateral refusal to perform an obligation and unilateral change of its conditions is not in principle allowed. In the event the obligation of contract is not performed properly, or in the case the breach of contract has occurred, the means for safeguarding of obligations may be applied to the violator of the contract. In Russian obligation law, they include securing measures for fulfilling obligations, operative safeguards, such as withholding right, real performance, including contracting out, as well as price reduction, premature performance, change and rescission of contract and compensation for damages as well.

The contract observance means that the contract conditions, in a large sense, are to be followed, which are generally be placed in the following hierarchy:

1) the imperative norms of the law,
2) the imperative norms of the other legal (normative) acts,
3) the terms of the contract agreed upon by the contracting parties,
4) the dispositive norms that are to be applied in default of the contractual terms,
5) the commercial customs (customs of trade) that are to be applied in default of both contractual terms and dispositive norms.

The significance of binding force of contract transpires particularly in that contract conditions are purported to stand unchanged. So, according to the Civil Code, changes in the civil legislation after the parties have concluded the contract, even if they are mandatory, do not have a direct effect on their contract unless it is provided by the law that its effect extends to relations arising from the previously concluded contracts[58]. Russian contract law is also otherwise based on a particularly high threshold for the change of the contract[59], considering it as exceptional measure.

[57]Article 309.
[58]Article 422.2.
[59]Articles 450–453.

Classification of Contracts[60]

Contracts are distinguished in Russian civil law in many ways depending on the aims of classification or on what features of contract are to be clarified. A part of criteria for classification of contracts is linked to its content[61], whereas the other part is concentrated on its formal aspects. Formal aspects are important in considering a contract in the capacity of a transaction, in which case the main question is to clarify whether the valid contract is concluded or not.

In the capacity of a transaction, contracts may be distinguished into real and consensual[62] and compensated and non-compensated contracts[63] as well as causal and abstract ones[64]. Compensated contracts may be divided, in turn, into exchange and risk or aleatory ones[65]. Distinct as transactions are also fiduciary contracts which are regarded often in Russian legal doctrine as a *sui generis* group[66].[67] In this connection, noteworthy is that the classification of contracts does not always correspond unambiguously with the reality. So, for instance, a storage, loan and delegation contract may be depending on its conditions compensated or non-compensated, whereas gift and storage contract as well as contract of uncompensated use may occur both as real and consensual one.

[60]Shablova (2023) at 209–213.

[61]In the aspect of obligations, contracts are classified in the provisions on types of contract (obligation) in the special part of the Civil Code (Articles 454–1054).

[62]The distinction between consensual and real contracts is grounded on the rules of the Civil Code defining the moment of the conclusion of a contract (Article 433) consisting of the general rule concerning consensual contracts and the special one purposed for real contracts. According to the rule on consensual contracts (Article 433.1) a contract is to be considered as concluded at the moment, when the person, who has sent an offer, has received its acceptance. In turn, the special rule concerning real contracts provides that in the event the conclusion of a contract requires under the law also the transfer of property, the contract is to be considered as concluded at the moment of transfer of the property at issue (Article 433.2).

[63]Russian law knows main or basic contract and supplementary contract, preliminary and basic contracts as well as mutually agreed contracts and contracts of adhesion. Furthermore, duty to contract and public contracts are distinct from freely agreed contracts in Russian contract law. Also fixed term contracts and contracts with undetermined term (or for the time being) and conditional contracts as well as contracts for the benefit of a third person are known in Russian contract law.

[64]Causal contract stands for a contract, in which the aim of the contracting parties is obvious, and its validity depends on the presence of the ground for concluding it (*causa*) which means the existence of the legally acceptable and achievable aim. Respectively, abstract contract comprehends a contract which is independent of its ground or contractual aim, like, for instance, bill of exchange.

[65]Specific for such contracts in Russia is that, according to the Civil Code (Article 1062), claims connected with the organization of games and wagers or with participation in them are subject to judicial protection only in exceptional cases. On the other hand, the Civil Code (Article 429^4) contains provisions on contract with performance on demand (subscriber contract). Although such contracts are based on risk, they enjoy legal protection.

[66]Such contracts are based on the special relations requiring personal confidence, and in failure of it, each of the contracting parties has the right to withdraw from the contract performance.

[67]Russian law knows main or basic contract and supplementary contract, preliminary and basic contracts as well as mutually agreed contracts and contracts of adhesion. Furthermore, duty to contract and public contracts are distinct from freely agreed contracts in Russian contract law. Also fixed term contracts and contracts with undetermined term (or for the time being) and conditional contracts as well as contracts for the benefit of a third person are known in Russian contract law.

According to their content contracts are distinguished into property contracts (obligations) that are aimed at the fulfilment of the agreed obligation,[68] and form the main part of the contracts in Russian law, and organisational arrangements.

Entrepreneurial Contracts

Business (or entrepreneurial) contracts have peculiarities although they are not defined in the Russian Civil Code that is the main legal civil law source in Russia. Entrepreneurial (or related to entrepreneurial activities) obligations are, however, mentioned in the provisions on obligations of the Civil Code, and they are doctrinally known as commercial transactions which form the specific group of the civil law contracts[69].

In the Russian legal doctrine, as entrepreneurial or business contract is regarded a contract, in which at least one party is a subject of the enterprise activities and by which the rights and duties connected with the enterprise activities have arisen, changed, or terminated. As being the civil law contract, an entrepreneurial contract is subject to the application of the general principles of the civil law regulation. However, its specific nature must be observed, which is transpired through the Civil Code norms concerning the subjects, objects, contracting procedure and content, as well as liability. The specific nature of an entrepreneurial contract is particularly apparent in accepting a commercial custom as a general legal source applicable to it, as well as in special proceedings for resolving disputes between the parties of entrepreneurial contracts, which are regarded as economic disputes to be handled in the arbitrazh court. Furthermore, international business contracts may be handled in international commercial arbitration proceedings and are subject to the application of the choice-of-law rules.[70]

Organisational Arrangements[71]

The purpose of organisational arrangements (agreements, contracts) is to create the framework for the future business relation that will be concretised in the property contract (or another establishment). Organisational arrangements in Russian law

[68]to transfer property, perform work, render service.

[69]Commercial transaction, through which contracts used in enterprise activities are characterised, is generally understood as a transaction which is regarded in the law as commercial irrespective of by whom it is made (objective criterion), or a transaction the party of which is an entrepreneur pursuing or realizing commercial goal (subjective criterion). It is presumed that any transaction made by the entrepreneur is related to commercial activities. So, the starting point is the subjective criterion of the commercial transaction. Also, what is the aim of the transaction is important and in respect of the commercial transaction it means profit seeking. In general, a commercial transaction is presumed as compensated in Russian contract law.

[70]At present, business contract regulation in Russia is characterised by growing significance of the judiciary in it and by enlarged dispositivity of the regulative rules.

[71]For more on the issue *see* Kurbatov (2021) at 3-17.

(recognised in the Civil Code) include preliminary contract[72] and framework agreement[73], as well as option for conclusion of contract[74] and option contract[75], and agreement with performance upon request (subscriber agreement)[76].

Preliminary Contract

Preliminary contract is, according to the Civil Code[77], a contract under which the parties are obligated to conclude in the future a (main) contract on the transfer of the property, on the performance of works or on rendering services (the basic or main contract) on the terms, provided by the preliminary contract. The preliminary contract must contain terms sufficient enough to determine the subject matter of the main contract as well as the terms which one of the parties had requested to agree upon at the time of concluding the preliminary contract[78]. In the event the other (contracting) party refuses from concluding the main contract, the rules on compulsory contracting are applicable and the court may compel the refusing party to enter into the main contract[79]. The preliminary contract must meet, according to the Civil Code[80], the same form requirements as the basic contract, and, if those are not established, it must be done in written form; nonobservance of the rules on the form of a preliminary contract entails its invalidity (nullity).

Framework Agreement

Framework agreement is understood, under the Civil Code[81], as an agreement with terms left open. It contains general conditions of the future obligations that are to be specified throughout the performance of the agreement by concluding separate contracts, submitting requests by one of the parties, etc. The general conditions are to be applied directly to the relations that are uncovered by separate contracts, including cases where the contract is not concluded, unless otherwise provided in separate contracts or follows from the nature of the obligation[82].

Option for Conclusion of Contract

Option for conclusion of contract stands, according to the Civil Code[83], for the case where the contracting parties agree on granting option for conclusion of contract. In accordance with such an agreement one party by virtue of irrevocable offer entitles another party to make one or several contracts subject to conditions

[72]Article 429.
[73]Article 429.1.
[74]Article 429.2.
[75]Article 429.3.
[76]Article 429.4.
[77]Article 429.
[78]Article 429.3.
[79]Article 429[5.]
[80]Article 429[2]
[81]Article 429[1].
[82]Article 429[2]
[83]Article 429[2]

provided by the option. By accepting such an offer in the procedure, at the time and under the terms provided for by an option, the other party is entitled to conclude a contract. An option to conclude a contract may provide that the acceptance is only possible in the event of occurrence of the condition defined by such option, including one which is dependent on the will of one of the parties. Where the term for acceptance of an irrevocable offer is not determined, it ought to be made within one year, unless otherwise follows from the essence of a contract or customs[84].

An option to conclude a contract is to contain the provisions that enable determination of the subject and other essential conditions of the contract; the subject of the contract to be concluded may be described in any way enabling its identification at the moment of acceptance of an irrevocable offer[85]. The option to conclude a contract is to be made in the same form as the contract to be concluded[86], and it may be included into another agreement unless otherwise follows from the essence of such agreement[87]. An option to conclude a contract shall be granted for payment or other consideration, unless otherwise is agreed between the parties, including commercial organisations. Unless otherwise provided for by an option to conclude a contract, payment related to it is to be counted against payments under the contract based on an irrevocable offer and it is not subject to repayment in the event of nonacceptance of the offer[88]. The rights under an option to conclude a contract may be assigned to another person unless otherwise provided for by the agreement or follows from its essence[89].[90]

Option Contract

In the case of an option contract, it is provided under the Civil Code[91] that either party under the terms provided for by the contract is entitled to demand within the time specified in the contract that the other party take the actions provided for by the option contract (including pecuniary payment, transfer and receipt of property), and, in the event the authorised party does not demand it at the cited time, the option contract is to be terminated. An option contract may provide that the demand under the option contract is to be considered as made in case of the occurrence of circumstances defined by such a contract. For the right to present a demand under an option contract a party is to pay the monetary sum provided for by such contract, except for the cases where an option contract, including one made between commercial organisations, provides for its gratuitousness or if the conclusion of such contract is caused by another obligation or another interest protected by law, that are related to the parties' relations[92]. In the event of termination of an option contract,

[84]Article 429^2.2.
[85]Article 429^2.4.
[86]Article 429^2.5.
[87]Article 429^2.6.
[88]Article 429^2.3.
[89]Article 429^2.7.
[90]The features of individual kinds of options to conclude a contract may be established by law. Article 429^2.8.
[91]Article 429^3.1.
[92]Article 429^3.2.

the payment provided for presenting the demand under the option contract, is not subject to repayment, unless otherwise provided for by the contract.[93]

Agreement with Performance upon Request (subscriber agreement)

Agreement with performance upon request or subscriber agreement is recognised, under the Civil Code[94], as an agreement, according to which, one party (the subscriber) provides definite, including periodical, payments or some other compensation for the right to demand from the other party (the executor) the performance in the required number or extent or under other terms defined by the subscriber. The subscriber must pay a subscription fee or provide other performance under the agreement irrespective of whether the performance was requested from the contractor or not, unless otherwise provided for by law or contract[95].

Limited Freedom Contracts

Russian law knows in addition to general freely agreed contracts also contracting arrangements that do not represent the principle of freedom of contract. Among such limited freedom contracts are contracts of adhesion and public contracts.

Contract of adhesion is[96] defined the Civil Code[97] of as a contract, the conditions of which are determined by one of the parties in printed forms or other standard forms, and which may be adopted by the other party only by adhering to the proposed contract as a whole. The purport of the legal regulation of contracts of adhesion is to protect the party who has accepted the standard conditions or adhered to the contract.

In the rules regulating contracts of adhesion of the Civil Code, it is expressly provided that the party adhering to the contract has the right to demand the rescission or change of the contract[98]. The application of these measures, however, require according to the Civil Code the circumstances when the contract of adhesion, although does not contradict the law or other legal acts, deprives the party adhered to the contract of the rights usually granted under contracts of the given type, excludes or limits the liability of the other party for the violation of obligations, or contains other conditions clearly burdensome for the adhered party which he, on the basis of his reasonably understood interests, would not have accepted, if he had the possibility of participating in the determination of the conditions of the contract[99]. The rules on contract of adhesion are applicable also to the cases of

[93]The features of individual kinds of option contracts may be established by law or in the procedure established by it (Article 429[3].4).
[94]Article 429[4.]
[95]Article 429[4].2
[96]For more on the subject see, for instance, Sergeev (2009) at 849–850, Suhanov (2008) at 186–187 and Braginsky & Vitryansky (1999) at 258–266.
[97]Article 428.1.
[98]Article 428.2.
[99]Unless otherwise established by law or follows from the essence of an obligation, in the event of amendments or termination of a contract by a court at the demand of a party that has joined the

contracting that is not to be recognised as a contract of adhesion, if the conditions of the contract are defined by either party, while the other party due to the evident disparity of negotiating power is in a position substantially complicating agreement of a different content of individual conditions of a contract[100].

Public contract is defined in the Civil Code[101] as a contract, concluded by a person who exercises business or other profitable activity, and establishes its obligations for the sale of goods, performance of works, or rendering of services, which this organization by the nature of its activity must exercise with respect to everyone who turns to it (retail trade, carriage by transport for common use, communications services, energy supply, medicine, hotel service, etc.) Such a person has no right not only to refuse from making contract but also to show a preference to some persons as compared to others as concerns the conclusion of a public contract, except for the cases established by law or other legal acts[102]. In the event of the groundless refusal to conclude a public contract the consumer the corresponding commodities and services may demand the application of the obligatory contracting procedure[103], provided for by the rules on precontractual disputes that are contained in Article 446 of the Civil Cod Furthermore, The conditions of the public contract that does not correspond to the established public contract requirements are null and void[104].

Conclusion of Contract[105]

According to the basic rules on conclusion of contract, which is contained in Article 432 of the Civil Code, a contract is to be considered concluded if an agreement has been reached on all essential conditions of the contract among the parties in the form required in appropriate cases[106].

Essential Conditions[107]

The concept of essential condition is contained in the rules of the Civil Code regulating conclusion of contract[108]. According to it essential are conditions on the object of the contract; the conditions defined as essential or necessary for contracts

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contract, the contract is to be deemed valid in the amended wording or, accordingly, invalid from the moment of its conclusion (Article 428.2).

[100]Article 428.3

[101]Article 426

[102]Article 426.1

[103]Article 426.3.

[104]Article 426.5.

[105]Shablova (2023) at 215–216.

[106]Article 432.1

[107]For more on the issue *see*, for instance Orlov (2011) at 144–148 and the material cited therein as well as Gruzdev (2019) at 86–97 and https://zakon.ru/blog/2016/06/28/suschestvennyeusloviyadogovora

[108]Article 432.1

of the given type in the law[109] or in other legal normative acts; and, also, all the conditions about which agreement must be reached according to the statement of one of the parties, or dispositive contract provisions. The reached agreement on essential conditions means that the contract has arisen, and that, on the contrary, if the other contracting party has failed to accept even one of them, a contract is not regarded as having been concluded. However, in the Russian judicial practice it is established that a claim of a contract being left unconcluded is to be recognised as invalid in the event the contract performance is executed and accepted or if there are other evidence that the contract is to be regarded as binding.[110]

Formal Requirements

The rules on the forms of contract are contained in the norms of the Civil Code regulating not only transactions[111] and conclusion of contract[112] but also different types of contracts. The rules on the form requirements may be represented also in the other laws concerning concrete type or specie of a contract. The norms regulating forms of contract contain not only form requirements but also the rules on the consequences for no observance of them. The form requirements concerning contracts are significantly important in respect of the transactions between enterprises which must be done, excluding certain exceptions, in written (and signed). In certain cases, contracts (transactions) are under Russian law also subject to registration requirements.

Transactions are divided in the Civil Code on the ground of the form requirements that concern them, into oral and written, and written transactions (contracts) are divided, in turn, into those which must be concluded in simple written form, and transactions which require notarial authentication or must be done in notarial form. This division reflects the hierarchy of the form requirements concerning transactions (contracts) in Russian law: the simplest form of them is oral, next is the simple written form and the most qualified form is the notarial form.

According to the general rule of the Civil Code on the written form of a transaction[113] a written transaction is to be made in Russia by the preparation of a document expressing its content and signed by the person or persons concluding the transaction, or by persons properly authorised by them. The written form of a transaction ought also to be deemed observed, if it is made by a person with the use of electronic or other technical facilities enabling to reproduce the content of the transaction on a material medium unchanged; and, in so doing, the requirement for

[109]In certain cases, although the condition is established as essential for the contract, it is unnecessary to include it in the contract because its content is defined in accordance with the dispositive norm provided by the law. So, if the parties have not included the condition on price into their contract, then the general rules on price contained in Article 424.3 of the Civil Code are applied. The essentiality of such condition is, however, evident, since if the parties have not reached the agreement on it, the contract is considered unconcluded.

[110]For more on the issue *see*, for instance Stepanov (2021) at 668–669.

[111]Articles 158–165. A contract ordinarily is a bilateral transaction.

[112]Article 434.

[113]Article 160.

availability of the signature ought to be deemed satisfied, if any method enabling to reliably determine the person that has expressed the will thereof is used.

According to the general rule of the Civil Code on the forms of contract[114] the contract in written form is to be concluded not only by compiling one document, signed by the parties, but usually also by way of exchanging in the form of letters, telegrams, telex messages, facsimile messages and other documents, including electronic ones, transmitted via communication lines that make it possible to establish for certain that the document comes from the party by the contract. As an electronic document to be transmitted via communication lines shall be deemed the information prepared, sent, received or kept with the help of electronic, magnetic, optical or similar facilities, including the exchange of information in electronic form and electronic mail. A contract may be concluded also by concludent acts in response to the written offer[115].

Contract Conclusion Procedure[116]

Russian law is acquainted with two traditional ways of conclusion of contract, and they are based on the offer-acceptance model. One of them is purported for the situation when contract is concluded between the present parties, whereas the other concerns conclusion of contract between the absent parties. Although each of these ways to conclude a contract is subject to its own rules, common for them is that, in the conclusion process, the offer and acceptance follows each other. Distinct for them is that, in the case of contracting between absent parties, they are relatively far from each other wherefore there is a is a time interruption in their expressions of the wills, whereas present contracting parties are in direct contact between each other. On the other hand, modern technical development has changed the situation, and even in the case the parties are physically far from each other, they have still possibilities for contracting between themselves without significant time interruptions by using, for instance, telephone, fax or e-mail.

According to the general rule of the Civil Code on conclusion of contract, the basic element of a contract is an accepted for its origin offer. The contracting procedure starts with the presentation of the offer.

As an offer is recognised, according to the Civil Code, a proposal addressed to one or several concrete persons, and it must be sufficiently definite and express the intent of the person who has made it to consider himself having concluded a contract with the addressee by whom the proposal will be accepted[117]. As corresponding to the rules of the Civil Code is regarded also a proposal containing all the essential conditions of the contract from which the will of the person who made the proposal appears to conclude a contract on the terms specified in the proposal with anyone who responds, and it is to be considered an offer or to be exact public offer in accordance with Article 437.2 of the Civil Code concerning offer. On the other

[114]Article 434.2
[115]Article 434.3.
[116]Shablova (2023) at 216–219.
[117]Article 435.1

hand, the rules on offer of the Civil Code contain a general presumption that advertising and other proposals addressed to an indeterminate group of persons is to be regarded as an invitation to make offers unless otherwise expressly indicated in the proposal[118].

The binding effect of the offer and its irrevocability are regulated in their own rules of the Civil Code[119]. The binding effect of the offer comprehends that if the concrete addressee of the offer inform that he has accepted the offer or is agreed to conclude the contract on the conditions presented in the offer, the contract is to be considered concluded. In turn, the requirement of irrevocability established for the offer[120] means that the offeror may not revoke his offer during the period established for its acceptance.

The binding force of the offer starts, according to the rules of the Civil Code on offer, from the moment it is received by the addressee[121]. Thus, before it, the offer may be revoked by the offeror, and in the event a notice on the revocation of the offer has arrived earlier than or simultaneously with the offer, the offer is to be considered not to have been received[122]. It is not only the binding force of the offer but also the period of its acceptance determined by the offeror which starts from the moment when the addressee has received the offer[123]. The offer expires at the moment, when the offeror receives from the addressee the answer which is negative to or deviating from his offer as well as when the period for its acceptance ends.

As acceptance of the offer (or consent to the contract) is understood, according to Article 438 of the Civil Code, the response of a person, to whom an offer is addressed, on its acceptance. Acceptance is to the same extend as offer an expression of the will, and it must be comprehensive, in other words, accepting all the conditions contained in the offer, and unqualified or without any additional conditions. But the same as for the offer, there is no form requirements concerning the acceptance in the Civil Code. The acceptance must occur, according to the Civil Code[124], within the period established for it in the offer or by the law, or in the absence of it, in the course of time normally necessary for the acceptance, or within a reasonable time, in the case of a written offer, in which the term for the acceptance is not determined.[125] As reasonable is considered the time which is sufficient for the bidirectional exchange of the corresponding documents by post. As to the case of an oral offer which does not contain the term for its acceptance, the response to it must be given immediately.[126]

The answer which contains consent to conclude a contract on terms other than those proposed in the offer or on deviating or additional conditions is not considered under Article 443 of the Civil Code as an acceptance. However, it may be regarded as counteroffer on the provision that it corresponds otherwise the characteristics of

[118]Article 437.1
[119]Article 435.2 and 436.
[120]Article 436.
[121]Article 435.2.
[122]Article 435.2.
[123]This comprehends the adoption of the reception theory in the Russian contract law.
[124]Article 440 and 441.
[125]Article 441.1.
[126]Article 441.2.

offer or contains all essential conditions of the future contract. If some essential condition is missing from the answer to the offer, however, it is not even considered counteroffer. Such an answer may be regarded as a refusal from concluding the contract and at the same time as a proposal to conclude another contract.

The rules of the Civil Code on acceptance are partly similar to the provisions on offer. This concerns in particular the revocation of acceptance. Alike in the case of offer, if a notice on the revocation of an acceptance has reached the offeror earlier than the acceptance or simultaneous with it, the acceptance is to be considered not to have been received[127].

The general rules of the Civil Code on conclusion of contract enables acceptance of the offer by concludent acts[128]. This may occur so that the offeree executes, within the period established for the acceptance, the actions in the performance of the terms of a contract indicated in the offer[129]. In turn, silence is not regarded, according to the Civil Code, as acceptance unless otherwise follows from the law, commercial customs or previous business relations of the parties or course of dealing.[130]

Belated acceptance is subject to the provisions of Article 442 of the Civil Code. According to them, in cases when a timely dispatched notification of acceptance has been received late, the acceptance is not be considered late unless the offeror has immediately informed the offeree of the late receipt of the acceptance. Thus, if it transpires from the answer to the offer or otherwise that it has been sent in time, the answer is considered acceptance unless the offeror informs immediately that it has arrived belated. The silence of the offeror effects in this case the conclusion of the contract. But also, in case the answer has been sent (evidently) belated, the contract may, according to the Civil Code, become concluded, if the offeror informs immediately (in written) the other party of the receipt (approval) of his belated acceptance[131].

According to Article 425 of the Civil Code, a contract enters into force and becomes binding for the parties from the moment of its conclusion. A contract is considered concluded, according to Article 433 of the Civil Code, at the moment, when the person, who has sent the offer, has received its acceptance. Exceptionally from the general rule, the time of conclusion of contract is determined in the case of a real contract and a contract requiring registration. A real contract or contract the conclusion of which requires under the law also the transfer of the property is to be considered concluded from the moment of the transfer of the respective property[132].

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[127]Article 439.
[128]Article 434.3 and 438.3.
[129]Article 438.3.
[130]Article 438.2. Silence is subject to the general presumption that it is not a legal fact. This follows from the provision of the Civil Code concerning form of transaction (article 158.3), according to which silence is recognised as an expression of will to make a transaction only in cases provided by the law or agreement of the parties.
[131]In the case the offeror does not respond to the obviously belated acceptance, this ought to be interpreted as the refusal of acceptance.
[132]Article 433.2.

In turn, a contract subject to State registration is to be considered concluded from the moment of its registration unless otherwise established by the law (GK 433.3)[133].[134]

Obligatory (compulsory) conclusion of contract or obligatory contracting or conclusion of a contract by obligatory procedure is known in Russian contract law as an exception from the general principle of freedom of contract based on the autonomy of the wills of the contracting parties. The rules regulating obligatory contracting are contained in Article 445 of the Civil Code incorporating the general provisions on contract. The article contains only the rules on how a contract is concluded in the obligatory procedure. As to the conditions of a contract to be concluded in the obligatory procedure, their definition occurs mainly in accordance with the principle of freedom of contract. Obligatory conclusion of contract is to be grounded only on the law or legal act and is purported to be used mainly in making public contracts. The rules on obligatory contracting are also applied to the cases when the obligation to conclude a contract is based on a voluntary undertaking like preliminary contract. The rules imposing the obligation to conclude a contract are found also in the other norms of the Civil Code, which concerns particularly norms on supply and work for State needs.

Under the Civil Code, the obligatory procedure on conclusion of contract differs depending on whom the obligation to conclude a contract concerns. It recognises two sets of the rules: one concerning the situation where the obligatory contracting is imposed on the addressee (offeree), and the other applicable to the case when it is the offeror who is subject to the duty to conclude a contract[135].

Where the obligation to conclude a contract concerns the recipient of the offer, or the party who has received the draft contract, the question is of the contracting procedure initiated by the customer (of the organizations subject to obligatory contracting) who is represented as the offeror. In this case the customer who is not subject to obligatory contracting but the counterparty of the party who is subject to obligatory contracting has prepared the offer or the draft contract and sent it to this or to the offeree. On receiving the offer or draft contract the offeree must, according to the Civil Code[136], send to the offeror a notification of acceptance or refusal to accept the offer within thirty days from the receipt of the offer. The offeree may notify the offeror of acceptation of the offer on other terms in which case he prepares a protocol of disagreements with the draft of the contract containing his proposals and send it to the offeror. After receiving this, in turn, the offeror notifies the other party about the acceptance of the contract, or he may bring the disagreements to the

[133]Additionally, the norms on types of contracts of the Civil Code contain at least one special rule concerning time of conclusion of contract which is divergent from the general rule, and it concerns consumer contracts of energy supply. According to the article 540.1 of the Civil Code, the contract is to be considered concluded from the moment of the first actual connection of the subscriber by the established procedure to the connected network.
[134]*See* Sergeev (2009) at 864.
[135]Article 445.
[136]Article 445.1.

consideration of a court within thirty days from the day of receipt of the offeree's response or of the expiration of the period established for acceptance[137].

In the case where the obligation to conclude a contract concerns the offeror or the contracting party who has prepared the draft contract, the addressee or the recipient of the offer (customer) may, according to the rules of the Civil Code regulating such cases[138], notify about his acceptance of the offer within thirty days from the receipt of it. He may also notify the offeror of acceptation of the offer on other terms in which case he prepares a protocol of disagreements with the draft of the contract containing his proposals and send it to the offeror. On receiving the protocol of disagreement the offeror must, otherwise than in the case when the conclusion of contract is obligatory for the offeree, send the recipient of the offer a notification of acceptance of the contract in its version or of the rejection of the protocol of disagreements. And in case of rejection of the protocol of disagreements or of nonreceipt of notification concerning this in the established time, the recipient of the offer has the right to bring the disagreements on the conclusion of the contract to the consideration of a court. The disagreements must be brought to the court within thirty days from the day of receipt of the negative response of the offeror or of the expiration of the period established for his response. Thus, the disagreements arising in obligatory contracting in the above presented cases may be brought to the consideration of a court only by the counterparty of the contracting party subject to the obligation to contract, in other words, by the customer.

The rules of the Civil Code regulating obligatory contracting contain in addition to the contracting procedure the rules the purport of which is to secure the fulfilment of obligation to contract[139]; they also protect the customer of the organizations subject to obligatory contracting. The rules expressly provide that if a party for whom in accordance with the Civil Code or other laws the conclusion of a contract is obligatory has refused to conclude it, the other party has the right to apply to a court with a demand for compulsion to conclude a contract. The decision on compulsion to conclude the contract is to contain the conditions on which the contract is concluded, and they are valid from the moment the decision is entered into force. Also, where the court solves the dispute concerning the conditions of the contract[140], they are to be defined in accordance with a decision of the court [141].

Due to the amendments to the Civil Code relating to the contract law rules, the changes, the necessity of which was realised following international practice[142] in legal practice, were legislatively adopted in Russia.

[137]The term of 30 days imposed for the actions of the obligatory contracting parties is general, and ought to be followed, according to Article 445.3 of the Civil Code, only if other periods have not been established by law, other legal act or agreed upon by the parties. Thus, it is a dispositive rule.
[138]Article 445.2.
[139]Article 445.4.
[140]Such a dispute is to be transferred to a court procedure or is subject to judicial settlement within six months from the moment its arising.
[141]Article 446.
[142]which have been attempted to improve the attractivity of Russian law for big transnational enterprises that are used to the legal conceptions of common law.

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Platform-to-business Contracts in Light of European Laws in the Digital Society

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Platform economy is a business model that gives life to a virtual market in which supply and demand for goods and services meet thanks to online platforms. These latter play an important role in the digital environment since they represent the access points to the market: in fact, the relationships between business users and consumers are managed by online platforms which hold disproportionate power as online intermediators and search engines. For this reason, a crucial role is played by platforms-to-business relationships, also bearing in mind the need of protection for business users in relation to the former as dominant companies. European legislation aims to fight potential unfair behaviour and to re-balance asymmetric relationships between these digital giants and business users within European market policies. The purpose of this paper is to observe EU norms in the light of their implementation.

Keywords: *Digital markets; online platforms; P2B contracts; weaker party protection; European policies; market regulation.*

Introduction

The role of online platforms, understood as search engines, social media, online sales systems, is increasingly central and essential for citizens and businesses.

Due to the immediacy of the technological context and the wide range of action amplified by the operation of the Internet, the use of these digital intermediation systems brings rapid and advantageous benefits, with a significant economic and social impact.

The strategic growth of these services, thanks to the achievement of objectives of absolute importance[1], has led to what is now known coloquially as the so-called "platform economy", whose economic value has grown from three billion euros in 2016 to fourteen billion in 2020[2], with interesting growth prospects.

These data represent the affirmation of the increasingly central importance of platforms, as a key segment for entrepreneurship, the creation of new business

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[1]Ruggeri (2021) at 23 et seq.

[2]The estimates of the Council of Europe, available at the following link https://www.consilium.europa.eu/en/infographics/platform-economy/, refer to the reference period prior to the drafting of the regulation in question. The estimates for 2020 have undergone strong growth also thanks to the important role assumed by platforms during the pandemic phase.

models and access to the great opportunities of the European internal market, for a complex series of reasons and to the advantage of multiple recipients.

First of all, the platform becomes an essential point of access to the market[3], qualifying itself as a true *matchmaker*[4], through the provision of a virtual space that facilitates the meeting of supply and demand of the parties. Depending on the specific type of business linked to the platform, this facilitation may consist in the stipulation of a contract that will be implemented within the platform (e.g. Uber, App store), outside (Booking)[5] or aimed at the meeting of users (Meta, Tinder, LinkedIN).

A further advantage is linked to the potential facilitated meeting of the platform's customers, being on the same platform because they are actually interested in the specific type of service offered therein. This circumstance allows economic operators to meet a selected clientele that is more interested in their services, thus increasing business opportunities and, consequently, turnover.

From the consumers' point of view, the benefit translates into access to a wide range of goods and services from different economic operators in a single virtual environment. In this way, the consumer is no longer limited and tied to local options but, with access to a single virtual environment, has available a wide range of goods and services, without geographical limitations and at much more convenient economic conditions.

Another impacted category is that of economic operators for whom the platforms entail considerable advantages, mainly linked to the facilitation of the digital transition. These effects are reflected especially on small and medium-sized enterprises, often lacking adequate skills and suitable infrastructures for the management of their own online sales channel, their own e-commerce site or resources for the advertising of their products or services. The final result is therefore to allow the company, even if it does not have its own online store[6], to be able to sell their goods or services, reaching many customers and in significantly large geographical areas.

The last category involved in the *platform economy*[7] is the occupational one, not directly the subject of this contribution but of great economic impact, created by the new needs of the digital supply chain. The rise of these new work contexts has been accompanied by an increase in the employment rate of these new types of workers, specialized in this new strategic context[8].

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[3]Ruggieri (2021) at 397- 422.

[4]Restelli (2022) at 4-10.

[5]Palmieri (2019) at 18 et seq.

[6]Proposal for a regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation service.

[7]Pais (2019).

[8]According to the analysis of the Council of the EU digital workers represent a significant percentage of the EU workforce which by 2022 with a size of 28, 2 million is expected to increase to 43 million in 2025. In this regard, it should be noted that this issue is at the centre of the regulatory policies of the Union which, following a long process, is close to approving the directive relating to the improvement of working conditions. of work in work through digital platforms. See: https://www.consilium.europa.eu/it/infographics/digital-platform-workers/

The optimistic and positive picture presented up to now should not lead one to believe that this scenario is free from risks or negative ramifications.

In the contractual interaction between platforms, consumers and commercial operators, new protection needs emerge daily due to the increasingly central and important role that they play. In particular, one of the problems that has attracted the most attention is that of the role of intermediary between online companies and consumers, due to the possible risks of monopoly attributable to the platforms and their abuses of dominant position[9]. The first element concerns the costs that operators must sustain to use the services made available by the platforms, which are anything but free and, indeed, subject to continuous and indiscriminate increases[10].

Another aspect concerns the specific types of services made available to economic operators and the transparency and fairness requirements that should characterise their dynamics. With regard to the issues arising from these reports, from the findings[11] of the European Commission in the drafting phase of the regulation which is the subject of this discussion, the main problems were: changes to the terms and conditions of service imposed by the platforms unilaterally and without notice; delisting of products, services or companies; suspension of accounts without notice and adequate justification, in the absence of adequate compensatory guarantees in favour of the economic operator; lack of transparency and explainability of the classification criteria (so-called rating) of business users or their offers; lack of clarity on the conditions of access and use of the access and use of data, personal and non-personal, collected and aggregated by the platforms; lack of adequate dispute resolution remedies; discrimination of companies to favour competing services offered by the same online platforms, for example through a more favourable classification or the use of transaction data to improve their products/services; "most favoured nation" (MFN) clauses which require a supplier

[9]In order to resolve such conduct, the European Commission has recently launched a public consultation inviting stakeholders to submit comments on the draft guidelines on abuses of a dominant position aimed at excluding competition. The issue concerns precisely art. 102 Treaty on the Functioning of the EU, which prohibits abusive conduct by companies holding a dominant position on the market. Most cases of abuse of a dominant position concern practices that have an exclusionary effect on actual or potential competitors. In this sense, consider the numerous judgments of the European Court of Justice that condemn platforms for their dominant position, in violation of art. 102 TFEU: See for example the judgment of the Court in case C-48/22 P | Google and Alphabet v Commission (Google Shopping) in which Google was ordered to pay 2.4 billion euros for having abused its dominant position by favouring its own product comparison service. In this sense also the jurisprudence of the Italian Supervisory Authority (AGCM) which in the A528 proceeding condemned Amazon for having damaged competing operators in the e-commerce logistics service.

[10]According to an ISTAT analysis, the percentage of commissions went from 16.5% to 16.7% in 2021 and has maintained constant levels of increase since then. ISTAT, Analysis of statistical measures for Goal. https://www.istat.it/storage/rapporti-tematici/sdgs/2023/goal9.pdf

[11]See European Parliament briefing https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625134/EPRS_BRI(2018)625134_EN.pdf and the outcomes of the preparatory work of the P2B Regulation https://wayback.archive-it.org/12090/20180805113004/https://ec.europa.eu/digital-single-market/en/business-business-trading-practices and in the Proposal for a Regulation of the European Parliament and of the Council of the P2B Regulation promoting fairness and transparency for business users of online intermediation services, COM (2018) 238 final.

to offer a product or service on an online platform at the lowest price and/or under the best conditions offered and may have an anti-competitive effect[12].

Due to the critical issues identified, the European Commission has launched several investigations into the state of compliance of the main regulations in force regarding commercial practices and consumer rights[13], which have highlighted the need to strengthen the legislative apparatus with provisions more adequate to the new needs of a single market that is growing and constantly evolving.

With specific regard to the topic of this paper, attention will be focused on critical issues and remedies relating to the relationships between platforms and economic operators, with regard to the regulatory protection offered by Regulation (EU) 2019/ 1150 of the European Parliament and of the Council of 20 June 2019 which promotes fairness and transparency for commercial users of online intermediation services (so-called "P2B").

Following the regulatory analysis, the obligations and protections offered by P2B and the fulfilments implemented, together with the new protection tools, we will understand the real starting point of this regulation and its actual effectiveness with respect to the ever-changing needs of this new digital economy.

Regulatory Framework

The P2B regulation is part of the broader framework governing the digital market[14], a flagship project within the European strategy, using regulatory harmonization as a key strategic tool for strengthening the EU. After multiple

[12]In argument, see Italian AGCM decision no. 1779/2015 in the proceedings against Booking and Expedia, which contests the MNF clauses because they "appear to integrate vertical restrictions that may constitute violations of Article 101 of the TFEU as they are capable of significantly limiting competition on price and offer conditions both between different platforms and between different sales channels". https://www.agcm.it/dotcmsDOC/allegati-news/I779_chiusura.pdf

[13]See Report of the Fitness Check on Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC andc2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'); Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts; Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers; Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees; Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests; Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, {SWD(2017) 208 final}.

[14]In its Resolution of 20 May 2010 on creating a single market for consumers and citizens (2010/ 2011(INI), (2011/C 161 E/14) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX: 52010IP0186), the European Parliament examined the enormous benefits associated with the creation of a single market for citizens and businesses and indicated the path to follow in order to facilitate its adoption as much as possible.

interventions and recommendations by EU institutions, on 6 May 2015[15] the Commission launched the Digital Single Market Strategy. This strategy is based on improving access to digital goods and services throughout the EU, to promote conditions for the growth of innovative networks and services, and unlock the Union's economic potential.

In 2020, the Communication "Shaping Europe's digital future"[16] set the scope of Community action in aiming to achieve three objectives: the digital transition, achieving a fair and competitive economy, and creating an open, democratic and sustainable society. In the post-COVID landscape and following a reassessment of Europe's needs, the Commission identified four cardinal points in "The Digital Compass 2030: A European blueprint for the Digital Decade"[17]. These key points are: digital skills, sustainable, secure and high-performance digital infrastructures, digital transformation of businesses, and the digitalisation of public services.

Within the proposed strategy, the adoption of fundamental regulations to serve as key pillars to support the creation of a robust Digital Single Market. The adoption of these regulations was driven by the need for harmonization and the removal of structural barriers, which are key factors in the opening and circularity of this single market[18]. Notable examples include: the regulation on cross-border parcel delivery[19]; the directive on copyright and related rights in the digital single market[20]; the directive on certain aspects of contracts for the supply of digital content and digital services[21]; the regulation on the prohibition of geoblocking[22]; the regulations

[15]Please refer to the detailed reconstruction of the process of formation of the single market in "Ubiquity of the digital single market", Thematic Notes on the European Union, September 2020, in https://www.europarl.europa.eu/factsheets/it/sheet/43/ubiquita-del-mercato-unico-digitale

[16]Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Shaping Europe's digital future, COM(2020) 67 final

[17]Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Digital Compass 2030: A European blueprint for the Digital Decade", COM(2021) 118 final, eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021DC0118

[18]Alpa (2021).

[19]Regulation (EU) 2018/644 of the European Parliament and of the Council of 18 April 2018 on cross-border parcel delivery services https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32018R0644.

[20]Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC DIRECTIVE (EU) 2019/ 790 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL - of 17 April 2019 - on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/ 29/ EC (europa.eu) .

[21]Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services https://eur-lex.Euro pa.eu/legal-content/EN /TXT/HTML/?uri=CELEX:32019L0770

[22]Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC. https://eur-lex.europa.eu/eli/reg/2018/302/oj

on electronic identification[23]; the regulation on the protection of personal data[24]; the regulation on artificial intelligence (AI ACT)[25].

In this context, Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019, in force since July 2020, is central to this discussion. It establishes a set of harmonized rules for the benefit of both commercial users[26] and the owners of corporate websites[27], who use online intermediation services[28] and online search engines[29] to offer goods and services to consumers.

Shorty after, but closely connected to this, is the so-called Digital Service Package[30], composed of the Digital Services Act[31] (DSA) and the Digital Markets Act (DMA)[32]. These aim to foster a safe digital space, innovation, growth and competitiveness[33], while respecting the users' fundamental rights.

In particular, the DSA serves as the general framework of reference for the horizontal regulation of relationships involving any entity that provides an information society service[34], promoting conditions of transparency and fairness. The DMA, on the other hand, addresses vertically the entities classified as "Gatekeepers"[35], imposing specific obligations on them to maintain competition and

[23]Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02014R0 910-20240520 amended by Regulation (EU) 2024/1183.

[24]Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0679

[25]Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonized rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168 /2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act). https://eur-lex.europa. eu/legal-content/EN/TXT/?uri=CELEX%3A32024R1689&qid=1727081424953.

[26]Art.2, par.1 P2B.

[27]Art.2, par.7 P2B.

[28]Art.2, par.6 P2B.

[29]Art.2, par.5 P2B.

[30]https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package

[31]Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R2065. In argument, see Chiarella (2023) at 33 et seq.; Allegri (2021) at 10 et seq.

[32]Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828. https://eur-lex.europa.eu/legal-content/EN/TXT/?toc=OJ%3AL%3A2022%3A265%3ATOC&uri=uriserv%3AOJ.L_.2022.265.01.0001.01.ENG. See, again, Chiarella (2023) at 33 et seq.; Allegri (2021) at 10 et seq.

[33]Allegri (2021) at 12-16.

[34]Foglia (2024).

[35]According to art. 2 of DMA, Gatekeeper is a 'core platform service' means any of the following: online intermediation services; online search engines; online social networking services; video-sharing platform services; number-independent interpersonal communications services; operating systems; web browsers; virtual assistants; cloud computing services; online advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, designated pursuant to Article 3, which provides the designation when the platform if: it has a

prevent the economic imbalances deriving from their pivotal position. Prior to these regulations, the P2B, in an even more sectoral manner, regulates the relationships between online platforms and companies based on the principles of fairness and transparency. We will now examine it more closely.

Obligations and Protections of the P2B Regulation

Generally speaking, the Regulation's primary goal is to create a digital environment based on the transparency and predictability of the behaviour of economic operators in contractual relationships with platforms. More specifically, the P2B, to its merit, introduced a series of previously nonexistant protections to ensure a balance between the parties involved, in pro-competitive terms[36]. This was particularly necessary in Business-to-Business (B2B) settings, where there had been an assumption—often inaccurate—that all parties had equal bargaining power and the freedom to define contractual terms.[37].

The gap between this assumption and the actual reality, as observed by the Commission, highlighted the need for a rethink of these dynamics, especially with the rise of the platform economy. To address these issues, the P2B Regulation includes protective measures for situations where an imbalance of that kind exists, such as delisting[38], the obscurity in the algorithms for the ranking of visibility of goods or services or of information provided to users, in addition to the inaccessibility of the big data in the possession of these companies[39].

The Regulation's approach focuses on transparency, fairness in contractual relations, and predictability of any circumstance modifying the relationship between the parties.

As anticipated, the legislation establishes a complex set of rules applicable to: providers of online intermediation services, understood as information society services[40] that allow "business users to offer goods or services to consumers, with the aim of facilitating the initiation of direct transactions between such business users and consumers, regardless of where such transactions are concluded and are provided to business users on the basis of contractual relationships between the provider of such services and business users offering goods and services to

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significant impact on the internal market; it provides a core platform service which is an important gateway for business users to reach end users; and it enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future.

[36]Pardolesi (2021).

[37]Forlan (2019).

[38]With regard to the phenomenon of "delisting", see the reference to recital (22) P2B providers of online intermediation services can also restrict individual listings of business users; for example, through their demotion or by negatively affecting a business user's appearance ('dimming') which can include lowering its ranking. Restelli (2022) at113-116.

[39]Smorto (2020) at 56-57 and Di Sabato (2020) at 40.

[40]Information society services within the meaning of Article 1, paragraph 1, letter b), of Directive (EU) 2015/1535 of the European Parliament and of the Council - Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ L 241, 17.9.2015, p. 1).

consumers"[41] and providers of online search engines, understood as "a digital service that allows the user to formulate queries in order to carry out searches, in principle, on all websites, or on all websites in a particular language, on the basis of a query on any topic in the form of a keyword, voice query, phrase or other input, and that returns the results in any format in which information relating to the requested content can be found"[42].

The direct beneficiaries of these rules are commercial users, understood as "private individuals acting in the context of their commercial or professional activities or legal persons offering goods or services to consumers through online intermediation services for purposes related to their commercial, entrepreneurial, craft or professional activity"[43].

Another distinctive feature of the P2B structure is its territorial applicability[44], corresponding to the place of establishment or residence in the Union of the beneficiaries and not of the providers of intermediation services or online search engines. If we consider that the companies required to comply with these rules, although providing services to EU citizens and businesses, are predominantly located outside the EU, it is clear that the absence of this provision would have effectively rendered the legislation in question useless[45].

The Regulation's attempts to achieve these objectives by specific requirements of transparency, fairness and sustainability of the contractual terms and conditions, effective tools for the out-of-court resolution of disputes.

To do this, the P2B imposes a series of rules designed to address the most problematic aspects inherent in the relationships between the parties, which were mentioned in the prior paragraph. The main instrument of the Regulation is transparency[46], which is the basis of all the provisions imposed for the drafting of the terms and conditions of service, the functioning of the ranking algorithms of the products or services offered or of the search results.

Having established the motivations and structural values of the P2B, we must now proceed to the analysis of the next paragraphs, which illustrate and examine in depth the most important themes of this regulation.

Terms and Conditions

As previously mentioned, platforms are market makers since they can create market opportunities, which in most cases are of crucial importance to business users. However, due to being so crucial, these opportunities are conversely a source of economic dependence on the platform[47]. This is more evident in the case of platforms identified as *gatekeepers*, i.e. digital giants that grant access to specific

[41]Art. 2 par 2, b - c.
[42]Art. 2 par. 3 - 5.
[43]Art. 2 par.1 P2B.
[44]Art. 2, par.2 P2B.
[45]Ruggeri (2021) at 78-81.
[46]Smorto (2020) at 37-45.
[47]In argument, see, widely, Stanzione (2022) at 1 et seq., Di Sabato (2020) at 1 et seq.

digital markets and which are specifically dealt with by the *Digital Market Act*. Given the importance of these latter, when we talk of *platformisation*, we are referring to the fact that this transformation involves all sectors of the economy.

The need for protection of commercial users is the basis of the P2B regulation, but it is also considered in the *Digital Service Act* and *Digital Market Act*[48] within the "Digital Single Market Strategy". In this framework, the goal of the P2B Regulation is to offer a system of safeguards for professionals who use online intermediation services, and to avoid the risk of unfair agreements and abuse of bargaining power[49]. As it is pointed out by Art. 1, in fact, the purpose of the Regulation is *"to contribute to the proper functioning of the internal market by laying down rules to ensure that business users of online intermediation services and corporate website users in relation to online search engines are granted appropriate transparency, fairness and effective redress possibilities*".

The P2B Regulation aims to protect business users in the case of terms and conditions unilaterally determined by the provider of online intermediation services. Nevertheless, as we can read in Recital 14, business users will not be deprived of the transparency and guarantees of P2B Regulation simply because they have the ability to successfully negotiate terms and conditions (henceforth T&C).

In order to ensure transparency and fairness of negotiations, the P2B Regulation aims to make the terms and conditions adopted by online intermediation service providers available and recognisable to business users. *Terms and conditions* are ruled in art. 3: the key words of this provision are accessibility, transparency and completeness.

Unilaterally defined by the providers of the online intermediation services, T&C have: to be drafted in plain and intelligible language (art. 3.1, let. a); to be easily available online (let. b); to set out the grounds for decisions to suspend or terminate or impose any other kind of restriction upon, in whole or in part, the provision of their online intermediation services to business users (let. c); to include information on any additional distribution channels and potential affiliate programs through which providers of online intermediation services might market goods and services offered by business users (let. d); to include general information regarding the effects of the terms and conditions on the ownership and control of intellectual property rights of business users (let. e). If T&C do not comply with these requirements, they are rendered null and void (art. 3.3).

Furthermore, intermediaries must inform their business users of the reasons for suspension, termination or any other restriction to the use of the services, jointly with other compulsory information. They must notify their professional users at least 15 days in advance of any modifications of their terms and conditions (art. 3.2)[50] and they must refrain from implementing retro-active changes to T&C (art. 8), providing a termination right to their professional users (art. 3.2), including information on the conditions under which business users can terminate the contractual relationship (art.

[48]Chiarella (2023) at 33 et seq.; Allegri (2021) at 10 et seq.

[49]Nicotra (2019) at 1 et seq.; Ruggeri (2021) at 315 et seq.; Rumi (2023) at 27 et seq.

[50]Providers of online intermediation services shall grant longer notice periods when this is necessary to allow business users to make technical or commercial adaptations to comply with the changes (art. 3.2).

8, lett. b) and describing technical and contractual access to the information provided or generated by the commercial user which they maintain after the expiry of the contract between the provider of online intermediation services and the business user (art. 8, lett. c).

As for data regulation, art. 9 contains transparency rules regarding access to personal data or other data, without prejudice to the application of Regulation (EU) 2016/679, Directive (EU) 2016/680 and Directive 2002/58/EC (art. 9.3).

Pursuant to P2B Regulation, further elements have to be indicated in the platforms' T&Cs. Among these, we have to consider: art. 5 which indicates the parameters for ranking[51], art. 6 for a description of ancillary goods and services, art. 7 for the cases of differentiated treatment and art. 10 which requires intermediaries to indicate in their T&Cs the reasons for any limitations on the ability of business users to offer their products and services under different conditions through means other than platforms.

In DSA, we find further provisions regulating T&C: providers of intermediary services shall include information on any restrictions that they impose in relation to the use of their service in respect of information provided by the recipients of the service (art. 14). That information shall include information on any policies, procedures, measures and tools used for the purpose of content moderation, including algorithmic decision-making and human review, as well as the rules of procedure of their internal complaint-handling system. Providers of intermediary services shall inform the recipients of the service of any significant change to the terms and conditions. Pursuant to DSA, T&Cs are available to the public in an accessible, machine-readable format.

A specific provision is introduced for minors: where an intermediary service is primarily directed at minors or is predominantly used by them, the provider of that intermediary service shall explain the conditions for, and any restrictions on, the use of the service in a way that minors can understand (art. 14.3).

A special duty is imposed on providers of very large online platforms and of very large online search engines (art. 14, par. 5, 6), who shall provide recipients of services with a concise, easily-accessible and machine-readable summary of the terms and conditions, including the available remedies and redress mechanisms, in clear and unambiguous language. Very large online platforms and very large online search engines shall publish their terms and conditions in the official languages of all the Member States in which they offer their services.

Last but not least, in article 27 of DSA we find rules of recommender system transparency: T&C must explain, in plain and intelligible language, the main parameters used in their recommender systems, as well as any options for the recipients of the service to modify or influence those main parameters. These latter shall explain why certain information is suggested to the recipient of the service. They shall include, at least: (a) the criteria which are most significant in determining

[51]According to art. 2, n. 8 Reg. P2B, ranking means "the relative prominence given to the goods or services offered through online intermediation services, or the relevance given to search results by online search engines, as presented, organised or communicated by the providers of online intermediation services or by providers of online search engines, respectively, irrespective of the technological means used for such presentation, organisation or communication".

the information suggested to the recipient of the service; (b) the reasons for the relative importance of those parameters[52].

Effective Redress

P2B introduces a series of procedural requirements that providers of online intermediation services must comply with in terms of restricting, suspending and terminating the provision of their services to business users (art. 4). In particular, providers are required to communicate their decisions at least 30 days prior to the termination taking effect, with a statement of reasons, on a durable medium (art. 4.1 and 4.2). The indication of the reasons for the decision is of particular importance, because it allows users to understand those facts and to lodge complaints to providers (art. 11.1).

P2B Regulation and the DSA regulate internal complaint-handling systems based on principles of transparency and equal treatment. The aim of these two pieces of European legislation is to ensure that a significant proportion of complaints can be solved bilaterally by the provider of online intermediation services and the relevant business user in a reasonable period of time (Recital 37 and art. 11.1 P2B Regulation; art. 20 DSA).

Complaints concern, for example; (i) issues relating to decisions taken by providers; (ii) issues relating to failures to comply with the obligations of the P2B Regulation and DSA; (iii) technological problems and measures or behaviours adopted by providers and directly connected to the provision of their online intermediation services (art. 11.1 P2B Regulation).

Furthermore, according to art. 12 of P2B Regulation, providers of online intermediation services shall identify in their terms and conditions two or more mediators to reach an agreement with business users, out of court, of any disputes between the provider and the business user arising in relation to the provision of the online intermediation.

Providers should bear a reasonable proportion of the total costs of mediation in each individual case taking into account all relevant elements of each case, as we read in Recital 41. For this reason, considering the costs and the administrative burden associated with the necessity to identify mediators in T&C, small enterprises are exempted from this obligation, even if these enterprises are free to identify mediators in their T&C in compliance with the criteria of P2B Regulation[53].

Such provisions do not affect the rights of the providers of online intermediation services and of the business users concerned in the case to initiate judicial proceedings at any time before, during or after the mediation process. In turn, DSA also introduces out-of-court dispute settlement: with reference to the decisions adopted by the platform pursuant to art. 20.1 on complaints received, the recipients of the service may resort to certified extrajudicial dispute resolution bodies (art. 21).

[52]See Quarta & Smorto (2024) at 206.
[53]See Recital 41, P2B Regulation.

Considering that various factors, such as limited financial means, a fear of retaliation and exclusive choice of law and forum provisions in terms and conditions, can limit the effectiveness of existing judicial redress possibilities, P2B Regulation allows organisations, associations representing business users or corporate website users, as well as certain public bodies set up in Member States, to take action before national courts in accordance with national law, including national procedural requirements (art. 14).

Furthermore, in Italy, complaints can also be lodged before the Communications Regulatory Authority (for violations of the P2B Regulation and the DSA) and Competition Authority (for violations of DMA). The first exercises its competences in the area of P2B matters pursuant to Law No. 1781 of 30 December 2020, which entrusted it with the task of ensuring "the adequate and effective application" of the P2B Regulation[54]. In turn, the Italian Competition Authority (AGCM) is the national authority designated for the enforcement of the Digital Market Act pursuant to Law 214 of 24 February 2023.

Conclusions

The existence of digital platforms has advantages for companies, and indirect benefits for consumers in terms of increasing supply and improving market competitiveness. Thanks to platforms, costs and space-time distances between companies and customers are reduced.

As highlighted in the Italian Communication Regulatory Authority Report of July 2024, aimed at assessing the implementation of EU legislation in P2B relationships[55], despite the progress in the application of the legislation, with regard to the transparency of contractual conditions and the accessibility of protection tools, the results, in general, although appreciable, still present a fair amount of potential for improvement in the face of a not entirely satisfactory experience of commercial users who use online intermediation services to carry out their craft, commercial and professional activities.

In the Report, we read that in the side of commercial users and owners of corporate websites, a widespread difficulty is seen in finding the T&Cs, which are not always written in simple and understandable language and placed in areas of the website that are not immediately identifiable. In the meantime, critical issues are registered as for the interaction with the platforms through the internal complaint management system, also due to the use in most cases of automated complaint management tools, as well as the general unavailability of adequate support in relation to relevant cases connected to the limitation, suspension or termination of the online intermediation service. Regarding other user protection mechanisms, the use of mediation remains limited, highlighting the lack of familiarity and awareness

[54]Furthermore, Italian AGCOM has been appointed Digital Services Coordinator for the application of the DSA in Italy, pursuant to Article 15 of Legislative Decree No. 123 of 15 September 2023, as converted, with amendments, by Law No. 159 of 13 November 2023.

[55]https://www.agcom.it/sites/default/files/media/allegato/2024/P2B_Report%202024_pubblicazione_0.pdf.

among commercial users in utilizing alternative dispute resolution, despite it being provided for in the legislation.

The permanent asymmetry in relationships with platforms, both on the economic and informational side, remains evident and strong. Nevertheless, it is also clear that regulatory interventions will lead step by step to a greater awareness of contractual protections, as well as of the possibilities of access and use of data, which are so important for the development of business activities. From this perspective, the final result is also an indirect benefit to consumers, as the P2B regulatory framework not only governs business negotiations but also helps standardize consumer contracts, leading to a fairer and more accessible digital market.

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Boardroom in AI Age, Scope for "Robo-Directors": An Analysis of the Indian Companies Act, 2013 and International Trends

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This study examines the adoption and impact of Robo-Directors in corporate governance worldwide, with a specific focus on the Companies Act 2013 of India. Therefore, it will also discuss the positions of the governing authorities on the use of Artificial Intelligence (hereinafter AI) and robots in the board of directors. Using qualitative comparative analysis, this paper reviews international governance standards for Robo-Directors and examines specific provisions of the Indian Companies Act 2013[1]. In this regard, this paper seeks to analyse the adequacy of the existing regulatory frameworks, focusing primarily on the Indian Companies Act of 2013, within the context of the introduction and operation of artificial intelligence-powered board members of the company's management while ensuring reasonableness and ethicality in the process. In India, Directors are defined under the Companies Act, which complies with the definitions provided in the prevailing principles and standards but does not use the word artificial Intelligence or AI. This paper contributes a unique perspective by analysing the legal requirements for AI in governance, emphasising India's regulatory context and offering insights for policy adaptation[2]. It examines the potential legal and operational challenges of introducing Robo-Directors to existing regulatory regimes, particularly in the context of India.

Keywords: *Robo-Directors, Corporate Governance, Artificial Intelligence, Board of Directors, Indian Companies Act 2013, Corporate Ethics, Corporate Crime, Automation, Governance Standards, India, Regulatory Compliance, Corporate Structure.*

Introduction

The evolution of AI has filled many areas in the world today very fast, including business management where it transforms approaches to making decisions. These AI-powered board members are referred to as Robo-Directors, and they can introduce fairness, effectiveness, and better analytical skills into the boardrooms. Although the use of AI is mainly associated with performing tasks, their potential in the case of Robo-Directors is endless with applications such as analysing data in real-time, assessing risks, or making objective decisions[3]. The concerns are relevant especially in the context of the Companies Act 2013 in India, 2013, since

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[1]Salah, Ziout, Alkahtani, Alatefi, Abdelgawal, Badwelam & Syarif (2021).
[2]Brennant, Subramanian & Van Staden (2019).
[3]Mertens (2023).

the Act provides the board members with clear guidelines on various fiduciary and ethical responsibilities and there are no provisions that would facilitate such AI-driven roles. The improvement in AI technology is putting its use in the corporate governance practices with the Robo-Directors. Owing to its uniqueness in the way it presents its arguments, the present paper is going to highlight these issues while looking at the regulatory stance of the Indian regulator. Corporate governance in India is the Companies Act 2013 and is one of the most important laws for companies and corporate governance.

Literature Review

AI has become a challenging element inside companies governance, destroying the usual order of things, and providing space for new, more productive and evaluative data management. This allows completeness through the AI, with additional leverage of "Robo-Directors" in Board rooms, as a means of enhancing corporate governance, by removing the propensity associated with human beings in decision making in governance. Looking at what Wilson and Daugherty[4] have to say, the leveraging of AI in the board context is equally able to contribute significantly towards the functions of the board in such areas as financial forecasting, risk assessment and compliance monitoring. Robo-Directors unlike traditional Directors, are built to perform as independent or semi-independent actors who come after humans, complementing them by presenting unvaried and objective facts, and applying them especially exceedingly beneficial in situations of high corporate venturing as there is a need for objectivity. As pointed out by Shah and Murthi that, as the robot technology continues to advance and improve, regulatory compliance could possibly serve as a role of Robo-Directors, including scrutinising contracts, identifying deviations and thereafter ensuring that the regulation of the corporate governance of the board is correct Bound by the moral and legal obligations of the role of the board[5].

The mere presence of sanctions in the pursuit of AI driven functioning of systems at the governance level is only one of the main sources of considerable challenges, namely from the ethical and operational perspective of AI being employed in roles meant for humans up to now. It is good however that scholars like Godwin, Lee & Langford[6] show that while the use of Robo-Directors may be beneficial in terms of uniformity and speed, the reliance on such technology is not helpful when more nuanced corporate values and long-term goals are required for governance. Hence, the existing research stresses the importance of a correct match between governance requirements and AI capabilities to avoid any contradictions that may impair ethical decision-making and accountability of the board.

Adoption of Robo-Directors is a phenomenon that occurs in different amounts in different countries, depending on the regulatory environment, corporate

[4]Wilson & Daugherty (2018).
[5]Shah & Murthi (2021).
[6]Godwin, Lee & Langford (2021).

structures, and level of advancement of technology. In America's companies, AI centrically engaged in executive responsibilities is being tested in many leading large corporations. These companies generally include artificial decision-making systems offering strategic planning and financial forecasting guidance. Chui and Francisco claims, these cases are less common and even the less radical approaches are just a try for prospective integration of AI in the management boards[7]. Nonetheless, Governmental restrictions on the implementation of AI into governance or directors' spheres of the United States situation are very conservative fears on the issues of the responsibility, protection of information and qualifications of the real directors which would own it greatly contribute objectively to the said conservatism.

On the other hand, Japan has always been known as a trend setter from as far back as 1950s, systematically allowing use of AI tools in corporate governance set up for decision-making among business leaders. In Japan, for example, AI tools have been established for the purpose of improving board reports, including helping in the provision of financial information in real-time[8]. Indeed, this all argues positively for the integration of AI in the recruitment by the territory Robo-Directors are permitted to play a supporting role to the board in terms of corporate enforcement and strategy planning. Even so, these models of including AI in corporate governance have been accepted by few countries in the European continent, particularly the Scandinavian countries, but with conditions that provide human directors with oversight.

In contrast, countries such as Germany and even India tend to adopt a less favorable position towards robotic directors in their business operations. German enterprises, influenced by the principles of humanism and consensual-decision-making strive not to entrust complete control over decisions to AIs and hence block the formation of fully automated governance structures, where AI becomes only a tool for analysis and recommendations[9]. And so it is also, that India's fiscal structures, which are majorly based on concepts of humanity and the obligation to shareholders in the Companies Act of India, 2013 make it difficult to accommodate robotic directors. The need for understanding people and changes causes immense anxiety to the extent that a number of stakeholders are resistant to the Robo-Directors, despite the widespread enthusiasm towards the operation alienation of AI in corporate governance[10].

Corporate governance protocols essentially aim at defining board roles and responsibilities known objectively, in addition to creating transparency needed for corporate honesty and accountability. In particular, the OECD principles, which are generally adopted in governance standards, entail certain principles supporting the protection of the interests of shareholders, fairness and realism in corporate life thus raising the issue of corporate citizenship. Yet, these principles are assumed naked, without social values and ethics-the essence of Robo-Directors. The Indian Companies Act 2013 is clear on the ethical aspects and the duties of directors,

[7]Chui & Francisco (2017).
[8]Papagiannidis (2024).
[9]Verma, Rao, Eluri & Sharma (2020).
[10]Mandal & Sunil (2021) at 113.

duties like the duty to act in good faith in the best interests of the company[11]. This Act imposes the requirement on the board members to be independent, and to be responsible, which independent Robo-Directors poses challenges.

While the OECD and other international governance principles understand that compliance can be enhanced through automation, the use of full Robo-Directors is inconsistent with key principles of governance which depend on ethical judgment of humans. Zhao and Gómez Fariñas. are of the opinion that AI can perform fiduciary duties only to an extent and in the absence of built-in accountability[12]. Moreover, in classical corporate governance systems, responsibility is an individual responsibility of corporate officers and therefore, it is not suitable for AI apparatus. All of which are contributing factors to the necessity of highly innovative governance systems recognising the peculiar characteristics that AI possesses while also maintaining the important governance aspects.

One of the pivotal issues that has generated moral debates over AI's place in the board room is the infiltration of Robo-Directors. Most importantly the question of accountability. Given that AI is not conscious, the incorporation of Robo-Directors leads to a challenging question of who is responsible for the decisions that are made? The indication of Lui's article on this problem[13] is that there should be some processes of human concern because there is no any point in seeking justice where there is a robot. Most of the fundamental governance principles are based on the consideration of human culpability. Therefore, it is a grey area as to who will face the legal consequences in cases where a Robo-Director's proposal causes loss or results in a legal violation such as breach of the code of ethics; AI developers, the company or the human officers who adopted such a resolution.

Moreover, bias also poses a difficult issue as AI models can easily propagate social biases that are inherent in the datasets it was trained on. AI can work with a pre-existing disparity, or even enhance the imbalance, in the case that the defeat probabilities were extracted from an assimilated society with the in-built gender and racial discriminatory prejudices[14]. This is more problematic with respect to governance whereby the decision-making authority is concentrated on a few stakeholders and their actions have to conform to ethical principles. Besides accountability, this has also been identified as a problem in the literature as the AI or AI-driven tools do not support any accountability in the sense it is either not possible for their operations to be bulk curtailed or no one can stop them. The literature has therefore identified very little in the way of addressing the problem among other questions such as lack of social awareness amongst vendors and users. Everyone is getting so excited with the idea of social robots.

Practical concerns regarding the same also emerge with regard to making AI work within the current board and procedures. The more heads of laptop processing units increase in scope the more it can be defined that more human aspect in the same equation is reduced: this convinces Floridi to believe that companies may stretch out too much towards AI hence underplaying human discretion among

[11]Singh (2021) at 140.
[12]Zhao & Gómez Fariñas (2023).
[13]Liu (2018); Zhao & Gómez Fariñas (2023).
[14]Machill (2020).

other analytical skills[15]. There is also the factor of the amount of money that will be needed to use Robo Directors which can be a dicey issue especially when it comes to non-profited human rights organisations. These ethical and practical concerns show that even though the development of Robo-Directors looks promising as regard improving governance, their incorporation into the system needs to be carefully managed so as to ensure that transparency, accountability, and ethics are not compromised.

Research Questions

The improvement in AI technology is putting its use in the corporate governance practices with the Robo-Directors by many countries. Owing to its uniqueness in the way it presents its arguments, the present paper is going to highlight these issues while looking at the regulatory stance of the Indian regulator. Corporate governance in India is the Companies Act 2013 and is one of the most important laws for companies and corporate governance. This law also emphasises ethical consideration, which is the basis of human-related conduct in business, instead of retaliation or leaving. The paper seeks to analyse these below research questions:

1. How does the regulatory stance (Companies Act 2013) of India handle Robo-Directors?
2. Weather the improvement of AI technology in corporate sector forced board to adopt Robo-Directors for better corporate governance?
3. What are the current trends of inclusion of Robo-directors across globe in their corporate firms?

Methodology

This study employs secondary data analysis employing qualitative research study in order to study the extent of integration of Robo-Directors in governance frameworks and to check whether the regulatory provisions, particularly the Indian Companies Act 2013 are in keeping with the present developments[16]. Using qualitative comparative analysis, this paper reviews international governance standards for Robo-Directors and examines specific provisions of the Indian Companies Act 2013[17]. In this regard, this paper seeks to analyse the adequacy of the existing regulatory frameworks, focusing primarily on the Indian Companies Act of 2013, within the context of the introduction and operation of artificial intelligence-powered board members of the company's management while ensuring reasonableness and ethicality in the process. The methodology which is chosen in this study sheds light on the softer issues associated with AI-aided governance and helps us to understand the challenges of rescoping the traditional board

[15]Floridi (2023).
[16]Annunziata (2023).
[17]Salah, Ziout, Alkahtani, Alatefi, Abdelgawad, Badwelan & Syarif (2021).

responsibilities to include AI. By making a thorough examination of secondary sources, this design enables the researcher to understand the legal and ethical jurisdictions and issues of the implementation of Robo-Directors.

Data Collection

Data regarding this research were obtained from several secondary sources, such as legislation such as the India Companies Act 2013, governance principles of the OECD, and other global governance guidelines[18]. Furthermore, academic pieces on AI in corporate governance and industrial studies were also examined to underline developments accounting for global regulatory diversity. Finally, successful illustrations from different parts of the world especially Japan and the United States will help shed more light on the question of AI governance. Moreover, based on the CSR report of Tata Group, the essay introduces the concept of Robo-directors as envisaged by the new India National Corporate Law. This diversity highlights this study as the role of cross-regional material is practically unavoidable within the discourse of the governance of such a country as India[19].

Overview of AI in Corporate Governance

AI nowadays has become a challenging element inside companies' governance, destroying the usual order of things, and providing space for new, more productive, and evaluative data management. This allows completeness through the AI, with additional leverage of "Robo-Directors" in Board rooms, as a means of enhancing corporate governance, by removing the propensity associated with human beings in decision-making in governance. Looking at what Wilson and Daugherty have to say[20], the leveraging of AI in the board context is equally able to contribute significantly towards the functions of the board in such areas as financial forecasting, risk assessment, and compliance monitoring. Robo-Directors unlike traditional Directors, are built to perform as independent or semi-independent actors who come after humans, complementing them by presenting unvaried and objective facts, and applying them especially exceedingly beneficial in situations of high corporate venturing as there is a need for objectivity. As pointed out by Shah and Murthi[21], as robot technology continues to advance and improve, regulatory compliance could serve as a role of Robo-Directors, including scrutinisng contracts, identifying deviations, and thereafter ensuring that the regulation of the corporate governance of the board is correct Bound by the moral and legal obligations of the role of the board. Di Vaio, Palladino, Hassan & Ferias[22] suggest that AI applications should meet the objectives of an organisation and that

[18]Godwin, Lee & Langford (2021).
[19]Möslein (2018) in Barfield & Pagallo.
[20]Wilson & Daugherty (2018).
[21]Shah & Murthi (2021).
[22]Di Vaio, Palladino, Hassan & Escobar (2020).

integration of AI with other business functions involves careful management of AI capabilities and compliance requirements.

The mere presence of sanctions in the pursuit of AI-driven functioning of systems at the governance level is only one of the main sources of considerable challenges, namely from the ethical and operational perspective of AI being employed in roles meant for humans up to now. In contrast, Germany and the United States have demonstrated caution, with AI often restricted to advisory roles due to ethical concerns and regulatory hesitancy. It is good however that scholars like Godwin, Lee & Langfoed show that while the use of Robo-Directors may be beneficial in terms of uniformity and speed, the reliance on such technology is not helpful when more nuanced corporate values and long-term goals are required for governance[23]. Hence, the existing research stresses the importance of a correct match between governance requirements and AI capabilities to avoid any contradictions that may impair ethical decision-making and accountability of the board. In India, robo-directors do not have many takers yet owing to the high standards of ethics and fiduciary responsibilities provided for in the Indian Companies Act. This is a deliberate gesture of distrust of technology in AI and other related technology by Indian corporate administrative leaders[24].

Global Patterns in Robo-Directors

Adoption of Robo-Directors is a phenomenon that occurs in different amounts in different countries, depending on the regulatory environment, corporate structures, and level of advancement of technology. In America's companies, AI centrically engaged in executive responsibilities is being tested in many leading large corporations. These companies generally include artificial decision-making systems offering strategic planning and financial forecasting guidance. Chui[25] claims, that these cases are less common and even the less radical approaches are just a try for prospective integration of AI in the management boards. Nonetheless. Governmental restrictions on the implementation of AI into governance or directors' spheres of the United States situation are very conservative fears on the issues of the responsibility, protection of information, and qualifications of the real directors which would own it greatly contribute objectively to the said conservatism.

On the other hand, Japan has always been known as a trendsetter from as far back as 1950s, systematically allowing the use of AI tools in corporate governance set up for decision-making among business leaders. In Japan, for example, AI tools have been established to improve board reports, including helping in the provision of financial information in real-time[26]. Indeed, this all argues positively for the integration of AI in the recruitment by the territory Robo-directors are permitted to play a supporting role to the board in terms of corporate enforcement and strategy planning. Even so, these models of including AI in corporate

[23]Godwin, Lee & Langford (2021).
[24]Verma, Rao, Eluri & Sharma (2020).
[25]Chui & Francisco (2017).
[26]Papagiannidis (2024).

governance have been accepted by few countries in the European continent, particularly the Scandinavian countries, but with conditions that provide human directors with oversight.

In contrast, countries such as Germany and even India tend to adopt a less favourable position toward robotic directors in their business operations. German enterprises, influenced by the principles of humanism and consensual decision making strive not to entrust complete control over decisions to AIs and hence block the formation of fully automated governance structures, where AI becomes only a tool for analysis and recommendations[27]. And so it is also, that India's fiscal structures, which are majorly based on concepts of humanity and the obligation to shareholders in the Companies Act of India, 2013 make it difficult to accommodate robotic directors. The need for understanding people and changes causes immense anxiety to the extent that a number of stakeholders are resistant to the Robo-Directors, despite the widespread enthusiasm towards the operationalisation of AI in corporate governance[28].

Corporate Governance Standards

Corporate governance protocols essentially aim at defining board roles and responsibilities known objectively, in addition to creating transparency needed for corporate honesty and accountability. In particular, the OECD principles, which are generally adopted in governance standards, entail certain principles supporting the protection of the interests of shareholders, fairness, and realism in corporate life thus raising the issue of corporate citizenship. Yet, these principles are assumed naked, without the social values and ethical essence of Robo-Directors. The Indian Companies Act 2013 is clear on the ethical aspects and the duties of directors, duties like the duty to act in good faith in the best interests of the company[29]. This Act requires the board members to be independent, and to be responsible, which independent Robo-Directors pose challenges.

The Indian Companies Act 2013 fails to prescribe legal or other mechanisms pursuant to which board members must act in good faith in pursuit of the best interest of the company effectively elevating the human duty of loyalty and judgment to a statutory requirement[30]. Zhao & Gómez Fariñas[31] believed that the usage of artificial intelligence technology is especially problematic in fulfilling fiduciary obligations due to the absence of ethical decision-making among robots. This void underlines the fact that if Robo-Directors are to an extent of their existence in the governing bodies governance frameworks need to adjust, and this is more so in countries like India with strong corporate governance and ethical obligations.

[27]Verma, Rao, Eluri & Sharma (2020).
[28]Mandal & Sunil (2021) at 113.
[29]Singh (2021) at 140.
[30]Vuppuluri, & Pandey (2024).
[31]Zhao & Gómez Fariñas (2023).

Legal Concerns and Robo-Directors

The Indian Companies Act 2013 talks about the modern corporates and stressed upon the good governance practices, risk management, fraud detection, and investor relations etc. However, this act is silent on the explicitly uses of AI technology because of its legal and ethical implications. Under the Indian companies Act 2013, companies are having certain distinguishing features such as; a separate legal personality, the identity of the company is separate from its members, artificial person with no physical existence etc. Therefore, it can do functions with the help of its members and especially with the Board of Directors elected by the shareholders. The 'Board of Directors' is considered as the brain of the company, to oversees the day-to-day affairs of the company and maintain the regular governance. Now, looking at the adoption of AI technology by corporates is no doubt a better idea for the companies. However, inclusion of AI technology in 'Board of Directors' is a complex decisions for the corporates, especially in India as the regulatory environment does not recognise the 'Robo-Directors' in Companies Act 2013. The legal status of robot is still is in immature stage as compared to the human intelligence and on the status of a legal person.

The definitions given in Section 2 (10) and Section 2 (34) of the Companies Act 2013 clearly defined about 'Board of Directors' and 'Director'. These above provisions while explained who a director is, they do not precisely define who a director is. Further, Section 149 of the Act, define that only an natural person is eligible to be appointed as a director in a company and also he must possess Director Identification Number ("DIN") issued by the Central Government of India to be appointed as director. Other regulatory conditions to be a director, one must not be disqualified as unsound mind, insolvency, conviction etc. Moreover, although the disqualifications under the Act are clearly designed for humans, the inability of an AI director to obtain a DIN would further hinder its eligibility.

Discussing about the accountability and liability, the Act categorically impose responsibility on individual directors and not AI driven Robo-directors. Even the modern corporate assigns responsibility to robo-directors, who is liable - the directors, the programmers, or the AI itself - becomes a complex issue? The Section 166 of the Act outlines the duties of directors, emphasising their fiduciary obligation to act in the best interests of the company and its stakeholders. This includes duties of care and skill, requiring directors to exercise reasonable diligence and independent judgment. Further, Section 166(2) of the Act, the director must act in the best interests of the company and all the stakeholders. Similarly, under Section 166(4) of the Act, "directors are not permitted to make decisions or involve themselves in matters in which they have a direct or indirect interest which conflicts or may conflict with the interest of the company" or under Section 166(5) "acquire or attempt to acquire any undue gain or advantage to himself or his relatives". However, the "black boxes" issues in AI would surely make errors that can hinder directors in fulfilling their oversight responsibilities under this act.

Ethical and Practical Concerns

One of the pivotal issues that have generated moral debates over AI's place in the board room is the infiltration of Robo-Directors. Most importantly the question of accountability. Given that AI is not conscious, the incorporation of Robo-Directors leads to a challenging question of who is responsible for the decisions that are made. The indication of the article of Liu[32] n this problem is that there should be some processes of human concern because there is no point in seeking justice where there is a robot. Most of the fundamental governance principles are based on the consideration of human culpability. Therefore, it is a grey area as to who will face the legal consequences in cases where a Robo-Director's proposal causes loss or results in a legal violation such as a breach of the code of ethics; AI developers, the company, or the human officers who adopted such a resolution.

Moreover, bias also poses a difficult issue as AI models can easily propagate social biases that are inherent in the datasets it was trained on. AI can work with a pre-existing disparity, or even enhance the imbalance, in the case that the defeat probabilities were extracted from an assimilated society with the in-built gender and racial discriminatory prejudices[33]. This is more problematic with respect to governance whereby the decision-making authority is concentrated on a few stakeholders and their actions have to conform to ethical principles. Besides accountability, this has also been identified as a problem in the literature as the AI or AI-driven tools do not support any accountability in the sense it is either not possible for their operations to be bulk curtailed or no one can stop them. The literature has therefore identified very little in the way of addressing the problem among other questions such as lack of social awareness amongst vendors and users. Everyone is getting so excited with the idea of social robots.

Practical concerns regarding the same also emerge with regard to making AI work within the current board and procedures. The more heads of laptop processing units increase in scope the more it can be defined that more human aspect in the same equation is reduced: this convinces Floridi to believe that companies may stretch out too much towards AI hence underplaying human discretion among other analytical skills[34]. There is also the factor of the amount of money that will be needed to use Robo Directors which can be a dicey issue especially when it comes to non-profited human rights organisations. These ethical and practical concerns show that even though the development of Robo-Directors looks promising as regards improving governance, their incorporation into the system needs to be carefully managed to ensure that transparency, accountability, and ethics are not compromised. There is an enhancement of the importance of mixing AI's comparative superiority and human dexterous approach for effective leadership in organisation structures by ensuring AI-guided governance aligns with normative values.

[32]Kiu (2018).
[33]Machill (2020).
[34]Floridi (2023).

Data Analysis

Subsequent methodologies for content analysis focused on the systematic classification of the text on aspects of the following: accountability, regulation, ethical concerns, and regulatory adaptive aspects[35]. This study used this method to extract themes and patterns that characterise the policies and processes of AI governance within the scope of regulatory frameworks specifically in the global and Indian setting. This type of data analysis is particularly relevant in the current study to facilitate the cross-sectional analysis and to find out whether Robo-Directors are compliant with the norms set in the governance framework [36]. Further, since this served as a post-analysis, the figures generated by the study that indicated such performance are corrected against the specific provisions under the Indian Companies Act which relate to possibilities of regulatory changes.

Findings and Analysis

Global Trends in Robo-Directors

Robo-directors are slowly being embraced in countries possessing advanced artificial intelligence regulatory frameworks, such as Japan and some Scandinavian countries, that allow room for the testing of AI in the governance structures[37]. Such countries, see AI as a race-winning technology for governance and deploy Robo-Directors for rational decision-making and monitoring compliance.

Opposed to the above regions, countries such as the U.S. and Germany take a more balanced approach by allowing AI to be used as an assistant but refusing to place decision-making authority in its hands[38]. This is because there are ethical considerations involved and there is also a strong inclination towards governance that is human-centred. For instance, in the fast-growing sectors of finance and technology where decisions are highly data-driven, there is more enthusiasm about the adoption of Robo-Directors. On the other hand, such technologies are not likely to be embraced for use in the health sector, which is prone to ethical dilemmas, for instance, decision-making throughout the care given.

[35]Zekos (2021).
[36]de Almeida, dos Santos & Farias (2021) at p. 514
[37]Daly, Hagendorff, Hui, Mann, Marda, Wagner & Wei Wang (2022).
[38]Renda (2019).

Table 1. *Global Adoption of Robo-Directors in Corporate Governance by Country and Industry*

Country	Industry	Level of Adoption	Key Observations
Japan	Technology	High	Progressive stance, AI advisory tools widely adopted in board functions, with Robo-Directors used to assist decision-making in compliance and strategy formulation.
	Finance	Moderate	Growing adoption, primarily in risk assessment and compliance monitoring, to support human board members.
United States	Technology	Moderate	Experimental use of AI in corporate governance, primarily for data analysis and strategic planning support, but limited by regulatory hesitance.
	Healthcare	Low	Limited adoption due to ethical concerns over AI in high-stakes, human-centred industries.
Germany	Manufacturing	Low	Conservative approach; AI is used only for advisory roles, with decisions retained by human directors to maintain ethical standards and accountability.
India	Financial Services and Other sectors	Very Low	Minimal adoption due to regulatory constraints under the Indian Companies Act, which emphasises ethical responsibilities and human accountability in governance roles.

Table I illustrates the varied adoption levels of Robo-Directors across these countries, emphasising both regulatory openness and industry-specific trends. This global comparison underscores the influence of regulatory frameworks and cultural perspectives on AI adoption in governance roles.

Case Study: Indian Companies Act 2013

- Governance Obligations: As per the Indian Companies Act 2013, every board member has their own ethical and fiduciary responsibilities that promote independence and responsibility, while working for the betterment of the company. These provisions are aimed humanely and especially in moral decision-making[39].
- Compatibility with Robo-Directors: The Act sets forth ethical and fiduciary standards to be observed but this has not been adapted for AI since it does not have a human face. Robo-directors, who are bound by prescriptions in the form of computer algorithms and not by ethical prescriptions, are difficult to consider in this siuation [40].
- Regulatory Constraints and Potential Adjustments: The Act would, however, need to be amended bearing in mind Robo-directors, for instance, new

[39]Lepeley, Morales, Essens, Beutell & Majluf (2021).
[40]Zekos (2021).

provisions that will state who is accountable for AI decisions. Present governance norms in India are still on the notion that human reasoning cannot be substituted hence presenting serious challenges to the embedding of AI in governance practices. Section 149 and other provisions of the Act, which prescribes independent director requirements and other eligibility criteria of other directors (Individual only), is particularly restrictive as it assumes directors possess moral agency an attribute AI cannot fulfil.

Impact on Corporate Governance Standards

- Transparency and Accountability: Conventional governance norms place emphasis on concepts such that 'one' must include within the ideals the factors of openness and responsibility which are hard to come by in AI. Robo Directors are controlled by algorithms that are described as black boxes and stakeholders may find them useless and difficult to engage in challenging their workings[41].
- Stakeholder Engagement: Effective governance standards place utmost importance on the trust of the stakeholders and on moral accountability. Robo-directors, much as they are credited for efficiency, may not render this completely because there is limited scope for resolution and addressing stakeholder issues which may hamper the stakeholder's confidence in AI decision-making[42].
- Adaptations in Standards: In order for Robo-Directors to be incorporated within the existing standard governance, there is a need for the inclusion of specific clauses on the governance of AI techniques such as advanced technologies like explainable robotics. This will make it possible for AI roles to maintain the level of transparency that is required by stakeholders[43].

[41]Williams, Cloete, Cobbe, Cottrill, Edwards, Markovic, Naja, Ryan, Singh & Pang (2022).
[42]Mason & Simmons (2014) at 83.
[43]Seal (2021).

Table 2. *Alignment of Robo-Directors with Corporate Governance Principles*

Governance Principle	**Alignment with Robo-Directors**	**Challenges**	**Potential Adjustments Needed**
Accountability	Limited	AI lacks personal accountability and moral agency.	Legislative provisions to clarify liability for AI-driven decisions
Transparency	Moderate	AI algorithms can be opaque, making decision processes challenging to interpret and explain to stakeholders.	Implement explainable AI (XAI) protocols to ensure transparency in AI decision-making.
Stakeholder Engagement	Low	AI lacks the ability to engage empathetically or communicate with stakeholders, potentially weakening trust	Use Robo-Directors as advisory support, with human directors leading stakeholder interactions.
Ethical Responsibility	Low	AI cannot independently uphold or apply ethical considerations inherent to human governance.	Establish guidelines for human oversight on ethical decisions AI systems influence

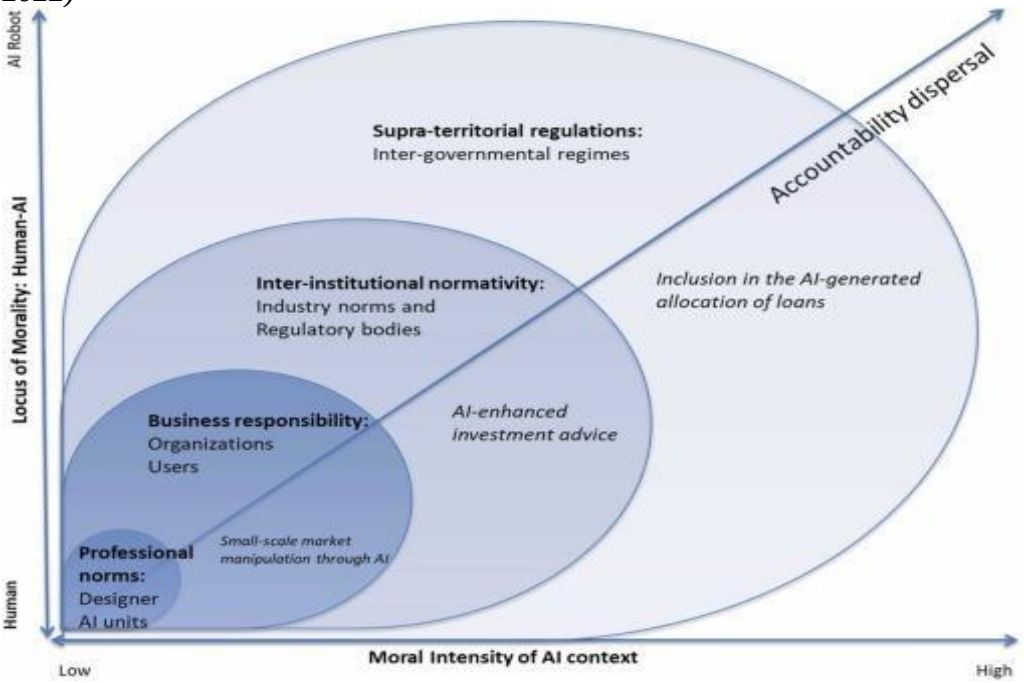
Challenges and Benefits

Key Challenges:

- Ethical Concerns: Robo-directors are being criticised for their inability to make morally sound decisions and for their minimal accountability. This creates problems in ensuring that decisions made through AI governance would respect fundamental morals[44].
- Technical Limitations: The sophistication of AI systems and the propensity to bias algorithms represent technical limitations that may hinder the achievement of governance goals especially in 'hard' accountability contexts.
- Regulatory and Compliance Issues: The board's position and functions, if made AI-centric, may lead to compliance issues in the implementation of the existing frameworks without incorporating any form of human directors, particularly in traditional jurisdictions[45].

[44]Möslein (2018).
[45]Möslein (2018).

Figure 1. *Application of a Framework for AI Accountability (following Tóth et al., 2022)*



Key Benefits

- Objectivity: Robo-directors are able to make decisions that are free from any biases, which minimises human biases during these high-stakes decisions hence promoting the credibility of the board.
- Evidence-Based Decision Making: Since Robo-Directors can analyse information instantly, their use will enhance the precision of predicting future revenues and expenses, evaluating potential threats, and assessing and ensuring adherence, which is an upper hand in complex decision-making processes[46].

Results and Discussion

Comparison with Existing Literature

The results of this research are consistent with previous studies regarding the transformative impact of AI on corporate governance through objectivity, data, and efficiency. Wilson and Daugherty emphatically argued that artificial intelligence can assist in improving how consistent decision-making processes can be by minimising human interference[47]. This is particularly true as evidenced by this study's findings on Robo-Directors. Studies such as those by Shah and Murthi

[46]Mertens (2023).
[47]Wilson & Daugherty (2018).

advanced the discussion regarding the applicability of AI and its deployment in predictive analysis by demonstrating the value of Robo-Directors being able to help in assessing compliance and financial health instead of retrospective reviews[48]. Nonetheless, our findings suggest some drawbacks also in line with some of the critiques in the literature for instance de Almeida, dos Santos & Farias argue that AI is ethically questionable and inherently unintelligible[49]. The 'black box' phenomenon of AI, in which the reasoning behind a particular decision is not revealed, is a major barrier to complying with the transparency aspect of the governance principles. As such, despite the benefits of Robo-Directors' capabilities, current bureaucratic systems still struggle to accommodate all precepts of them.

In addition, the aspects of ethical issues and accountability discussed in this study align with the arguments of Williams, Cloete, Cobbe, Cottrill, Edwards, Markovic, Naja, Ryan , Singh & Pang, who believe that governance has no equivalent in AI systems.[50] The results presented here show that Robo-Directors may perform well-established functions that require data processing, but they cannot assume the duties that involve values and ethical principles that governance entails, and this is echoed by Floridi[51] who cautions that as much as AI systems are helpful, their applications should not be extended to making ethical decisions. This paper adds another dimension to the existing debate, demonstrating that although Robo-Directors are ideal, their use will require proper regulatory changes and structures of accountability that support governance.

Implications for the Indian Corporate Sector

For Indian entities, more particularly those operating under the Indian Companies Act 2013, the incorporation of Robo-Directors presents its own challenges. The Act stresses the moral and fiduciary obligations of the directors and creates a risk for non-human equipment such as Robo-directors which have no accountability at alls[52]. Unlike their human counterparts, Robo-Directors cannot be liable for their decisions; neither do they, for they are machines, can morally justify actions taken that may be contrary to the interests of the organisational updates could clarify AI's operational boundaries, providing guidelines on AI-driven decision-making in boardrooms. The results of this research indicate that some changes in the legislation of the Indian corporate structure must be made first before Robo-Directors can be used. The changes can be introduced that will specify the level of responsibility where AI shall be allowed, the extent of control over the AIs' workings and decisions, and the earmarking of ethical and all legislated boundaries on such activities.

Moreover, Robo-Directors' possible incorporation may also affect the organisational principles of management of Indian businesses. Indian governance systems are traditionally based on agreement and humanism, concepts that Robo-

[48]Shah & Murthi (2021).
[49]de Almeida, dos Santos & Farias (2021).
[50]Williams, Cloete, Cobbe, Cottrill, Edwards, Markovic, Naja, Ryan, Singh & Pang (2022).
[51]Floridi (2023).
[52]Zekos (2022) at 213.

Directors may undermine (Ricci 2018). Consequently, firms in India may have to consider the cultural value of human responsibility and ethical leadership in decision-making against the advantages posed by Robo-Directors for innovation. In addition, the implementation of Robo-Directors may foment a change in the present governance structures of Indian corporations in the direction of more use of better transparency and information management technology to meet acceptable standards locally and globally.[53] Nonetheless, such a transition will necessitate active engagement with the regulators and the policy-makers to ensure that the relevant laws are amended in a balanced way where the governance objectives will be achieved without compromising the possible benefits of AI in business organisations.

Broader Governance Implications

Robotic directors, if appropriately integrated, offer the potential to change the face of corporate boards by incorporating human and AI intelligence together. This paradigm shift would need corporations to value technical expertise during board member appointments more specifically professionals who have acquaintance with AI to oversee such Robotic directors. From a much broader perspective, Robo-Directors could revolutionise the practices of corporate governance by infusing a level of objectivity, consistency, and insight that has never been previously experienced. The introduction of Robo-Directors may change the structure of the board and reduce the requirement of some of the traditional roles while focusing on the need for technical knowledge[54]. For instance, it may be necessary for boards to hire professionals who are proficient with AI and data management for the explanation and understanding of the output generated by the Robo-Director. Therefore, there can be a shift in governance structures where there is a mix of human decision-making and the use of AI in analytics for effective decision-making and adherence to compliance.

Nevertheless, certain recognised authorities have also noted that employing Robo Directors within a business organisation calls for changes to the existing structures of regulatory compliance as the current regulations fall short of integrating the new age of artificial intelligence actors making decisions[55]. The governance codes that have been developed by the OECD for example may as well need to be revised in ways that will address the capabilities and limitations when it comes to artificial intelligence technology therefore maintaining its functioning and ethical obligations. Results of this study suggest that governance bodies may also need to issue guidance on explainable AI recommending Robo-Directors disclose the rationale for their decisions consistent with the tenets of transparency and stakeholder engagement[56]. Moreover, the incorporation of Robo-Directors in an organisation may also alter the organisational culture from one focused on human instincts to tackling problems through analytics which may be problematic to parties with a background in traditional structures.

[53]Ricci (2018).
[54]Annunziata (2023).
[55]Birkstedt, Minkkinen, Tandon & Mäntymäki (2023).
[56]Aralova (2020).

Limitations and Recommendations

To ensure the effective incorporation of Robo-Directors without compromising on the principles of governance, the following suggestions are made:

- *Legislative Repurposing:* Indian policymakers need to begin amending the Companies Act 2013 to include rules addressing the roles of the AI board members, particularly those who bear the responsibility for actions taken by the AI. The above changes should be very clear on what a Robo-Director is allowed to do and more so how such actions require the interference of a human being.
- *Understandable AI Integration:* In order to mitigate the transparency issue in the use of Robo-Directorship, companies using Robo-Directors should adopt AI models that provide sound and clear reasoning for every decision taken. This will promote confidence and accountability when it comes to the governance processes of AI.
- *Hybrid Governance Models:* Firms may also employ a blended style of governance which aims at reaping the benefits of AI while using human governance. In this case, Robo-Directors will do data crunching but directors will reserve the right to make decisions such that the outcomes of AI do not supplant moral decisions[57].
- *Regular Audits and Monitoring:* Where a corporation aims to employ Robo-Directors, there should be routine checks and monitoring of the working of the Robo-Director to conform with the acceptable standards of governance and to check for any biases or deviations in functioning. If necessary, third-party supervision will help to reduce the level of risk involved in the use of Robo-Directors by ensuring that they follow the statutory and ethical standards so as to protect a wider range of individuals, including the shareholders and other stakeholders.
- *Enhanced Training for Human Directors:* There is a need for training the human directors on AI ethics and data management in order to be able to correctly manage the Robo-Managers and appreciate the effect of AI-derived knowledge.

Conclusion

Summary of Findings

Robo-directors have not been accepted at the same rate in all parts of the world. Despite the development of legal and practical mechanisms in Japan, India is reluctant to promote such a way of governance, and their companies though in the stock market, are still largely family-oriented. In India, Directors are defined under the Companies Act, which complies with the definitions provided in the

[57]Berryhill, Heang, Clogher & McBride (2019).

prevailing principles and standards but does not use the word artificial Intelligence or AI. The application of Robo-Directors on a global scale and their suitability within existing corporate governance expert systems, in particular, the Indian Companies Act of 2013, forms the basis of this research. The results show that there are differing trends of adoption across the globe with countries such as Japan and some European countries experimenting more than others and in places, like the USA and Germany, which have adopted a more wait-and-see approach due to regulations and ethical considerations. In India, however, the provisions in the Companies Act 2013 present difficulties with respect to Robo Directors because this act is centred around the concepts of legal status, fiduciary duties and ethics, key roles played by human directors. It has been found that while Robo-Directors can offer the level of utilities that consists of rationality and facts thinking, there are also principles and ethical conundrums within the existing system of governance that limit the scope of application of such entities. Therefore, there are implications that current legislations have to be amended in order to replace the non-human directors with AI in full capacity within the Indian corporate governance system.

Future Research

Considering it is still the early stages of Robo-Directors in the market and other organisations, there exist many more avenues to be explored. Future investigations could engage in primary research, such as talking to business executives and policymakers, to grasp the issues in practice and their advantages or disadvantages in using Robo-Directors in a particular environment. In addition, it would be useful to conduct similar investigations, but with a focus on the legal provisions of other countries, for example, China and the UK, in order to understand different ways of regulating the use of AI. In addition, the applicability of mixed or hybrid governance approaches could also be put to the test, where the effectiveness of utilising decision-making processes that integrate human engagers and AI engagement will be assessed. Finally, since research in AI is very dynamic, the impact of Robo-Directors may be examined in terms of a few decades reaching to conclusions about their influence on the overall corporate management, its ethical aspect, and internal and external stakeholders' relations.

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Alternative Dispute Resolution Forums in Consumer Disputes in Austria and Germany

By Noémi Suri[*]

The last fifteen years in Europe have been marked by the proliferation of alternative dispute resolution methods - mediation, arbitration, conciliation, conciliation - and the widening of the possibilities, which have affected public and private law, substantive and procedural law, national, international and European norms. In practice, mediation takes a variety of forms, depending on the (legal) field concerned. In Europe, out-of-court mediation is by far the most widespread form, but several jurisdictions have also made room for the institution of mediation in court. The aim of the study is to provide a comparative analysis of the civil substantive and civil procedural law of Austria and Germany with regard to alternative dispute resolution forums for resolving consumer-business disputes.

Keywords: *Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation; Alternative dispute resolution forums; German Mediation Act; Alternative Dispute Resolution in consumer matters; Federal Act on Alternative Dispute Resolution; Conciliation bodies*

Introduction

In order to comply with Article 25 of Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC,[1] all EU Member States had to comply with their legislative obligation to ensure that consumers and businesses have access to alternative dispute resolution for their disputes by 9 July 2015.

The aim of the study is to provide a comparative analysis of the civil substantive and civil procedural law of Austria and Germany with regard to alternative dispute resolution forums for resolving consumer-business disputes.

As a first step, the research assignment will clarify how the countries in the research project regulate the issues related to alternative dispute resolution forums. It then seeks to explore the specific substantive and procedural rules that apply to alternative dispute resolution forums available for resolving disputes between consumers and businesses. Finally, the specific provisions applicable to the members of the conciliation body (in particular the election, appointment and conflict of interest of members) will be examined in detail.

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[1]Official Journal of the European Union, L 165/63, 18.6.2013. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0011

Alternative Dispute Resolution Forums in Consumer Disputes in Germany

The German Mediation Act *(Gesetz zur Förderung der Mediation und anderer Verfahren der außergerichtlichen Konfliktbeilegung vom 21. Juli 2012, BGBl. I S. 1577*), hereinafter *"Mediationsgesetz"*, came into force on 26 July 2012. The *Mediationsgesetz* is the framework legislation for mediation as a means of alternative dispute resolution in Germany. With this act, Germany as a Member State fulfilled its legislation obligation under the European Mediation Directive[2], and it laid the foundations for any mediation activity in Germany, irrespective of the nature of the dispute or the parties' place of residence.[3] The *Mediationsgesetz* only defines the fundamental principles of the process. Mediators and parties must have a large leeway in the conduct of mediation. The act specifies the definitions of "mediation" and "mediator" to separate mediation from other conflict resolution methods. According to the definition, mediation is a structured process in which the parties strive on a voluntary basis and autonomously, to achieve an amicable resolution of their conflict with the assistance of one or more mediators. The mediators are independent and impartial persons without any decision-making power, who guide the parties through the mediation.[4] Their duty of confidentiality – including that of any other participant's – is specifically stipulated in the Act.[5]

In Germany, various incentives were incorporated in several legislations to foster consensual conflict resolution. Pursuant to Section 278 (1) of the *Code of Civil Procedure (ZPO)*[6], hereinafter "ZPO", in all circumstances of the proceedings the court is to act in the interests of arriving at an amicable resolution of the legal dispute or of the individual points at issue. This can also be understood as a judicial mediation activity. When filing an application at a civil court, the parties must state whether they have made efforts to resolve the conflict amicably, for instance, through mediation, and whether, in their opinion, they have any reasons to oppose such a procedure. The court may recommend mediation, or other out-of court dispute resolution procedures, and if the parties accept such recommendation, it may order the suspension of the procedure. It is important to note, however, that mediation is currently not provided as a legal aid in Germany.[7]

Section 165 of the *FamFG*[8], for instance, regulates court mediation in conflicts related to access rights over children. Moreover, pursuant to Section 363 of the

[2]Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters. Official Journal of the European Union, L 136/3, 24.5.2008. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0052.
[3]Rühl (2014) at 8-11.
[4]Osswald & Flecke-Giammarco (2017) at 352.
[5]https://www.bmj.de/DE/Themen/GerichtsverfahrenUndStreitschlichtung/Mediation/Mediation_node.html
[6]Zivilprozessordnung ("Zivilprozessordnung in der Fassung der Bekanntmachung vom 5. Dezember 2005 (BGBl. I S. 3202; 2006 I S. 431; 2007 I S. 1781), die zuletzt durch Artikel 2 des Gesetzes vom 7. November 2022 (BGBl. I S. 1982) geändert worden ist").
[7]https://www.bmj.de/DE/Themen/GerichtsverfahrenUndStreitschlichtung/Mediation/Mediation_node.html
[8]Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (FamFG) ("Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit vom 17. Dezember 2008 (BGBl. I S. 2586, 2587), das zuletzt durch

FamFG, at the request of any of the heirs, the notary shall mediate in distributing the estate, except when there is an executor who is authorised to distribute the assets of the estate. Section 18 of the Rules of Professional Practice for Lawyers *(Berufsordnung für Rechtsanwälte)*[9] declares that lawyers are subject to the ethical rules even when they act as conciliators, arbitrators or mediators.

An act of mediation becomes mediation only if the mediator remains impartial and does not ”develop” the solution for the parties concerned. This must be achieved by the parties involved in the conflict. The mediator may participate in the communication, the negotiation and the agreement processes, thereby promoting the reconciliation of interests; contrary, however, to a judge or an arbitrator, they do not have decision-making powers, and contrary to a conciliator, they do not propose solutions directly.

In Germany, mediation can occur through co-mediation, when two mediators act jointly in a matter. This method can better ensure impartiality or representation of the interests of both parties. For instance, co-mediation in a family conflict can be carried out by a male and a female mediator, one with a legal, the other one with a psychological professional background.

In Germany, the institution of mediation is applied in the following areas:

- family matters, specifically related to separation or divorce;
- international legal disputes, for example, in custody and access law cases,
- inheritance legal disputes;
- business;
- civil law (neighbour law, tenancy law, consumer law);
- construction law;
- public administration (focusing on environmental mediation);
- labour law;
- conflicts between doctors and patients,
- mediation between victims and perpetrators in criminal law,
- education (mediation at school),
- political conflicts.

The Act on Alternative Dispute Resolution in Consumer Matters *(Gesetz über die alternative Streitbeilegung in Verbrauchersachen – Verbraucherstreitbeilegungsgesetz, VSBG*[10]*,* hereinafter "*VSBG*", was approved by the German *Bundestag* on 3 December 2015 in the version proposed by the Committee of Legal Affairs of the Bundestag. The Act of 19 February 2016 on the Execution of the Directive on Alternative Dispute Resolution in Consumer Matters and the Execution of the Decree on Online Dispute Resolution promulgated on 25 February 2016 entered into force on 1 April 2016. The traders’ obligation to provide information is

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Artikel 12 Absatz 21 des Gesetzes vom 16. Dezember 2022 (BGBl. I S. 2328) geändert worden ist”), hereinafter FamFG.

[9]https://www.brak.de/fileadmin/02_fuer_anwaelte/berufsrecht/bora_stand_01.01.2020.pdf

[10]Verbraucherstreitbeilegungsgesetz vom 19. Februar 2016 (BGBl. I S. 254, 1039), das zuletzt durch Artikel 2 Absatz 3 des Gesetzes vom 25. Juni 2020 (BGBl. I S. 1474) geändert worden ist". https:// www.gesetze-im-internet.de/vsbg/VSBG.pdf

applicable only since 1 February 2017. Pursuant to Section 18 of the above act, matters not regulated in the *VSBG* are governed by the provisions of the *Mediationsgesetz*. In accordance with Section 4(2)2 of the VSBG, the out-of-court dispute resolution body for consumers and traders *(Außergerichtliche Streitbeilegungsstelle für Verbraucher und Unternehmer e.V.)* is the general conciliation body for consumer matters acknowledged by the Federal Office for Justice *(Bundesamt für Justiz)*.[11] This body keeps and records the list of mediators who can act in legal disputes between consumers and traders.[12]

Consumer dispute resolution bodies are institutions that carry out procedures for the out-of-court resolution of civil law disputes in which the consumers and traders participate on opposing sides, and are qualified as consumer dispute resolution bodies acknowledged, appointed or established under the *VSBG* or other legal provisions (Section 2 of the VSBG). A consumer dispute resolution body must be a registered association with its own budget, separate from the budget of the sponsoring body, and with a budget sufficient for its operation.

At the consumer's request, the consumer conciliation body conducts out-of-court proceedings for the settlement of disputes arising out of or in connection with a consumer contract within the meaning of Section 310 (3) of the Civil Code (*Bürgerliches Gesetzbuch)* hereinafter – BGB[13]); disputes concerning employment contracts are excluded.

The competences of a consumer conciliation body may be restricted to

1. certain economic sectors,
2. certain types of contracts,
3. certain traders, or
4. traders with registered seats in a specific country (Section 4 of the VSBG).

They must have their own rules of procedure (hereinafter Rules of Procedure) which outlines the conflict resolution procedure and provides for the details of its implementation. The consumer conciliation body may not conduct any conflict resolution procedures that impose a binding solution on the consumer or exclude the consumer's right to take recourse to the courts (Section 5 of the VSBG).

In Germany, mediation is an out-of-court conflict resolution process between the affected parties conducted by one or more mediators as independent, impartial third parties following the principles of voluntariness, personal responsibility and mutual agreement. The mediators are responsible for the communication and negotiation between the parties, but not for the actual result of the negotiation. The result of the process is set out in writing. The process is further characterised by trustful, open communication and cooperation. Non-disclosure of the information uttered must be ensured throughout the mediation process.

[11]https://www.streitbeilegungsstelle.org/faq/

[12]https://www.streitbeilegungsstelle.org/faq/

[13]"Bürgerliches Gesetzbuch in der Fassung der Bekanntmachung vom 2. Januar 2002 (BGBl. I S. 42, 2909; 2003 I S. 738), das zuletzt durch Artikel 6 des Gesetzes vom 7. November 2022 (BGBl. I S. 1982) geändert worden ist", hereinafter "BGB".

Consumers may submit applications for conciliation at the conciliation body. Following this, the conciliation body submits a conciliation proposal for the parties within 90 days. The conciliation process is concluded with the notification of its result. The result will not be published and is not enforceable. The process can be cancelled by either party at any time. Apart from cases of misuse, the costs are generally borne by the trader. [14]

In Germany, conciliation bodies must employ at least one person who is engaged in the out-of-court settlement of disputes, and who is responsible for the impartial and fair conduct of the (mediation) process. The mediator must possess appropriate legal knowledge specifically as regards consumer protection law as well as the expertise and skills necessary for the resolution of disputes under the jurisdiction of the conciliation body. In addition, this activity may only be conducted with judicial or mediator qualifications.

In the last three years before his appointment, the dispute mediator may not have worked

1. for a trader that has committed itself to taking part in the dispute resolution procedure of the consumer conciliation body or is committed to taking part on the basis of legal provisions, or
2. for a business associated with the trader under point 1, or
3. for an association to which the trader under point 1 belongs and that represents trader interests in the economic sector in which the consumer conciliation body is competent, or
4. for an association that represents consumer interests in the economic sector in which the consumer conciliation body is competent.

An activity as a dispute mediator for an association under points 1, 3 or 4 does not preclude a renewed appointment as a dispute mediator. (Section 6 of the VSBG).

The dispute mediator should be independent and is not subject to any instructions. He must offer a guarantee of impartial dispute resolution. The dispute mediator may not be remunerated or employed by only one trader or by a business associated with only one trader. The dispute mediator's remuneration may not be associated with the result of dispute resolution procedures.

The dispute mediator is obliged to disclose without delay to the supporting agency of the consumer conciliation body any circumstances that could affect his independence or impartiality. The dispute mediator shall disclose to the parties any circumstances that could affect his independence or impartiality. Under such circumstances, the dispute mediator may only take action if the parties expressly consent to his activity as a dispute mediator. If the dispute mediator's task has been transferred to a body to which representatives of both consumer and trader interests belong, the two sides must be represented in equal numbers. This provision does not apply to members of the body who only represent trader interests or consumer interests. The dispute mediator must be appointed for an appropriate period. The

[14]https://www.mediationskanzlei-goettingen.de/verbraucher-adr-schuetzt-verbraucher/

period of office should not be less than three years. Reappointment is permissible (Sections 7-8 of the VSBG).

Alternative Dispute Resolution Forums in Consumer Disputes in Austria

Austria established legal rules for mediation in family law cases back in 1999,[15] and in 2004 it enacted the first mediation act in Europe.[16]

In Austria, mediation is a process aimed at the out-of-court settlement of conflicts in the private, professional, business and environmental sectors, the legislative grounds of which is provided for by the Federal Law on Mediation in Civil Law Matters *(Zivilrechts-Mediations-Gesetz – ZivMediatG)*[17]. Compared to civil proceedings, mediation is a more cost-efficient procedure without the risk of compensating the other party for their costs. With mediation, the parties save time since the results are often achieved faster than a court decision in a civil proceeding. Participation in the procedure is always voluntary, the resolution of the legal dispute is always dependent on the parties. With the help of optimal solution strategies, a conflict may be handled quickly and in a manner satisfactory for both parties. The sustainability of the problem-solving process creates a situation from which both parties can profit. The parties themselves select the proceeding mediator, who is obliged to hold confidential all information of which they become aware in the course of performing their activity. A person who is a party to a conflict between the parties, a representative of the parties, an adviser to the parties, acting as a judge in the case or who has previously taken a decision in the case, cannot act as a mediator.[18]

In Austria, mediation is an alternative dispute resolution procedure primarily in the following areas: family law disputes, business conflicts, neighbour law disputes, environmental matters, education-training (mediation at school), public sphere, construction, and politics.[19]

As in Germany, Austria has further legislation to regulate the alternative settlement of disputes between consumers and traders, in addition to the Act on General Mediation - The Federal Act on Alternative Dispute Resolution (*Alternative-Streitbeilegung-Gesetz)*, hereinafter the *"Alternative Dispute Resolution Act" – or AstG*), entered into force on 9 January 2016.[20]

Under this act, traders can voluntarily undergo an alternative dispute resolution procedure instead of a court procedure in disputes with consumers.[21] The scope of

[15]Marriage Law Amendment Act (Eherechts-Änderungsgesetz) 1999.
[16]Roth & Gherdane (2012) at 249.
[17]Bundesgesetz über Mediation in Zivilrechtssachen (Zivilrechts-Mediations-Gesetz – ZivMediatG) StF: BGBl. I Nr. 29/2003 (NR: GP XXII RV 24 AB 47 S. 12. BR: AB 6780 S. 696.). https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20002753
[18]Lenz & Risak (2017) at 34-35.
[19]https://www.oesterreich.gv.at/themen/familie_und_partnerschaft/scheidung/Seite.100800.html
[20]Bundesgesetz über alternative Streitbeilegung in Verbraucherangelegenheiten (Alternative-Streitbeilegung-Gesetz – AStG). StF: BGBl. I Nr. 105/2015 (NR: GP XXV RV 697 AB 772 S. 85. BR: AB 9411S.844.) https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=2000 9242
[21]Wendland (2016).

the act covers contracts for goods and services concluded online or offline in exchange for a payment.[22]

Section 4(1) of the Alternative Dispute Resolution Act of Austria (*AstG*) outlines eight state-approved institutions for alternative dispute resolution:

- *"*Schlichtung für Verbrauchergeschäfte*":* the conciliation board for consumer transactions;[23]
- *"*Internet Ombudsmann*"*: the ombudsman for online infringements;[24]
- *"*Schlichtungsstelle der E- Control Austria*":* the E- Control Austria conciliation board;[25]
- *"*Telekom Schlichtungsstelle der Rundfunk und Telekom Regulierungs GmbH*"*: the telecommunications conciliation board of the Rundfunk und Telekom Regulierungs GmbH;[26]
- *"*Post Schlichtungsstelle der Rundfunk und Telekom Regulierungs GmbH*"*: the postal services conciliation board of the Rundfunk und Telekom Regulierungs GmbH;[27]
- *"*Agentur für Passagier- und Fahrgastrechte*"*: the agency for passengers' and travellers' rights;[28]
- *"*Gemeinsame Schlichtungsstelle der Österreichischen Kreditwirtschaft*"*: the joint conciliation board of Austrian credit institutions;[29]
- *"*Ombudsmann Fertighaus*"*: the ombudsman for prefabricated houses.[30]

The conciliation board for consumer transactions *(Schlichtung für Verbrauchergeschäfte)* is a state-approved, independent and non-profit association. The board offers voluntary mediation procedures free of charge for the resolution of conflicts between consumers and traders with exclusive jurisdiction and competence. It does not take sides with the consumer or with the trader, it strives to promote an agreement through providing support for both parties. It is important to highlight, that the conciliation board is not a consumer protection organisation, but a so-called *"*service-provider organisation" for consumers and traders. Given that the conciliation board for consumer transactions is not a consumer protection organisation, it does not provide legal counselling, nor does it promote and defend consumer or trader interests in any court or out-of-court procedures (with no right to launch an action either).[31]

[22]https://www.wko.at/service/wirtschaftsrecht-gewerberecht/Alternative-Streitbeilegung.html
[23]https://www.verbraucherschlichtung.at/
[24]https://www.ombudsstelle.at/ueber-uns/
[25]https://www.e-control.at/
[26]https://www.rtr.at/TKP/was_wir_tun/telekommunikation/konsumentenservice/schlichtungsverfahren/TKKS_Schlichtung.de.html
[27]https://www.rtr.at/TKP/was_wir_tun/post/konsumentenservice/schlichtungsstelle/PKS_Schlichtung.de.html
[28]https://www.apf.gv.at/de/apf.html
[29]https://www.bankenschlichtung.at/default.htm
[30]http://www.ombudsstelle-fertighaus.org/
[31]https://www.verbraucherschlichtung.at/ueber-uns/

The conciliation board for consumer transactions operates as an association whose members may be natural persons or legal entities. Its members include the Federal Chamber of Labour *(Bundesarbeitskammer)*, the Financial Market Authority *(Finanzmarktaufsicht)*, the State of Burgenland *(Land Burgenland)* and the State of Upper Austria *(Oberösterreich)*.

Consumer conciliation is financed by the Federal Ministry of Social Affairs, *(Bundesministerium für Soziales, Gesundheit, Pflege und Konsumentenschutz)*, by the Banking and Insurance Division of the Chamber of Commerce *(Sparte Bank und Versicherung der Wirtschaftskammer)*, by the State of Lower Austria and by the association members.[32]

Further information on the association can be found in its Statues[33]. Bodies of the association are the General Meeting (Sections 7 and 8), the Executive Committee (Sections 9 and 10), the Executive Board (Section 11), the Conciliation Board (Section 12), the Auditors (Section 13), and the so-called Court of Arbitration (Section 14). The consumer conciliation board has its own rules of procedure (Rules of Procedure)[34].

A particular feature of the Austrian regulations is that a procedure before a conciliation board may only be launched by the consumer. The *AStG* defines for traders a strict data provision obligation about the competent conciliation board. The consumer must be notified of the conciliation organisation competent in their matter including its website address. Several legislations regulate the details of the data provision obligation, such as the Telecommunications Act *(Telekommunikationsgesetz)*[35], the General Railway Act *(Eisenbahngesetz)*[36], the Motor Vehicle Route Act *(Kraftfahrliniengesetz)*[37], the Federal Aviation Law *(Luftfahrtgesetz)*[38], and the Shipping Act (*Schifffahrtsgesetz*)[39]. The trader is obliged to disclose this information on its website and in the General Terms and Conditions, if provided, in a clear, comprehensible and easily accessible manner. Failing to do so is considered an administrative offence and is punishable with a fine up to EUR 750.00.

The procedure opens when the consumer files a complaint at the competent conciliation board. Legal representation is not obligatory, but representation through

[32]https://www.verbraucherschlichtung.at/ueber-uns/

[33]https://www.verbraucherschlichtung.at/wp-content/uploads/2018/05/Vereinsstatuten-vom-27.04.2018.pdf

[34]https://www.verbraucherschlichtung.at/wp-content/uploads/verfahrensordnung.pdf

[35]Telekommunikationsgesetz vom 23. Juni 2021 (BGBl. I S. 1858), das zuletzt durch Artikel 9 des Gesetzes vom 20. Juli 2022 (BGBl. I S. 1166) geändert worden ist.

[36]Allgemeines Eisenbahngesetz vom 27. Dezember 1993 (BGBl. I S. 2378, 2396; 1994 I S. 2439), das zuletzt durch Artikel 10 des Gesetzes vom 10. September 2021 (BGBl. I S. 4147) geändert worden ist". https://www.gesetze-im-internet.de/aeg_1994/AEG.pdf

[37]Bundesgesetz über die linienmäßige Beförderung von Personen mit Kraftfahrzeugen (Kraftfahrliniengesetz - KflG) StF: BGBl. I Nr. 203/1999 (NR: GP XX IA 1118/A AB 2047 S. 180. BR: 6013 AB 6047 S. 657). https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer =20000098

[38]Bundesgesetz vom 2. Dezember 1957 über die Luftfahrt (Luftfahrtgesetz – LFG). StF: BGBl. Nr. 253/ 1957 (NR: GP VIII RV 307 AB 318 S. 40. BR: S. 128). https://www.ris.bka.gv.at/GeltendeFassung.Wxe?Abfrage= Bundesnormen&Gesetzesnummer=10011306

[39]Bundesgesetz über die Binnenschifffahrt (Schifffahrtsgesetz – SchFG) StF: BGBl. I Nr. 62/1997 (NR: GP XX RV 564 AB 618 S. 67. BR: 5400 AB 5420 S. 624). https://www.ris.bka.gv.at/Geltende Fasung.wxe? Abfrage=Bundesnormen&Gesetzesnummer=10012703

an appointed person or a lawyer is possible. Participation in the procedure is voluntary both for the trader as well as the consumer and is generally more cost-efficient than a court action.[40] The procedure must be closed within 90 days. Its termination may be initiated by either party without any time limitation.

In Austria, the mediation process may be divided into several phases:

(a) In the preliminary phase the mediator endeavours to define the grounds for the dispute, explains the objectives, the process and the rules of mediation, and concludes a mediation agreement with all the parties. In this agreement, the parties outline the expenses, the division of expenses, any potential conditions, possible deadlines and the rules of conciliation.
(b) In the first phase, the mediator creates an atmosphere in the negotiation which reinforces the establishment of trust, and both (all) parties are given the opportunity to elaborate their position. The mediator describes the various aspects of the conflict; without making any judgments about the parties, the mediator creates a list of the issues.
(c) In the second phase, the parties express their feelings. During the process, the parties' underlying interests, needs and objectives are defined. In the third phase, all possible, potential ways of resolving the conflict are explored based on the wishes and objectives of the parties involved, and all the solution proposals are gathered without a value judgment.
(d) In the fourth phase, the parties evaluate all alternative solutions, check their feasibility and sustainability, and choose from the remaining solutions the one offering the most benefits for everyone.
(e) In the fifth phase, following any potential external expert supervision, the mediation agreement is written down and signed by the parties. Furthermore, there is the evaluation, with other words, the follow-up phase, in which it may be optionally considered whether the results match or have matched the objectives and expectations for the details to be improved.
(f) As a result of a successful mediation process, the parties find a common solution and the procedure is closed with an out-of-court agreement. In case they do not find a common solution, the parties are entitled to settle the legal dispute in a legal action.[41]

Pursuant to the regulations in force in Austria, an agreement reached in a conciliation procedure does not give rise to an enforceable title. Therefore, it is possible that following the closure of a conciliation board procedure, a court procedure (civil action) has to be launched, if the consumer does not fulfil their payment obligation as per the agreement.[42]

[40]https://www.wko.at/service/wirtschaftsrecht-gewerberecht/ALTERNATIVE-STREITBEILEGUN G-IN-VERBRAUCHERANGELEGENHEITEN1.html
[41]https://www.oesterreich.gv.at/themen/familie_und_partnerschaft/scheidung/Seite.100800.html#Liste_BMJ
[42]https://www.wko.at/service/wirtschaftsrecht-gewerberecht/ALTERNATIVE-STREITBEILEGUNG-IN-VERBRAUCHERANGELEGENHEITEN1.html

In Austria, at least one of the conciliation board members must have legal qualifications. All members must possess the knowledge and skills required for the out-of-court settlement of disputes or court procedures for the resolution of consumer disputes. During the execution of their tasks, conciliators are not bound by instruction, they are appointed by the board for at least three years. Their activity is supported by the Executive Board and the staff appointed by it. They may be dismissed from their office only on reasonable grounds and with a unanimous decision of the Board of Directors (Section 12 of the Statues). The Statutes do not lay down any conflict of interest rules for the members of the conciliation board.

The list of mediators is kept by the Federal Ministry of Justice *(Bundesministerium für Justiz – BMJ)*.[43] In addition to submitting the relevant application, registration is subject to the age of 28, professional qualifications, proof of trustworthiness (by means of a certificate of good conduct), the conclusion of a mediation liability insurance contract and information on the place where the mediator carries out their activities. Registered mediators must complete further trainings.

Conclusions

In Germany and Austria, conciliation bodies operate in the form of associations. Their operation and procedures are governed partly by law and partly by their own rules of procedure. The difference between the two countries is that while in Germany there are several conciliation bodies, the Austrian conciliation body for consumer affairs ("*Schlichtung für Verbrauchergeschäfte*") is the body with exclusive competence and jurisdiction for the alternative resolution of disputes between consumers and businesses. In Germany the rules on conciliation board members are laid down in law with provisions primarily relating to qualifications. In Austria, provisions on the members of the conciliation body are laid down in the statutes. Among the conflict of interest rules, the intermediary must be an independent person, not bound by instructions. His or her person must guarantee the impartial settlement of the dispute. The mediator must immediately disclose to the competent consumer body any circumstances that may affect his or her independence or impartiality. In Germany, the VSBG regulates the rules for conciliation board members. The conciliation body must employ at least one person who is responsible for the out-of-court settlement of disputes and who is responsible for the impartial and fair conduct of the proceedings (mediator). The mediator must have appropriate legal knowledge, in particular in the field of consumer protection law, and the expertise and skills necessary for the settlement of disputes falling within the competence of the conciliation body. In addition, this activity may be carried out only if the person concerned has the qualifications required for the office of judge or mediator. In Austria, the conciliation body consists of five members, information on the members of the body can be found in the statutes. At least one of the members of the conciliation body must have a law degree. All members must have the knowledge and skills necessary for out-of-court dispute resolution or for the judicial

[43]https://mediatoren.justiz.gv.at/mediatoren/mediatorenliste.nsf/docs/home

settlement of consumer disputes. However, the statutes do not lay down any conflict of interest rules for the members of the conciliation panel.

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Tracing the Modern Concepts of Economic Law in the Ancient Monarchical Governance in Sri Lanka - A Comparative Analysis of selected Modern Trade Legislation with the Epigraphic Evidence

By Raja Goonaratne[*]

It is generally believed that the notion of law originated with the evolution of human species. Law is a mechanism by which the human actions and conduct are regulated to ensure peaceful co-existence and justice in the society. Law is classified in multiple ways for diverse purposes. Economic Law is one such evolving category in the contemporary global jurisprudence. The embryonic concept of economic law can be traced to many ancient societies including Sri Lanka. Sri Lankans are a great chronicling nation. They kept records on every aspect of their collective life in chronicles such as the Mahāvamsa- Great Chronicle on the Nation, Vansattappakāsinī-Commentary on the Great Chronicle, Dīpavamsa-Chronicle on the Island, Daladāvamsa- Chronicle on the Sacred Tooth Relics of the Buddha, Tūpavamsa- Chronicle on the Pagodas, Mahā Bōdivamsa-Chronicle on the Sacred Bo-Tree and Attanagaluvamsa- Chronicle on the Temple at Attanagalla etc. Their ancestors have used any writable material such as granite, copper, gold, silver and Ola or Talipot palm leaves-Corypha umbraculifera- for writing down their history. Those writing are collectively called the epigraphic records. There are thousands of epigraphic records of which some belong to the pre-Christian period. The epigraphic records are rich and authentic sources in studying the legal history of Sri Lanka. The objective of this study is to analyze the application of legal concepts and rules in regulating trading activities during the ancient monarchical rule in Sri Lanka and compare them with the modern legislations. The qualitative research methodology combined with doctrinal legal research methods were used for this research. The principal research problem that was investigated is whether Sri Lanka has applied any economic legal norms akin to their modern counterparts during the ancient monarchical rule. The primary sources include Badulla pillar inscription, Epigrapahia Zeylanica and a few selected modern legislations such as the Constitution of Sri Lanka, Sale of Goods Ordinance No. 11 of 1896, Measurement Units, Standards and Services Act No. 35 of 1995, Consumer Affairs Authority Act No. 9 of 2003, Value Added Tax Act. No 14 of 2002. The secondary sources include scholarly journal articles, government reports and standard books. The findings confirm that the ruling monarchs in ancient Sri Lanka have had advanced juridical thoughts and they have conceptualized economic legal concepts akin to the modern principles.

Keywords: *Ancient Economics; monarchs; law; rules*

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Introduction

The human species began to evolve from ape into a more complex species called *Homo sapiens sapiens* 4.5 million years ago.[1] The fossils and DNA evidence suggest that modern humans have evolved around 300,000 years ago. Also, evidence such as stone tools, artifacts, cave art suggest technology and cultures began to evolve 50,000-65,000 years ago.[2]

Since then, human species grew rapidly and at present nearly 8.2 billion human beings live on the earth.[3] It expects to grow 8.5 billion in 2030, 9.7 billion in 2050, and 10.9 billion in 2100.[4]

As hunter-gatherers, humans started to live in small, nomadic and egalitarian groups and later progressed into complex societies that we live in today.[5] Still later, they conceptualized two important norms that greatly impacted on the survival of human beings i.e. 'law' and 'economy.'

In its broader sense 'law' refers to a mechanism used to control human actions.[6] The unregulated human conduct would undoubtedly make human society unliveable due to the selfish nature of man.[7] The credible evidence suggest that the ancient human societies had written and unwritten laws, e.g. Mesopotamia, Rome, Greece, China, India etc.[8] King Hammurabi's law code in Mesopotamia is believed to be an early written law codes dating back to 1722 BCE. Western civilization owes many of its major institutions including law to the ancient Roman society.[9]

The word "economy" derives from the Greek term "*oikonomia* which means household management.[10] Scottish thinker Adams Smith (1723-90) is believed to have spearheaded the modern 'economic thinking' through his celebrated work "The Wealth of Nations."[11] Also, new discipline to investigate laws' impact on economies and *vice versa* emerged a few decades ago.[12]

In modern sense, 'economic activity' refers to any activity by which goods or services are produced, intermediated, and sold to consumers. It includes producing, brokering, or selling goods or service etc.[13] It occurs when capital, labour, manufacturing techniques are combined to produce goods or services. So, it is characterized by an input of resources, a production process and an output of products.[14]

The economic activity has special characteristics, i.e., (a) earning motive, (b) utility creation, (c) satisfaction and (d) measurability in terms of money. Non-

[1]Parker (2001).
[2]Longrich (2020).
[3]Worldometers (2024).
[4]United Nations (2022).
[5]Venkataraman (2022).
[6]Raz (1979).
[7]Amin (2010).
[8]Tulane University Law School.
[9]Roberts (2023).
[10]Kenton (2021).
[11]Vann (2023).
[12]Gelter & Grechenig (2014).
[13]Karan (2022).
[14]Glossary: Economic Activity (2023).

economic activities are characterized by (a) motivation of service, (b) self-satisfaction, (c) inability to measure in terms of money and (d) social obligation.[15]

Since law is a mechanism for regulating human conduct, it regulates people's economic activities. So, there is a close conceptual and consequential affinity between law and economy.[16]

Objective of the Research

The objective of this study is to examine the legal norms and rules applied in regulating trading activities during the monarchical rule in Sri Lanka and compare them with a few selected modern legislations. The period under review is the reign of King *Udaya IV* which lasted from 942 to 950 CE.

Methodology

The qualitative research methodology combined with doctrinal legal research methods was used for this research. It is interpretative in nature. The principal research problem is whether Sri Lanka has applied any legal norms akin to their modern counterparts to regulate trading activities during the ancient monarchical rule. The primary sources include the *Badulla* pillar inscription, *Epigraphia Zeylanica*, and a few selected modern legislations, i.e., Constitution of Sri Lanka, Sale of Goods Ordinance No. 11 of 1896, Measurement Units, Standards and Services Act No. 35 of 1995, Consumer Affairs Authority Act No. 9 of 2003 and Value Added Tax Act. No 14 of 2002. The secondary sources include the scholarly journal articles, government reports, standard books.

Discussion

Monarchical Rule and Development

Sri Lanka is an island-nation located in the Indian sub-continent and her people; especially the Sinhalese are one of the best chronicling nations in the world. They kept written records on every aspect of their collective life using any materials such as granite, copper, gold, silver and *Ola* leaves (*Corypha umbraculifera*).

The monarchical governance is believed to have commenced in the 5th century BCE and continued up to 1815 CE. The first monarch King *Vijaya* is believed to have landed with his seven hundred followers in the 5th century BCE.[17]

From King *Vijaya* to the first invasion by the British in 1815 CE, more than 192 kings ruled Sri Lanka. They established kingdoms at *Tambapanni*, *Anurādhapura*,

[15]Kloosterhuis (2017).
[16]Wang & Madson (2013).
[17]Geiger (1958).

Polonnaruva, *Rōhana*, *Dambadeniya*, *Kurunagala*, *Gampola*, *Kōtte* and finally *Kandy*.

Besides a few dark periods, this epoch flourished with economic development. Huge reservoirs (*väwa)* with complex water management systems were built demonstrating engineering knowledge, skills and technology of the ancient Sinhalese.[18] Large brickworks of multiple shapes e.g. cylindrical-shaped *dāgäba* and multi-storied buildings similar to modern skyscrapers were constructed i.e. *Lōvāmahāpāya* or the Brazen Place.

The survival of humans depends on health-care system. Even food is in abundance, if there is no proper health-care system; survival is threatened and eventually it may lead to extinction. The ancient monarchs built a network of hospitals in their kingdoms. Special hospitals were built for animals, blinds and cripples, e.g. inscriptions found at *Kiribatvehera*, *Dorabavila*, *Vessagiri*, *Mädirigiriya* and *Mihintalē* confirm it.[19]

The literature, fine art, music, sculpture, sports etc. had developed that their remaining ruins demonstrate the socio-economic development in that period.

Sri Lanka-Ancient Hub of Trans-national Trades

Sri Lanka's strategic location[20] in the Indian Ocean has always been a blessing and curse. It facilitated invasions from the neighbouring states and three western colonizers. As Sri Lanka was a cynosure of the world from early periods, Claudius Ptolemy (150 CE) depicted Sri Lanka in the first world map and named it as "*Taprobana*."[21]

Silk Route was a famous ancient sea trading-route which ran from China to Europe.[22] Sri Lanka has naturally positioned in the middle of the Silk Route. From 8th century BCE many trading ships from around the world have sailed to Sri Lankan harbours for trading purposes.[23] The popular sea ports were *Māntai* (north-west), *Godavāya* (south) and *Gōkanna* (east).[24] Stone inscription found at *Godavāya* temple confirms that it was a sea-port and the King *Gajabāhu* (113-135 CE) ordered that custom duties of that port to be offered to *Godavāya* temple for maintenance.[25]

The *Nainative* Tamil inscription contains a Royal Decree of King *Parākramabāhu* I (1153-1186 CE) about the rules on anchoring ships at *Ūrātota* sea-port (modern *Kytes* in Jaffna).[26]

Also, ancient foreign coins, ceramics, potsherds and other artifacts confirm that Sri Lanka has been a well-known emporium in the world.[27] So, export and import trading via sea-routes have been a part of routine trading activities in those days.

[18]Shannon & Manawadu (2007).
[19]Upeksha & Thilakarathna (2018).
[20]Walakuluge & Arbeysekara (2024).
[21]D'Ambra (2021).
[22]Sudharmawathie (2017).
[23]Ranatunge, Malmgren, Hayaski & Mikami (2003).
[24]Bohingamuwa (2018).
[25]Sri Lanka Archaeology (2010).
[26]Indrapala (1963).

Those evidence confirms that Sri Lanka has been a center of cross-border and transnational trading activities. So, it is hardly possible to deny the existence of laws to regulate those activities. Since the pre-Christian period, Sri Lanka has had both written and unwritten laws to regulate human conduct.[28]

The Reign of King *Udaya IV* (942- 950 CE) and Merchants' Complaints

King *Udaya IV* is the 120th monarch and his reign lasted 8 years. His predecessor was *Sēna III* who ruled 9 years and his successor was *Sēna IV* who could rule 4 years only.[29]*King Udaya's* reign was marred by *Cōla* invasion and he fled to *Rōhana.* Subsequently, the monarch returned to his kingdom.

King *Udaya IV* enacted a law code, wrote it down on stone pillars and installed them in his kingdom. It provides credible evidence of laws relating to trading activities in the 10th century BCE. It is known as '*Badulla* Pillar Inscription' *(BPI).*[30]

Table 1. *Salient Features of Badulla Pillar Inscription*

Name of King	Reign	Seat of Reign	Location of BPI	Dimension	Width	Height	Font Type	Font Size	No. of Lines
King Udaya IV **As per EZ Vol. III** ***Udaya III***	From 942- 950 CE	Polonnaruva Polonnaruwa	Found near *Sorabora väva*- 3 km north-west of *Mahiyanganaya*-. Now at Provincial Museum in *Badulla*	Rectangular with 4 sides- A, B, C, & D	10.05 in.	8 ft. 5 in. and sits on a capital of 1 ft. & 2 in.	Sinhalese alphabet of 10th century	1- 1.5 in	Side A- 47 lines, Sides B & C-49 lines Side D-58 lines

Source: *Epigraphia Zeylanica* (Vol. III)

When the King visited *Mahiyangana* temple some merchants-residents of *Hōpitigamu* market town met the sovereign. They complained about illegal and corrupt practices at the market place.[31] In response to those complaints, King and his Royal Council laid down the necessary laws. Side A lines 11- 36 confirm it as follows;

> *"Sirisangbo Udā ma-ha-radahu tumā sat längu de vana avurudu-yehi Nikini Sa[nd] ava viseniyi Sorabarahi āvū* ***Hōpiṭigumu padiyä väpāra[ya-]n*** *kud in vat…himiya[n] vahanse Miyagun - ma-ha-****vēra*** *vädi kalä -gi-ya davasä- padi lad dananāyakayan gättan* ***Sataḷosä piriniviyan (vahanse)*** *davasä kala* ***vävasthā imkmä annē yen daḍa gat -ha no sirit paḍuru gatta****…… Satalosä*

[27] Mendis, Perera & Nonis (2024).
[28]Goonaratne (2024).
[29]Martino & Codrington (1933).
[30]Ibid.
[31]Tennakoon (2005).

(vahanse) *davasä kala siritak misä anna yen karana däyak nokaranā sätiyata vävas [tha] vak liyavā taba [nna] ta vadālen"….*

The meaning of the above lines is;

"When the King visited the great monastery of ***Miyugun*** *(Mahiyangana) on the 5th day in the month of* ***Nikini*** *(July) in the second year of his coronation, merchants and residents of* ***Hōpitigamu*** *market town (****Hōpiṭigumu padiyä väpāra[ya-]n*** *) complained that the officials in the market town had violated the laws* ***(vävasthā)*** *of the previous kings, illegally exacted fines* ***(annā yen daḍa gat),*** *and obtained presents/bribes contrary to customs* ***(no sirit paḍuru gatta).*** *So, King ordered to write down a law* ***(vävasthā)*** *prohibiting everything other than what is to be done in accordance with the customs of the previous kings."*

He ordered the officers in the Secretariat of Royal Council (*sabhāye lēkam gehi sam daruvan)* to engrave the Royal Decree on stone pillars. Side D-lines 42-46 confirm it;

"… sabhāaye lekam geyi daruvan ta kiyā [a] vul haravā …dun …yukti [me pahan hindavannat ā]"

The names of the royal officers who were so directed and their ranks are mentioned in lines 46-58 of Side D.

"… [*Me pahan hindvannat ā] sabhāye hindnā* ***Tak-naru Udagi*** *isā* ***Mula [vasa] Sen*** *isā…..-lā varä Mekāppar* ***Maṇi [ti]- la Kiliyem*** *isā… la..* ***Golabāgama Ni- la devu*** *isā* ***Maṅgul Mahale Samannā Araksamaṇan*** *varä* ***Kunḍasalā vat Kämidevu*** *ätutluvä metuvāk sam daruvan avud [mesam] vatā pahna hi [ndvanu ladi]"*

The names of Royal Officials and their ranks are as follows:

i. Two members of the Royal Council- ***Tak-naru Udagi*** and ***Mula [vasa] Sen***
ii. One military officer in the capacity of body guard- ***Maṇi [ti]- la Kiliyem***
iii. One officer of the Royal Treasury- ***Golabāgama Ni- la devu***
iv. Chief Secretary-. ***Samannā Araksamaṇan's*** deputy ***Kunḍasalā vat Kämidevu***

Some similarities in enacting laws under the monarchical and the present parliamentary system can be observed.[32] King with the Royal Council enacts laws and officials of the Council Secretariat communicate them to the subjects.

The Economic Activities of Hōpitugamu Division

Hōpitigamu division referred to in the BPI is believed to have located in the present Ūva province. BPI side A lines 16-17 refers to it as ***"Hōpitugamu padiyä***

[32]In the present parliamentary system, legislature enacts laws. Speaker certifies and parliamentary office sends it to government press for publication.

väpāra[ya]n." The early Sinhalese word ***'väpāraya'*** means 'a business entity'. In this sense, it is believed that "***Hōpitugamu padiyä väpāra[ya]n."*** means a market town where guild of sellers and buyers assembled for trading purposes.

Table 2. *Trading Activities Regulated by King Udaya's Royal Decree*

S/N	Trading Activities Regulated under BPI Law
01	Prohibition of illicit trades and consumer protection[33]
02	Prescribing the instruments to be used for weighing and measuring and prohibition of using non-prescribed instruments
03	Exacting taxes from market place and residents
04	Prescribing places for sale of specific goods
05	Misconduct of royal officers working at the market place

Table 3. *Trading Activities Regulated by King Udaya's Royal Decree*

S/N	Trading Activities Regulated under BPI Law
01	Prohibition of trading on *Pōya* days (Full moon days)
02	Prohibition to seize bulls entering the village carrying commodities,
03	Banning of robbing commodities while they are being brought to the market
04	Assessment and imposing of fines
05	Settlement of trade disputes by arbitration

Comparison of Laws in the BPI with Modern Laws

When the BPI laws governing the above matters are analysed from modern legal perspectives, the equivalent modern legal subjects and legislations can be identified as given in Tables 4-6 below.

Table 4. *Comparison of Laws in BPI with Modern Sale of Goods, Weighing & Measuring & Tax Laws*

S/ No	Subject-matter in BPI Law	Equivalent Modern Legal Areas	Equivalent Modern Legislations
01	Prohibition of illicit trades	Sale of Goods & Consumer Protection	Sale of Goods Ordinance No. 11 of 1896 & Consumer Affairs Authority Act No. 9 of 2003
02	Prescribing the instruments to be used for weighing and measuring and prohibition of using non-prescribed instruments	Law relating to weighing and measuring goods	Measurement Units, Standards and Services Act No. 35 of 1995

[33]Ucaryilmaz (2021).

03	Exacting taxes from market place and residents	Tax Law	Value Added Tax Act No. 14 of 2002
04	Prescribing places for sale of specific goods	Sale of goods & Consumer Protection	Sale of Goods Ordinance No. 11 of 1896 & Consumer Affairs Authority Act No. 9 of 2003

Table 5. *Comparison of BPI Laws on Holidays, Crimes and Carriage of Goods with Equivalent Modern Laws*

S/ No	Subject-matter in BPI Law	Equivalent Modern Legal Area	Equivalent Modern Legislations
01	Prohibition of trading on *Pōya* days (Full moon days)	Public Holiday Laws	Holidays Act No. 29 of 1971
02	Banning of robbing commodities while they are being brought to the market	Penal laws- the offence of robbery	Penal Code No. 2 of 18183
03	Prohibition to seize pack bulls entering the village carrying commodities	Carriage of goods	Sale of Goods Ordinance No. 11 of 1896, Vehicles Act No. 60 of 1961, Animal Act No. 29 of 1958, Prevention of Cruelty to Animals Ordinance No. 13 of 1907

Table 6. *Comparison of BPI Laws on Imposition of Fines, Bribery and Corruption with Equivalent Modern Laws*

S/ No	Subject-matter in BPI Law	Equivalent Modern Legal Area	Equivalent Modern Legislations
01	Settlement of trade disputes	Commercial Arbitration	Arbitration Act No. 11 of 1995[34]
02	Assessment and imposition of fines	Imposition of fines	Increase of Fines Act No. 12 of 2005 and the relevant legislations
03	Misconduct of officers working at marketplace demanding gifts	Bribery and Corruption	Anti –Corruption Act No. 9 of 2023, Bribery Act No. 11 of 1954

The following areas were selected for this analysis due to limitations.

(a) Sale of goods and consumer protection,
(b) Weighing and measuring goods available for sale,
(c) Exacting taxes from market place and residents.

[34]Arbitration is a method of settlement of disputes. Parties are free to decide on the scope of arbitration. See Varga (2021).

Sale of Goods and Consumer Protection Laws in the BPI and Existing Laws

Hōpitigamu is a market town where sellers and buyers used to gather for trading. The desire of any seller is to sell his goods at higher profit-margins. Buyer's expectation is to buy quality goods at affordable prices. So, the competing interests between them lead to frauds. It is the duty of ruler to make laws to regulate their activities. Tables 7 & 8 below provide a comparative analysis of laws on sale of goods and consumer protection in the BPI with the Sri Lankan current laws.

Table 7. *Comparison of Sale of Goods and Consumer Protection Laws in the BPI with Current Acts Laws*

S/N	Relevant Lines in BPI	Meaning of the Relevant Lines	Comparative Principles in Consumer Affairs Authority Act (CAAA) No. 9 of 2003	Relevant Lines in BPI	Meaning the Relevant Lines	Comparative Principles in Sale of Goods Ordinance (SGO) No. 11 of 1896
1	*padi vadana badu pere magata gos noganna* – Side B Line 49- Side C Line -3	Commodities being brought to the market town should not be taken on the way. Implication-to be sold at *Hōpitigamu* market town only.	Section 10 (1) – Authority issues special directions to protect consumers specifying to **traders;** (i) The time and **the places at which**, such goods may be sold; (ii) Failure to comply with any direction issued shall be guilty of an offence under this Act	*Sora veladam no karanu isa*..Side Lines 25-26	Do not do false/rogue sale	Section 13- 16- Implied conditions and warranties- e.g. (i) Seller has a right to sell. (ii) Goods is of merchantable quality (iii) Goods are of fitness to use (iv) Seller should ensure quiet possession to buyer
2	*Sora veladam no karanu isa*..Side Lines 25-26	Do not do false/rogue sale	Section 31- falsely represents that goods are of a particular standard, quality or grade, particular style or model			

Table 8. *Comparison of Sale of Goods and Consumer Protection Laws in the BPI with Current Acts*

S/N	Relevant Lines in the BPI	Meaning of the Relevant Lines	Comparative Principles in Consumer Affairs Authority Act (CAAA) No. 9 of 2003	Relevant Lines in the BPI	Meaning of the Relevant Lines	Comparative Principles in Sale of Goods Ordinance (SGO) No. 11 of 1896
2	*Su-t badu notänä hindä novikanu isā* Lines C 18-19	Taxable commodities should not be sold at improper places	Section 10 (1) – Authority issues special directions to protect consumers specifying 186 manufacturers or **traders;** (i) The time and **the places at which**, such goods may be sold; (3) Failure to comply with any direction issued shall be guilty of an offence under this Act	(b) *Sa-l no kala manavun no kiranu* Lines C-22-23	Commodities which are not for sale, should **not be weighed**	Section 19- ascertaining intention of the parties on passing title: Rule 3.- In a contract for sale of specific goods in deliverable state**, seller is bound to weigh, measure** to ascertain the price; - title does not pass **until such act is done and the buyer has notice.**
3	*..bulat puvak madapaye tabā vikunanu kot isā… no täna tabā vikka dutuvā radolan haravā gannā isā-* Lines **C 27-32**	(a) Betel and areca nuts should be sold in special sheds (b) If it is sold at other places Royal Officers remove them		(a) *Sa-l no kala manā tänä nokiranu isa-* Lines C-19-22	Goods not for sale should not **be weighed at the proper place**	

Observations and Inferences

Law on Sale of Goods and Consumer Protection

Sections 13 to 16 deals with implied conditions and warranties, which means even if there is no written contract sellers are bound by the contractual obligations in those implied terms. So, if seller attempts to sell what is not belonged to him, its amount to false sale. This appears to be the juridical thinking in banning the false sales under BPI.

In SOG contracts, the time of passing seller's title to buyer is crucial. Section 19 contains the Rules for ascertaining intention of them. Accordingly, for sale of specific goods where **seller is bound to weigh, measure, test**, to ascertain price, the title does not pass to buyer **until such act is done.** The rationale behind these rules seems to be similar irrespective of the time gap between King *Udaya's* law and the modern law. It serves multiple purposes, i.e. to avoid price manipulations, identify goods, maintain quality etc.

It is observed that the concepts behind the BPI rules are similar to the modern laws on consumer protection and sale of goods. Also, the BPI laws prescribe punishment for violation of those rules, similarly the modern trading legislations in Sri Lanka impose penal sanctions on traders when they violate those laws.

Laws on Weighing and Measuring of Goods in the BPI and Modern Laws

It is a legal requirement in commercial transactions to weigh and measure commodities available for sale. Modern states have laws on weighing and measuring goods in sales. Those laws prescribe the instruments and licensing of them annually.

There has been weighing and measuring system in ancient Sri Lanka.[35] BPI provides strong evidence as shown in Table 9 below.

Table 9. *Comparison of Laws on Weighing and Measuring of Goods in the BPI and Modern Laws*

S/N	Lines in the BPI	Meaning of BPI Lines	Comparative Principles in Measurement Units Standards and Services Act No. 35 of 1995
1	*No pätu madadiyen (no yen) no kiranu isā*– Lines C-17-18	Weighing should not be done by *madadi* (i.e. a type of authorized scaling unit) which are not duly stamped	Section 12- The weights and measures specified in the Third Schedule are authorized for use in trade. Section 19-Prohibition to weigh and measure by instruments which are not stamped by inspectors
2	*[gana] lahassen mi sä sesu lahasi yen no mananu isa.* Line C-8-10	Commodities should be measured by *gana lahassa and* not by other *lahasu (i.e. measuring unit)* other than the	Do

Observations and Inferences

It is observed that the modern legislation prescribes the weighing and measuring units for trading purposes. Also, it further provides that such prescribed measuring and weighing units need to get stamped by the inspectors appointed for that purposes.

BPI also lays down the similar principle. It says that the prescribed **weighing unit** is *"**madadi**"* and it needs to be stamped. If it is not stamped it should not be used for weighing purposes. The prescribed unit for **measuring** is ***"gana lahassa."*** It declares that other measuring unit *"sesu lahasu"* should not be used for measuring purposes**.** So, it is clear that the legal theory and juridical thinking which prevailed

[35]Jayawardana (2010).

some 1500 years ago in the 10th century in Sri Lanka seems to be compatible with the modern legal thought.

Law on Exacting Taxes from Marketplace and Residents in the BPI and Modern Law

In mercantile transactions, parties are required to pay various taxes or tariffs to the government. It is a major source of government income. It is a universal practice irrespective of the nature of government or size of the state. Taxes are of many types, i.e. direct and indirect, import and export, tax on goods and services, value added tax, custom duties etc. There has been a tax system in ancient Sri Lanka.[36] The Tables 10 & 11 below compare the ancient tax law in BPI with current laws.

Table 10. *Comparison of Tax Laws in the BPI with the Existing Legislations*

S/N	Relevant Lines in the *BPI*	Meaning/ Interpretation of the Relevant Lines	Comparative Principles in the Relevant Current Legislation
1	*Satalosa piriniviyan vahanseyi davasä vävasthā se pere- sirii dada ganut misa ani[yā] no karanau isā* Lines A-44-B-1	Levying taxes should be done as per former customs and legislation of the previous kings and should not do anything contrary to law	Constitution Article 148-Parliament has full control over public finance. No tax, rate or any other levy shall be imposed by any local authority or any other public authority, except by or under the authority of a law passed by Parliament or of any existing law.
2	*..gam vatā genä ge tirä genä dada no elvanu isā* Lines B 6-8	Taxes should not be demanded having the village surrounded or having not verified the house that taxes should be levied.	Value Added Tax Act No. 14 of 2002 Section 83- "taxable activity" means – **any activity** carried out as a **business, trade,** profession or vocation other than in the course of employment or every adventure or concern in the nature of a trade
3	*Dada gämä hindä e[l] vat misä kudin gämin pitat kotä no genä yanu isā..* Lines B 9-12.	Taxes should be demanded within the village without taking villagers out of the village	As per the above Act, every person who engages in taxable activity is required to register and then is liable to pay taxes

[36]Sudharmawathie (2017).

Table 11. *Comparison of Tax Laws in the BPI with the Existing Legislation*

S/N	Relevant Lines in the *BPI*	Meaning/ Interpretation of the Relevant Lines	Comparative Principles in the Relevant Current Legislation
1	*No pirikäpū dadat väläkme no gannā kot isā. lī dadat savāmi ginut misä abu-daruvan väläkme no gannā isā* Lines B-13-19	For fines thus not assessed, villages should not put in the *valakma-* punishment. Taxes should be imposed only on the chief householder and not his wife or children should be put in the *väläkme-* punishment	It is a general principle that tax to be paid, should be assessed properly and wife or children should not be punished for non-payment of taxes.
2	*..gam- van badu gämä vikkä misä genä yet sutvat no gannā isā..* Lines C 10-13	Toll should be levied on commodities brought into the village if they are sold within the village. But if they are only passing through it, tax should not be levied.	Exemption from payment of taxes
3	*[no-] pa viki badiyehi dīna sut- vat ganut misä – ākula no karanu isā* Lines C 13-16	In the case of those commodities sold without being shown to the authorities double dues should be taken, but no other disturbance should be created.	Penalties for non-payment

Observations and Inferences

It is observed that some fundamental principles of modern taxation have been introduced by the BPI laws well before the modern tax laws came into being in Sri Lanka. Those principles are; (i) Tax should not be levied arbitrarily,[37] (ii) Taxation should be in accordance with the laws, (iii) The taxable amount has to be assessed in accordance with pre-established criteria by assessors- ***pere- siriṭ daḍa ganut misa ani[yā] no karanau,*** (iv) Wife and children of the errant trader should not be punished for non-payment of taxes and (v) Exemption from paying taxes and penalties for non-payment etc.

Overall Conclusion

It is observed from the foregoing analysis that there have been specific laws governing sale of goods, consumer protection, taxation and weighing and measuring units during the reign of King *Udaya IV* who ruled Sri Lanka more than 1570 years ago.

[37]Du Preez (2018).

So, the conceptual and procedural similarities in the ancient and the modern laws appear to be remarkable in the areas of sale of goods, consumer protection, weighing and measuring laws and taxation.

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