

## ARTICLES

### EXPERIENCES OF LEGAL INTEGRATION AND RECEPTION BY THE BRICS COUNTRIES: FIVE PASSENGERS IN A BOAT (WITHOUT A DOG)

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*This article assesses the problems and prospects of the development of cooperation among the BRICS countries' in the sphere of law and the movement of these countries towards the creation of a common legal framework. The article presents a comparative analysis of the systems of law, including the cultural, historical, social and political contexts of their formation and development as well as the functioning of the systems in the conditions of the modern world.*

*The article particularly focuses on the subject of a common philosophy of law for the BRICS countries that would allow not only to establish the interaction of such dissimilar partners in the legal sphere, but also to move towards a new model of legal interaction for the whole world that has embarked on the path of globalization. Special means allowing the assessment of the possibility of future legal integration and globalization based on a common philosophy of law are the traditions and values of the civilizations represented by the BRICS countries. The article suggests that the core of the civilizational and value-based identity of each BRICS partner consists in a set of ideas and interpretations of the notion of justice clearly manifested in the controversy with the theory and ideology of justice proposed by the initiators and leaders of globalization – the countries of the West led by the United States. The theory and ideology of justice promoted by the “Atlantists” is concisely formulated in the book “A Theory of Justice” by John Rawls. Therefore, the*

*reaction to and discussion of such a theory by the philosophers and jurists from Russia, India and China allows determining the contours of the common philosophical and legal position of these countries as well as outlining its significance for the future of the BRICS countries and, perhaps, of the whole system of legal relations in a new globalizing world.*

*Keywords: BRICS; philosophy of law; theory of justice; legal integration; regional cooperation.*

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## Introduction

As we may recall, the characters in the well-known book by Jerome K. Jerome "Three Men in a Boat" (1889) ventured on their daring journey one fine day in the late 19<sup>th</sup> century. This adventure allowed them to escape from the routine of idle daily life and confinement within the city walls, and came as a breath of fresh air full of the promise of change.

In the 21<sup>st</sup> century, the initiative of the BRICS had to a certain extent similar motives: to provide a new impetus and a favorable current for the development of the relations between the members of the bloc. At the same time, the main drivers for and determinants of creating the bloc of regional leaders were of an economic nature. The term "BRIC" was first introduced by Jim O'Neill, the leading economist and analyst at Goldman Sachs Bank, in November 2001. The term became widely known in 2003, when Goldman Sachs issued an analytical report forecasting that by 2040 the countries of the BRIC group would catch up with – and by 2050 overtake – the USA, Japan and the countries of Western Europe in terms of total GDP.

Our predictions may seem dramatic. But over a period of a few decades, the world economy can change a lot. Looking back 30 or 50 years illustrates that point. Fifty years ago, Japan and Germany were struggling to emerge from reconstruction. Thirty years ago, Korea was just beginning to emerge from its position as a low-income nation. And even over the last decade, China's importance to the world economy has increased substantially. History also illustrates that any kind of long-term projection is subject to a great deal of uncertainty. The further ahead into the future you look, the more uncertain things become. Predictions that the USSR (or Japan) would overtake the US as the dominant economic power turned out to be badly off the mark.<sup>1</sup>

Later on, at the G20 summit in Seoul on 11 and 12 November 2010, the Republic of South Africa expressed its willingness to join the BRIC group. After the accession of South Africa on 18 February 2011, the BRIC was renamed the BRICS (Brazil, Russia, India, China, South Africa), bringing together the five fastest-growing emerging economies distinguished by high rates of economic development and a high-degree export orientation, which, according to Goldman Sachs experts, had in the long term the potential to become the dominant economic actor in the world.

In many ways, the emergence of the BRICS was the result of a deep crisis in the world economic system of the liberal type. Joseph E. Stiglitz, Nobel laureate economist, made a salient point in this respect when he remarked that

September 15, 2008, the date that Lehman Brothers collapsed, may be to market fundamentalism (the notion that unfettered markets, all by themselves, can ensure economic prosperity and growth) what the fall of the Berlin Wall was to communism... Today only the deluded... would argue that markets are self-correcting and that society can rely on the self-interested behavior of market participants to ensure that everything works honestly and properly [– let alone works in a way that benefits all].<sup>2</sup>

Certainly, the social and economic initiative could not but affect the evolution of the BRICS countries' legal systems. In this article, we will (a) determine the peculiarities

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<sup>1</sup> Dominic Wilson & Roopa Purushothaman, *Dreaming with BRICs: The Path to 2050*, Global Economics Paper No. 99 (October 2003), at 6 (Jun. 6, 2018), available at <http://www.goldmansachs.com/our-thinking/archive/archive-pdfs/brics-dream.pdf>; Michaël Oustinoff, *Introduction*, 3(79) *Hermès*, La Revue 13 (2017).

<sup>2</sup> *Стиглиц, Дж.* Крутое пике: Америка и новый экономический порядок после глобального кризиса [Joseph E. Stiglitz, *Freefall: America, Free Markets, and the Sinking of the World Economy*] (Moscow: Eksmo, 2011) 26 (Jun. 6, 2018), also available at [https://archive.org/stream/joseph\\_e\\_stiglitz\\_freefall\\_america\\_free\\_markets\\_and\\_the\\_sinking\\_of\\_the\\_world\\_economy/Joseph%20E.%20Stiglitz-Freefall\\_%20America%2C%20Free%20Markets%2C%20and%20the%20Sinking%20of%20the%20World%20Economy-W.%20W.%20Norton%20Company%20%282010%29\\_djvu.txt](https://archive.org/stream/joseph_e_stiglitz_freefall_america_free_markets_and_the_sinking_of_the_world_economy/Joseph%20E.%20Stiglitz-Freefall_%20America%2C%20Free%20Markets%2C%20and%20the%20Sinking%20of%20the%20World%20Economy-W.%20W.%20Norton%20Company%20%282010%29_djvu.txt).

of the BRICS bloc of regional leaders in the context of legal globalization; (b) assess the legal cooperation among the BRICS countries; and, finally, (c) highlight the facets of the proper and the actual of the BRICS countries' philosophy of law.

## 1. BRICS Within the Framework of Globalization

Globalization, in terms of global axiology and ontology, is a multi-level, multi-functional and multi-dimensional phenomenon.

Both a wide and a narrow interpretation of this concept can be found in the works on globalization: from designating a certain stage of global history to serving as a name for specific phenomena and trends. One of the most common philosophical definitions of globalization is the approach proposed by David B. Goldman, who points out that globalization is, essentially, "the increasing interconnections amongst things that happen in the world."<sup>3</sup>

Different approaches to the legal equivalent of globalization are put forward in the academic sphere. In his famous work "Profils des mondialisations du droit" ("Profiles of Globalization of Law") Jean-Louis Halpérin explicitly proclaims Roman law to be the first experience of legal globalization in the history of humankind,<sup>4</sup> with regard to the "Bologna Renaissance"<sup>5</sup> – accordingly – a new attempt of social community, to introduce standardized legal formulas into the practices of the medieval states of continental Europe.

Looking at the Roman type of legal globalization, it should be noted that the globalization processes as such had both synchronous and diachronous vectors in relation to the existence of the Roman civilization itself. On the one hand, the integrative network distribution of *jus romanum* was to a large extent driven by the aggressive passional power of the state itself – the promoter of the corresponding ideas and values. On the other hand, the resort by medieval states to the legal past of Ancient Rome was to a large extent due to the problem of the gaps existing in and the insufficiency of the instrumentarium available in Europe for organizing and regulating social relations. A decisive role in the reception of Roman law in medieval Europe was played by the schools of glossators and conciliators. Another promoter of this type of globalization processes was the university community as such. It was the universities that became the centers of the initial introduction of the network patterns of the Roman right into new spatial and temporal sites.

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<sup>3</sup> David B. Goldman, *Historical Aspects of Globalization and Law in Jurisprudence for an Interconnected Globe* 43 (C. Dauvergne (ed.), Aldershot; Burlington: Ashgate, 2003).

<sup>4</sup> Jean-Louis Halpérin, *Profils des mondialisations du droit* 60 (Paris: Dalloz, 2009).

<sup>5</sup> This is the name given by Professor Halpérin to the process of Roman law reception in the Middle Ages, led primarily by the universities of Europe and, in particular, by the oldest of them – located in the city of Bologna, Italy.

Certain similarities with the Roman legal globalization of the synchronous type can also be traced in its colonial equivalent. Just like the Roman civilization, the colonial powers relied primarily on forceful political and legal methods to spread their own legal formulas, standards and rules in foreign social environments. The object of globalization experiments was a highly aggregate category of "Western law," which, in terms of comparative law, should be considered in two main directions: the law of continental Europe and Anglo-American law.

The deployment of the modern type of legal globalization brought humankind face to face with a unique social reality. Notably, this uniqueness was determined by both purely quantitative factors (such as the extent of network integration distribution in the aforementioned social sphere – unprecedented in the previous time ladders) and purely qualitative factors (substance-related aspects of actualization).

The qualitative leap in the system integration and in the network interpenetration of multi-vector values, institutions and norms in legal communities began to fully manifest itself in the mid to late 20<sup>th</sup> century. Undoubtedly, certain "spots" of globalization appeared on the legal maps of the world even earlier – in different time periods. However, the insufficient level of integration of the social systems as a whole did not allow them to acquire a truly universal character. Such a leap in the ontology of legal globalization, in our opinion, was brought about by the following circumstances:

- the intensification of comparative jurisprudence development which resulted in minimizing the number of blank spots on the legal map of the world, while up to the early 20<sup>th</sup> century the comparative academic research was limited only to the study of the so-called civilized legal communities of the Western legal world;

- a high level of communication links in the global legal space leading to the accelerated diffusion of legal patterns of different qualitative orientation in various geographical areas of implementation;

- the step-by-step institutionalization of universal supra-state, integration-type legal instrumentarium, in particular under the auspices and the jurisdiction of the United Nations as well as international institutions localized and based on various qualitative grounds;

- the interpenetration of globalization processes of different qualitative orientation. In particular, we are referring to the merging of legal, economic and value-related equivalents of globalization in certain functional areas. This merging led to the advent of unique social phenomena unknown in previous social practices, such as internet law (IT law, cyberlaw) or McDonald's law.<sup>6</sup>

To some extent, globalization has also intensified integration along the regional vector. However, the interaction of globalization and regionalization has a more complex structure of relationships. Here we can trace some elements of a contradictory

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<sup>6</sup> For details see Maxim V. Voronin & Maria V. Zakharova, *Convergence and Competition of Legal Systems of the Modern World*, 1 Revista QUID (Special Issue) 1322, 1326 (2017).

unity, meaning the existence of both the time periods when the goals of these processes coincide and the periods when they do not. Andrei Savinskiy was right when he wrote:

Globalization has a contradictory effect on the processes of regionalization... [O]n the one hand, it reconciles and even aligns the basic characteristics of individual regions, while[,] on the other hand[,] it encourages them to preserve their peculiarity and uniqueness.<sup>7</sup>

The BRICS also faced all these contradictory unity problems on the social map of the modern world. The network connections between objects that D.B. Goldman wrote about, undoubtedly, exist within the framework of the integration of the BRICS countries as well. At the same time, if we regard globalization not just as a total network interconnection, but as a kind of neo-liberal hegemony,<sup>8</sup> regionalism becomes to some extent a counterpoint to such hegemony.<sup>9</sup>

<sup>7</sup> *Савинский А.В.* БРИКС как продукт глобализации // Вестник РУДН. Серия: Экономика. 2011. № 5. С. 57 [Andrei V. Savinskiy, *BRICS as a Product of Globalization*, 5 Bulletin of the Peoples' Friendship University of Russia, Economics Series 55, 57 (2011)].

<sup>8</sup> Thus, V. Sorokin believes that modern globalization represents the realization of the hegemonic, pro-American principles. The globalization of the world, he writes, "is an ambitious, historically unprecedented political and legal project of the United States aimed at implementing the strategy of establishing its hegemony over the whole world for the long term, it is a bid to create a global American empire" (*Сорокин В.В.* Юридическая глобалистика. Т. 1 [Vitaliy V. Sorokin, *Legal Globalistics. Vol. 1*] 235 (Moscow: Yurlitinform, 2010)). Continuing further to pursue the general critical line of thought with regard to globalization as a phenomenon of global practice, Sorokin, in particular, points out the following: "Over the recent decade, contemporary international law has been increasingly transforming from a traditional means of peaceful resolution of conflicts between countries into a means of justifying the use of force by the repressive apparatus of the system of global governance and, therefore, has been playing the role of an ideological institution that justifies the legitimacy of the resort to force in international relations. This is especially true with regard to the so-called international human rights standards, which are beginning to perform the function of limiting national sovereignty, turning not so much into international, interstate law, but rather into supra-national law, which bears the seeds of the emerging global law" (*Сорокин В.В.* Юридическая глобалистика. Т. 2 [Vitaliy V. Sorokin, *Legal Globalistics. Vol. 2*] 73–74 (Moscow: Yurlitinform, 2010)).

<sup>9</sup> According to David Lane's methodology, the multi-polar configuration of the modern capitalist system of the world includes the following structural elements: (1) the core, uniting the leading Western countries and the regional alliances headed by these countries, such as NAFTA (USA) and the EU; (2) the semi-core, including countries that form their own regional alliances, closely interact with each other and are included in the system of economic exchange with the center of the prevailing neoliberal order, such as the SCO (Shanghai Cooperation Organization) or the BRICS countries; (3) the periphery. The difference between the periphery and the semi-core countries is that the latter have their own transnational corporations and a much greater autonomy from the core, thereby reconstituting themselves as independent economic formations. Therefore, these countries and the corresponding regional alliances may qualify for the role of a counterweight, capable of weakening the influence of the core on the system of the world and becoming the basis for a new order (*Лэйн Д.* Евразийская региональная интеграция как ответ неолиберальному проекту глобализации // Мир России. 2015. № 2. С. 6–27 [David Lane, *Eurasian Integration as a Response to Neo-Liberal Globalisation*, 2 Mir Rossii 6 (2015)]).

A peculiar feature of integration along the BRICS vector is the absence of historical academic platforms for unification. In this respect, the European Union demonstrates the opposite tendency. For example, in France the first political and legal project of creating a “united Europe” was developed, surprisingly, as early as the 14<sup>th</sup> century. It was the first written project of Europe unification in history. Its author was Pierre Dubois, the Master of the University of Paris and the legist of the French King Philip the Fair.<sup>10</sup> In his treatise “The Recovery of the Holy Land,” written in 1305–1307, Dubois puts forward a very specific plan for the unification of Europe.<sup>11</sup> Later on, the ideological background for European integration would be set out in the “Grand Design” by the Duke of Sully (*duc de Sully*) (the Superintendent of King Henry IV of France); in the work of Émeric Crucé, a 17<sup>th</sup>-century monk, “The New Cyneas, Or Discourse on the Occasions and Means for Establishing General Peace and Free Trade Throughout the World: To the Monarchs and Sovereigns of the Present Day; in the Project for Making Peace Perpetual in Europe” by Charles de Saint-Pierre (1712) and in a number of other works.

Does this complicate integration within the BRICS? On the one hand, it does – as happens every time when the recreation of social reality takes place without hundreds of years of experience in designing and outlining the integration. On the other hand, such a situation necessarily generates the multivariance of the evolution of the BRICS, where practical implementation is sometimes way ahead of theoretical comprehension.

## 2. Legal Influences and Legal Cooperation Among the BRICS Countries

None of the BRICS countries is of a matrix type (according to the methodology of “Grands systèmes de droit contemporains: Approche comparative” by Raymond Legeais<sup>12</sup>) in the classic sense of comparative law. The exception is Russia, which in the early 20<sup>th</sup> century put forward a specific political and legal model of social organization based on the ideology of Marxism-Leninism. However, everybody remembers that towards the end of the century Russia itself quit the socialist platform, whose recipients (China, Cuba, North Korea) from that time forward have been left to float freely on their own upon the political waterways of the world.

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<sup>10</sup> Право Европейского союза [*European Union Law*] 59 (S.Yu. Kashkin (ed.), Moscow: Yurist, 2009).

<sup>11</sup> See Буда Д.А. Зарождение и развитие “европейской идеи” во Франции в XIV–XVIII вв.: историко-правовой экскурс // Пробелы в российском законодательстве. 2015. № 3. С. 49–52 [Darya A. Bida, *Origin and Development of the “European Idea” in France in 14<sup>th</sup>–18<sup>th</sup> Centuries: Historical and Legal Review*, 3 Gaps in Russian Legislation 49 (2015)].

<sup>12</sup> Raymond Legeais, *Grands systèmes de droit contemporains: Approche comparative* (3<sup>rd</sup> ed., Paris: LexisNexis, 2016).

At the same time, each of the BRICS countries became a recipient of certain external (in relation to national law) legal regulations.<sup>13</sup>

The modern Chinese legal system can be regarded as the most “mosaic” in this respect. According to Pavel Troshchinsky,

The legal system of the PRC is unique. It embodies the characteristic features of law of the countries of the socialist system,<sup>14</sup> the norms of traditional (ancient Chinese) law as well as certain implemented principles and norms of international law.<sup>15</sup>

H. Patrick Glenn points out that the parts of the “legal mosaic” do not just coexist, but also actively interact, integrate or become a basis for mutual interpretation and reinterpretation.

Adat law thus represents a particular, Asian exemplification of chthonic law, and its survival in Asia tells us a great deal of the value attached to informal tradition. Another form of chthonic law could be found in Chinese feudalism, which may be seen as the original source of the normativity developed by, and derived from, the man known in the [W]est as Confucius.

He goes on:

There is a long tradition of formal law and formal sanctions, or [*fa*], in China, though it has played a subordinate role to the [*li*], or persuasion, of the [C]onfucians. In [W]estern discussion those who argued the case for [*fa*] in China are known as legalists (and sometimes realists) and they have been making the case since before Confucius, at least since the eighth century BC, which was about three centuries before the Twelve Tables and around the time of the early [D]harmasutras.<sup>16</sup>

<sup>13</sup> For details see the following works on legal borrowing: Frederick P. Walton, *The Historical School of Jurisprudence and Transplantations of Law*, 9(4) *Journal of Comparative Legislation and International Law* 183 (1927); Maria V. Zakharova, *Borrowing in Law: To Take or Not to Take, That Is the Question in The Interaction of Legal Systems: Post-Soviet Approaches* (W.E. Butler & O.V. Kresin (eds.), London: Wildy, Simmonds & Hill, 2015); Pierre Legrand, *The Impossibility of “Legal Transplants,”* 4(2) *Maastricht Journal of European and Comparative Law* 111 (1997).

<sup>14</sup> The influence of such transplantation was most pronounced, primarily, in the sphere of public law regulating the framework of the so-called “socialist democracy” in the country.

<sup>15</sup> Трошинский П.В. Правовая система Китайской Народной Республики: становление, развитие и характерные особенности // Вестник МГЮА – Сравнительное право. 2015. № 5. С. 101 [Pavel V. Troshchinsky, *The Legal System of the People’s Republic of China: Formation, Development and Peculiar Features*, 5 *Bulletin of the Moscow State Law University – Comparative Law* 99, 101 (2015)].

<sup>16</sup> H.P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* 283 (Oxford: Oxford University Press, 2000).

The uniqueness of the Chinese legal system is also manifested in the fact that, in accordance with the “one state – two systems” policy implemented by the country’s leaders, the legislation in effect in Hong Kong and Macao is different from that of mainland China and retains its unique peculiarities which developed before the return of these territories to the “homeland.” As a result, we can see different sets and nuances of legal borrowings in each of the subsystems. Thus, for mainland China, such subsystem components will be the law of continental Europe, Anglo-American law, Soviet law, traditional law of China; for Hong Kong – Anglo-American law and traditional law of China; for Macau – the law of continental Europe<sup>17</sup> and traditional law of China.

The legal system of South Africa is also a vivid example of a mosaic structure and, according to the classic work by Vernon V. Palmer “Mixed Jurisdictions Worldwide: The Third Legal Family,” along with Scotland, the U.S. state of Louisiana, the Philippines and Israel, is a typical example of a mixed-type legal system. In Palmer’s methodology, mixed legal systems (or mixed jurisdictions) display the “common law/civil law” duality and are characterized by the following features: first, they are the result of the coexistence between the traditions of continental law and the common law with their inherent legal features which are represented in the system to a sufficient extent; and, second, they represent the historical superimposition of the fundamentals of the common law on the already existing (legacy) layer of continental law.<sup>18</sup>

The “common law/civil law” duality also exists in the countries of Latin America and, in particular, in Brazil. Its peculiarity is manifested in two important aspects. First, the influence of “common law” (in the American law variant) is more pronounced in the sphere of public law, whereas private law remains the sphere of “civil law.” Second, when borrowing from the matrix-type French legal system, Brazilian civil law (just as it happened in a number of other countries of Latin America, such as Colombia, Panama, Argentina, Uruguay and Paraguay) experienced “second-tier” borrowing. We are referring to the famous Civil Code of the Republic of Chile by Andrés Bello through which the aforementioned countries got some kind of the Napoleonic Civil Code version. According to Professor Mauricio Tapia Rodríguez, the reason for the existence of some sort of legal intermediary between the matrix-type French law and the national law of a number of the legal systems of Latin America represented by Bello’s code is as follows: the code represented a sort of compromise between the secular origins of private life dictated, among other things, by the maxims of natural law and the religious dogmas of Catholicism.<sup>19</sup> On the one hand – continues Professor

<sup>17</sup> The legal system of Macao is based on Portuguese law – both in the form of Portuguese codes and in the form of the indigenous laws adopted in Macao modeled after the corresponding Portuguese regulations.

<sup>18</sup> Vernon V. Palmer, *Mixed Jurisdictions Worldwide: The Third Legal Family* 11–12 (Cambridge: Cambridge University Press, 2001).

<sup>19</sup> Mauricio T. Rodríguez, *Le modèle juridique français et l’Amérique latine in Quel avenir pour le modèle juridique français dans le monde?* 111, 113 (R. Cabrillac (ed.), Paris: Economica, 2011).

Rodríguez – it became a symbol of the humanist ideas of the Enlightenment, and, on the other hand, the flagship of Chile's independence.<sup>20</sup>

As for the Russian experience in matters of legal influence, as we noted in a previous joint publication,

Russia has always been a conglomerate of differently vectored values, ideas, origins and images, where the light is easily combined with the dark, the irrational with the rational, the European with the Asian, the evolutionary with the revolutionary.<sup>21</sup>

Each civilization has worked out its own mechanisms of protection against external influences, including in the sphere of law. For example, the uniqueness of law in India is connected with a history in which it is possible to trace the layers of law that drove the predecessors thereof to the periphery and then looked for ways of coexistence. In this respect we can agree with Glenn's idea that Hindu law has the ability to "fold back" and "withdraw into itself." Glenn writes:

As offered relatively little resistance to [W]estern expansion, so [H]indu law has folded back into itself when faced with external pressure. This may be one of the burdens of tolerance, or pluralism, as a central philosophy. Hindu teaching could offer itself to the [C]hthonic people of India, and be largely accepted by them, but on the arrival of the [M]uslims, around the eleventh century, [H]indu law was gradually supplanted by [I]slamic law as the law of the land, though it probably retained some application in local [H]indu dispute resolution.<sup>22</sup>

Bringing their legal systems to the point of starting a new integration-type formation, as one can see from the above, the BRICS countries, on the one hand, were already full of different vectors of influence representing some kind of *Meccano kits*,<sup>23</sup> while, on the other hand, as experts point out, faced a unique form of integration. Its peculiarity is manifested in the informal nature of establishing social, economic and legal links between the regional formation participants. In the academic literature, based on status features, the BRICS is classified as an international quasi-

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<sup>20</sup> Rodríguez 2011, at 113.

<sup>21</sup> Vladimir Przhilenskiy & Maria Zakharova, *Which Way Is the Russian Double-Headed Eagle Looking?*, 4(2) *Russian Law Journal* 6, 7 (2016).

<sup>22</sup> Glenn 2000, at 273.

<sup>23</sup> *Meccano* is a model construction system for children invented in the early 20<sup>th</sup> century by Frank Hornby who later founded the firm of the same name. The term [*enigma del mecano*] was used in relation to the mosaic nature of legal systems of the world by Professor L.M. Díez-Picazo. For details see Marie-Claire Ponthoreau, *Droit(s) constitutionnel(s) comparé(s)* 143–144 (Paris: Economica, 2010).

organization<sup>24</sup> or is called an “informal club.”<sup>25</sup> The BRICS is fundamentally different from the notion of an international organization in the traditional sense, as it is not vested with legal capacity, functions without constituent instruments, does not have a formalized organizational structure or any rights to make legally binding decisions.<sup>26</sup>

Therefore, such mechanisms of cooperation as, for example, directives functioning in the EU or less stringent forms such as model regulations in various ways applied within structures comparable to post-Soviet CIS countries are currently not relevant for the legal systems of the BRICS participants. And at the moment we can observe albeit visible but so far only initial steps of the BRICS countries’ legal systems in certain areas of legal integration. At the latest forum (The IV Legal BRICS Forum) which took place in November 2017 in Moscow, the following areas of regulatory environment were declared to be the priority spheres of legal cooperation: trade, taxation, ecology,<sup>27</sup> the digital economy, cultural dialogue among the BRICS countries and the fight against global terrorism.<sup>28</sup> Earlier, on 15 July 2014, by virtue of the Fortaleza Agreement, the BRICS countries established a New Development Bank for the purpose of financing infrastructure projects and sustainable development projects in the BRICS and developing countries. Notably, Agustina Vazquez pointed out that,

When considering G7 and BRICS economic results, namely GDP annual growth rates in 2003–2008, the BRICS figures are impressive when compared to the weak economic performance of G7 nations.<sup>29</sup>

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<sup>24</sup> Абашидзе А.Х., Солнцев А.М. БРИКС — международная квазиорганизация? // Актуализация процесса взаимодействия стран БРИКС в экономике, политике, праве [Aslan Kh. Abashidze & Alexander M. Solntsev, *Is BRICS an International Quasi-Organization?* in *Actualization of the Process of Interaction of the BRICS Countries in Economy, Politics, Law*] 14 (К.М. Belikova (ed.), Moscow: RUDN University, 2012).

<sup>25</sup> Кузнецов А.В. Транснациональные корпорации стран БРИКС // Мировая экономика и международные отношения. 2012. № 3. С. 3 [Alexei V. Kuznetsov, *Transnational Corporations of the BRICS Countries*, 3 *Global Economy and International Relations* 3, 3 (2012)].

<sup>26</sup> Бевеликова Н.М. БРИКС: правовые особенности развития // Журнал российского права. 2015. № 8. С. 113 [Nelly M. Bevelikova, *BRICS: Legal Peculiarities of Development*, 8 *Journal of Russian Law* 110, 113 (2015)].

<sup>27</sup> For details on this aspect of cooperation see, e.g., Elena Gladun & Dewan Ahsan, *BRICS Countries’ Political and Legal Participation in the Global Climate Change Agenda*, 3(3) *BRICS Law Journal* 8 (2016).

<sup>28</sup> In July 2017, at the meeting of the BRICS High Representatives held in Beijing, Nikolai Patrushev, Secretary of the Security Council of the Russian Federation, suggested that all BRICS countries should join the International Anti-Terrorist Data Bank set up by the Russian Federal Security Service. РФ предложила БРИКС подключиться к Банку данных против терроризма // РИА Новости. 28 июля 2017 г. [Russia Invited BRICS to Join the Anti-Terrorist Data Bank, RIA Novosti, 28 July 2017] (Jun. 6, 2018), available at [https://ria.ru/defense\\_safety/20170728/1499319308.html](https://ria.ru/defense_safety/20170728/1499319308.html).

<sup>29</sup> Agustina Vazquez, *Is the BRICS New Development Bank a Fledgling Alternative to the World Bank?*, 4(3) *BRICS Law Journal* 6, 32 (2017).

At the same time, transnational cooperation is becoming another area of the legal integration of the BRICS countries. Until recently, the common weakness of the economies of the BRICS countries preventing them from joining the world leaders was believed to be the absence of powerful structures of transnational business grown on their own national soil. However, lately this situation has been changing. Examples of such change include the computer giant Lenovo and the financial group CITIC (China), the industrial group TATA Industries and the oil and gas company ONGC (India), the mining company THK CVRD and the oil and gas company Petrobras (Brazil), the telecommunications giant MTN Group and the retail giant Steinhoff International (South Africa). As for Russia, such companies as Gazprom, Lukoil, Rusal, Severstal, VimpelCom and Norilsk Nickel<sup>30</sup> can be named. The development of transnational companies determines the need for specific forms of security provisions and regulations functioning in this sector of the national economy, such as “soft law” as well as other nongovernmental forms of regulation of public relations.<sup>31</sup>

The aforementioned examples of multi-vector and multi-level legal cooperation and integration are in a certain sense peculiar. Such an integration model can be identified in line with the Aristotelian thesis as a “unity of dissimilar.” This model of cooperation and integration manifests itself not only at the level of legal principles (regulations) and institutions, but also at the level of legal values. What are its peculiar features in this case?

### **3. The BRICS Countries’ Philosophy of Law: Experiences of the Proper and the Actual**

As pointed out by Marco A.B. Martins, the BRICS bloc has reached its limits in terms of the possibility of a greater extent of integration due to the heterogeneity of its members as well as the geocultural realities, political differences and geographical remoteness. At the same time, the Portuguese researcher believes that

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<sup>30</sup> Вергун А.Н. Сотрудничество стран БРИКС как новый формат интеграционного процесса быстроразвивающихся стран // Вестник МГИМО-Университета. 2015. № 5(32). С. 153–161 [Alla N. Vergun, *Cooperation Between the BRICS Countries as a New Format of the Process of Integration of Rapidly Developing Countries*, 5(32) MGIMO Review of International Relations 153 (2013)].

<sup>31</sup> Soft law became the subject of scientific evaluation relatively recently – in the middle of the 20<sup>th</sup> century. But there is no consensus yet on the soft law concept in a legal science. Some scientists believe that “soft” law covers only “non-binding rules or documents that interpret or communicate to others the idea of their creators about legally binding norms or represent promises that create expectations about the future behavior of a person” (Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2(1) *Journal of Legal Analysis* 171, 174 (2010)). Other scientists believe that the term “soft law,” as a rule, “refers to any international document different from an international treaty that contains principles, norms, standards and other provisions regarding the expected behavior” (Dinah L. Shelton, *Normative Hierarchy in International Law*, 100(2) *American Journal of International Law* 291, 319 (2006)).

the BRICS bloc can become a global force, on the condition that it assert and combine its differences in the exercise of power, otherwise this objective will be difficult to achieve because the differences are superior to similarities in terms of unity and national interest, it is not simply enough to wish to counterbalance the United States as a real power to set the international agenda. Finally, it is clear that in spite of the heterogeneity and scope of its own limits, the BRICS have assumed a new position within the framework of global governance in the last decade, becoming a platform where it was possible to analyze specific challenges of negotiating on common causes such as avoiding future financial crises or even trying to solve environmental issues.<sup>32</sup>

As we can see, the European analysts believe that one of the main tasks of the BRICS bloc is to overcome the differences in the “exercise of power.” Yet, this is possible only on condition of the availability of a new philosophy of power, a philosophy which has to be law-related rather than political – i.e. a philosophy of law. Naturally developing cooperation among the BRICS countries, including in the sphere of law, cannot but give rise to some reflection in this regard. Reflection over what already exists is inevitably followed by questions about what could exist and what may happen in the future depending on how the partnership of the five countries evolves. Will the BRICS be capable of becoming a real force actually participating in the process of globalization? Will the political leaders of the five countries be willing to move in the same direction? Will they demonstrate the willingness to maintain a strategic partnership? And, finally, will they be able to form a common legal space maximally conducive to their interaction in the spheres of politics and economy, culture and values? If the answers to these questions are positive, it is necessary to raise the question about the possibility of a common philosophy of law for the BRICS. Here it should be noted that, in this regard, we can only talk about a philosophy of law that would not contradict the national systems of legal values or distort the existing legal pictures of the world of the five different civilizations, but would rather be built upon them, promoting their convergence and natural co-evolution.

Speaking of the possibility of the BRICS philosophy of law, one has to think about what tasks can be set for such a philosophy and what resources can be used to create it. Since the current globalization is not only a process of engineering and technology development or informational, financial and economic integration, but also a movement towards a common legal order, a common culture and a common system of values, the ability to influence this process and, more importantly, to manage it is the most important condition for participating as a subject rather than

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<sup>32</sup> Marco António Batista Martins, *The European Union and the BRICS: Challenges and Power Relations Between Antagonism and Interdependence*, 9(4) *International Journal of Arts & Sciences* 495 (2017).

as an object. In this case, any claims to universalism in the sphere of the philosophy of law are an effective tool allowing the so-called Western countries to get political, economic, legal and symbolic advantages in the competitive struggle for the future. Thus, in the period of globalization philosophical and legal means are involved in the struggle for political, economic and cultural domination. Or, alternatively, the philosophy of law as one of the subsystems of the value system can act as a guarantor of maintaining the capacity and civilizational identity of the countries involved in the processes of integration. At the same time, it is important not to use the philosophical and legal maxims for the purpose of justifying isolation and, particularly, for the purpose of moral justification of the isolationism of the emerging legal systems. However, the protection of civilizational identity as well as defense of the national interests directly fall within their competence and retain importance in the structure of internal goal-setting.

What can the five countries located on four continents and for the first time correlated only in the course of analyzing the prospects of the emerging economies have in common? First of all, each of the countries represents a separate civilization transcending national boundaries and having its own culture and history. And each civilization can offer its own special theory of justice, the role of which in the development of the legal system is impossible to overestimate. As far back as half a century ago, the American philosopher John Rawls put forward the theory of justice as a kind of quintessence of the ideology of the political circles standing at the origins of the current globalization. Although this theory is debated and criticized in the countries of Western Europe and North America, its claims to global legal universalism and to the role of a representative of the historical experience of the West are unquestionable. That is why the reaction of the philosophers of the BRICS countries to the theory of Rawls, its ideas and principles as well as the conclusions which could be made based on this theory is so essential and relevant.

In Russia, the reaction to the ideas of Rawls's theory of justice was rather reserved – and for a good reason. Almost simultaneously with Rawls's theory of justice a theory of real communism arrived, the author of which, A. Zinovyev, deduced the structure of Soviet society from the so-called “communal relations,” where occupation of the best room, the best place in a room or the best sun-lounger on the beach depends, among other things, on chance, but not only on chance. Meanwhile, it looks as though Rawls introduces new axiomatics, different from both the Marxian and the Weberian ones. According to the American philosopher, the fact that some people turned out to be poor and sick while some other people turned out to be rich and healthy is a matter of pure chance, coincidence. In his opinion, it is not the result of rational decisions – right or wrong, correct or erroneous – as Weber, an adherent of capitalism who linked capitalist rationality to religious asceticism, would argue. Nor is it a consequence of someone's malicious intent, of a collective takeover of ownership of the means of production (with inevitable conversion into wealth and power),

as in the case of Marx. It is only a chain of random coincidences and unrealized opportunities that lead some members of society to poverty and an unhappy life.

At the same time, based on the hypothesis put forward by Zinovyev, the main question which the theory of justice needed to answer for Russia is the question of how to ensure justice in conditions of weakness and the underdevelopment of institutions. This, in turn, logically raises a different question – the question of how to understand justice within the theory of justice of the communal society, what meaning it should have and what word/concept it can be expressed by. And will it be a theory or is it an issue of a pre-theoretical lifeworld – the only sphere where it is possible to look at the question of comparing the two concepts of justice (the Russian and the American) at all?

Is the theory of justice possible in these conditions exactly a theory? It certainly is. It is just that the way of presentation looks too unusual, although very attractive for those who were once again deprived of the theory which could explain what is happening in the present and forecast what may happen in the future. As early as the 19<sup>th</sup> century, the peculiarity (otherness) of the Russian culture, values and meanings became almost the only topic of interest for Russian philosophers. However, nobody seriously tried to formulate on such a basis a concept like Rawls's, except for the aforementioned study of communism by Zinovyev.

Meanwhile, the experiences of other countries also facing the challenge and trying to understand what kind of "theory of justice" they could offer as their own alternative may turn out to be very interesting. For example, the issue of the comparative analysis of Rawls's theory of justice was formulated in the Chinese comparative studies in line with the country's own traditions of understanding and argumentation of justice.

As Ruiping Fan points out, there is a lot of disagreement with regard to the comparison of the Confucian understanding of justice with the Rawlsian theory. Thus, some researchers argue that the two points of view are incomparable due to the fact that Confucius' doctrine of justice is based on metaphysics and serves as a foundation for a moral doctrine, while Rawls's theory of justice is a generalization of some practical experience and is aimed at improving the system of social action. Fan does not agree with this position. In her opinion, both the first and the second understanding of justice are based on social life experience and comprehension thereof. In addition, both the first and the second viewpoint on the fair and just organization of society are aimed at improving it. At the same time, Fan finds differences between these viewpoints in terms of substance – and very significant ones. By way of experiment, she suggests theoretically applying the Rawlsian principles of justice to a society dominated by the Confucian system of values. Fan writes:

To begin with Confucians would agree with Rawlsians that there ought to be fundamental principles to direct the institutions, law, and policies of

society. However, I would argue that Confucians could not affirm that such principles primarily concern the *distribution* of primarily social goods. For Confucians, the first subject of fundamental social principles should not be distribution. The particular Confucian understanding of human nature and its implications for human society does not allow a theory of social justice primarily to focus on the allocation of social goods, even if the allocation of some social goods is important and must be involved in the Confucian view of social justice.<sup>33</sup>

Further on, Fan asks the question of whether a Confucian familist civil society is possible and gives a positive answer to this question. At the same time, the author is well aware of the difficulties existing on the way to implementing the Confucian ideal in the current conditions. It takes not just the revival of Confucian values based on the life experience of an individual family, but a combination thereof with the ideals of civil society, precedence of law and equality before the law.

The issue we face is not simply to stress equal citizenship in Chinese society. Rather, the challenge is to articulate the social structures that can make possible a Confucian familist civil society in which there is both rule of law and space for robust family loyalties and associations of friendship and collaboration. Chinese culture must develop a means for curing the abuses of the past without killing the body of cultural commitments that mark its true character and give it a prospect for a future with more integrity of its own.<sup>34</sup>

Fan's optimism with regard to the possibility of building a familist civil society and the rule-of-law state based on family values is shared by some Western researchers. However, they do not tend to see a fundamental denial of family values in Western society. Thus, according to Erin Cline, family values underpin moral progress both in the West and in the East. In addition, she points out the similarity between the American thinker of the 20<sup>th</sup> century and the ancient Chinese sage, drawing attention to the fact that both Rawls and Confucius define the inner sense of justice as an inherent attribute or an essential feature of the entire human race. "Rawls and Kongzi," Cline writes, "also maintain that parent-child relationships provide the foundation for cultivating a sense of justice, which in turn provides the foundation for a stable and harmonious society."<sup>35</sup> In fact, she is convinced that comparative

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<sup>33</sup> Ruiping Fan, *Social Justice: Rawlsian or Confucian?* in *Comparative Approaches to Chinese Philosophy* 144, 145 (B. Mou (ed.), London: Routledge, 2003).

<sup>34</sup> Ruiping Fan, *Reconstructionist Confucianism: Rethinking Morality after the West* 40–41 (Dordrecht; New York: Springer, 2010).

<sup>35</sup> Erin M. Cline, *Two Senses of Justice: Confucianism, Rawls, and Comparative Political Philosophy*, 6(4) *Dao* 361, 379 (2007).

studies will allow gaining a better insight into both traditions, revealing their hidden semantic resources and heuristic potential while gradually moving towards the mutual enrichment of cultures and social practices.

As for the attitude towards the issue of justice in the Indian philosophical, political and legal tradition, one circumstance needs to be taken into account. Indian society has always been and remains a caste-based society, which implies neither the same understanding of justice for everybody nor the understanding of justice in the European sense of the word at all. The differences here are much more significant than in the case of the ethics and philosophy of the Chinese tradition. The point is that, in order to determine justice, Indian philosophers and jurists often use the concept of “Nyaya,” which in European terms means something similar to logic, cognitive theory and rules of argumentation, rather than ethics or – even less – a separate social philosophy. For example, Indian philosophers have repeatedly pointed out that the Rawlsian concept of justice is too “aristocratic” and suggests a system in which civil society and political and legal institutions are included as equals or as systemic elements. But what fits American or, say, Canadian society, has little to do with other social systems where a civil society in the Western sense of the word does not exist and institutions are formed in conjunction with religion, tradition and the social reality. “The Global Justice debate,” Aakash S. Rathore writes, “is currently parochial (that is, a monological, predominantly Anglo-American exercise) and romantic (that is, academic and privileged/elitist, out-of-touch with ground realities, and yet self-satisfied and glib).”<sup>36</sup>

The two remaining BRICS countries demonstrate a similar attitude towards the theory of justice, however with some notable individual features. Both the Republic of South Africa and the Federative Republic of Brazil have followed a similar path in their historical and legal development. Their colonization by Europe began before they formed their own civilization with sufficiently developed political and legal institutions. At the time of their first encounters with the Europeans, the South African and South American tribes had neither a separate philosophy nor differentiated law. Unsurprisingly, their prevailing ideas about justice were rather primitive and could not have a significant impact on the development of institutions and values brought from Europe and adapted to the conditions of the colonized nations. This circumstance can explain the absence of any noticeable reaction to the challenge contained in Rawls’s theory of justice. This fact, however, by no means rules out the possibility of inclusion of the corresponding theory in the education courses of South African and Brazilian universities. Therefore, the formation of the BRICS philosophy of law should take into account the civilizational experiences of South Africa and Brazil the philosophical comprehension of which is just starting.

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<sup>36</sup> Aakash Singh Rathore, *The Romance of Global Justice? Sen’s Deparochialization and the Quandary of Dalit Marxism*, 5(1) Indian Journal of Human Development 175 (2011).

## Conclusion

The BRICS boat has been successfully set afloat. Over the course of its journey thus far, it has set in motion a number of actions towards strengthening the cooperation among its passengers, the five countries of the bloc of regional leaders, building up both the quantitative segment (we are referring, in particular, to the accession of South Africa to the BRIC group in 2011) and the qualitative segment of integration (the creation of the New Development Bank of the BRICS countries based on the Fortaleza Agreement).

It should be acknowledged that in certain areas of cooperation the BRICS potential is still not exhausted. For example, one of the vectors of humanitarian law development in the BRICS countries may be the creation of a Human Rights Court of the BRICS countries.

With regard to the philosophy of law for the BRICS, it should be noted that the integration of the social and moral experiences of past generations should in many respects contribute to the preservation of their civilizational identity and the creation of conditions for coexistence and interaction both within and beyond the bloc.

The prospects of further success of the BRICS boat to remain afloat upon the treacherous waterways of global politics, economics and law are not absolutely clear yet. According to expert assessments, we can anticipate several different scenarios for the BRICS future: (1) the BRICS is amorphous and its creation is only a fantasy of economic journalists;<sup>37</sup> (2) a rapidly progressing China drops out of the BRICS; (3) the BRICS is expanded;<sup>38</sup> (4) the BRICS goes on to exist in the declared form of a five-member bloc.

The development of centrifugal or, on the contrary, centripetal forces at the base of the bloc will largely depend on how successfully the BRICS countries manage to turn the effects of social, economic and legal heterogeneity into a positive segment of the evolution of the common integrated formation.

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<sup>37</sup> For details see Jean-Luc Sauron, *L'Europe est-elle toujours une bonne idée?* 5 (Paris: Gualino, 2012).

<sup>38</sup> New options such as BRICET (BRIC + Eastern Europe and Turkey), BRICKET (BRIC + Eastern Europe, Turkey and Korea), BRIMC (BRIC + Mexico) were discussed. Goldman Sachs experts look beyond the change in the BRIC format and suggest singling out a new group – Next 11 – in which they include Indonesia, Iran, Nigeria, Turkey, Mexico, Bangladesh, Vietnam, Egypt, Pakistan, the Philippines and South Korea. This term was introduced into the discourse in the agency's annual report of 15 December 2005. For details see Хейфец Б.А. БРИК: миф или реальность? // *Мировая экономика и международные отношения*. 2010. № 9. С. 72–80 [Boris A. Kheyfets, *BRIC: Myth or Reality?*, 9 *World Economy and International Relations* 72 (2010); Шонин Н.Е., Миннихметова К.И. БРИКС: проблемы и перспективы сотрудничества // *Вестник Башкирского университета*. 2014. № 1. С. 199–204 [Nikolai E. Shonin & Kamila I. Minniakhmetova, *BRICS: Problems and Prospects of Cooperation*, 1 *Bulletin of the Bashkir University* 199 (2014)].

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