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Editorial

A *Revista Brasileira de Alternative Dispute Resolution – RBADR* finaliza, com este número 12, seu sexto ano de existência. O sucesso da publicação depende dos editores, da Editora Fórum e de todo o seu time, pelos quais nutrimos profundo agradecimento, bem como dos autores, leitores e revisores.

Neste último ano, o periódico melhorou suas métricas, atingindo um CiteScore (2023) na base Scopus de 1.3, o que alçou o periódico ao segundo melhor quartil (61º) na área do Direito. Além disso, a revista alcançou um SNIP de 1.664 e um SJR de 0.184, posicionando-a no terceiro quartil no ScimagoJr. No Google Acadêmico a revista atingiu um índice H de 10.

A revista tem sido também rotineiramente referenciada pela UNCITRAL em suas indicações bibliográficas (*Bibliography of Writings Related to the Work of UNCITRAL*), o que demonstra o impacto internacional do periódico e sua relevância dentro da comunidade de *alternative dispute resolution*. Além disso, a revista já possui artigos citados pelo Superior Tribunal de Justiça (STJ), uma vez que está indexada na biblioteca do Tribunal.

Em suma, a revista tem cumprido sua missão de ser um ponto de encontro da comunidade internacional de *alternative dispute resolution* e de influenciar, por meio de pesquisas de qualidade, a reflexão sobre as mais variadas modalidades de solução de disputas.

O presente número continua demonstrando a vocação internacional da revista, com 13 (treze) artigos de vários países. Há uma concentração de submissões de países dos BRICS, o que enxergamos como positivo para a discussão de soluções de conflitos dentro do bloco. Neste número, contamos com um artigo de Bangladesh, dois do Brasil, quatro da Indonésia, três da Rússia, dois da Ucrânia, e um da África do Sul.

Os artigos abordam diversas temáticas, como mediação entre pares e coletiva, arbitragem, prova digital e inteligência artificial.

Agradecemos aos autores por suas contribuições e desejamos a todos uma excelente leitura!

Daniel Brantes Ferreira, Ph.D
Editor-Chefe

Elizaveta A. Gromova
Editora Assistente

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Editorial

The *Brazilian Journal of Alternative Dispute Resolution* (RBADR) marks its sixth year with its 12th issue. The publication's success depends on the editors, the Fórum Publishing House, and its entire team, to whom we extend our deepest gratitude, as well as the authors, readers, and reviewers.

In the past year, the journal improved its metrics, achieving a CiteScore (2023) of 1.3 in the Scopus database, placing it in the second quartile (61st) in the field of Law. Furthermore, the journal reached an SNIP of 1.664 and an SJR of 0.184, positioning it in the third quartile of ScimagoJr. In Google Scholar, the journal reached an H-Index of 10.

The journal has also been routinely referenced by UNCITRAL in its bibliographic recommendations (*Bibliography of Writings Related to the Work of UNCITRAL*), demonstrating its international impact and relevance within the alternative dispute resolution community. Additionally, the journal has had articles cited by the Brazilian Superior Court of Justice (STJ), as it is indexed in the court's library.

In short, the journal has fulfilled its mission of being a meeting point for the international alternative dispute resolution community, influencing reflections on the various dispute resolution methods through high-quality research.

This issue continues to showcase the journal's international scope, with 13 (thirteen) articles from several countries. There is a notable concentration of submissions from BRICS countries, which we see as positive for discussions on conflict resolution within the bloc. In this issue, we have one article from Bangladesh, two from Brazil, four from Indonesia, three from Russia, two from Ukraine, and one from South Africa.

The articles cover various topics, including peer and multiparty mediation, arbitration, digital evidence, and artificial intelligence.

We thank all the authors for their contributions and wish everyone an excellent read!

Daniel Brantes Ferreira, Ph.D.
Editor-in-Chief

Elizaveta A. Gromova
Associate Editor

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Role of state in developing mediation – In EU and Ukraine (a comparative perspective)

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Abstract: Ukraine's status as a candidate country and the start of negotiations on accession to the European Union require a comparative analysis and harmonization of Ukrainian legislation with the legislation of other EU Member States and European legislation. One of the areas of comparative jurisprudence is the development of mediation as a legal institution, including the state policy of legislative regulation of the mediation institution. This development has attracted the attention and support of the EU and the Council of Europe, as European democratic standards require cooperation between the state and citizens or individuals. However, the need for a more cohesive and unified approach to mediation across the EU remains crucial, as highlighted by De Palo & Trevor (2012),[1] who argue that such harmonization would strengthen the effectiveness and accessibility of mediation services. The purpose of this article is, first, to compare the role of the state in the development of mediation in the EU and Ukraine. The state of research and literature on this topic in the EU and Ukraine is not sufficiently systematic, so a comparative analysis of this topic is relevant. In terms of methodology, the paper applies logical and linguistic methods. Still, some conclusions are based both on statistical data and on the observations of the participants, in particular, on their own mediation practice. Despite the more active role of the state in the development of mediation in the EU, this process cannot be called a 'success story'. To a certain extent, we can observe similarities between the EU and Ukraine regarding successes, challenges, and the state's role as one of the actors promoting the development of mediation.

Keywords: Mediation. EU law. Ukrainian law. The role of the state.

1 Introduction

The status of Ukraine's candidacy for European Union (EU) membership[2] underscores the imperative for a comparative examination between Ukrainian legislation

[1] De Palo, G., & Trevor, M. (2012). "EU Mediation Law and Practice: The Need for a Coherent Approach". *European Review of Private Law*, 20(5), pp. 1237-1262.

[2] On *17 June 2022*, the European Commission issued its opinion on the application for EU membership and on *23 June*, the European Council *granted candidate status to Ukraine*. On *14 December 2023*, the European Council decided to open accession negotiations with Ukraine.

and that of other EU member states, thus engendering a significant discourse "novelty" and introducing a fresh academic context. One focal area of comparative legal analysis pertains to the advancement of mediation, including the influence of governmental intervention on its evolution. Harmonisation in civil litigation across EU countries has been increasingly discussed, as Albors-Llorens (2012)[3] highlights the necessity of a cohesive approach to ensure consistency and accessibility in dispute resolution mechanisms.

Mediation has previously garnered *attention and endorsement from the Council of Europe* (*CoE*),[4] an integral institution of European integration to which Ukraine has been affiliated since the 1990s.[5] Nevertheless, the progress of mediation across different legal domains varies among signatory states, with some exhibiting robust mediation cultures and comprehensive legislative frameworks or procedural protocols. Hopt & Steffek (2013)[6] provide a comparative perspective on how mediation principles and legislation differ among EU Member States, illustrating the challenges in creating a unified mediation framework across diverse legal systems. While the *CoE recommendations and resolutions*[7] hold a soft law status, they are applicable across all member states, aligning with European democratic standards that advocate for state collaboration with citizens.

The primary *objective of this article* is twofold: firstly, to juxtapose the current state of mediation development in EU member states and Ukraine, and secondly, to assess the extent of achievements and challenges, as well as adherence to Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters of 21 May 2008 (hereinafter – Directive 2008/52/EU)[8] and Recommendations of the CoE and CEPEJ Guidelines.[9] Despite variations in the depth of research and literature on this subject between the EU and Ukraine, a comparative analysis of mediation regulations represents

[3] Albors-Llorens, A. (2012). "Mediation and Its Impact on Civil Litigation in Europe: Is There a Need for Further Harmonization?" *Cambridge Yearbook of European Legal Studies*, 14, pp. 187-209.

[4] See recommendation of 5 September 2001, R (2001) 9 On Alternatives To Litigation Between Administrative Authorities And Private Parties [https://rm.coe.int/16805e2b59].

[5] Ukraine – since 1995.

[6] Hopt, K. J., & Steffek, F. (2013). "Mediation: Principles and Regulation in Comparative Perspective". *European Review of Private Law*, 21(1), pp. 87-120.

[7] Restricting only to normative regulations of a *lex generalis* nature, these are recommendations: R (81) 7, referring to (78) 8; R (86) 12 and the resolution no. 1 (2000). A for *lex specialis* nature see recommendations other than R (2001) 9 no.: R (87) 18 Concerning The Simplification Of Criminal Justice; R (99) 19 Concerning Mediation In Penal Matters; R (98) 1 On Family Mediation; R (2002) 10 On Mediation In Civil Matters. See also: *European Code of Conduct for Mediators* – http://ec.europa.eu/civiljustice/adr/adr_ec_en.htm.

[8] http://data.europa.eu/eli/dir/2008/52/oj.

[9] Guidelines for a better implementation of the existing recommendation concerning mediation in penal matters – CEPEJ(2007)13E (12/2007), Guidelines for a better implementation of the existing recommendation concerning family mediation and mediation in civil matters – CEPEJ(2007)14E (12/2007), Guidelines for a better implementation of the existing Recommendation on alternatives to litigation between administrative authorities and private parties – CEPEJ(2007)15E (12/2007).

an innovative approach. Methodologically, the study draws upon literature, online resources, and legislative enactments, employing logical and linguistic analysis, supplemented by participant observations and the author's mediation practice. However, the primary methodological framework employed is the comparative method, facilitating a nuanced understanding through a cross-jurisdictional lens.

2 Development of mediation in EU and Ukraine

2.1 EU Countries

The XX-XXI centuries represent a period in which many countries began resolving conflicts through the mediation process, particularly evident in the European Union. It is worth noting that the mediation procedure has specific characteristics, prompting the need to explore international experience in this matter. Let's define these features.

Firstly, mediation distinguishes itself with universality. Examining international practices reveals a universally applicable model observed today. Mediators, irrespective of continent or cultural nuances, share a common universal "mediation" language, facilitating the free exchange of experiences. This unique communication language necessitates preservation and development through increased intensity of international interactions.

Secondly, the universality of the mediation development process is noteworthy. According to most researchers studying mediation issues, the universality of its procedure was introduced in the United States and subsequently spread across different continents. It is essential to emphasize that each European country has undergone its own path of mediation development, facing intricate processes regarding its integration into societal consciousness, legal system, and judicial proceedings.[10]

[10] E.g.: T. Kyselova, G. Eromenko, Медіація в Україні: Щодо Необхідності Нормативно-Правового Регулювання (The Need to Regulate Mediation in Ukraine), Interdisciplinary Humanities Studies: Studia Jurisprudentia, 2015/2, [available at SSRN: https://ssrn.com/abstract=2671775]; S. Fursa, Mediation in Ukraine: urgent issues of theory and practice and necessity of legislative regulation [in:] C. Esplugues, L. Marquis (eds.), New Developments in Civil and Commercial Mediation, New York 2015, p. 737–754; T. Kyselova, Institutional preconditions for mediation reform in Ukraine, Socìal'no-ekonomìčnì Problemì ì Deržava, 2016/15(2), p. 78-84; N. Mazaraki, Mediation in Ukraine: problems of theory and practice, Foreign Trade, Economics, Finance, Law, 2016/84(1), p. 92–100 [retrieved from http://journals.knute.edu.ua/foreign-trade/article/view/533]; T. Tsuvina, National Mechanisms of the *Enforcement of Agreements Resulting from Mediation: EU Experience and Ukrainian Perspectives*, Problems of Legality 2022/158, p. 110–123 [https://doi.org/10.21564/2414-990X.158.264998]; O. Mozhaikina, *Legal regulation of mediators' professional training in Ukraine and Slovakia*, Foreign Trade, Economics, Finance, Law, 2022/124(5), p. 30–39 [https://doi.org/10.31617/3.2022(124)03].

The role of the state in the development of mediation can be manifested through legislative regulation, the model of introduction and regulation of mediators' activities – which are significant components of this development.

Legal Framework

Any statutes, or procedural rules that might exist in each Member State are examined to demonstrate how firmly embedded mediation is in each jurisdiction. The analysis examines whether the regulation is uniform across the EU.

It is now more than 15 years since the European Union adopted Directive 2008/52, which is an important step in the development of legislation aimed at regulating mediation in civil and commercial matters. The Mediation Directive marked the end of a long journey by the European Parliament to formally recognise alternative dispute resolution ("ADR") in all EU Member States. But it also signalled the opening of a new direction –the path to mediation as a viable form of dispute resolution in the Member States. As Hopt and Steffek (2013)[11] highlight, despite the Directive's goal of harmonisation, significant diversity exists in the way mediation has been regulated across different EU nation.

The first decisive steps towards the adoption of the Mediation Directive were taken in 1999, when EU political leaders gathered in Tampere, Finland, and formally decided that EU member states should establish "alternative, non-judicial procedures" for dispute resolution as part of the promotion of "better access to justice in Europe". According to De Palo and Trevor (2012),[12] the Directive emerged from an overarching EU policy promoting Alternative Dispute Resolution (ADR) to enhance access to justice. In other words, ADR is useful and should be promoted through legislation.

Directive 2008/52/EU was envisioned as such an approach, with a primary focus on broad areas encompassing civil and commercial matters. However, its significance extends beyond these realms, proving relevant in family matters, particularly those pertaining to matrimonial issues and parental responsibilities. It is essential to recognize that this Directive isn't the initial European document addressing alternative dispute resolution. Instead, it builds upon the Council's May 2000 Conclusions on alternative methods of settling disputes under civil and commercial law. This earlier document emphasizes the necessity of establishing fundamental principles in the realm of alternative dispute resolution to facilitate

[11] Hopt, K. J., & Steffek, F. (2013). "Mediation: Principles and Regulation in Comparative Perspective". *European Review of Private Law*, 21(1), pp. 87–120.

[12] De Palo, G., & Trevor, M. (2012). "EU Mediation Law and Practice: The Need for a Coherent Approach". *European Review of Private Law*, 20(5), pp. 1237-1262.

the development and operation of extrajudicial procedures for settling civil and commercial disputes and enhancing access to justice.

The Mediation Directive set out minimum regulatory standards for Member States to transpose mediation legislation into their national legal systems. Thus, Member States had the freedom of choice to implement this regulatory framework as they chose, including the possibility of adopting stricter standards. The purpose of the Mediation Directive, as stated in Article 1, is to "promote access to alternative dispute resolution and to facilitate the amicable resolution of disputes by promoting the use of mediation and ensuring a "balanced relationship".

One of the steps taken by the state to strengthen the development of mediation is the introduction of a special law on mediation.

Analysing these best practices and national legislation in the field of mediation, it should be noted that mediation practices in the *27 EU members*, vary. They can be split into 3 groups. *The first group* of countries has a special law on mediation (Austria,[13] Bulgaria,[14] Croatia,[15] Cyprus,[16] Czech Republic,[17] Germany,[18] Hungary,[19] Ireland,[20] Lithuania,[21] Malta,[22] Portugal,[23] Romania,[24] Slovakia,[25] Slovenia,[26] Spain[27]). *The second group* of countries where mediation is regulated in civil procedure codes (Luxembourg,[28] Poland[29]), judicial mediation (France[30]), judicial mediation (Estonia[31]), statute on court-annexed mediation (Finland), other

[13] https://www.viac.eu/images/law/Austrian_Mediation_Act.pdf.

[14] Mediation Act promulgated on 17.12.2004. Since then, the law has undergone 6 amendments - the latest on 2.02.2023, which will come into force on 1.07.2024 https://www.justice.government.bg/home/normdoc/2135496713.

[15] https://hgk.hr/documents/mediation-act586b9f6251f81.pdf.

[16] https://www.mjpo.gov.cy/mjpo/mjpo.nsf/all/1DB25AD29B67BB94C2258614005BEBB8/$file/The%20Certain%20Aspects%20of%20Mediation%20in%20Civil%20Matters%20Law%20of%202012%20(Law%20159(I)%202012).pdf?openelement.

[17] https://www.cak.cz/assets/zakon-o-mediaci_aj.pdf.

[18] https://www.gesetze-im-internet.de/englisch_mediationsg/englisch_mediationsg.html.

[19] https://njt.hu/jogszabaly/2002-55-00-00.

[20] https://www.irishstatutebook.ie/eli/2017/act/27/enacted/en/html.

[21] https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/a1214b42d40911eb9787d6479a2b2829?jfwid=13yl78zgim.

[22] https://legislation.mt/eli/cap/474/eng/.

[23] https://www.arbitrare.pt/media/4261/law-on-mediation-_no-29-2013-19-april.pdf.

[24] https://www.cmediere.ro/legislatie/7/.

[25] https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2004/420/20120101.html.

[26] http://www.sloarbitration.eu/Portals/0/Zakonodaja/Mediation%20in%20Civil%20and%20Commercial%20Matters%20Act.pdf.

[27] https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Act_on_mediation_in_civil_and_commercial_matters_%28Ley_5_2012__de_mediacion_en_asuntos_civiles_y_mer.PDF.

[28] https://legilux.public.lu/eli/etat/leg/code/procedure_civile/20231101.

[29] Provisions regarding mediation are contained in articles 183.1 - 183.15 of the Code, while articles 184-186 regulate court settlements. https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19640430296/U/D19640296Lj.pdf.

[30] https://allowb.org/acts_pdfs/CPC.pdf.

[31] https://www.riigiteataja.ee/akt/13240243.

laws (Belgium,[32] Greece,[33] Denmark,[34] Italy[35]). *The third group* of countries where mediation is practised but not regulated by law is - the Netherlands.

While the EU Mediation Directive aims to establish consistency in key areas like confidentiality, enforceability of settlement agreements, and mediation's effect on limitation periods, some EU nations lack local regulations on these matters. Furthermore, even in countries that have incorporated the Directive's provisions, varying legislative approaches exist, leading to differences in addressing these issues.

As Coben and Thompson (2006)[36] illustrate, regulatory approaches to confidentiality in mediation can create paradoxes. For example, while confidentiality aims to promote open dialogue, excessive regulation can limit a mediator's flexibility and discretion. This tension can, at times, affect the enforceability of mediated agreements, which varies widely among EU countries, thus affecting the efficiency and appeal of mediation. Regarding the confidentiality of mediation proceedings: While Bulgarian, Belgian, Greek, and Slovenian law impose confidentiality obligations on all participants involved in mediation, some countries, like Germany (according to the current draft of the Mediation Act), only mandate confidentiality for the mediator and their staff, not the parties or other participants. In Spain, the Netherlands, the Czech Republic, and currently in Germany, there are no specific legal provisions regarding confidentiality, leaving it to be addressed contractually through confidentiality agreements between the parties and the mediator. Given these disparities, it is strongly recommended that a confidentiality clause be included in the contract signed by the mediator and the parties before commencing any cross-border mediation to ensure the confidentiality of the proceedings.

Regarding the enforceability of mediation agreements, two primary approaches have been adopted: some countries require the mediation agreement to be concluded in the form of a notarial deed with explicit consent to enforceability (Czech Republic, Slovenia, Netherlands, Bulgaria), while others achieve enforceability through court approval, treating the agreement as a judicial settlement (Belgium, Germany, Italy, Slovenia, Netherlands, Bulgaria). In certain countries (Bulgaria, Slovenia, Netherlands), both methods are available.

Regarding the impact of mediation on statutes of limitation: In Germany, Belgium, Bulgaria, and Slovenia, the limitation period for a claim undergoing

[32] https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=1967101002&table_name=loi.

[33] https://www.taxheaven.gr/law/4640/2019.

[34] https://www.uv.es/medarb/observatorio/leyes-mediacion/europa-resto/denmark-administration-of-justice-act-chapter-27.pdf.

[35] https://www.101mediatori.it/Public/OpenArticleAttachement/1160?attachementId=245, https://www.gazzettaufficiale.it/eli/id/2023/10/31/23G00163/sg.

[36] Coben, J. R., & Thompson, P. N. (2006). "Disputing Irony: A Systematic Look at Litigation About Mediation". *Harvard Negotiation Law Review*, 11, pp. 43-80.

mediation halts during the mediation process. Moreover, in Slovenia, any deadline for initiating legal action related to a mediated claim, as stipulated by special regulations, cannot elapse sooner than 15 days after mediation concludes. Conversely, in other countries like Spain, the Netherlands, and the Czech Republic, existing legislation does not entail the suspension of limitation periods.

Mediation Schemes

The focus of this section is an investigation of schemes that have been implemented in each Member State. Regarding the requirement of mediation prior to initiating court proceedings.[37]

In Italy, legislation mandates mediation in specific dispute areas, including tenancy, land rights, property partition, inheritance, leases, loans, rental companies, vehicle and boat accidents, medical malpractice, defamation, contracts, insurance, and banking. Failure to engage in mediation before litigation results in the court dismissing the case.

In Germany, Article 15a of the Introductory Law to the Code of Civil Procedure[38] grants German states the authority to mandate pre-litigation conciliation for small claims (up to EUR 750), neighbour disputes, and libel suits. Several German states have enacted mandatory alternative dispute resolution (ADR) schemes.

Under Article 16, Paragraph 2 of the Slovenian Mediation Act, courts will dismiss an action if mandatory mediation proceedings are stipulated by law before filing the action.

In various jurisdictions, including Belgium and Slovenia, if contract parties agree to mediate disputes, courts will uphold this agreement. Failure to pursue mediation prior to litigation may result in the court staying the case (Belgium) or dismissing it (Slovenia, Germany).

Furthermore, in countries such as Italy, Slovenia, and Belgium, parties unreasonably refusing mediation may incur judicial costs, irrespective of the case outcome.

These instances underscore substantial disparities in mediation's legal framework and ramifications across EU member states, underscoring the need for careful consideration in cross-border mediation scenarios.

Article 5.2 of Directive 2008/52/EU provides Member States with the option, although not the obligation, to make mediation mandatory, provided that the right of access to justice is guaranteed. Thus, Member States that have so far refused

[37] For a comparative perspective, refer to an interesting study on multiparty mediation in Brazil, particularly involving the public sector. FERREIRA, Daniel B.; SEVERO, Luciana. Multiparty Mediation as Solution for Urban Conflicts: A Case Analysis from Brazil. *BRICS Law Journal*, v. 8, n. 3, p. 5-29, 2021. https://doi.org/10.21684/2412-2343-2021-8-3-5-29.

[38] https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html.

to introduce mandatory mediation to increase its use have the option of using other regulatory instruments, such as mandatory information sessions or financial incentives.

The concept of voluntary participation in the mediation process is enshrined in the Recommendation of the Committee of Ministers of the Council of Europe on Family Mediation of 21 January 1998 No (98)[39] (in particular, the provision "mediation should not be compulsory"), as well as in paragraph 10 of the preamble to Directive 2008/52/EU, which states: "This Directive shall apply to processes whereby two or more parties to an international dispute attempt to reach a settlement agreement on a voluntary basis by means of a mediator".

Having analysed the Member States' mediation legislation, it can be concluded that usually one of the first principles of mediation in the text of the law is voluntariness (voluntary participation of the parties in the mediation process). In particular, Article 4 of the Law of Moldova "On Mediation", as well as Article 1731 of the Belgian Judicial Code, Article 5 of the Bulgarian Law "On Mediation", Article 5 of the Law of Ukraine "On Mediation".

Instead, some foreign laws do not have a separate provision containing a list of principles of the mediation process, but the concept of voluntariness emerges from the text of the law. For example, Article 17 of the Mediation Act of the Republic of Malta provides that the parties may voluntarily apply to the mediation process; Article 2 of the Romanian Law on Mediation and the Organisation of the Mediation Profession states that, unless otherwise provided by law, the parties may voluntarily apply to the mediation process. Articles 22, 23, 26 of the Lithuanian Law on Mediation in Civil Disputes stipulate that the parties to a dispute may continue mediation voluntarily at the expense of the parties to the dispute. According to Art. 2 of the Bulgarian Law on Mediation, the concept of mediation is mediation, which is a voluntary and confidential procedure for the out-of-court settlement of disputes.

In addition, the scientific and practical analysis of foreign legislation in the field of mediation shows that the mediation procedure may be initiated by a party to the dispute, provided for in a ruling or order of a court or other body that considers cases and makes decisions in arbitration, or carried out in accordance with the law (for example, Article 17 of the Mediation Act of the Republic of Malta). Pursuant to Article 3 of Directive 2008/52/EU, the mediation process may be initiated by the parties, or proposed by a recommendation or order of a court, or prescribed by the law of a Member State. In other words, foreign legislation provides for several grounds for starting the mediation process.

[39] https://rm.coe.int/1680747b77.

Regulation of Mediators

Mediation legislation and practices vary across Member States, reflecting distinct legal traditions and cultural attitudes toward ADR. Eidenmüller (2011)[40] discusses how regulatory competition among EU countries has influenced the development of mediation laws, with some jurisdictions adopting more stringent regulations to attract cross-border mediation cases. For instance, Italy mandates mediation in several specific areas, while countries like Germany give states the discretion to impose pre-litigation mediation requirements in certain cases.

The different training courses and accreditation requirements for mediators in each Member State are explained. Comparisons are drawn between the various schemes in each jurisdiction and particularly the number of hours of training required for accreditation.

So far, only a few countries have adopted legal requirements for the accreditation of mediators, mediation and mediation training organisations, and the required training (Belgium, Bulgaria, Italy). Although the Greek Mediation Law contains such requirements, the relevant implementing regulations have not yet been adopted.

We conclude that Member states should recognise and promote existing as well as new workable mediation schemes by financial and other forms of support. Where successful mediation programmes have been established, member states are encouraged to expand their availability by information, training and supervision.

2.2 Ukraine

The development of mediation in Ukraine can be divided into several stages that reflect different aspects of its evolution. The beginning of the history of this process is associated with the support of donor international organisations, which was accompanied by an active interest of people in the development and practice of mediation. The first stage, starting with the collapse of the Soviet Union and Ukraine's independence, was marked by the activity of international donor organisations and the development of public initiatives. The second stage, from the mid-1990s to the early 2000s, was characterised mainly by the support of mediation projects by international organisations, which contributed to the opening of the first mediation centres in Ukraine. The third stage, from the early 2000s until the adoption of the Law of Ukraine "On Mediation".[41] The development of mediation in Ukraine can be divided into several stages that reflect different

[40] Eidenmueller, Horst G. M., Regulatory Competition in Contract Law and Dispute Resolution Available at SSRN: https://ssrn.com/abstract=2201772 or http://dx.doi.org/10.2139/ssrn.2201772.

[41] https://zakon.rada.gov.ua/laws/show/1875-IX#Text.

aspects of its evolution. The beginning of the history of this process is associated with the support of donor international organisations, which was accompanied by an active interest of people in the development and practice of mediation. The first stage, starting with the collapse of the Soviet Union and Ukraine's independence, was marked by the activity of international donor organisations and the development of public initiatives. The second stage, from the mid-1990s to the early 2000s, was characterised mainly by the support of mediation projects by international organisations, which contributed to the opening of the first mediation centres in Ukraine. The third stage, from the early 2000s until the adoption of the Law of Ukraine "On Mediation" in 2021, was characterised by growing interest in mediation by international and national organisations, as well as the activation of the public and public associations in this area. This process was accompanied by pilot projects with the courts, and one of the conclusions was the need for legislative regulation of mediation, as referring citizens to alternative methods of conflict resolution without an appropriate legal framework was impossible outside of pilot projects. The lack of legal status of a mediator also hindered the development of this profession in Ukraine. In 2019, Ukraine joined the 46 countries that signed the United Nations Convention on International Agreements to Settle Disputes through Mediation in Singapore (the Singapore Convention).[42] This event stimulated legislative activity, and Draft Law No. 3665 was actively supported by both the mediation community and the Ministry of Justice of Ukraine. On 16 November 2021, the Law on Mediation was adopted by the Parliament.

Legal framework

The adopted Law of Ukraine "On Mediation" took into account modern foreign standards of legislative regulation of mediation and international practices,[43] such as Directive 2008/52/EC, the Council of Europe Recommendations on Mediation for Different Categories of Cases,[44] developed by the European Commission on the

[42] United States Convention on International Settlement Agreements Resulting from Mediation: https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf.

[43] Handbook for mediation Lawmaking, adopted at the 32nd plenary meeting of the CEPEJ Strasbourg, 13 and 14 June 2019. https://rm.coe.int/cepej-2019-9-en-handbook/1680951928.

[44] Recommendation Rec (2002)10 of the Committee of Ministers to member States on mediation in civil matters, adopted by the Committee of Ministers on 18 September 2002 at the 808th meeting of the Ministers' Deputies. https://rm.coe.int/16805e1f76; Recommendation No R (98)1 on family mediation, adopted by the Committee of Ministers on 21 January 1998 at the 616th meeting of the Ministers' Deputies. https://rm.coe.int/1680747b77; Recommendation Rec (2001) 9 of the Committee of Ministers to Member States on Alternatives to Litigation between Administrative Authorities and Private Parties adopted by the Committee of Ministers on 5 September 2001 at the 762nd meeting of the Ministers' Deputies. https://rm.coe. int/16805e2b59; Recommendation No R (99) 19 of the Committee of Ministers to Member States on Mediation in Penal Matters, adopted by the Committee of Ministers on 15 September 1999 at the 679th meeting of the Ministers' Deputies. https://rm.coe.int/1680706970.

Efficiency of Justice,[45] and the UNCITRAL Model Law "On International Commercial Mediation and International Mediation Settlement Agreements".[46]

Ukraine provides for a classical model of facilitated mediation.[47] Законом "Про медіацію" визначені принципи медіації: добровільність, конфіденційність, нейтральність, незалежність та неупередженість медіатора, самовизначення та рівності прав сторін медіації.[48] The Law on Mediation defines the principles of mediation: voluntariness, confidentiality, neutrality, independence and impartiality of the mediator, self-determination and equal rights of the parties to the mediation. The scope of the Law on Mediation is quite broad. It applies to relations related to mediation in order to prevent conflicts (disputes) in the future or to resolve any conflicts (disputes), including civil, family, labour, economic, administrative, as well as in cases of administrative offences and criminal proceedings with the aim of reconciling the victim with the suspect (accused).[49]

The Law "On Mediation" (Article 1(1)(9)) defines a mediation agreement as an agreement that records the result of the agreement of the parties to mediation in an oral or written form agreed between them, taking into account the requirements of the law, and also establishes the right of the parties to mediation to apply to a court, arbitration court, international commercial arbitration in accordance with the procedure established by law in case of non-performance or improper performance of the mediation agreement (Article 18(1)(6)). The right of the parties to civil proceedings to reconcile, in particular through mediation, allows the results of the parties' agreement as a result of mediation to be approved as settlement agreements (agreements on reconciliation in administrative proceedings; Article 49(7) of the Civil Procedure Code of Ukraine, Article 46(7) of the Commercial Procedure Code of Ukraine, Article 47(5) of the Code of Administrative Procedure of Ukraine), which are an enforcement document and may be enforced (Article 208 of the Civil Procedure Code of Ukraine, Article 193 of the Commercial Procedure Code of Ukraine, Article 191 of the Code of Administrative Procedure of Ukraine).[50]

[45] CEPEJ Guidelines for a better implementation of the existing recommendation concerning family mediation and mediation in civil matters. https://rm.coe.int/16807475b6; CEPEJ Guidelines for a better implementation of the existing recommendation concerning mediation in penal matters https://rm.coe.int/1680747759.

[46] UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002). https://www.uncitral.org/pdf/english/commissionsessions/51stsession/Annex_II.pdf.

[47] Mayer, B. (2004). Facilitative Mediation. In J. Folberg, A. L. Milne, & P. Salem, Divorce and Family Mediation: Models, Techniques, and Applications. Guilford Pres.

[48] Article 4 of the Law 'On mediation'.

[49] Part 1 of Article 3 of the Law 'On mediation'.

[50] Tsuvina, T.A. (2022). National Mechanisms of the Enforcement of Agreements Resulting from Mediation: EU Experience and Ukrainian Perspectives. Problems of legality, 158, 110-123. https://doi.org/10.21564/2414-990X.158.264998.)

Mediation Schemes

The Law on Mediation defines the principle of voluntariness as one of the main provisions that none of the participants may be forced to participate in mediation, mediation is possible only if the parties voluntarily choose a mediator by their mutual consent, and the procedure may be terminated by one of the parties at its own initiative at any time. However, there is now a tendency to interpret the principle of voluntariness from voluntary entry into the mediation procedure to voluntary completion of the procedure.[51]

Certain alternative methods of dispute resolution are provided for in the Civil Procedure Code of Ukraine,[52] the Commercial Procedure Code of Ukraine,[53] the Code of Administrative Procedure of Ukraine[54] and the Laws of Ukraine "On Arbitration Courts",[55] "On Enforcement Proceedings".[56]

As part of the reform of procedural legislation in 2017, the institute of dispute resolution with the participation of a judge was introduced in civil, commercial and administrative proceedings,[57] but this procedure is not identical to judicial mediation, so judges cannot currently act as mediators.

It should be noted that according to the procedural law (Code of Civil Procedure, Code of Commercial Procedure, Code of Administrative Procedure of Ukraine), the parties may reconcile at any stage of the court proceedings and the court shall ascertain the parties' desire to enter into a settlement agreement, to conduct out-of-court settlement of the dispute through mediation, and in case of such agreement, the court shall adjourn.

Ukrainian law also grants notaries the right to conduct mediation, subject to completion of the training required by law.[58]

Regulation of mediators

A mediator is a "specially trained neutral, independent, impartial person who conducts mediation".[59] The requirement for a person wishing to become a

[51] T. Tsuvina, T. Vakhonieva 'Law of Ukraine 'On Mediation': Main Achievements and Further Steps of Developing Mediation in Ukraine' 2022 1(13) Access to Justice in Eastern Europe Pp 142-153. DOI: https://doi.org/10.33327/AJEE-18-5.1- n000104.

[52] https://zakon.rada.gov.ua/laws/show/1618-15#Text.

[53] https://zakon.rada.gov.ua/laws/show/1798-12#Text.

[54] https://zakon.rada.gov.ua/laws/show/2747-15#Text.

[55] Law of Ukraine 'On Arbitration Courts' No 1701-IV of 11 May 2004, Vidomosti of the Verkhovna Rada 35/412. https://zakon.rada.gov.ua/laws/show/1701-15#Text.

[56] Law of Ukraine 'On Enforcement Proceeding' No 1404-VIII of 1 June 2016, Vidomosti of the Verkhovna Rada 30/542. https://zakon.rada.gov.ua/laws/show/1404-19#Text.

[57] https://zakon.rada.gov.ua/laws/show/2147-19#Text.

[58] Anna Kalisz, Alina Serhieieva. The Development of Mediation in Poland and Ukraine: A Comparison and Prospects for Experience Exchange. Studia Iuridica Lublinensia vol. 32, 3, 2023. https://journals.umcs.pl/sil/article/view/14996/pdf http://dx.doi.org/10.17951/sil.2023.32.3.89-109.

[59] Part 2 of Art 8 of the Law 'On mediation'.

mediator is to complete a basic mediation course (at least 90 hours, including at least 45 hours of practical skills training)[60] in Ukraine or abroad. There is no age limit for mediators. Associations of mediators and entities providing mediation shall maintain registers of mediators in compliance with the law on the collection, storage, use and dissemination of confidential information about a person The Law on Mediation (Article 14).

3 Role of state in development mediation in EU and Ukraine – Comparative conclusions

An analysis of the development of mediation in the European Union shows significant progress in its integration into conflict resolution processes. Mediation has become a universal approach to dispute resolution in the EU Member States, thanks to a common language of mediation and the exchange of best practices.

The role of the state in the development of mediation is manifested in legal norms regulating the activities of mediators. Some countries have adopted specific legislation on mediation, while others have included provisions on mediation in existing legislation. The EU Mediation Directive, together with the Council of Europe Recommendations, provides a basic framework for the promotion of mediation and minimum regulatory standards.

National legislation and best practices vary across EU Member States, reflecting the range of approaches to mediation regulation. This requires harmonization and careful consideration of cross-border mediation cases, in particular with regard to confidentiality, the enforceability of mediation agreements and the impact on limitation periods.

Despite the progress made in introducing mediation as an alternative dispute resolution mechanism, challenges remain in harmonizing legal frameworks and ensuring consistency across jurisdictions. International cooperation and ongoing dialogue between EU Member States and other countries is essential for the further development of mediation practice and the improvement of access to justice.

In this context, the different mediation schemes applied in each EU Member State and their impact on the pre-trial process are analyzed. The differences in the regulation of mediation in different EU Member States underline the need for a careful approach to cross-border mediation. While Article 5.2 of the EU Mediation Directive gives Member States the flexibility to make mediation mandatory, ensuring access to justice for citizens remains a priority.

[60] Part 1 of Art 10 of the Law 'On mediation'.

The concept of voluntary participation in mediation is enshrined in European law, as evidenced by the different legal provisions in different Member States. This analysis of foreign legislation highlights the diversity of procedures for initiating mediation and the importance of compliance with the law in creating effective dispute resolution mechanisms.

The development of mediation in Ukraine reflects the experience of both U.S. and EU donor support and the grassroots development of mediation that has emerged from a growing civil society. At the same time, the legislative process in the EU has been driven by social innovation, while in Ukraine proper regulation of mediation has been postponed until 2021.

Ukraine, like EU countries, incorporates mediation into its legal system in a wide range of cases, from criminal disputes to family conflicts. However, the Russian invasion in 2022 complicated the implementation of the law on mediation, and pilot projects were suspended. Ukrainian mediation is not yet integrated into the judicial system, and there is no unified register of mediators, resulting in a lack of statistical data.

In addition to the war, Ukraine faces much greater challenges than EU countries, such as a short experience with legal mediation and the absence of a unified register of mediators. As with many other standards derived from the Copenhagen criteria and EU rules and legal principles, Ukraine will face a process of harmonization that will apply to mediation, among many other areas of life and law. Mediators continue to provide consultations, negotiations, training and education even in these difficult times.

Given the increasing number of disputes related to war damage, mediation can be an effective tool for resolving these conflicts, which highlights the need for cooperation between courts and mediators.

Resumo: O *status* da Ucrânia como país candidato e o início das negociações de adesão à União Europeia exigem uma análise comparativa e a harmonização da legislação ucraniana com a legislação dos outros Estados-Membros da UE e a legislação europeia. Uma das áreas do direito comparado é o desenvolvimento da mediação como uma instituição jurídica, incluindo a política estatal de regulamentação legislativa da mediação. Esse desenvolvimento atraiu a atenção e o apoio tanto da UE quanto do Conselho da Europa, uma vez que os padrões democráticos europeus exigem cooperação entre o estado e os cidadãos ou indivíduos. No entanto, a necessidade de uma abordagem mais coesa e unificada para a mediação em toda a UE continua a ser crucial, como destacado por De Palo & Trevor (2012), que argumentam que essa harmonização fortaleceria a eficácia e acessibilidade dos serviços de mediação. O objetivo deste artigo é, primeiramente, comparar o papel do estado no desenvolvimento da mediação na UE e na Ucrânia. O estado da pesquisa e da literatura sobre este tema na UE e na Ucrânia não é suficientemente sistemático, por isso uma análise comparativa deste tema é relevante. Em termos de metodologia, o artigo aplica métodos lógicos e linguísticos. Ainda assim, algumas conclusões são baseadas tanto em dados estatísticos quanto nas observações dos participantes, em particular, em sua própria prática de mediação. Apesar do papel mais ativo do estado no desenvolvimento da mediação na UE, esse processo não pode ser chamado de uma "história de sucesso". Em certa

medida, podemos observar semelhanças entre a UE e a Ucrânia em relação aos sucessos, desafios e ao papel do estado como um dos atores que promovem o desenvolvimento da mediação.

Palavras-chave: Mediação. Direito da EU. Direito ucraniano. Papel do Estado.

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Using predictive analytics systems to resolve a legal dispute*

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Abstract: Increasingly, in the mass media, we hear about examples of using predictive analytics systems to obtain solutions to legal disputes. However, from the viewpoint of legal regulation, the question arises: Can we consider a solution proposed by the system to be final and legally significant, or just one of a possible set of solutions? A parallel with legal principles is drawn in the scientific literature analyzing the prospects for such systems application. Researchers come to disappointing predictions about possible risks to human rights and freedoms if the solutions proposed by predictive systems are approved without human participation. In our study, we came to the following conclusions. Firstly, at the moment of technological development, intelligent systems cannot explain why they make certain decisions. Secondly, because the system's decision-making is not transparent, it is incorrect to assume that programmers or developers replace the judge. The role of programmers and developers of an intelligent system model is very important but purely technical. Thirdly, the problem of inaccuracy in the system's decisions refers only to the stage of system training. The higher the quality of the datasets and the more data sets there are, the more accurate the decision made by this technology will be. That is why forming correct datasets is an independent and challenging technological task.

Keywords: Formalization of natural language constructions. Inaccuracy of solutions. Algorithms. Self-learning.

1 Introduction

Disputes have accompanied humanity throughout its existence. However, over time, people have formed models of dispute resolution – from the independent search for a compromise to the model of appealing to the courts or resorting to a mediator, which led to the emergence of the legal model of legal dispute resolution. Currently, the development of mathematical methods, algorithms, and information technologies allows the development of services that can act as mediators in

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resolving legal disputes or as judge assistants. A literature review suggests that such information systems have already been developed and applied in some situations. Such information systems include intelligent systems based on predictive modeling techniques and neural network language models. Although these intelligent systems are an auxiliary tool in the hands of a judge or a service used by stakeholders to obtain a prediction about a dispute, their use raises questions about the balance between ethical risks and benefits to society.[1] Research shows that scholars are concerned about possible situations where the system would make a decision instead of a judge, or the prediction provided by such information systems would implicitly influence the final decision made by a judge. In addition, other issues are also discussed in the academic literature, such as how trustworthy such technological solutions can be and whether they are correct and accurate. Can the system make a mistake by offering an incorrect prediction of the dispute resolution, which could then lead to judgment errors and affect the dispute outcome?

The literature review has shown that such concerns are not unfounded, as indeed the system developers' choice of algorithms and the accuracy of the intelligent systems training determine the accuracy of making a decision – the very decision that the legal dispute parties wish to obtain by turning to the system. In turn, the consequences of this inaccurate decision can be legally significant decisions. The roots of this problem lie in the complexity of natural language constructs. The choice of the necessary mathematical model requires preliminary formalization of natural-language constructs, which is a separate and very complex mathematical and technical task. Some authors associate the risks of making inaccurate or incorrect decisions with the presence of strong and weak artificial intelligence in these systems. However, such a position has a particular inaccuracy, which we will show in this paper.

Because of such risks, some researchers propose limiting the use of these technologies. In our opinion, such proposals seem to be a struggle against technological evolution and its takeover of the humanitarian spheres. We should emphasize that there is no way to counteract this technological process. Using such information systems is a stage in the evolution of human life automation. Drawing a parallel with past technological revolutions, we see a definite pattern: humans mechanized their activity at the beginning of their existence; later, with technological development, they automated it. Then came informatization, not only of human labor but also of their life and social relations. In other words, applying various information technologies, creating information systems on their basis, and using these in human

[1] ERAHTINA O. S. Approaches to Regulating Relations in the Sphere of Developing and Using the Artificial Intelligence Technologies: Features and Practical Applicability, *Journal of Digital Technologies and Law*, *1*(2), P. 421–437, 2023. https://doi.org/10.21202/jdtl.2023.17.

life are natural stages of humanity's development. The main goal of humans at all stages of mechanization and automation of their work was to outsource routine or labor-intensive and complex tasks to technologies. Nowadays, one such task is predictive analytics of dispute matters. The result of predictive systems is a reduction in court workload. If such intelligent systems are used, the time of litigation is reduced and the court system is relieved. In case of an alternative way of dispute resolution, the parties receiving the case assessment can decide whether to apply to the judicial authorities. This, in turn, indirectly reduces the burden on the judiciary.

Thus, the article aims to study public relations in the sphere of artificial intelligence algorithms applied in predictive modeling for judicial and alternative dispute resolution. The author also identifies and analyzes risks to human rights arising from using such systems.

2 Algorithmization and predictive modeling for judicial and alternative dispute resolution

2.1 Algorithmization as an initial step in the development of a predictive modeling system

Algorithmization has touched the area of social relations and legal regulation that some scholars have long believed can never be algorithmized. We proceed from the fact that any resolution of legal disputes is subject to a specific algorithm, a sequence of actions that leads to obtaining the result – the decision on the dispute. In this case, we can assume that such a sequence of actions can be programmed.

There are various legal models of dispute resolution that the parties can choose. For example, the parties may select a judicial or alternative dispute resolution model, but their goal is to get an answer to the legal conflict that has arisen. Often, such legal disputes are accompanied by a lot of legal documents that need to be analyzed with a single legally relevant detail. This goal can be achieved with the help of algorithmization of the said processes and through developing technological solutions based on the algorithms, which may take up the search for an answer to the conflict. This informatization of human activity is a natural step of technological evolution.

However, the development of these technologies affects the technological problem of algorithmization of the decision-making process and formalization of natural-language constructs – those case materials that the parties submit for evaluation and analysis. The main difficulty in evaluating the case materials is that they are presented in natural language, which the technology must analyze. In fact,

the challenge in this case is to formalize natural language constructs, which refer to complex dynamic systems.

Despite this difficulty, scientists have managed to find a solution to this problem. The most effective tool at this stage of information technology development is the artificial intelligence (AI) model – neural network language model, which uses various types of neural networks to model natural language. An example of a neural network language model implementation is the GPT chatbot.

An example of Russian legal scientists' attention to the algorithmization of natural-language constructs is the technology of machine-readable law.[2] In 2021, the Concept of Machine Readable Law was approved in the Russian Federation. According to this Concept, machine-readable law is a technology that "to a greater or lesser extent will be applied in all branches of legislation of the Russian Federation, to supplement, but not to replace, the norms written in natural language".[3] In the future, the development of machine-readable law may lead to its predominance over the norms set forth in natural language in the legislative sphere. In turn, the norms in natural language may become a derivative statement of the norms in formal language.[4]

Thus, the interest in formalizing natural language constructs is a step in the development of predictive analytics for dispute resolution. However, it should be noted that despite the demand for these technologies, there are currently few such technological solutions for predictive analytics of dispute resolution.

2.2 Predictive modeling for judicial and alternative dispute resolution

Predictive modeling uses statistical models to predict future events or outcomes based on available data. Predictive modeling can be applied in various fields, such as medicine, economics, weather, and others, to make better-informed decisions based on likely scenarios of events. Different methods, such as regression analysis, machine learning, time series and others, are used to build models.

The alternative dispute resolution system using predictive modeling involves unique algorithms and technologies to predict and prevent conflicts between

[2] For an in-depth examination of the concept and status of digital sovereignty in BRICS+ countries, refer to: GROMOVA E., BRANTES FERREIRA D. On the Way to BRICS+ Digital Sovereignty: Opportunities and Challenges of a New Era. *BRICS Law Journal*; 11(3), P. 54-69, 2024. https://doi.org/10.21684/2412-2343-2024-11-3-54-69.

[3] Concept of development of machine-readable law technologies (approved by the Government Commission on digital development and the use of information technologies for improving the quality of life and business environment, Minutes of 15.09.2021 No. 31) (The document was not published). SPS "ConsultantPlus".

[4] Concept of development of machine-readable law technologies (approved by the Government Commission on digital development and the use of information technologies for improving the quality of life and business environment, Minutes of 15.09.2021 No. 31) (The document was not published). SPS "ConsultantPlus".

parties. The basic idea of this system is to use data and analytics to anticipate possible situations that may lead to disagreements and disputes between parties or to offer a possible solution to parties in an existing conflict. In all cases, these technologies are supportive tools that can help proactively identify potential problems and resolve them before the issues lead to severe consequences. On the one hand, predictive analytics technologies for legal disputes may relieve the burden on the judicial system; however, scholars note risks to the human rights that may arise from these technologies. Such concerns are indeed unfounded.

In the case of an alternative way of resolving legal disputes, predictive modeling technology may be the mediator to which the disputing parties are ready to turn to find a compromise solution. This technology can be chosen as a mediator of disputes because any method of dispute resolution other than judicial can be selected for alternative ways of resolving legal disputes; hence, technological means may perform this function. In this regard, predictive modeling systems can be used for alternative dispute resolution. For example, analytical algorithms can help predict possible dispute outcomes based on the data and facts in the dispute file. This allows the disputing parties to obtain more objective and informed decisions, reducing the likelihood of conflicts and improving the dispute resolution process.

In the Russian Federation, the development of theoretical foundations of predictive modeling and optimization is carried out by the Institute for Information Transmission Issues named after A.A. Kharkevich of the Russian Academy of Sciences (IITI RAS) together with DATADVANCE company.[5] DATADVANCE is engaged in their practical realization. Such cooperation allows the creation of innovative technologies in data analysis, predictive modeling and process optimization. At the end of 2010, DATADVANCE became one of the first participants of the Skolkovo Innovation Center project.[6]

However, despite the social need for such technological solutions, we must admit they are few. This is true not only for the Russian Federation but also for other technologically developed countries. However, researchers provide examples of using such information systems in the media and scientific literature. For instance, in the US, such a system was developed by Ravel Law. However, as

[5] A leading global software company developing software to automate and accelerate the design and optimization of products and processes. Their product, the Seven platform, combines advanced machine learning, optimization and data analysis algorithms to enable users to efficiently solve complex optimization and decision-making problems. DATADVANCE's predictive modeling and optimization technology and its engineering applications are widely used by the world's largest high-tech companies such as Airbus and IHI. One of the co-founders of DATADVANCE is EADS, Europe's largest aerospace corporation with an annual turnover of about 43 billion euros.

[6] Scientific and technological innovation complex for the development and commercialization of new technologies.

the article shows,[7] this system is used not to build a forecast of the legal dispute resolution but to search for arguments that most often affect the judge's decision-making, or factors that irritate the judge, as well as the most cited precedents in court decisions. However, there are also examples of more advanced intellectual systems in the United States,[8] such as Lex Machina,[9] which is designed to analyze data and find patterns to help predict dispute resolution.

In the Russian Federation, there have been no examples so far of systems providing advice on judgments. At the moment, intelligent systems are used only as an auxiliary tool in the evaluation of evidence, for example, for the judge to obtain information necessary for the case. Since 2024, the intelligent system "Justice Online" is available.[10] The main task of this system is the automated drafting of judicial acts based on the analysis of the procedural appeal and case materials; it also transcribes audio protocols and provides an intelligent search engine able to analyze and systematize judicial practice. This system serves only as an auxiliary tool for the judge since the constitutional principle stipulates the realization of justice only by the court. In other words, within the framework of this legal principle, only a human judge has the right to make a decision.

The Casebook system is also used in Russia. This is a service that allows users to track and control court cases. Its functionality includes tools for managing documents and analyzing them practically. Still, simultaneously, the system allows for the prediction of the outcomes of cases.[11]

However, the technological development of such systems and their application in the public sphere in the Russian Federation is underway. For example, in 2022 the Chairman of the Government instructed the Federal Antimonopoly Service of Russia to apply predictive analytics methods more actively. Still, this instruction was given in order to identify risks associated with prices.[12] The task was to develop a sub-technology, "Recommendation Systems and Intelligent Decision Support Systems", to provide predictive modeling of performance/learning without testing in the real environment and to obtain by the end of 2023 the prototypes of products capable of performing predictive modeling.[13]

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7 *AL Interview: Ravel and the AI Revolution in Legal Research.* https://www.artificiallawyer.com/2017/01/23/al-interview-ravel-and-the-ai-revolution-in-legal-research.

8 *Algorithm Helps New York Decide Who Goes Free Before Trial.* https://www.wsj.com/articles/algorithm-helps-new-york-decide-who-goes-free-before-trial-11600 610400?mod=searchresults&page=1&pos=1.

9 *Why Lex Machina's Legal Analytics Are the Best*. https://lexmachina.com.

10 *Courts plan to use artificial intelligence in drafting decisions*. https://rg.ru/2023/05/25/robot-pomozhet-rassudit.html.

11 Predictive analytics in civil litigation. https://pro-sud-123.ru/news/prediktivnaya-analitika-v-grazhdanskom-sudoproizvodstve.

12 Meeting between Mikhail Mishustin and Maksim Shaskolsky, Head of the Federal Antimonopoly Service. URL: http://government.ru/news/44429/ (access date: 26.07.2022).

13 Roadmap for the development of "end-to-end" digital technology "Neurotechnologies and Artificial Intelligence" (The document was not published). https://digital.gov.ru.

Thus, we can note that in the Russian Federation, the development and application of predictive modeling technologies in various social relations are not only included in the plan of measures controlled by the state to form a modern information and telecommunication infrastructure to ensure a high level of its availability and provision of quality services on its basis but also such systems are actually being developed. Despite these technologies being considered promising,[14] predictive systems of legal dispute analytics are not widespread in the Russian Federation.

Exploring the potential risks of using these technologies, scholars express their concern about possible violations of human rights and freedoms.[15] Such risks and threats are summarized in the next section.

3 Risks of using predictive systems for modeling legal disputes

3.1 Modeling the process of finding solutions

For decision-making, an intelligent predictive dispute resolution system must learn on a large amount of data,[16] [17] also called datasets. These datasets are case files that have already been adjudicated. During training, the system learns to identify patterns and build causal relationships. After training, the system is presented with new case files for which it must propose a decision. Based on the relationships it has formed during training, the system searches for similar patterns in the latest case materials and concludes them. In fact, the training of the intelligent system is based on analyzing and searching for patterns in statistical data.

From the viewpoint of modeling the process of searching for solutions, the only correct sequence of actions is to identify regularities and construct cause-and-effect relations. However, from the perspective of making legally significant decisions, lawyers do not accept this learning algorithm. For example, Russian lawyers explain their concern in the following way. Since the Russian legal system belongs to the Romano-Germanic (continental) legal family, the predictive system training through analysis of existing statistics on dispute resolution contradicts the legal model of continental law and this tool cannot be a means of administering justice.[18]

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[14] SAMSONOVA M.V., STRELTSOVA E.G., CHAIKINA A.V. et al. *Digital technologies in civil and administrative court proceedings: practice, analytics, perspectives.* Moscow: Infotropic Media, 2022.

[15] STILGOE J. Who Killed Elaine Herzberg? In *Who's Driving Innovation?* P. 1–6, 2020. Springer International Publishing. https://doi.org/10.1007/978-3-030-32320-2_1.

[16] KOVALEV S.M., OLGEIZER I.A., SUKHANOV A.V., KORNIENKO K.I. Identification of Critical States of Technological Processes Based on Predictive Analytics Methods, *Automation and Remote Control,* Vol. 84, No. 4, P. 424–433, 2023. DOI 10.1134/S0005117923040100. EDN QRJWPX.

[17] Shaping the future of business marketing: unveiling the potential of predictive analytics and predictive intelligence. *International Research Journal of Modernization in Engineering Technology and Science,* 2023. DOI 10.56726/irjmets46344. EDN EQXCDO.

[18] KONSTANTINOV P.D. *Influence of information technologies on principles of civil process (Comparative legal research on the example of Russia and France),* major 5.1.3 – Private-legal (civilistic) sciences (legal sciences). Abstract of Cand. Sci. (Law) thesis. Ekaterinburg, 2022. https://ургюу.рф/science/dissovet/file/base/5/561/dissert_dl.pdf.

We can agree with this position, as one of the major drawbacks of technology that analyzes statistics alone is that it does not consider a situation's contextual and qualitative aspects. Systems trained on statistical information may not consider a particular situation's unique circumstances, people's behavioral patterns, motivations, and goals. This, in turn, may lead to incorrect or suboptimal decision-making. In addition, such models may be unsuitable for predicting people's behavior in complex and non-standard situations, which almost always arise when it comes to assessing social relations. When analyzing materials related to a legal dispute, it is essential to consider many factors, since each situation is unique, and the limitations that are defined by statistics cannot take into account all the specifics of the relations that have arisen. However, if the decision proposed by the system does not take into account all the specifics, it can lead to legally significant consequences only if procedural acts are adopted based on this decision. For example, a judge bases her decision on the conclusion proposed by the artificial intelligence system. In this case, we can conclude that the judge made a procedural error, because "a procedural error is the incorrect procedural action (inaction) of an investigator, a prosecutor, or a judge, which is manifested in incomplete study of the case circumstances, significant violation of the criminal procedural law requirements, its incorrect application, and adoption of an incorrect procedural decision".[19]

B.V. Lesiv agrees with the existence of this problem; studying the works by O. Holmes, he showed the importance of the judge taking into account the perpetrator's attitude to the deed and due diligence. He gives an example of a worker throwing a heavy beam from the roof into the street. In one case, the worker was sure that there was no one beneath, and in the other, he did not check whether there was somebody. According to the law, the punishment will be different for the same action of the worker and the same consequences because the judge will take into account all the factors surrounding the situation.[20]

To prove the slowing down of predictive modeling systems, representatives of states with legal systems based on common law, such as the United States, cite the contradiction between two opposing ways of thinking about judicial decision-making: legal formalism and legal realism.[21]

Proponents of legal formalism argue that, based on the law wording, it is possible to give an unambiguous interpretation and correctly apply it to a particular

[19] STEPANOVA N.A. Classification of errors made in criminal proceedings, *Legal Science and Law Enforcement Practice*, No. 1(35), P. 23–30, 2016. EDN XBIAPR.

[20] LESIV B.V. Predictability of law and prediction of judicial decisions in the doctrine of O. Holmes, *Justice*, Vol. 5, No. 2, P. 43–66, 2023. DOI 10.37399/2686-9241.2023.2.43-66. EDN TNJGSG.

[21] FERREIRA D.B., GROMOVA E.A. Hyperrealistic Jurisprudence: The Digital Age and the (Un)Certainty of Judge Analytics. Int J Semiot Law 36, 2261–2281 (2023). https://doi.org/10.1007/s11196-023-10015-0; Algorithmic Realism: Expanding the Boundaries of Algorithmic Thought. In *Conference on Fairness, Accountability, and Transparency (FAT* '20),* January27–30,2020, Barcelona, Spain.

situation. This position allows formalizing the text of the law. According to this theory, the task of a lawyer is to find a correspondence between the facts and the law and, based on this, to make the right decision.[22]

Legal formalism has advantages, such as clarity and strictness of legal regulation, which avoids arbitrariness and subjectivity in legal decisions. However, it also has its disadvantages, such as the inability to take into account contextual features and changing social conditions. The basic idea of legal realism is that judicial decisions are formed on the basis of not only laws and norms but also non-legal factors. Legal realists reject the traditional view of justice as a neutral and objective activity of judges. They believe that personal beliefs, the social environment, and political, economic and social factors influence judicial decisions.

Adherents of legal realism distinguish two main strands in this approach: empirical and normative. Empirical legal realism argues that judicial decision-making should be based on evidence and empirical research. Normative legal realism, in contrast, recognizes that judicial decision-making can be influenced by norms and values that are not always legitimate.

The goal of legal analysis is to create a clear, consistent, and fair system of laws and a code of conduct that is understandable and accepted by all.[23] However, making such a system of rules is a task beyond human capabilities. However, everyone can do their part in trying to create such a system.

3.2 The right to be heard by a judge

Russian scholars believe that in the case of predictive analytics applied by the court, the right to be heard may be violated. In their opinion, if predictive analytics systems replace the judge, the right to be heard by the judge will be replaced by the right to be heard by the machine, "which will take the form of informing the parties that the decision was made using a predictive justice system, the possibility to familiarize themselves with the results of this analytics and to challenge them".[24]

For our part, the risk noted by P. D. Konstantinov is still in the realm of fiction. For this risk to occur, the system must make a decision instead of the judge. However, as we said, the development of algorithms has yet to reach the level where systems become entirely autonomous and can explain the logic of their decision. In the future, this risk could become real in predictive technologies. But, in such a

[22] TAMANAHA B.Z. Introduction. In *Beyond the Formalist-Realist Divide: The Role of Politics in Judging,* P. 1–10, 2010. Princeton University Press. http://www.jstor.org/stable/j.ctt7rm95.4.

[23] HART H.L.A. *Punishment and responsibility.* Oxford University Press, 1968.

[24] KONSTANTINOV P.D. *Influence of information technologies on principles of civil process (Comparative legal research on the example of Russia and France),* major 5.1.3 – Private-legal (civilistic) sciences (legal sciences). Abstract of Cand. Sci. (Law) thesis. Ekaterinburg, 2022. EDN QVOVHT.

case, we would suggest formulating a legal principle related to the right of a human to communicate with a human and to receive legally significant decisions from a human.

3.3 Inaccuracy of the system in making its decision

As we have already mentioned, the currently used predictive analytics systems for legal disputes are trained on a large volume of datasets.[25] Without this training stage, the system's functioning will not make sense. However, this mandatory stage carries risks associated with possible inaccuracies in the dataset. For the system's accuracy, datasets must be accurate; if they are inaccurate, inaccuracy will occur in the decisions made by artificial intelligence. The conclusion from this premise is obvious – further erroneous legally significant consequences will follow an incorrect decision.

Errors made by artificial intelligence[26] and incorrect information generation are noted by scientists, including the GPT chatbot.[27] Scientists emphasize the possibility of generating incorrect, harmful, and biased information: "This is the biggest problem today, and it mainly depends on the quality of the datasets".[28]

The use of datasets, without which it is impossible to train an intelligent system, may also lead to another risk – the risk of personal data privacy breaches, since the dataset for training (in our case the dataset of previous judgments) contains personal data, sensitive information and other information related to an individual.[29]

3.4 Data privacy violations

A possible solution to the problem of privacy breaches is to extend the legal requirements for personal data security to include relationships in intelligent systems training. For example, we propose to recognize the dataset system operator to be a personal data operator. However, this proposal is feasible only

[25] A set of data used in various types of analysis and machine learning. The success of the latter directly depends on the amount of raw data: the more information there is, the better AI will develop.

[26] MATTHIAS A. The responsibility gap: Ascribing responsibility for the actions of learning automata, *Ethics and Information Technology*, 6(3), P. 175–183, 2004. https://doi.org/10.1007/ s10676-004-3422-1.

[27] OBAID O.I., ALI A.H., YASEEN M.G. Impact of Chat GPT on Scientific Research: Opportunities, Risks, Limitations, and Ethical Issues, *Iraqi Journal for Computer Science and Mathematics* 4(4), 2023. DOI: 10.52866/ijcsm.2023.04.04.002.

[28] FERREIRA D. B., GROMOVA E. A. Hyperrealistic Jurisprudence: The Digital Age and the (Un)Certainty of Judge Analytics, *International Journal for the Semiotics of Law*, 36(6), P. 2261-2281, 2023.

[29] ZHAROVA A. Ensuring the information security of information communication technology users in Russia, *International Journal of Cyber Criminology,* Vol. 13, No. 2, P. 255–269, 2019. DOI 10.5281/zenodo.3698141. EDN LTMESV.

for training datasets containing personal data. In other cases, when datasets do not contain personal data, it would be illogical to recognize the dataset system operator to be a personal data operator.

As in cases arising from the use of information technologies that process personal data, in case of failure to ensure data confidentiality in dataset training, risks occur for all parties – the state, judges, plaintiffs and other participants in the process.[30] However, the main consequence of this situation is the lack of public confidence in justice.

All the analyzed risks associated with the application of predictive analytics systems arise in the case of systems with weak artificial intelligence. These systems can perform an analysis of the submitted documents and estimate the outcome of the case. Hence, the following risk is the inability of the system to explain the logic of its decision.

3.5 Failure of the system to explain its decision logic

The inability of the system to explain the logic of its decision-making leads scientists to the conclusion that the programmer, i.e., the system developer, sets the algorithm, thus becoming a judge.[31] [32] [33]

We cannot agree with this thesis since in the relations we analyze, namely those of the predictive systems' application in legal disputes, there is no formal replacement of the judge; technologies do not make legally binding decisions.

An algorithm is a sequence of specific steps the programmer sets that leads to some result. The result of the system can be obvious if the formalized system is linear. In computer science, this algorithm is called a deterministic algorithm. However, the result may need clarification, even for the developer, because the system may search for a solution according to the algorithms it created in the self-learning process. In computer science, this is called a nondeterministic algorithm. This situation occurs when complex, dynamic systems are formalized. For example, during training the system derives a causal relationship from the algorithm, with the dependency determined in the relationship. Thus, if situation "X" occurs, the system decides to act on situation "Y". However, the developer cannot explain why

[30] CALO R. Robotics and the lessons of cyberlaw, *California Law Review*, 103(3), P. 513–563, 2015. https://doi.org/10.2139/ssrn.2402972.

[31] DORAN D., SCHULZ S., BESOLD T.R. *What does explainable AI really mean? A new conceptualization of perspectives,* 2017. arXiv preprint arXiv:1710.00794.

[32] PASQUALE F. *The Black Box Society*. Harvard University Press, 2015. https://doi.org/10.4159/harvard.9780674736061.

[33] STILGOE J. Machine learning, social learning and the governance of self-driving cars, *Social Studies of Science*, 030631271774168, 2017. https://doi.org/10.1177/0306312717741687.

the system has chosen these particular relationships and solution algorithms from all the possible ones.

Therefore, we conclude that in complex systems, the choice of algorithm and the creation of cause-and-effect relationships by the system is not influenced by either the programmer or the intelligent system developer.[34] In addition, the models and algorithms of these systems cannot replace humans because they cannot explain the logic of their decisions. There are examples from judicial practice in the USA, such as when the developer was summoned to court and could not explain why the intellectual system made the decision.[35] This fact can be confirmed at the theoretical level. Any artificial intelligence models, including neural network language models, exactly copy human capabilities, but they are not able to think. Humans do not learn to create correct phrases but learn to express their thoughts and emotions with phrases.[36]

Scientists are working towards a strong AI that models the behavior of thinking beings based on the interaction of agents who are given external constraints and opportunities to use any tools, and then the agents learn by trial and error.[37] However, their creation is a very complex process that is likely to take decades.

The representatives of common law also emphasize the importance of explaining the decision. They believe that in arbitral tribunals and national courts, one of the critical features of the decision-making process is the reasoning behind the decision.[38] [39] [40] Justification helps the losing party to understand why it lost, thus making the decision understandable and the decision-making process transparent. Understanding the reasons helps the parties adjust their behavior for the future, and making the reasoned decision public allows other arbitrators to use the reasoning or to explain their differences with the precedent.[41] Intelligent predictive analytics

[34] ZHAROVA A., ELIN V., PANFILOV P. (2019). Introducing artificial intelligence into law enforcement practice: The case of Russia, *Annals of DAAAM and Proceedings of the International DAAAM Symposium*, Zadar, Vol. 30, P. 688-692, October 23–26, 2019. Zadar. DOI 10.2507/30th.daaam.proceedings.094. EDN OSFIVO.

[35] SANTONI de SIO F., MECACCI, G. Four Responsibility Gaps with Artificial Intelligence: Why they Matter and How to Address them, *Philos. Technol.,* 34, P. 1057-1084, 2021. https://doi.org/10.1007/s13347-021-00450-x.

[36] SLAVIN B. Prospects of creating a strong artificial intelligence, *Open Systems. DBMS*, No. 1, P. 13–17, 2024. DOI 10.51793/OS.2024.25.57.003. EDN LSLOEN.

[37] SLAVIN B. Prospects of creating a strong artificial intelligence, *Open Systems. DBMS*, No. 1, P. 13–17, 2024. DOI 10.51793/OS.2024.25.57.003. EDN LSLOEN.

[38] O'NEIL C. *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy.* Broadway Books, 2017.

[39] MOATS D., SEAVER N. "You Social Scientists Love Mind Games": Experimenting in the "divide" between data science and critical algorithm studies, *Big Data & Society* 6, 1, 2019, 2053951719833404. https://doi.org/10. 1177/2053951719833404.

[40] OBERMEYER Z., POWERS B., VOGELI Ch., MULLAINATHAN S. Dissecting racial bias in an algorithm used to manage the health of populations, *Science* 366, 6464, P. 447-453, 2019. https://doi.org/10.1126/science.aax2342.

[41] SCHERER M. Artificial Intelligence and Legal Decision-Making: The Wide Open? Study on the Example of International Arbitration, *Queen Mary School of Law Legal Studies Research Paper No. 318/2019,* May 22, 2019. SSRN: https://ssrn.com/abstract=3392669.

technologies can quickly analyze a situation, but the solution proposed by these technologies must be reasonable and understandable to all participants in the process. However, such systems still need to be developed during mathematical modeling. This means that existing intelligent systems can only be a tool in the hands of a judge or other procedural parties. The conclusions or solutions proposed by the systems are not binding and can only be recommendations on an issue.

However, the fact that the system cannot explain its decision does not imply that the dispute resolution becomes non-transparent.[42] This is because the decision-making algorithms are clearly defined and provide for the system's self-learning based on the sequence of actions set by the programmer. During self-learning, the system builds cause-and-effect relationships, subsequently making a decision based on them. It is not possible to explain this second stage, i.e., why the system has built this particular cause-and-effect relationship.

Therefore, predictive analytics technologies can only be recognized as a tool to be used by a judge or other procedural parties in case of alternative dispute resolution. In this case, the possible risks to human rights that we have analyzed will have a minimal probability of occurrence.

4 Conclusion

Thus, if we had to decide whether predictive modeling systems for legal decisions could be used, what arguments could we provide?

First, in the period when intelligent systems cannot explain why they make a particular decision, they can only be a tool. This is a temporary problem,[43] and for the time being this criterion is only relevant for dividing intelligent systems into those with strong and those with weak artificial intelligence. In a few years, theoretical mathematical models and algorithms will be developed to serve as the basis for designing systems that can explain their decisions.

From the legal viewpoint, the risks associated with the inability of the system to explain its decision are relevant only if the system's decision is used as a basis for a legally significant decision without its preliminary analysis by a judge. If, for example, a court decision is formed on the basis of the solution offered by the technology without its preliminary analysis by a judge, then we can talk about a procedural error.

[42] KHARITONOVA Yu.S. Legal Means of Providing the Principle of Transparency of the Artificial Intelligence, *Journal of Digital Technologies and Law*, *1*(2), P. 337–358, 2023. https://doi.org/10.21202/jdtl.2023.14.

[43] ZHAROVA A. The protect mobile user data in Russia, *International Journal of Electrical and Computer Engineering*, Vol. 10, No. 3, P. 3184–3192, 2020. DOI 10.11591/ijece.v10i3.pp3184-3192. EDN JUZBOH.

Therefore, until systems are developed that can explain their decision, they should only be a tool in the hands of a judge or a service that can be used by the parties to obtain a possible solution from the many potential solutions to their dispute. The mere fact that we assume the existence of multiple solutions is not contrary to legal reality. The existence of a single correct solution would negate the existing legal reality where we find that solutions are challenged, judgments are overturned and others are made in their place. In other words, at present, when a predictive system forms a decision, the parties are only given the probability of the possible outcome of the dispute.

Second, it is incorrect to assume that programmers or developers replace the judge because the system's decision-making process is non-transparent. The role of programmers and developers of the intelligent system model is very important but purely technical. They participate only in the development of the intelligent system algorithm. Further, as we have already noted, based on self-learning, the system independently forms cause-and-effect relationships and then offers a solution using them.

Third, the problem of inaccuracy of decisions made by the system is related only to the training stage of the system. The better the datasets are[44] [45] and the more of them there are, the more accurate the decision made by this technology. That is why forming correct datasets is a separate and very complex technological task.

Usando sistemas de análise preditiva para resolver uma disputa legal

Resumo: Cada vez mais, nos meios de comunicação de massa, ouvimos falar sobre exemplos de uso de sistemas de análise preditiva para obter soluções em disputas legais. No entanto, do ponto de vista da regulação jurídica, surge a questão: podemos considerar uma solução proposta pelo sistema como final e juridicamente significativa ou apenas uma de um possível conjunto de soluções? Um paralelo com os princípios jurídicos é traçado na literatura científica que analisa as perspectivas de aplicação desses sistemas. Pesquisadores chegam a previsões desanimadoras sobre os possíveis riscos para os direitos humanos e liberdades se as soluções propostas por sistemas preditivos forem aprovadas sem a participação humana. Em nosso estudo, chegamos às seguintes conclusões. Em primeiro lugar, no momento atual de desenvolvimento tecnológico, sistemas inteligentes não conseguem explicar por que tomam certas decisões. Em segundo lugar, devido à falta de transparência na tomada de decisões do sistema, é incorreto presumir que programadores ou desenvolvedores substituem o juiz. O papel dos programadores e desenvolvedores do modelo de sistema inteligente é muito importante, mas puramente técnico. Em terceiro lugar, o problema da imprecisão nas decisões do sistema refere-se apenas à fase de treinamento do sistema. Quanto maior a qualidade dos conjuntos de dados e quanto mais conjuntos de dados houver, mais precisa será a decisão tomada por essa tecnologia. É por isso que a formação de conjuntos de dados corretos é uma tarefa tecnológica independente e desafiadora.

Palavras-chave: Formalização de construções em linguagem natural. Imprecisão de soluções. Algoritmos. Autoaprendizado.

[44] BRAUNEIS R., GOODMAN E.P. Algorithmic Transparency for the Smart City, *The Yale Journal of Law & Technology,* 20, P. 103–176, 2018.

[45] HOLLAND S., HOSNY A., NEWMAN S., JOSEPH J., CHMIELINSKI K. *The dataset nutrition label: A framework to drive higher data quality standards.* arXiv preprint arXiv:1805.03677, 2018.

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E-Musyawarah: Innovative ADR for resolving administrative disputes outside the court from the perspective of Lawrence M. Friedman's legal system theory

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Abstract: The continuous development of administrative disputes has highlighted the need for Alternative Dispute Resolution (ADR) to resolve these disputes outside the court system in Indonesia. The concept of E-Musyawarah represents a form of ADR that offers new legal perspectives. The data collection method used in this research is secondary data obtained through library research, with the theoretical approach being Friedman's legal system theory. The concept of E-Musyawarah as an ADR for resolving administrative disputes outside the court reflects the trend of utilizing information and communication technology to facilitate dispute resolution outside the judiciary. The resolution of E-Musyawarah is agreed upon with electronic signatures registered in the E-Court, giving them the same legal standing as decisions by the Administrative Court. However, this concept also faces legal challenges, particularly regarding legal equality.

Keywords: Indonesia. E-Musyawarah. Alternative Dispute Resolution (ADR). Administrative Dispute Resolution. Legal System Theory. Information and Communication Technology (ICT) in Law.

Introduction

Enforcing the law in society has a crucial impact on establishing fairness, predictability, and advantages for all individuals.[1] Compliance with the law promotes justice, predictability, and advantageous results for the entire community.[2]

Expeditious population expansion might result in heightened demand for public services.[3] The increasing population fosters a heightened legal consciousness within the community, prompting individuals or organizations to initiate legal proceedings against government actions or policies perceived to infringe upon their rights.[4]

Administrative conflicts are the subject matter of administrative courts.[5] Numerous developing and developed nations endeavour to discover resolutions to tackle the escalating administrative conflicts arising from societal expansion.[6]

Alternative Dispute Resolution (ADR) is a widely used approach for settling problems outside the court system's jurisdiction.[7] It includes a range of methods, such as negotiation, mediation, and arbitration. ADR provides a more adaptable, less confrontational method for resolving disputes. It necessitates a significant level of intelligence and logical reasoning. Logic is essential in ADR as it assists parties in identifying difficulties, analyzing arguments, and achieving mutually agreeable solutions.[8]

Indonesia's civilization is characterized by a deeply ingrained idea that can be utilized to address conflicts among its population effectively. This principle is referred to as Musyawarah. The Musyawarah principle can facilitate the implementation of ADR as a method of settling administrative issues outside the judicial system, thereby exemplifying Indonesia's enduring history.

The Musyawarah principle is rooted in Indonesia's state ideology, Pancasila, which emphasizes the value of democratic decision-making through wise

1 Muhamad Romdoni et al., "A Critique and Solution of Justice, Certainty, and Usefulness in Law Enforcement in Indonesia", *Journal of Law Science* 5, no. 4 (2023): 174–81, https://doi.org/10.35335/jls.v5i4.4269.

2 Annisa Farah Azizah, "Kepatuhan dan Ketaatan Hukum Masyarakat Lamaru terhadap Hukum di Indonesia", *De Cive: Jurnal Penelitian Pendidikan Pancasila dan Kewarganegaraan* 2, no. 2 (2022): 61–69, https://doi.org/10.56393/decive.v2i2.1497.

3 Yurike Siti AS Mariyam, *E-Government Dalam Pelayanan Publik* (Pasaman Barat: CV. Azka Pustaka, 2024).

4 Qinwen Deng, Shuai Xiang, and Boli Chen, "Rural Land Consolidation and Social Consciousness Change: A Case Study of a Land Consolidation Program in Rural Chongqing, China", *Sustainability* 15, no. 22 (2023): 15853, https://doi.org/10.3390/su152215853.

5 Agustien Wereh and Istislam Istislam, "Conflict in Management of Passive State Administrative Decision in State Administrative Dispute", *Brawijaya Law Journal* 5, no. 2 (2018): 249–60, https://doi.org/10.21776/ub.blj.2018.005.02.08.

6 Louis Kriesberg and Joyce Neu, "Conflict Analysis and Resolution as a Field", in *The International Studies Encyclopedia* (Wiley-Blackwell, 2017).

7 Borut Strazisar, "Alternative Dispute Resolution", *Law. Journal of the Higher School of Economics*, no. 3 (2018): 214–33, https://doi.org/10.17323/2072-8166.2018.3.214.233.

8 Frank Fleerackers, "Alternative Dispute Resolution and Affective Legal Analysis", *Revue interdisciplinaire d'études juridiques* 43, no. 2 (1999): 93–134, https://doi.org/10.3917/riej.043.0093.

deliberation and representation. This principle aims to ensure fairness by seeking consensus and plays a significant role in developing the legal system.[9]

Efforts are needed to support individuals seeking administrative justice and aid administrative courts in reducing their caseload due to the ongoing rise and rising number of administrative disputes.[10]

Presently, technological progress has been integrated into the fabric of societal existence. Using cutting-edge technology in the legal domain is a highly appreciated advancement that has effectively resolved numerous legal challenges. Courts have widely employed technology to offer services to the public or legal organizations needing legal assurance. The legal system has seen substantial changes due to technological improvements, transforming how courts work and provide services to the population.[11]

The author suggests the notion of "E-Musyawarah" by combining ADR as an alternative to the court for settling administrative issues, the culturally established Musyawarah principle in Indonesia, and the application of technology as a modern innovation.

The E-Musyawarah concept is an ADR method to resolve administrative conflicts outside the judicial system. It introduces innovative legal perspectives. This research examines the E-Musyawarah idea as an ADR method for resolving administrative conflicts outside the court. Additionally, the study will assess the legal obstacles encountered by the E-Musyawarah concept as an ADR for resolving administrative disputes outside of the court.

Research methods

The data collection method used in this research is secondary data obtained through library research. This involves examining literature such as books, laws, scholarly opinions, lecture materials, and online resources.[12] The research method employed in this study involves secondary data analysis, primarily conducted through extensive library research.

This process includes a comprehensive literature review, which encompasses several vital steps. Firstly, it involves reading and analyzing relevant legal textbooks

[9] Koichi Kawamura, "Consensus and Democracy in Indonesia: Musyawarah-Mufakat Revisited", *IDE Discussion Paper* 308 (2011), https://www.ide.go.jp/English/Publish/Reports/Dp/308.html.

[10] Ahmad Siboy et. al., "The Effectiveness of Administrative Efforts in Reducing State Administration Disputes", *Journal of Human Rights, Culture and Legal System* 2, no. 1 (2 April 2022): 14–30, https://doi.org/10.53955/jhcls.v2i1.23.

[11] James E Cabral et. al., "Using Technology to Enhance Access to Justice", *Harvard Journal of Law & Technology* 26, no. 1 (2012): 241–324.

[12] Aga Natalis, Ani Purwanti, and Teddy Asmara, "Determining Appropriate Policies for Prostitution Reform in Indonesia: Evaluating Harm Reduction Versus Harm Elimination Strategies", *Journal of Southeast Asian Human Rights* 7, no. 2 (2023): 176–213, https://doi.org/10.19184/jseahr.v7i2.37952.

and publications to understand foundational concepts and theories pertinent to the study. Secondly, it examines legislative documents, regulations, and statutes governing various jurisdictions' administrative dispute resolution and ADR mechanisms. Thirdly, the study reviews academic journal articles, theses, and dissertations to gather diverse scholarly perspectives and interpretations on E-Musyawarah and ADR methods. Additionally, it utilizes lecture notes, presentations, and educational resources from legal education to supplement and validate findings from other sources. Furthermore, the research explores credible online databases, legal websites, and digital libraries for the most recent developments, case studies, and expert commentaries related to the research topic.

The collected literature is systematically categorized and analyzed to identify key themes, concepts, theories, and definitions relevant to legal issues surrounding E-Musyawarah as an ADR method. Cross-referencing and triangulation techniques are applied to ensure the reliability and validity of the secondary data. The theoretical framework utilized in this research is Lawrence M. Friedman's legal system theory, chosen for its comprehensive nature encompassing three critical components of a legal system: legal structure, legal substance, and legal culture.

In applying this theory, the research analyzes the formal mechanisms and institutional frameworks that support E-Musyawarah as an ADR process. It investigates the substantive legal principles, rules, and norms underpinning the operation of E-Musyawarah. Additionally, it explores the attitudes, values, and perceptions of stakeholders – including disputants, mediators, and legal professionals – towards E-Musyawarah and its efficacy in resolving administrative disputes. Integrating theoretical insights from Friedman's legal system theory with empirical data from the literature review facilitates a comprehensive understanding of E-Musyawarah's role and effectiveness as an ADR mechanism. This synthesis helps identify gaps, challenges, and opportunities for enhancing the implementation and acceptance of E-Musyawarah in administrative dispute resolution.

The essence and application of musyawarah in conflict resolution

The primary objective of resolving disputes through debate (musyawarah) and consensus and through consultation, negotiation, conciliation, and expert judgment is to achieve peaceful resolutions to conflicts. Musyawarah, consensus, consultation, negotiation, mediation, conciliation, and expert judgment significantly depend on mutual understanding, connections, and communication. This strategy aims to attain a mutually agreeable outcome for all parties involved.[13]

[13] Abdurrahman Konoras, *Aspek Hukum Penyelesaian Sengketa Secara Mediasi di Pengadilan* (Jakarta: PT. RajaGrafindo Persada, 2017).

Participating in deliberation, consensus-building, consultation, negotiation, mediation, conciliation, and expert judgment provides a more efficient and cost-effective approach to resolving conflicts. It can enhance strained relationships instead of relying on arbitration institutions or courts for settlements. Consensus is a state of agreement that is achieved by the parties involved through musyawarah, which is a process that facilitates the attainment of consensus among the parties.

The phrase syûrâ (musyawarah) is taken from Arabic, stemming from the base words "syawara" and "asyara", which denotes the act of extracting honey from a beehive. Initially, it denoted the action of obtaining honey from a beehive. However, its definition has expanded to include all things that can be acquired or derived from another origin (including viewpoints). Certain interpreters limit the extent of musyawarah to secular affairs while ignoring religious concerns. The directive to engage in discussions with secular matters without relying on divine revelation is a guiding principle for all Muslims, especially leaders, to seek input from their constituents.

Regarding musyawarah and societal issues, the Prophet Muhammad and the Rightly Guided Caliphs displayed a range of practices. They occasionally choose individuals considered competent for the particular matter, involve community leaders, and seek input from all parties involved. During the process of syûrâ, decisions were not made quickly based on the majority after one or two musyawarah sessions but instead required repeated deliberations until a consensus was formed. This is because syûrâ is carried out by individuals of high commendation who do not possess personal or group biases. Thus, in syûrâ, the primary focus lies on fostering a sense of fraternity rooted in an unwavering belief in Allah and for the betterment of the collective rather than individual triumph. The crucial factor is the individual's thoughts or ideas concerning the stated problem.[14]

Musyawarah is a deliberative activity in which individuals from different groups engage in a discussion to exchange their perspectives on a particular problem to reach a decision that benefits the collective welfare. The objective of musyawarah is to attain a collective consensus and provide an accurate resolution since it is grounded in the interests of all parties and mutual accord.[15]

Implementing the fourth principle of Pancasila can be achieved through joint decision-making. The fourth premise asserts that the sagacity of deliberation and representation guides democracy. The implementation of Pancasila as a guiding principle in the functioning of the state was initially established by the Decree of the MPR No.II/MPR/1978, and later improved by the MPR No.1/MPR/2003 Decree.

[14] Abdul Ghani, Asep Fathurohman, and Ade Jamarudin, "Komparasi Tafsir Mafatih Al-Ghaib dan Anwar Al Tanzil Wa Asrar Al Ta'wil tentang Musyawarah QS Ali Imran Ayat 159", *Reslaj : Religion Education Social Laa Roiba Journal* 5, no. 6 (2023): 159, https://doi.org/10.47467/reslaj.v5i6.2908.

[15] Dudung Abdullah, "Musyawarah dalam Al-Quran (Suatu Kajian Tafsir Tematik)", *Al Daulah : Jurnal Hukum Pidana dan Ketatanegaraan* 3, no. 2 (2014): 242–53, https://doi.org/10.24252/ad.v3i2.1509.

The critical aspects are as follows: Every Indonesian, as a citizen and part of society, possesses an equitable standing, entitlements, and responsibilities. No individual must impose their desires upon others. Emphasize the practice of musyawarah in decision-making for the collective benefit. Musyawarah for consensus is distinguished by a sense of kinship. Respect and adhere to every decision made through musyawarah; Embrace the outcomes with benevolence and a conscientious attitude, and put them into practice. During musyawarah, the collective interest takes precedence over individual or group interests; Musyawarah is performed rationally and in alignment with a virtuous conscience. Decisions must be ethically answerable to the Divine, respecting the dignity of humanity, truth, and justice, focusing on unity and collective welfare. Trusted representatives are entrusted with the responsibility of executing musyawarah.

According to the traditions above, making decisions together in line with the ideals of Pancasila is done through musyawarah. Therefore, decisions can be made through a consensus infused with a sense of familial unity. Musyawarah is a unique characteristic of the Indonesian population in effectively addressing shared issues. The Indonesian nation strongly values the principle of human equality. Consequently, it is imperative to respect all individuals' opinions. Musyawarah is a process in which individuals exchange opinions over a specific problem or topic. During the musyawarah, the participants will express a multitude of ideas. Every individual articulates their viewpoint and attentively hears the perspectives of others. The exchange of thoughts in musyawarah is conducted with camaraderie while emphasizing proper etiquette. Following a discussion and sharing of viewpoints, a conclusion is reached. The conclusion in musyawarah is determined by consensus rather than by a majority vote or compulsion from certain parties. Consensus refers to the unanimous agreement reached by all persons involved in a musyawarah without compulsion. Consensus should take into account the collective welfare. In this instance, it is necessary for agreement to be based on religious morality and justice norms. The outcome of musyawarah will be transformed into a collective agreement if the participants are willing to conform to the consensus reached.

When there are conflicts between the government and the people, the main principle that should be prioritised is resolving disputes through musyawarah using administrative methods, with judicial administration as a final option. Using administrative methods to resolve disagreements is anticipated to uphold and reinstate the harmony of relationships between the government and the populace, hence restoring harmony. Thus, administrative efforts will be perceived as necessary since they can serve as a mechanism for legal safeguarding, akin to judicial administration.[16]

[16] Hardi Munte, *Model Penyelesaian Sengketa Administrasi Pilkada* (Medan: Puspantara, 2017).

Resolving conflicts using administrative methods By promoting musyawarah, support can be gained as it aligns with the Indonesian society's values of familial spirit, mutual collaboration, living in harmony, peace, and compromise. The strategic positioning of administrative efforts will be strongly evident in this context, highlighting the growing necessity of their existence to reduce the occurrence of administrative disputes before administrative courts, where administrative bodies or officials would interact with the public.

Musyawarah offers many advantages, such as allowing us to gauge the amount of intelligence, comprehension, empathy, and genuine commitment to collective welfare. The level of human intelligence varies, and individuals exhibit different cognitive processes. Some individuals inside their group may possess unique advantages that leaders lack. All opinions presented in a musyawarah are evaluated for their competence. Subsequently, the superior opinion is selected. During musyawarah, individuals' collective determination and consensus are evident, leading to success in their endeavours. Undoubtedly, this is vital for the successful resolution of the current difficulties.

The concepts of Musyawarah have a strong foundation in Indonesian culture. The principle of gotong royong, which refers to cooperation, is a fundamental virtue that enhances the implementation of musyawarah. This principle promotes community, unity, and collaborative endeavour, crucial for resolving issues and making decisions that benefit the overall welfare.

Throughout history, musyawarah has played a crucial role in many Indonesian communities, ranging from local decision-making procedures in villages to national political structures. The customary village gatherings, referred to as "rapat desa", exemplify the practical implementation of musyawarah. These gatherings entail the assembly of villagers to deliberate and address local matters, ensuring that each individual's perspective is acknowledged and valued. The judgments reached in these meetings demonstrate majority rule and serve as evidence of the community's collective consensus and cohesion.

Musyawarah has significantly impacted Indonesia's political environment at the national level. The country's legislative entities, namely the DPR (Dewan Perwakilan Rakyat – House of Representatives) and the MPR (Majelis Permusyawaratan Rakyat – People's Consultative Assembly), exemplify the concepts of musyawarah. These institutions are specifically created to embody the Indonesian population's varied perspectives and reach choices by means of careful discussion and agreement rather than relying just on confrontational debates and voting.

In present-day Indonesia, the practice of musyawarah goes beyond politics and society to include corporate and organizational environments. Many firms and organizations embrace the musyawarah principles in decision-making, establishing a collaborative environment that promotes employee appreciation and active

participation. This strategy not only improves employee satisfaction but also results in more imaginative and successful solutions since it utilizes the combined knowledge and creativity of the group.

Furthermore, musyawarah is crucial in resolving conflicts at different societal levels. It serves as a structured platform for calm and productive discussions, whether addressing family issues, communal problems, or industrial conflicts. Musyawarah's emphasis on comprehension, empathy, and mutual respect averts the intensification of disputes and fosters enduring concord.

Musyawarah offers numerous advantages. First and foremost, it fosters inclusivity and encourages democratic involvement. Musyawarah enhances the credibility of choices and cultivates a feeling of ownership and dedication among participants by ensuring that all perspectives are considered. In a varied country like Indonesia, where various cultural, ethnic, and religious groups coexist, this inclusivity is of utmost importance.

Furthermore, musyawarah promotes societal unity. Promoting transparent communication and fostering mutual regard cultivates trust and enhances interpersonal connections within the community. Social cohesiveness is crucial for preserving peace and stability since it decreases the probability of conflicts and promotes a supportive and cooperative atmosphere.

Furthermore, musyawarah facilitates enhanced decision-making. Considering many viewpoints and concepts facilitates a more thorough comprehension of the current issues. This comprehensive analysis aids in identifying the most efficient and unbiased solutions, guaranteeing that decisions are not only pragmatic but also morally upright and impartial.

In addition, musyawarah promotes both individual and communal development. It promotes expressing ideas, active listening, and healthy interaction among persons. This process improves cognitive reasoning, verbal and written expression, and understanding and managing emotions. Simultaneously, it fosters a sense of obligation and liability as participants acquire the skill of managing their interests in harmony with the collective welfare.[17]

E-Musyawarah as Alternative Dispute Resolution (ADR) for resolving Administrative Disputes outside the Court

The ongoing evolution of administrative disputes requires legal initiatives that facilitate access to justice for those seeking it. The Administrative Court is undoubtedly the most trusted institution for people seeking justice in administrative

[17] Mukhid, "Musyawarah Dalam Perspektif Ekonomi Islam", *Jurnal Masharif Al-Syariah: Jurnal Ekonomi dan Perbankan Syariah* 1, no. 2 (2016): 15–27, https://doi.org/10.30651/jms.v1i2.760.

matters. Up to now, the Administrative Court has been making attempts to decrease the number of administrative conflicts by taking legal measures prior to the occurrence of administrative lawsuits before the Administrative Court.[18]

Prior to initiating a complaint in the Administrative Court, Indonesia provides legal options for seeking redress. These legal remedies are referred to as administrative measures. The institution that issues the state administrative judgment is responsible for carrying out administrative efforts in the context of the administrative dispute. Administrative initiatives have had a negligible impact on reducing the number of administrative conflict settlements and have not instilled a strong sense of confidence among those seeking justice. An innovative approach is required to introduce a new notion into the procedural process of the Administrative Court, which is external to the court itself.[19]

E-Musyawararah, or Electronic Musyawararah, is a suggested concept for an out-of-court procedure known as ADR.[20] It is drawn from Indonesia's state ideology, Pancasila. Moreover, the significance of Pancasila stems from its relative position to ideologies. For the Indonesian society who believes in, internalizes, and comprehends the reasons why Pancasila serves as the fundamental principle and objective in multiple facets of life, such as social, national, state, and political domains, they can utilize Pancasila as the basis and objective in their personal growth.[21]

From a philosophical standpoint, the fourth principle of Pancasila, "Democracy led by the wisdom of deliberations among representatives", emphasizes the importance of musyawarah (deliberation).[22] In this context, musyawarah mufakat, or consensus deliberation, is conducted with sagacious leadership. Aligned with the fundamental principles of the fourth Pancasila, musyawarah mufakat is a process that fosters consensus through informed and wise discourse among representatives. Within this framework, each choice must be undertaken with accountability and adhere to the tenets of Pancasila or the 1945 Constitution. Everyone must be granted equal rights and opportunities to participate in the deliberation process.[23]

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[18] Enrico Parulian Simanjuntak, "The Rise and the Fall of the Jurisdiction of Indonesia's Administrative Courts: Impediments and Prospects", *Indonesia Law Review* 10, no. 2 (2020): 159–90, https://doi.org/10.15742/ilrev.v10n2.611.

[19] Indriati Amarini et. al., "Exploring the Effectiveness of Mediation in Resolving Disputes in the Indonesian Administrative Court", *Journal of Indonesian Legal Studies* 9, no. 1 (2024), https://doi.org/10.15294/jils.vol9i1.4632.

[20] Hikmahanto Juwana, *Dispute Resolution Process in Indonesia* (Institute of Developing Economies, 2003).

[21] Otto Gusti Ndegong Madung and Winibaldus Stefanus Mere, "Constructing Modern Indonesia Based on Pancasila in Dialogue with the Political Concepts Underlying the Idea of Human Rights", *Journal of Southeast Asian Human Rights* 5, no. 1 (2021): 1–24, https://doi.org/10.19184/jseahr.v5i1.20258.

[22] Hamdan Zoelva, "The Development of Islam and Democracy in Indonesia", *Constitutional Review* 8, no. 1 (2022): 37–61, https://doi.org/10.31078/consrev812.

[23] Agus Suwignyo and Rhoma Dwi Aria Yuliantri, "An Analysis of The Discursive Gap in the Ideas and Practices of Musyawarah Mufakat in the Indonesian Nation-State Formation, 1900-1980s", *Paramita: Historical Studies Journal* 33, no. 1 (2023): 1–15, https://doi.org/10.15294/paramita.v33i1.41514.

The topic of Pancasila remains a matter of continuous discourse. The fourth principle emphasizes the significance of wisdom and democracy, specifically emphasizing the role of wisdom in ensuring fairness during the process of deliberation and representation.[24] Within student elections, the fourth principle is pivotal in highlighting the significance of equitable and astute leadership while fostering vigorous engagement from individuals in the electoral proceedings.

The E-Musyawararah, also known as Electronic Musyawararah, is a legal concept under ADR. It involves using electronic technology to aid in deliberation or mediation between parties involved in a dispute.[25] This exemplifies a pattern in which information and communication technology is employed to facilitate the resolution of disputes outside of the court system. Contained within it are core principles, specifically Musyawarah and Mufakat, which refer to the processes of discourse and consensus. Musyawarah and Mufakat strongly support ADR, encompassing negotiation, mediation, and arbitration.[26]

Negotiation is a collaborative process in which parties strive to achieve a mutually acceptable agreement.[27] Negotiation strategies frequently generate dynamics that lead to the emergence of winners and losers. This technique is typically characterized by assertiveness, with strong negotiators taking control of the negotiation process, making compromises, and employing threats to exert influence over the other party.[28] In contrast, negotiators who are more accommodating in their approach prefer to steer clear of conflicts by offering compromises to reduce tension and persistently work towards achieving a mutually satisfactory resolution. Using negotiating strategies, whether characterized by assertiveness or gentleness, frequently favours the more assertive party, leading to an outcome that establishes a dichotomy of winners and losers.[29]

[24] Yuliana, "The Philosophy of Pancasila in the Religious Perspective in Indonesia During the Covid-19 Pandemic", *Pancasila: Jurnal Keindonesiaan* 1, no. 2 (2021): 141–51, https://doi.org/10.52738/pjk.v1i2.29.

[25] Azizah et. al., "Digitalization of Alternative Dispute Resolution: Realizing Business Fair Principles In The Current Era", *Jurnal Dinamika Hukum* 23, no. 2 (2023): 429–49, https://doi.org/10.20884/1.jdh.2023.23.2.3667.

[26] Winner Sitorus, "Online Dispute Resolution: The Conceptualization of Business Dispute Resolution Model in Indonesia", *Online Dispute Resolution* 1, no. 1 (2024): 34–41.

[27] David Fairman et al., "Managing the Negotiation Process", in *Negotiating Public Health in a Globalized World: Global Health Diplomacy in Action*, ed. by David Fairman et al. (Dordrecht: Springer Netherlands, 2012), 29–61, https://doi.org/10.1007/978-94-007-2780-9_3.

[28] P. J. Carnevale and D. G. Pruitt, "Negotiation and Mediation", *Annual Review of Psychology* (Annual Reviews, 1992), https://doi.org/10.1146/annurev.ps.43.020192.002531.

[29] Zhenzhong Ma and Alfred M. Jaeger, "A Comparative Study of the Influence of Assertiveness on Negotiation Outcomes in Canada and China", *Cross Cultural Management: An International Journal* 17, no. 4 (2010): 333–46, https://doi.org/10.1108/13527601011086568.

Mediation is a method of facilitating communication between two opposing parties in order to achieve a mutually agreed-upon resolution.[30] During the mediation process, an impartial mediator serves as a facilitator to assist the conflicting parties in achieving a consensus. Within this particular context, the mediator lacks the power to decide the specific format of the resolution or agreement to be pursued. Instead, they offer clarifications and insights to each side regarding the topic's essence.[31]

The mediation technique, which seeks to attain a mutually beneficial resolution, instils ease for all parties engaged in the disagreement. The parties collaboratively determine the agreements obtained in mediation by their preferences and objectives. This aligns with the fundamental values of liberty and mutual agreement in mediation, wherein the involved parties own complete authority over the ultimate resolution of the conflict.

If a settlement reached through mediation establishes a binding legal connection between the parties concerned, it holds the same legal weight as any other conventional legal arrangement. Nevertheless, suppose one party engages in deceitful behaviour and breaches the mutually agreed-upon agreement. In that case, the mediation outcome does not possess an unequivocal legal authority, even if it has led to peace or agreement between the conflicting parties.

Arbitration is resolving conflicts using peaceful and suitable methods to achieve a legally binding and conclusive conclusion. During the arbitration process, the parties involved in a disagreement agree to hand up the resolution of the issue to a neutral third party, known as an arbitrator, who will make a final and enforceable ruling. Arbitration offers a prompt and effective option for settling conflicts, simplifying the procedure, and producing agreeable outcomes for all parties concerned.

Arbitration is a nonviolent process for settling conflicts suitably, leading to conclusive and obligatory legal judgments. It is an ADR encompassing many approaches to settling conflicts that do not include traditional judicial proceedings. Arbitration is acknowledged as a proficient method for resolving disputes that fall outside the judiciary's jurisdiction.

Arbitral awards commonly include "In the Name of Justice, derived from the Divine Being". Arbitral awards possess legal authority that is on par with judgments rendered by courts. The initial sentence in the award is a general rule that applies broadly, whereas its descendant is a specific rule that is obligatory in every court decision.

[30] Maria Zhomartkyzy, "The Role of Mediation in International Conflict Resolution", *Law and Safety* 90, no. 3 (2023): 169–78, https://doi.org/10.32631/pb.2023.3.14.

[31] Leonard L. Riskin, "Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed", in *Mediation* (Routledge, 2018), 137–81.

Arbitration, a method of resolving disputes beyond the court's jurisdiction, has gained significant recognition. This technique encompasses a range of nonviolent methods that lead to conclusive and enforceable judicial rulings. Arbitration is a dispute settlement part of ADR.[32]

Consensual discussion is an integral component of Indonesia's cultural history and a foundational value inscribed in the fourth principle of Pancasila. Each region may have different names and ways of implementing the culture of consensus deliberation. It is crucial to sustain, protect, and apply this culture of reaching agreement through practical discussion in different contexts, such as social, family, and educational situations. Consensus discussion is a fundamental principle deeply ingrained in Indonesian society. The fourth principle of Pancasila, which serves as the fundamental basis of our state, explicitly articulates this ideal. The fourth principle of Pancasila stipulates that the tenet of Indonesian democracy should be executed via a judicious deliberation process.

The resolution of disputes is predicated on the notion of consensus deliberation, wherein all parties are asked to engage in negotiations and arrive at a mutually acceptable accord. Every person is expected to make concessions and prioritize the common good to preserve mutual harmony. The deliberative approach has demonstrated greater efficacy in resolving societal problems, mainly when the state and legal system cannot deliver sufficient justice and alleviate the backlog of cases.

E-Musyawararah, also known as Electronic Musyawarah, employs diverse electronic technologies to enhance communication and engagement among conflicting parties while considering legal aspects such as privacy, data security, and the legal validity of agreements concluded online.

The notion of deliberation serves as the basis for the consultation process, which aims to achieve consensus or resolve issues. The principle of deliberation can be implemented by incorporating fundamental supporting elements, including openness and active listening, equality and respect, cooperation, consensus, and assertiveness. These elements constitute the basis for the principle of discussion in E-Musyawararah (Electronic Musyawararah).

E-Musyawararah (Electronic Musyawararah) is currently not explicitly regulated in Indonesia as an ADR method. However, this concept can be associated with various regulations promoting its implementation as a legal initiative that aligns with societal technological advancements. It also serves as an innovative ADR solution for resolving legal matters in the administrative domain without resorting to court proceedings.

[32] Akhmad Al-Farouqi Sastrowiyono, "The Pro's and Con's Of Arbitration: A Study of International Arbitration with Perspective of Indonesian and Korean Law", *Jurnal Lex Renaissance* 4, no. 2 (2019): 231–47, https://doi.org/10.20885/JLR.vol4.iss2.art2.

The notion of E-Musyawararah, which refers to the use of electronic means for conducting Musyawararah (a form of deliberation or consultation), might be associated with the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018). This legislation establishes detailed legal parameters for international mediation and the resolution agreements that arise from such mediation. While electronic deliberation is not the main focus, the utilization of technology in mediation can be considered. Furthermore, it might be associated with the European Union Regulation on Electronic Identification and Trust Services for Electronic Transactions (eIDAS), which seeks to improve the portability and security of electronic transactions in order to support the concept of E-Musyawararah (Electronic Musyawararah) as an ADR mechanism.

Indonesia has specific legal provisions about the notion of E-Musyawararah (Electronic Musyawararah) as an ADR method, particularly in resolving administrative disputes through a deliberative approach. The mentioned regulations are the Perka BPA Mediation No. 1 of 2017, which outlines the procedures for resolving disputes by mediation within the Administrative Judiciary, the Electronic Information and Transactions Law No. 19 of 2016, and Law No. 30 of 2014 on Government Administration. The legal standards are a foundation for incorporating technology into the ADR procedure.

E-Musyawararah, or Electronic Musyawararah, is an ADR method that utilizes electronic technology to streamline the resolution of disputes between parties. In order to ensure the protection of personal data, it is necessary to incorporate pertinent legal considerations when utilizing electronic or virtual spaces for administrative dispute resolution. This should involve the participation of an Administrative Court Judge who is well-versed in mediation and serves as a legal expert in this field. Guidance from authoritative institutions, such as the Cyber and Crypto Agency, is necessary to provide clear instructions on using electronic rooms for ADR purposes. Apple has just unveiled a technology called Apple Version Pro that enables virtual rooms, providing a more immersive and lifelike setting for remote discussions, eliminating the need for in-person engagement.

E-Musyawararah (Electronic Musyawarah) settlement is the ultimate stage of electronic negotiation in which the parties engaged in a dispute strive to achieve a mutually agreeable agreement. Once a consensus has been reached, the involved parties must create a written document outlining the terms of the agreement. The agreement must encompass all pertinent particulars, encompassing the specifics of the mutually agreed-upon settlement, timetable for implementation, and means for resolving disputes in the event of agreement violation. Every party concerned must thoroughly examine and digitally endorse the agreement.

The Administrative Court Judge, acting as the law enforcer in the E-Musyawararah (Electronic Musyawarah), will register all signed agreements in the Administrative Court's e-court. These agreements will be ratified and hold the same legal weight as a decision made by the Administrative Court in the administrative field, by the authority of the Almighty God.

It is crucial to emphasize that the E-Musyawararah resolution process, as an ADR method, necessitates strong collaboration and effective communication among all parties involved. Furthermore, it necessitates strict compliance with the regulations and protocols outlined in the agreement established during the deliberation process. The agreed-upon agreement must be adhered to conscientiously, enabling the parties to conduct their operations without any interruption and in a peaceful manner.

The author's worry about the development of administrative disputes has led to the notion of E-Musyawararah (Electronic Musyawararah) as an ADR method. This concept originated from the author's comprehension of Lawrence M. Friedman's[33] legal system theory, which serves as a framework for national development strategies in legal reform. Lawrence M. Friedman contends that any reform should delineate various elements, including legal structure, legal substance, and legal culture.

The notion of E-Musyawararah is connected to the legal system theory and aims to reform by focusing on changing the legal structure. E-Musyawararah is an ADR mechanism utilized outside the Administrative Court. It represents a significant advancement in the legal domain for settling administrative conflicts. Furthermore, there is a noticeable transition in the legal culture of our day. This notion is preparing civilization, which is currently in the 5.0 era characterized by AI, Robots, and IoT, to transition into the era of Artificial Intelligence (AI). While the explicit presence of legal material may not be apparent, the restrictions outlined by the author can be connected to establishing particular guidelines for E-Musyawararah.

Legal challenges faced by the concept of E-Musyawarah as Alternative Dispute Resolution (ADR) for resolving Administrative Disputes Outside the Court

Administrative disputes are frequently complex and time-consuming, necessitating a methodical effort by the parties involved in their resolution. The E-Musyawarah method provides a complete framework for effectively resolving administrative problems promptly. The procedure is carried out in a series of logical

[33] L.M. Friedman, *The Legal System: A Social Science Perspective* (Russell Sage Foundation, 1975).

stages, each contributing to the ultimate objective of arriving at a settlement that is acceptably acceptable to both parties.

Beginning with the application's registration and submission, the conflict settlement process gets underway. Parties that are interested in resolving administrative disputes through the use of E-Musyawarah begin the procedure by submitting a comprehensive application on the platform that has been allocated for this purpose. The foundation is this application, which contains all of the necessary information regarding the disagreement, such as the relevant facts, the parties engaged, and the claims submitted throughout the dispute.

Immediately following the application's acceptance and registration, the administrative staff verifies that they have received the matter and thoroughly documents it. This phase focuses on verifying required data and documents and lays the groundwork for the succeeding steps in the conflict resolution process.

Mediation and Preliminary negotiations are the next steps. They invite the disputing parties, including the applicant and the opposing party, to participate in mediation or preliminary negotiations through the E-Musyawarah platform. During this phase, the primary purpose is facilitating dialogue and investigating potential solutions acceptable to all parties concerned.

After that, the conflict resolution team will conduct an in-depth analysis and performance evaluation. During this crucial stage, additional research into the facts provided, a review of the arguments proposed, and an appraisal of acceptable prospective solutions are all required.

The parties meet and negotiate using the study's insights as a foundation. Under these circumstances, they attempt to reach a mutually advantageous consensus by engaging in open dialogue, exchanging arguments, and further deliberating on suggestions for potential solutions.

After the parties have settled, the agreed-upon parameters are formalized into a Settlement Agreement. This paper outlines the particulars of the agreed-upon solution, including the separate responsibilities each party is responsible for in implementing the agreement.

Following the establishment of the agreement, the monitoring and enforcement phase will occur. The team responsible for resolving disputes monitors the implementation of the agreement and ensures that its requirements are adhered to. This means keeping an eye on the actions taken by each party by the agreement created and taking action in situations where there is a breach or non-compliance.

Electronic Musyawarah in administrative disputes refers to using electronic means to facilitate discussions and decision-making processes in resolving administrative conflicts. Legal equality is a crucial principle that ensures fairness and equal treatment for all parties concerned. However, it also presents a legal obstacle.

Legal parity in the idea of deliberation is crucial to guarantee that all participants in the deliberation process have equitable opportunities to access the law and that their rights are impartially upheld.

The idea of deliberation in the notion of E-Musyawarah in administrative disputes is a method employed to address disagreements or divergent viewpoints that arise in administrative disputes. Deliberation in administrative problems is frequently the first step towards attaining a peaceful resolution and preventing litigation.

Legal equality poses a legal challenge to the concept of E-Musyawarah as ADR due to various supporting factors. These factors pertain to the equal treatment of the applicant who files a request or lawsuit against a state administrative decision and the official responsible for the decision.

More information needs to be provided between the applicant and the decision-making official. Officials typically possess superior access to information, procedures, and legal processes, whereas applicants may need equivalent access. Applicants may need help comprehending the underlying rationale behind the decisions rendered, which might hinder their ability to construct compelling arguments or provide substantial evidence supporting their appeals.

Information asymmetry arises when one party possesses superior or more comprehensive access to pertinent information. Officials making choices may have access to internal or sensitive information not accessible to applicants. This encompasses several types of information, such as data, reports, internal documents, or any other crucial information essential for comprehending the decision's foundation. Officials making decisions may better understand the appropriate legal procedures, laws, policies, or best practices for administrative conflicts. This suggests that individuals who make judgments frequently possess more expertise and institutional authority than those who apply.

The concept of the burden of proof. Applicants may encounter challenges in demonstrating the invalidity or lack of legal basis of a state administrative decision made by government personnel. They must present compelling and definitive proof to contest the decision's validity, which might be difficult due to the officials' discretionary power.

The burden of proof signifies that parties must assist one another in collecting evidence and presenting arguments truthfully and impartially. It necessitates the participation of an impartial third party to evaluate the evidence and facilitate the process. The involvement of a third party helps ensure that the burden of proof is evaluated unbiased and equitably.

Legal equality is a crucial aspect of contemporary society, leading to the implementation of stringent regulations through several legal mechanisms to guarantee the fair and equitable protection of individual rights under the law. A

cooperative attitude among all parties concerned is necessary. A just, transparent, and efficient process of resolving conflicts can be achieved by guaranteeing legal parity within the framework of E-Musyawarah as an ADR mechanism outside the Administrative Court for settling administrative disputes. This approach enables all parties to reach satisfactory resolutions while preserving or enhancing their relationships.

Conclusion

Using E-Musyawarah as an ADR method for settling administrative conflicts outside the court system demonstrates a growing inclination towards employing information and communication technologies to promote dispute resolution outside the traditional judicial framework. E-Musyawarah is founded on the notion of deliberation. While there are no explicit regulations specifically governing E-Musyawarah as an ADR method in Indonesia, it can be associated with the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018), eIDAS, Perka BPA Mediation, the Electronic Information and Transactions Law, and the Government Administration Law.

E-Musyawarah is implemented through the use of electronic or virtual rooms, which can make use of Apple Version Pro technology. These rooms are facilitated by an Administrative Court Judge who acts as a mediator. The E-Musyawarah resolution is reached through consensus utilizing electronic signatures, and the agreement is then recorded in the E-Court to obtain a ruling equivalent to that of the Administrative Court, based on divine authority. This concept emerges from the author's apprehension regarding the proliferation of administrative disputes in conjunction with Lawrence M. Friedman's view of the judicial system.

The issue of legal parity is the primary obstacle encountered by the notion of E-Musyawarah as an ADR mechanism for settling administrative conflicts outside the court system. E-Musyawarah, in the context of administrative disputes, strongly emphasizes the principle of legal equality. Legal equality is a legal challenge due to several supporting factors. These factors encompass unequal access to information between the individual applying and the authority responsible for making the decision, as well as the requirement for the applicant to provide sufficient evidence to support their case.

Legal equality is a crucial aspect of contemporary society, leading to the implementation of stringent regulations through several legal mechanisms to guarantee the fair and equitable treatment of individual rights under the law.

The Administrative Court aims to enhance technology integration in the judicial system by promoting the concept of E-Musyawarah as an ADR method for resolving administrative disputes outside of court. This innovative approach seeks

to instil a sense of justice and trust among the public regarding electronically resolving administrative disputes through the Administrative Court.

Resumo: O desenvolvimento contínuo dos litígios administrativos destacou a necessidade de Métodos Alternativos de Resolução de Conflitos (ADR) para solucionar essas disputas fora do sistema judicial na Indonésia. O conceito de E-Musyawarah representa uma forma de ADR que oferece novas perspectivas jurídicas. O método de coleta de dados utilizado nesta pesquisa é baseado em dados secundários obtidos por meio de pesquisa bibliográfica, com o referencial teórico fundamentado na teoria do sistema jurídico de Friedman. O conceito de E-Musyawarah como um ADR para a resolução de disputas administrativas extrajudiciais reflete a tendência de utilização de tecnologias da informação e comunicação para facilitar a resolução de conflitos fora do Judiciário. A solução alcançada pelo E-Musyawarah é formalizada com assinaturas eletrônicas registradas no E-Court, conferindo-lhes a mesma validade jurídica que as decisões do Tribunal Administrativo. Contudo, esse conceito também enfrenta desafios jurídicos, especialmente no que diz respeito à igualdade perante a lei.

Palavras-chave: Indonésia. E-Musyawarah. Métodos Alternativos de Resolução de Conflitos (ADR). Resolução de Disputas Administrativas. Teoria do Sistema Jurídico. Tecnologia da Informação e Comunicação (TIC) no Direito.

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Evolution of sports arbitration: from paper-based to digital evidence in football disputes

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Abstract: Digitalization poses many challenges to sports law, including the issues related to using digital evidence in sports arbitration. As one of the most popular sports, football has given rise to many sports controversies. Parties increasingly use digital evidence to prove their position, which requires arbitrators' correct and professional assessment. The paper aims to explore the challenges digital evidence poses in sports, specifically focusing on football. The research is primarily focused on the admissibility of digital evidence and hacked and leaked evidence, given football's susceptibility to data breaches. Applying comparative legal analysis and case study through an analysis of existing literature, legal frameworks, and case law allowed us to scrutinize a spectrum of digital evidence utilized by litigants to illuminate the admissibility standards adopted by arbitral tribunals. As a practical implication, the authors proposed practical guidance to stakeholders and adjudicators on managing and evaluating digital evidence in sports arbitration.

Keywords: Sports Arbitration. Digital Evidence. Case Law. Hacked and Leaked Evidence. Practical notes.

Introduction

Digitalization presents ongoing challenges to society, particularly within the legal sphere. Traditional paper-based proceedings are rapidly becoming obsolete,

with many jurisdictions transitioning to digital platforms.[1] While digitalization offers numerous advantages, such as increased efficiency, accessibility, and sustainability, it also poses challenges in preserving due process and managing evidence in the digital realm.[2]

Digitalization has transformed not only sports themselves but also sports law, inevitably influencing sports dispute resolution.[3] Therefore, it is crucial to study digital evidence in sports disputes today. This paper aims to explore the challenges digital evidence poses in sports, with a specific focus on football. The paper scrutinizes the spectrum of digital evidence utilized by litigants by applying comparative legal analysis and case studies, including examining existing literature, legal frameworks, and case law. It sheds light on the admissibility standards adopted by arbitral tribunals.

1 The concept of digital evidence

In legal contexts, the terms "electronic evidence", "digital evidence", or "computer evidence" are often used interchangeably, though their exact usage may vary across literature.[4] Digital evidence refers to any material in digital form adduced to establish a fact. Therefore, it encompasses data created, manipulated, stored, or transmitted by any computer or electronic device.

Domestic statutes usually define the types of evidence in general terms, that is, the most used types of evidence in court and arbitration tribunals: real evidence, demonstrative evidence; documentary evidence; and testimonial evidence. In general terms, evidence can be testimony, documents, photographs, videos, voice recordings and other legal admissible means.

Most domestic statutes provide comprehensive definitions for the types of evidence commonly used in courts and arbitration tribunals. These definitions typically encompass a wide range of evidence, including real evidence, demonstrative

1 FERREIRA, D. B., GROMOVA, E., & TITOVA, E. V. (2024). The Principle of a Trial Within a Reasonable Time and Just Tech: Benefits and Risks. Human Rights Review, 1-20. https://doi.org/10.1007/s12142-024-00715-w.

2 PATRIKIOS, A. (2008). The role of transnational online arbitration in regulating cross border e-business – Part I. *Computer Law & Security Review*, *24*(1), 66–76. https://doi.org/10.1016/j.clsr.2007.11.005; Li, Z., Zheng, P., & Xie, H. (2024). Judicial digital intellectualization and corporate online misconduct. *Finance Research Letters*, *62*, 105117. https://doi.org/10.1016/j.frl.2024.105117.

3 JONSON, P., & HOYE, R. (2011). Sport law and regulation. *Sport Management Review*, *14*(3), 223–225. https://doi.org/10.1016/j.smr.2011.08.003; Reedy, P. (2023). Interpol review of digital evidence for 2019–2022. Forensic Science International Synergy, 6, 100313. https://doi.org/10.1016/j.fsisyn.2022.100313; ZHANG, J. K., ALIMADADI, A., REVEAL, M., DEL VALLE, A. J., PATEL, M., O'MALLEY, D. S., MERCIER, P., & MATTEI, T. A. (2023). Litigation involving sports-related spinal injuries: a comprehensive review of reported legal claims in the United States in the past 70 years. The Spine Journal, 23(1), 72–84. https://doi.org/10.1016/j.spinee.2022.08.012.

4 MASON, S., & SENG, D. (2021). *Electronic Evidence and Electronic Signatures* (p. 604). University of London Press. https://ials.sas.ac.uk/publications/electronic-evidence-and-electronic-signatures.

evidence, documentary evidence, and testimonial evidence. Evidence can take various forms, such as testimony, documents, photographs, videos, voice recordings, and other legally admissible means.

In both common law and civil law jurisdictions, the legal frameworks generally admit all forms of evidence, including those in digital format, with the ultimate consideration being the authenticity of the digital proof.

The UNCITRAL Model Law on International Commercial Arbitration (1985), with the 2006 amendments, serves as a critical international model law for arbitration. Article 7 (3)(4) of Option I of this Model Law, for instance, acknowledges the validity of an arbitration agreement concluded by electronic communication. However, procedural rules in arbitration allow the parties to select the procedure they wish to follow, as Article 19 of the UNCITRAL Model Law outlines. Hence, guidelines for assessing evidence and arbitration rules are deemed essential for any thorough analysis in this context.

In contemporary legal practice, there is a noticeable decline in paper-based proceedings, with videoconference hearings[5] increasingly replacing or complementing in-person hearings. This shift reflects the broader trend toward digitalization in dispute resolution, characterized by efficiency, accessibility, and sustainability. This era is often called the "digital multi-door courthouse", highlighting the emergence of digital dispute resolution (DDR).[6]

The realm of dispute resolution is no exception to this trend. Institutions, such as the CBF's NDRC, the Brazilian Center for Mediation and Arbitration (CBMA), and the Court of Arbitration for Sport (CAS), have adopted virtual proceedings. For instance, the CBMA, which previously relied on paper-based processes, transitioned to a fully digital system post-pandemic.

As sports dispute resolution institutions manage their proceedings digitally, all evidence eventually takes on an electronic form. Consequently, the admissibility and weight of digital evidence and the sports dispute institution's rules become critical considerations in these contexts.

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5 FERREIRA, D. B., GIOVANNINI, C., GROMOVA, E., & DA ROCHA SCHMIDT, G. (2022). Arbitration chambers and trust in technology provider: Impacts of trust in technology intermediated dispute resolution proceedings. *Technology in Society*, *68*, 101872. https://doi.org/10.1016/j.techsoc.2022.101872. See also FERREIRA, D. B., GIOVANNINI, C., GROMOVA, E. A., & FERREIRA, J. B. (2023). Arbitration chambers and technology: witness tampering and perceived effectiveness in videoconferenced dispute resolution proceedings. *International Journal of Law and Information Technology*, *31*(1), 75-90. https://doi.org/10.1093/ijlit/eaad012

6 PALANISSAMY, A., & KESAVAMOORTHY, R. (2019). Automated Dispute Resolution System (ADRS) – a proposed initial framework for digital justice in online consumer transactions in India. Procedia Computer Science, 165, 224–231. https://doi.org/10.1016/j.procs.2020.01.087.

2 Digital evidence in sports disputes: the issue of admissibility

In legal proceedings, it is crucial to distinguish between the admissibility and relevance of evidence. Admissibility pertains to whether evidence is legally permissible for consideration by the judge or arbitrator. At the same time, relevance concerns the degree to which evidence logically proves or disproves a fact, a determination made by the adjudicator based on their experience and common sense.

Arbitral tribunals, as granted by article 19 (2) of the UNCITRAL Model Law on International Commercial Arbitration, hold the power to determine the admissibility, relevance, materiality, and weight of any evidence. However, this provision does not explicitly address evidence in electronic form, which leaves room for interpretation.

Similarly, the 1996 Brazilian Arbitration Act (Article 22) and the 1987 Swiss Private International Law Act (PILA) (Article 184[1]) empower arbitral tribunals to admit and assess evidence as they deem necessary, including the authority to conduct the taking of evidence themselves. The PILA further allows tribunals (Article 182 [2]) to determine procedural matters without party agreement.

The tribunal's broad discretion to analyze evidence admissibility and relevance is also reflected in the institution's arbitration rules.

In the context of Brazilian football dispute resolution, the ecosystem is comprised of the following entities: The Brazilian Football Confederation (CBF) National Dispute Resolution Chamber (NDRC),[7] and the Brazilian Center for Mediation and Arbitration (CBMA) serve as the primary dispute resolution bodies, with the CBMA acting as the appellate tribunal. The Anti-Doping Sports Courts of Justice handle the football doping cases,[8] with the Court of Arbitration for Sport (CAS) serving as the institution for appeals.

The rules governing the assessment of evidence play a paramount role in shaping the decision-making process in Brazilian football dispute resolution institutions such as the CBF-NDRC, CBMA, and CAS.

Article 16, §1º of the CBF-NDRC rules mandates that the NRCD (National Dispute Resolution Chamber) must freely assess the evidence, making decisions based on its conviction and providing reasons for its conclusions in the final decision. Conversely, the CBMA's ordinary and appellate sports arbitration rules are silent on the method of evidence assessment, although, in practice, the tribunal enjoys broad discretion.[9]

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7 CBF – Câmara Nacional de Resolução de Disputas – CNRD. https://www.cbf.com.br/a-cbf/cnrd/index. Accessed 22 April 2024.

8 Tribunal de Justiça Desportiva Antidopagem. https://www.gov.br/esporte/pt-br/composicao/orgao-colegiado-1/tribunal-de-justica-desportiva-antidopagem#:~:text=O%20Tribunal%20de%20Justi%C3%A7a%20Desportiva,of%20Arbitration%20for%20Sport%20%2D%20CAS. Accessed 22 April 2024.

9 See the rules at https://cbma.com.br/arbitragem/regulamento-de-arbitragem-esportiva/. Accessed 22 April 2024.

CAS Article R57 similarly empowers the tribunal to assess evidence, explicitly stating that the tribunal has the discretion to exclude evidence if it was already available before the rendering of the appealed decision.[10] This provision aims to prevent surprises in the appeal process and to discourage arbitration guerrilla tactics. Article R57 also underscores the panel's full authority to review the facts and the law.[11]

In the jurisprudence of the Court of Arbitration for Sport (CAS), a nuanced approach is taken regarding excluding evidence, particularly in cases where evidence was not produced in the initial proceedings: *Article R57(3) of the CAS Code gives a CAS panel discretion, but not the obligation, to exclude evidence that was not produced in first instance. Consequently, the panel is not limited to considerations of the evidence that was adduced previously and can examine all new evidence produced before it. It should exclude evidence with restraint, only when there is a clear showing of abusive or inappropriate behavior. In this context, a sports association does not behave abusively when it mandates new reports from integrity betting companies with a view to clarifying some diverging interpretations put forward by the appellant. For the same reasons, the jurisprudence on the prohibition of post-facto evidence is not relevant, it being specified that it would in any case not result in a finding of inadmissibility, but in a diminution of the probative value of the said reports.*[12]

Notably, neither institutional arbitration rules nor guidelines nor domestic arbitration laws in Brazil specifically address the authentication requirements for evidence, including digital evidence.

In international arbitration, two prominent guidelines govern the taking of evidence: the International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration,[13] and the Efficient Conduct of Proceedings in International Arbitration (Prague Rules) from 2018.[14] When endorsed by the parties and adopted by the arbitral tribunal, these guidelines establish parameters for conducting proceedings and assessing evidence. The IBA Rules, in particular, serve as a bridge between different legal cultures,[15] reflecting procedures from various legal systems with a predominant influence from the common law tradition. Despite being considered soft law, these guidelines are valuable for resolving domestic and cross-border sports disputes.

[10] See CAS 2012/A/2797, and CAS 2020/A/7117.
[11] CAS – Code: Procedural Rules. https://www.tas-cas.org/en/arbitration/code-procedural-rules.html. Accessed 22 April 2024.
[12] CAS 2022/A/8651.
[13] IBA Rules. https://www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b. Accessed 22 April 2024.
[14] Prague Rules. https://praguerules.com/prague_rules/. Accessed 22 April 2024.
[15] IBA Rules Foreword, p. 5.

When considering the admissibility of digital evidence, Article 9 of the IBA Rules on the Taking of Evidence in International Arbitration is a crucial reference point. This article grants the arbitral tribunal the authority to reject evidence for various reasons, such as lack of relevance, legal impediments, or considerations of procedural efficiency. Significantly, Article 9(3) allows the tribunal to exclude evidence obtained illegally, such as hacked evidence or evidence violating privacy, upon request or at its discretion. However, the *Commentary on the revised text of the 2020 IBA Rules* notes that national laws vary on the admissibility of illegally obtained evidence, leading to diverse decisions by arbitral tribunals.

On the other hand, the Prague Rules, while not explicitly defining documents, champion efficiency in document production. Article 4.2 encourages the arbitral tribunal and parties to steer clear of extensive document production, including e-discovery, in order to streamline proceedings. Moreover, as per Article 4.7, documents must be submitted or produced in photocopies and/or electronically, with the tribunal having the authority to request originals for examination.

To assist parties in efficiently producing electronic evidence, the International Chamber of Commerce (ICC) has issued helpful reports. The 2016 ICC Commission Report on Managing E-Document Production,[16] and the 2018 ICC Commission Report on Controlling Time and Costs in Arbitration guide cost-effective strategies.[17] The 2016 report suggests considering five factors for the scope of production: timing, number, and focus of requests; specificity of requests; accessibility of sources; metadata; and use of electronic tools and methods. These resources serve as valuable tools for parties navigating the complexities of electronic evidence in arbitration.[18]

In arbitration, each institution establishes specific procedural rules that provide guidelines for handling evidence by detailing evidentiary procedures or leaving a gap for arbitrators to determine the best approach in conjunction with the parties. This discretion grants arbitrators significant latitude in assessing evidence. Regardless of its form, arbitrators are tasked with evaluating evidence for admissibility, weighing its probative value, and ultimately determining its impact on the case.

In football disputes, the practices observed in Brazilian arbitration institutions, namely the NDRC and CBMA, illustrate a broad approach to evidence admission,

[16] The document is copyright 2012, but the date of publication is July 2016, available at https://iccwbo.org/wp-content/uploads/sites/3/2022/01/icc-arbitration-adr-commission-report-on-managing-e-document-production-english-version.pdf. Accessed 22 April 2024.

[17] https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/icc-arbitration-commission-report-on-techniques-for-controlling-time-and-costs-in-arbitration/. Accessed 22 April 2024.

[18] FERREIRA, D. B., & GROMOVA, E. A. (2023). ELECTRONIC EVIDENCE IN ARBITRATION PROCEEDINGS: EMPIRICAL ANALYSIS AND RECOMMENDATIONS. Digital Evidence & Elec. Signature L. Rev., 20, 30. https://doi.org/10.14296/deeslr.v20i.5608.

encompassing both analogic and digital forms. Subsequently, arbitrators deliberate on the weight of this evidence when rendering decisions. A critical divergence between commercial arbitration and sports disputes lies in the parties involved, with sports disputes often featuring individuals rather than corporate entities. This distinction leads to a more informal mode of communication, significantly impacting the types of evidence presented. Notably, social media messages, particularly those from platforms like WhatsApp, have emerged as pivotal evidence in Brazilian sports disputes, as evidenced by an analysis of evidence adduced in CBMA sports cases.[19]

In digital evidence, arbitrators must consider three fundamental factors: authenticity, provenance (authorship), and preservation (chain of custody). They must ensure that the evidence is authentic, potentially aided by a certificate of authenticity, verifying its authorship, and meticulously documenting its life cycle to minimize the risk of fraud and enhance reliability. When faced with uncertainty, arbitrators must seek the expertise of specialists to validate the digital evidence in question.

In CAS jurisprudence, a party challenging the authenticity of evidence must substantiate their claim of forgery with an expert opinion: *It is for the party alleging that the signature is a forgery to request an expert opinion to verify authenticity or initiate proceedings before competent penal authorities. In the absence of evidence, the authenticity of the signature must be presumed.*[20]

3 Digital evidence in sports disputes: the issue of hacked and leaked evidence

In the realm of arbitration, the admissibility of digital evidence obtained through unauthorized means, such as hacking, presents a multifaceted challenge. This is primarily due to the lack of a uniform approach across jurisdictions, which further complicates the matter. The term 'hacker' denotes an individual who intentionally gains unauthorized access to computer systems.[21] Consequently, in state courts or arbitration proceedings, hacked evidence refers to digital documents, data, or images acquired through unauthorized access to computer systems. Conversely, leaked information involves private data obtained through illegal or prohibited

[19] FERREIRA, D. B., & GROMOVA, E. A. (2023). Electronic evidence in arbitration proceedings: empirical analysis and recommendations. Digital Evidence & Elec. Signature L. Rev., 20, 30, p. 38.

[20] CAS 2021/A/8292.

[21] FURNELL, S. M., & WARREN, M. J. (1999). Computer hacking and cyber terrorism: The real threats in the new millennium? *Computers & Security*, *18*(1), 28-34. https://doi.org/10.1016/S0167-4048(99)80006-6.

means and subsequently disclosed to the public.[22] The distinction is that hacked information is acquired by an external party with unauthorized access. In contrast, leaked information is obtained by an internal party with authorized access but shared without authorization.

International arbitration jurisprudence places significant emphasis on the inadmissibility or exclusion of digitally obtained evidence procured by parties involved in cyberattacks, i.e., hacked evidence. This is based on the grounds of violating the *clean hands doctrine*,[23] a legal principle that dictates a party with unclean hands, having breached the duty of good faith, cannot benefit from evidence obtained illegally.

On the other hand, arbitration tribunals have more widely admitted leaked evidence, provided that it meets standards of reliability, authenticity, and accuracy. However, arbitrators should seek the original documents rather than rely solely on leaked documents in the public domain.[24]

A notable example is the 2020 case of Manchester City FC v. UEFA before the Court of Arbitration for Sport (CAS), in which leaked emails were admitted as evidence after undergoing reliability tests. The CAS decision emphasized the importance of authenticating leaked evidence for admissibility, highlighting the tribunal's cautious approach towards evidence obtained through unauthorized means: *The Panel notes that the matter of the authenticity of the Leaked Emails was resolved because MCFC ultimately – at least partially – submitted the unredacted original versions of the Leaked Emails into evidence.* [...] *To avoid any doubt in respect of the authenticity of the Leaked Emails, the Panel does not rely on the Leaked Emails, but on the original versions thereof provided by MCFC on 18 May 2020. For ease of reference, the Panel however continues to refer to the Leaked Emails. The award also cites CAS jurisprudence stating that if a means of evidence is illegally obtained, it is only admissible, if the interest to find the truth prevails. The tribunal also considered the fact that the leaked emails were already in the public domain and are highly publicized, i.e. that they are not alleged to have been illegally obtained by UEFA.*[25]

In arbitration, particularly within the jurisdiction of the Court of Arbitration for Sport (CAS), the treatment of illegally obtained evidence presents a complex and

[22] FREEMAN, L. (2020). Hacked and Leaked: Legal Issues Arising from the Use of Unlawfully Obtained Digital Evidence in International Criminal Cases. UCLA J. Int'l L. Foreign Aff., 25, 45. https://escholarship.org/content/qt5b87861x/qt5b87861x.pdf. Accessed 22 April 2024.

[23] WORSTER, W. T. The Effect of Leaked Information on the Rules of International Law (2013). American University International Law Review, 28, 443-464.

[24] FERREIRA, D. B., & GROMOVA, E. A. (2023). Digital Evidence: The Admissibility of Leaked and Hacked Evidence in Arbitration Proceedings. International Journal for the Semiotics of Law-Revue internationale de Sémiotique juridique, 37, 903-922. https://doi.org/10.1007/s11196-023-10014-1.

[25] CAS 2020/A/6785

nuanced challenge. In a notable case, the Swiss Federal Tribunal acknowledged the general principle in Swiss doctrine that illegally obtained evidence is unusable but also recognized exceptions to this principle. After a meticulous examination, the Tribunal upheld a CAS decision in which the arbitral Tribunal admitted specific evidence: *The arbitral tribunal carried out an individual examination of the various interests affected and did not admit all evidence, but rather, based on a balance of interests, considered the transcript of an illegally tape-recorded telephone conversation with a player involved to be unusable and only took another video recording into account because the complainant and other appellants referred to this to exonerate themselves*.[26]

The nuanced approach of CAS jurisprudence is further exemplified through notable cases in which unlawfully obtained evidence was deemed admissible. Notably, in a doping case (CAS 2011/A/2384), CAS permitted the testimony of an anonymous witness. In contrast, in a match-fixing case (CAS 2013/A/3258), complete transcripts of intercepted text messages and recorded phone calls acquired by Turkish authorities were considered.

Leaked documents in football disputes represent a critical area of concern for stakeholders. Given the fervor associated with football, including prominent clubs and players, important documents such as contracts and communications are susceptible to hacking and subsequent leaks. To mitigate these risks, stakeholders must, therefore, prioritize investment in cybersecurity tools and compliance regulations.

CAS has established criteria for admitting leaked evidence, emphasizing the reliance on original versions, the overriding interest in establishing the truth, and should also adhere to the clean hands' doctrine. In the context of leaked evidence already in the public domain, this doctrine underscores CAS's approach to balancing the interests at stake.

These cases underscore a growing ambiguity surrounding the concept of illegally obtained evidence. While principles such as *ex turpi causa non oritur action (no action can arise from an illegal act)* are foundational in common law, they may not apply straightforwardly to leaked evidence presented by a third party with clean hands. CAS jurisprudence highlights the Tribunal's authority to assess evidence, weigh conflicting interests, and determine admissibility considering these complexities.

[26] ATF 4A_362/2013. https://www.bger.ch/ext/eurospider/live/fr/php/aza/http/index.php?highlight_docid=aza%3A%2F%2F27-03-2014-4A_362-2013&lang=fr&type=show_document&zoom=NO&. Accessed 23 April 2024.

4 Guidelines for the use and assessment of digital evidence in efficient sports arbitration

The proliferation of digital evidence in arbitration underscores the imperative for parties and arbitrators to acquire expertise in digital forensics.[27] Parties, in particular, must devise strategies to produce digital evidence, especially in e-discovery, cost-effectively. Leading arbitration institutions' guidelines, such as those from the ICC, serve as invaluable resources. Additionally, parties should prioritize enhancing the reliability of the evidence they present, with authentication being key to compliance with jurisdictional regulations.

Moreover, parties should be adept at identifying reliability red flags in digital evidence proffered by their counterparts, enabling them to challenge its inclusion in arbitration proceedings. Arbitrators, on the other hand, are tasked with assuming an active role in overseeing the production of evidence, including evaluating the authenticity and reliability of digital evidence, a responsibility underscored by jurisdiction-neutral guidelines crafted to assist in this assessment.

Arbitrators must strike a delicate balance between upholding due process and avoiding undue paranoia (*due process paranoia*) regarding evidence. A well-reasoned arbitration award detailing the rationale behind any decision to exclude evidence significantly enhances its enforceability. Therefore, arbitrators are duty-bound to exclude fraudulent digital evidence, or any evidence deemed inadmissible, thus ensuring the integrity of the arbitration process.

Conclusion

Sport, especially football, embodies intense passion, substantial financial stakes and a multitude of powerful stakeholders, including managers, players, athletes and clubs. With the integration of the digital sphere and the digitization of arbitration procedures, electronic evidence has become commonplace. This includes but is not limited to emails, text messages, social media posts and videos. The skills required to effectively obtain and evaluate this form of evidence are not only useful, but crucial. Legal practitioners and arbitrators should receive comprehensive training and seek professional help to build their arguments and make judgments based on such evidence.

The field of sport is particularly susceptible to evidence leakage, prompting arbitrators to reflect on its implications, especially when the pursuit of truth is paramount. In addition, arbitrators must weigh its admissibility if the evidence

[27] KESSLER, Gary C. (2011). Judges' Awareness, Understanding, and Application of Digital Evidence, Journal of Digital Forensics, Security and Law. 6, 1, 55-72. https://doi.org/10.15394/jdfsl.2011.1088.

has been made public. Judges should consider the clean hands doctrine if a party contributed to the evidence of tampering.

In general, the legal and arbitration framework gives arbitrators broad discretion in evaluating evidence. This discretion underscores the importance of arbitrators being well-versed in the nuances of the digital landscape, allowing them to exercise their discretion wisely.

A evolução da arbitragem esportiva: A passagem das provas em papel para as provas digitais nas disputas no futebol

Resumo: A digitalização apresenta muitos desafios para o direito esportivo, incluindo questões relacionadas ao uso de provas digitais nas disputas arbitrais. Como um dos esportes mais populares, o futebol gera muitas controvérsias esportivas. As partes cada vez mais utilizam provas digitais para sustentar suas posições, o que exige uma avaliação minuciosa e profissional por parte dos árbitros. O objetivo deste artigo é explorar os desafios que as provas digitais representam no esporte, com foco específico no futebol. A pesquisa concentra-se principalmente na admissibilidade das provas digitais e nas provas hackeadas e vazadas, dado o risco de violações de dados sensíveis do futebol. A aplicação da análise jurídica comparativa e do estudo de caso, através da análise da literatura existente, dos frameworks legais e da jurisprudência, permitiu examinar uma gama de provas digitais utilizadas pelos litigantes e demonstrar os padrões de admissibilidade adotados pelos tribunais arbitrais. Como uma implicação prescritiva, os autores propuseram orientações práticas para partes interessadas e adjudicadores sobre como gerenciar e avaliar provas digitais na arbitragem esportiva.

Palavras-chave: Arbitragem esportiva. Provas digitais. Jurisprudência. Provas hackeadas e vazadas. Notas Práticas.

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Indigenous tourism as an instrument to avoid conflicts between Arctic development and indigenous resilience

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Abstract: Over the last decades, tourism has experienced continued growth and deepening diversification to become one of the fastest-growing economic sectors in the Arctic. As a new phenomenon, Indigenous tourism is closely linked to sustainable development and encompasses a growing number of northern indigenous peoples and specific methods of interaction with nature and society. This research aims to focus on indigenous tourism as an effective tool for balancing emerging economies of the Arctic region and sustainable or resilient development of the Arctic aboriginal peoples who have been inhabiting this region for thousands of years. It suggests that Indigenous tourism and activities encompass several tools to prevent conflicts, reach decisions, raise environmental awareness, and teach sustainable values. This idea is relevant for all Arctic states where development is justified mainly by economic perspectives, not indigenous resilience. The topic is also appropriate for the global community because sustainable development is understood as the only possible future where people must correlate economic, environmental and social dimensions and prevent conflicts within those. The paper describes one Arctic region in the Russian Federation – the unique and intriguing Yamalo-Nenets Autonomous District. The author believes that this region, with its distinct opportunities and features, is a prime example of how indigenous tourism can be used as an instrument to avoid conflicts, taking into account sustainability factors, guaranteeing the interests of the indigenous population, and expanding the tourist experience towards sustainable values.

Keywords: Indigenous peoples. Tourism. Arctic. Russia. Conflict prevention.

Concept of indigenous tourism

The Arctic covers about 15 thousand km^2 of pristine and untouched lands and vast wilderness areas. The Arctic territories are global biodiversity reserves

and unique indigenous culture.[1] The natural resources in the Arctic have been used for millennia for hunting, grazing, fishing and other traditional resource use, more recently for commercial activities, for example, road construction, oil and gas development since the 1960s and tourism in the last decades.[2] With broadening knowledge about the High North, accessibility of its territories and increasing popularity of the Arctic over the past 15 years, more and more people want to see this region. Mass tourism in the northern destinations will inevitably change the nature and culture of Indigenous peoples and impact them environmentally, socially and economically.[3]

The World Tourism Organization, the Tourism Council and the Earth Council define sustainable tourism as:

> Sustainable Tourism Development meets the needs of present tourists, host regions while protecting and enhancing opportunity for the future. It is envisaged as leading to management of all resources in such a way that economic, social and aesthetic needs can be fulfilled while maintaining cultural integrity, essential ecological processes, biological diversity and life support systems.[4]

On the one hand, the economic potential of Arctic tourism activities is underestimated. For example, across the vast territory of the Russian North, there is a substantial imbalance between what the territory can provide and what the tourism industry can utilize.[5] Although the design of the tourism experience forming in the course of tourist routes has been described in some research,[6] recent studies pay less attention to its monetary benefits.

On the other hand, tourism in the Arctic region can cause conflicts between the economic units undertaking the tourist activities, Indigenous communities leading the traditional economic activities (reindeer herding, fishing, etc.) and the environment experiencing pressure on natural ecosystems. Thus, tourism should be organized sustainably, albeit with consideration for the environment and the traditional lifestyles of Indigenous peoples.[7] In this way, tourism can become the main instrument of regional economic development, in which the local community is the beneficiary but not the victim.

To target this goal the Arctic communities need to foster 'Indigenous tourism' led by Indigenous peoples and based on core principles of their worldview and

1 LUKIN, 2016a, p. 212-213.
2 See: FAY & KARLSDÓTTIR, 2010; KAJAN, 2013; LOKTEV, 2015, STONEHOUSE & SNYDER, 2010.
3 BARRE et al., 2016.
4 SUSTAINABLE TOURISM, 2018.
5 USENYUK & GOSTYAEVA, 2016.
6 McCOOL & MOISEY, 2008; TUSSYADIAH, 2014; USENYUK & GOSTYAEVA, 2016.
7 CHEN, 2014; HILLMER-PEGRAM, 2016; KAJAN, 2013.

attitudes towards the Arctic: compatibility and conservation; preservation of wilderness and biodiversity; sustainable use of natural resources; consumption, waste and pollution abatement; respect for local cultures; preservation of historic and scientific sites; benefits for local communities; responsibility; opportunity for the Arctic studies; safety rules.

These principles contribute to resolving all conflicts that might arise when tourist activities are going on across ancestral lands of Indigenous peoples, sacred areas, fragile environmental ecosystems, etc. They can become critical factors for fostering environmentally and socially responsible behaviors, providing particular explanations before and during tourist activities.

To exemplify and verify the concept of Indigenous tourism, the author of this paper conducted research in the territory of Yamalo-Nenets Autonomous District in 2022-2023. The Yamalo-Nenets Autonomous District was chosen because vulnerable Arctic ecosystems and unique traditional cultures make sustainable indigenous tourism the most preferred form of tourism in this area.[8] Each stage of the tourist route in the Yamal land is the platform to study traditional values, attitudes, and customs following sustainable development goals. In this way Indigenous tourism in the territories of the northern Indigenous peoples can become an effective tool for balancing the dimensions of sustainable development (economic, environmental and social).

The Arctic is considered one of the most attractive tourism destinations,[9] and the Yamal region is the most suitable for this. Besides, many researchers describe the dependence of tourism on climate change.[10] The effect of climate change on tourism is inevitable and ambiguous. On the one hand, climatic changes are assessed as increasing the attractiveness of the Arctic and making tourism more popular. On the other hand, the increasing availability of the Arctic aggravates threats to local people and the environment.

The study proves that values of sustainable development are compatible with traditional indigenous values. Traditional values have a historical background and define unwritten rules of the economic life of people and aesthetic perception of the surrounding world. They are reflected in religious beliefs, arts, traditional occupations, and folklore.[11] Researchers believe sustainable development goals can be more successfully achieved if based on traditional indigenous values.[12] We supported this conclusion with regard to legislation on sustainable development

8 LOKTEV, 2015; CHEMCHIEVA, 2015.
9 CHEN, 2014; USENYUK & GOSTYAEVA, 2016, p. 23-24.
10 HOVELSRUD, POPPEL, van OORT & REIST, 2011; KAJAN, 2013. See also: GLADUN & AHSAN, 2016.
11 ABRYUTINA, 2004; OOSTHOEK, 1999.
12 BERNA GÖRMEZ & YAMAN, 2012.

enacted on the international level as well as in Russia and the Yamalo-Nenets Autonomous District.[13]

The study aims to introduce new tools of avoiding conflicts between Arctic development and Indigenous resilience via indigenous tourist activities and teaching indigenous values.

Main tools for conflict prevention and resolution related to tourist economic activities and Indigenous resilience

Indigenous tourism stands out as a unique approach to conflict prevention and resolution, particularly in the context of Arctic development and indigenous resilience. Unlike conventional tourist routes, those proposed by Indigenous peoples are not centered on mere 'sightseeing' or 'activities'. Instead, they serve as platforms for 'lessons' and 'storytelling', through which Indigenous communities impart their values, unique culture and traditions, and traditional way of life.

The educational potential of sustainable Indigenous tourism is significantly enhanced through the rich storytelling of local traditions and the demonstration of a traditional way of life. These stories, which detail how behavior models and limitations were embodied and transmitted in the culture of Indigenous peoples, serve as valuable lessons for sustainable development for contemporary people.

Learning about sustainable development through the narrative of indigenous peoples' experiences can occur during the tourist route. Forms of teaching sustainable values during the tourist itinerary are:

- Problem-oriented situations.
- Studying traditional lifestyles and occupations.
- Storytelling.
- Participating in events and holidays.
- Lessons on sustainability.

The comparative methods applied to ethnographic materials and field projects in the Yamal District make it possible to learn more about the life of the northern Indigenous peoples (their traditions, fairy tales, and rituals) and contrast their attitudes to the economic goals of Indigenous tourism. Based on those methods, different tools can be formulated to avoid conflicts between economic, environmental, and social targets in indigenous tourism in the Arctic.

[13] GLADUN & ZAKHAROVA, 2016.

– Tool 1. Assessment of the consequences in economic decision-making process (responsibility)

The northern indigenous peoples adhere to their own worldviews and mythological beliefs. According to Nenets and Mansy, living in the Yamal District, the universe is a coherent system of three 'worlds': if someone is born in the upper world, someone dies in the lower one. The upper world is eternal; the middle world is for birth and death; the lower world is for the dead.[14] Thus, the mythology of indigenous peoples asserts the appropriateness of all living beings and human beings must not destroy the existing world order and interrelations.

Indigenous peoples are aware of the universe's interconnectedness, visible in the reindeer herding: 'Only if there are pastures, there will be deer and Khanty, Mansi, Nenets remain in the world'.[15] The sustainability of traditional herding is mirrored in the interdependence of animals and human life – pasture area must be proportionate to the needs of reindeer herding. In case of its reduction, the life is endangered.

The daily routine of Indigenous peoples is also a part of the universe's interconnections. Khanty, Mansy and Nenets do not plan, and their days are scheduled according to the weather. If the hunter gets up in the morning and does not feel like going anywhere, he follows his feelings and decides to do household chores, reasoning that on such a day, the game does not fly, the animal rests, and the fish does not appear.[16]

Therefore, a crucial tool for conflict prevention could be the consideration of the feelings and awareness of Indigenous peoples. Their unique perspective, rooted in their understanding of the interconnectedness of the universe, could significantly contribute to discussions about the use of their territories for industrial development or other economic activities. By acknowledging and respecting their perspective, we can promote understanding and prevent potential conflicts.

Tool 2. Governance is necessary for the society and its cohesion in achieving the sustainable development (accordance)

Indigenous traditions, knowledge, rules of behavior in the environment, and traditional skills are not just cultural elements, but also crucial contributors to sustainable development. These are deeply rooted in the cosmological and religious beliefs of the northern Indigenous peoples.[17] Applying indigenous traditional knowledge

[14] KULEMZIN, 1984, p. 170.
[15] MOLDANOVA & MOLDANOV, 2010, p. 15-16.
[16] Ibidem, p. 33-34.
[17] INDIGENOUS PEOPLES OF THE NORTH, 2014.

in land use, resource use, and ecological planning underscores its significance in preserving and promoting such knowledge and traditional rules for future generations.

Traditional knowledge is better transferred through ritual songs, geographical songs, religious songs, personal songs and fairy tales, which are demonstrated during Indigenous tourism.[18] For example, through the fairy tale of Khanty and Mansi, a child learns that fire is dangerous for the forest. Still, water is stronger than fire, and land wins over water, absorbing it, but a water monster can swallow the earth, and boys armed with bows and arrows can kill the beast. Boys can fall through the ice; the sun can melt the ice, etc. Via indigenous tourism, a visitor learns that all phenomena of nature are interconnected and to anticipate danger in some situations. Indigenous peoples recommend using a fairy tale and its considerations to avoid conflicts.

Tool 3. Limits and restrictions in behavior (balance)

Indigenous peoples living in extreme northern conditions for centuries follow the rule of 'few people on a large territory', enabling them to maintain the necessary level of hunting and fishing reserves and pasture conditions. This rule is determined by the slow rate of biological resource reproduction in the North.[19] It is essential nowadays in the conditions of intensive industrial development of the Arctic territories.

Numerous examples illustrate traditional economic activity regulations – certain bird species are considered commercial. Religious and mythical rules protect certain species, which cannot be hunted during the nesting period.[20] Indigenous peoples use the resources they need for food. Greed is considered a sin that can cause the wrath of the gods. Compliance with such rules contributes to maintaining biological diversity in the northern territories. Within Indigenous tourism, a person learns how to assume definite restrictions and impose them on economic activities.

Tool 4. Human beings are entitled to a healthy and productive life (life in harmony with nature)

Indigenous peoples' deep reverence for the environment is evident in their admiration for life in all its forms. For instance, there is a tradition to only shoot a beast within a certain distance. It is believed that if the beast desires to live, it will not present itself to the hunter. A perched bird may be taken, but a bird in

[18] MOLDANOVA & MOLDANOV, 2010, p. 120.
[19] INDIGENOUS PEOPLES OF THE NORTH, 2014.
[20] MOLDANOVA, 2004, p. 95.

flight is off-limits.[21] Those who disregard these rules of nature face retribution from the gods, emphasizing the importance of maintaining nature's equilibrium. Elaborate rituals and offerings made to the gods after a hunt serve as a reminder to Indigenous people of the weight of their actions.[22]

The effectiveness of traditional indigenous activities, such as those of nomads, hunters, and fishermen, hinges on their profound knowledge of animals, birds, and fish, their spatial navigation skills, and their understanding of natural and weather phenomena. This knowledge, passed down through generations, is embedded in traditional arts and everyday objects, like clothing.[23] The worldview of Indigenous peoples is mirrored in their art. For instance, traditional songs portray a settlement as an integral part of the surrounding environment; everything in the world is depicted as a unified whole. The most prevalent motif is a journey, which allows for the depiction of the river, snow, deer, people, historical events, and the beauty of the girls,[24] all of which Indigenous peoples consider indispensable.

The worldview of Indigenous peoples can be likened to a 'fishing net cast over the world'. It governs the entire universe, ensuring its coherence while being selective, flexible, and fundamentally open-ended.[25] This worldview fosters a society that is remarkably adaptable and resilient, a testament to the ingenuity and resourcefulness of Indigenous peoples.

Tool 5. The interests of future generations (justice)

The rituals associated with the traditional activities aim to secure the production at present and in the future.[26] Bones of animals are placed in a certain way so that the animal could rise again; aboriginal people often address local spirits or particular natural objects with a request for resources. This demonstrates one of the main lessons of sustainable development and conflict prevention principle – intergenerational justice.

Tool 6. Rational use of resources (economy)

Very often, Indigenous peoples show their houses and households to tourists. It is organized rationally – extended families can share small spaces without disturbing each other. Everything is multi-functional; for example, only necessary things in a reindeer herding camp can be packed and taken away quickly.

21 KULEMZIN, 1984, p. 93.
22 Ibidem, p. 95.
23 SYAZI, 2000, p. 19.
24 MOLDANOVA & MOLDANOV, 2010, p. 120.
25 SAGALAEV, 1991, p. 23.
26 KULEMZIN, 1984, p. 82.

In an integrated economy, everyone is engaged in elementary and natural crafts without any specialization to provide themselves with everything necessary. These examples manifest a vital tool – rationality.

Tool 7. Environmental values

Many indigenous traditions and rituals demonstrate environmental values and thoughtfulness towards any human activity. Environmental problems relevant to the Arctic require immediate and practical solutions based on a deeper understanding of their political, economic, and social background. The environmental issues of the Russian state have deep historical roots based on a 'resource' or 'consumerist' approach to economic development.[27] Alternatively, Indigenous environmental values are reflected in 'nature's laws' – generalizations already evident in what we now know about the ecosphere, and that can be organized into a kind of informal set of laws of ecology. Ecology has not yet explicitly developed cohesive, simplifying generalizations exemplified by laws of physics or other natural studies. Still, some observations in this realm were done by famous biologist and environmentalist Barry Commoner:[28]

Everything is connected to everything else. There is one ecosphere for all living organisms, and what affects one affects all.

Everything must go somewhere. There is no 'waste' in nature and no place where things can be 'thrown away'.

Nature knows best. Human beings have invented technology to improve nature, but such change in a natural system is, says Commoner, 'likely to be detrimental to that system'.

There is no such thing as a free lunch. Exploitation of nature will inevitably involve converting resources from functional to useless forms.

Lessons of sustainability in Indigenous tourism

Indigenous tourism contributes to the studies and educational modes of 'sustainability', which are considered an environmental, economic, and social goal for people to co-exist on Earth for a long time.

The traditions and mentality of the northern indigenous peoples correspond to sustainable development ideas. The indigenous traditions restricted people's activities while using natural resources. Indigenous ancient wisdom describes the dependence of economic activities on natural conditions and gratitude towards

[27] GLADUN & ZAKHAROVA, 2017.
[28] COMMONER, 1971.

nature. Indigenous arts glorify the beauty of nature, making people think about the importance of nature for human development.

Cultural and societal factors imply the potential social effects of tourism's contribution to social development[29] — tourism-related business impacts residents' traditional nomadic way of life and routine activities. Local people are not ready to experience mass tourism, and their survival (in a physical sense and cultural preservation) is still highly dependent on the environment. Indigenous peoples have certain religious restrictions they consider important, while tourists find meaningless,[30] discouraging local communities' positive attitudes towards tourism.[31] Nonetheless, the tourist business might be essential for maintaining traditions, holidays, and traditional crafts;[32] in this case, the indigenous peoples are interested in its development. Additionally, increasing tourism contributes to the quality of life in the territories, such as accessibility of communications. The objective of researchers is to improve the interactions of tourists with local communities and with operating oil and gas companies to guarantee the interests of all stakeholders in the Arctic.[33]

Conclusion

Arctic indigenous peoples – Khanty, Mansi, Nenets – have created a civilization that is the most viable and adaptive to the harsh northern conditions, climatic changes and needs of human society. The main features of the traditional economy, culture and way of life can be considered effective tools of conflict prevention and resolution conditioned by vital necessity, and tourists visiting the Arctic region have an opportunity to witness those tools in practice, visiting camps and participating in traditional occupations.

Indigenous tourism demonstrates various preventive tools in the paradigm of sustainability to avoid conflicts between environmental, economic, cultural and societal factors. Environmental factors are associated with the vulnerability of Arctic ecosystems, seasonal accessibility and severe climate.[34] Social factors are linked to indigenous civilization, which has existed for thousands of years and has become resilient. The economic experience of these peoples is paradoxical: the economy of northern peoples is complex (it is not specialized), extensive (intensive

[29] FAY & KARLSDÓTTIR, 2010.
[30] GRIMWOOD, 2015, p. 4.
[31] STEWART, DRAPER & DAWSON, 2011.
[32] LOKTEV, 2015, p. 110.
[33] CHEMCHIEVA, 2015, p. 45.
[34] LUKIN, 2016a, p. 212-213.

use of resources in the Arctic is harmful to nature), and appropriating (while the modern economy is of a 'producer type').

A significant role in the implementation of indigenous tourism principles and tools belongs to administrative support and efficient legal regulations. In the Yamalo-Nentes Autonomous District, the Law "Protection of the Original Habitat and Traditional Way of Life of the Northern Indigenous Peoples in the Yamalo-Nentes Autonomous District" was enacted in 2006. It regulates indigenous rights, regional government policy, and powers to preserve indigenous culture and the environment. In 2006, the regional legislative authority adopted a law, "Objects of Cultural Heritage (Monuments of History and Culture) of the Population Living in the Territory of the Yamalo-Nenets Autonomous District". The law provides the basic principles and rules on protecting, preserving and using cultural objects. The indigenous culture issues are regulated by the law "Folklore of Indigenous Peoples in the Yamalo-Nenets Autonomous District". The objective of the law is to protect the cultural diversity, rights, and identity of the indigenous population of Yamal. In addition, district programs aim to preserve Indigenous peoples' cultural heritage. For example, there was a program, "Preservation, Use, Popularization and State Protection of Cultural Heritage Objects of the Yamal-Nenets Autonomous District for 2009-2011". As a result of the program implementation, a system of recording cultural heritage sites was established, and measures for their use and protection were performed.

It is crucial to recognize that dramatic changes in the Arctic can both negatively and positively affect the region's development. These changes can generate threats to resilience and sustainability and can have a global impact on the traditional lifestyle and culture of the northern indigenous peoples and biodiversity. Therefore, sustainable tourism in the Arctic region should be organized based on the traditional knowledge, values, and lifestyle of the northern indigenous peoples. Their knowledge and practices, which have consistently demonstrated social responsibility, a strong commitment to nature, and integration with the natural environment, are vital for the preservation of indigenous culture.

Thus, the main goal of Indigenous tourism developing in the Arctic is to achieve resilient advantages for the local communities while preventing damage to the natural environment.

O turismo indígena como instrumento para evitar conflitos entre o desenvolvimento do Ártico e a resiliência indígena

Resumo: Nas últimas décadas, o turismo tem experimentado um crescimento contínuo e uma diversificação aprofundada, tornando-se um dos setores econômicos de maior crescimento no Ártico. Como um fenômeno novo, o turismo indígena está intimamente ligado ao desenvolvimento sustentável e envolve um número crescente de povos indígenas do norte e métodos específicos de interação com a natureza e a sociedade. Esta pesquisa foca no turismo indígena como uma ferramenta eficaz para equilibrar as economias emergentes da região ártica e promover o desenvolvimento sustentável ou resiliente dos povos aborígenes que habitam esta região há milhares de anos. Sugere-se que o turismo

indígena e suas atividades envolvem várias ferramentas para prevenir conflitos, alcançar decisões, aumentar a conscientização ambiental e ensinar valores sustentáveis. Essa ideia é relevante para todos os estados árticos, onde o desenvolvimento é justificado principalmente por perspectivas econômicas e não pela resiliência indígena. O tema também é apropriado para a comunidade global, pois o desenvolvimento sustentável é entendido como o único futuro possível, no qual as pessoas devem correlacionar as dimensões econômica, ambiental e social e prevenir conflitos entre elas. O artigo descreve uma região do Ártico na Federação Russa — o único e intrigante Distrito Autônomo de Yamalo-Nenets. A autora acredita que essa região, com suas distintas oportunidades e características, é um exemplo emblemático de como o turismo indígena pode ser usado como instrumento para evitar conflitos, levando em consideração fatores de sustentabilidade, garantindo os interesses da população indígena e expandindo a experiência turística para valores sustentáveis.

Palavras-chave: Povos indígenas. Turismo. Ártico. Rússia. Prevenção de conflitos.

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Underlying policy considerations for assigning the applicable substantive law in international commercial arbitration

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Abstract: In international commercial arbitration, when the parties do not choose any law to govern the substance of their disputes, arbitrators are responsible for doing so. The inherent flexibility of the arbitrator's discretion makes this task critical, as their decision can significantly impact the outcome of the arbitration. This article aims, to examine relevant policies that underlie an arbitrator's choice of the applicable substantive law in the absence of the parties' choice. It employs a comprehensive blend of secondary research and analytical methodologies, to identify and evaluate the nature of these policies, highlighting their possible extremes and, or irreconcilable elements. This article highlights the distinction between the direct and indirect methods used to assign the applicable substantive law and questions the practical application of these methods by arbitrators. It also explores relevant policies from three perspectives – a transnational perspective, a party perspective and a jurisprudential perspective. The findings suggest that specific, policy considerations influence the arbitrator's decision-making process, regardless of the method employed to assign the applicable substantive. By understanding and assessing these policy considerations, arbitrators can make informed decisions when assigning the applicable substantive law in international commercial arbitration.

Keywords: International Commercial Arbitration. Applicable Substantive Law. Arbitrator Discretion. Choice of Law. Policy Considerations.

1 Introduction

The national arbitration laws and the rules of most arbitration institutions, allow parties to freely choose not only the procedural provisions that will affect the conduct of their arbitration proceedings but also the law that will govern their

substantive rights and obligations.[1] Simultaneously, these national and institutional arbitration laws generally also grant arbitrators a wide margin of discretion to assign applicable substantive law[2] when the parties fail to select one.[3] Consequently, in international commercial arbitration, the applicable substantive law is identified in two distinct ways – parties choose the applicable substantive law, or arbitrators assign the governing law.[4]

Where arbitrators must assign applicable substantive law in the absence of the parties' choice, the methods they employ differ according to whether or not they are specifically required to apply conflict of law rules to make the determination.[5] The UNCITRAL Model Law on International Commercial Arbitration of 1985 (UNCITRAL Model Law)[6] for instance provides that the tribunal "shall apply the law determined by the conflict of laws rules which it considers applicable".[7] In contrast, the UNCITRAL Arbitration Rules of 1976 (UNCITRAL Arbitration Rules)[8] do not mention conflict of laws and provide that when parties have not designated a governing law, the tribunal "shall apply the law or rules of law which it considers to be most appropriate".[9] The case of the former involves a two-step process. First, arbitrators must identify which conflict of laws rules they should use. Second, according to those rules, they must determine which law will govern the substance of the dispute. In the latter case, the language allows arbitrators to determine substantive law without first conducting a conflict of laws analysis. Determining the applicable substantive law without applying conflict of laws rules is considered a direct method (*voie directe*), whereas determining the applicable substantive law using a conflict of laws analysis is regarded as an indirect method (*voie indirecte*).

The distinction between the direct and indirect methods used to assign the law applicable to the merits of a dispute enjoys doctrinal prominence only in international arbitration.[10] One could argue successfully that the distinction between

1 GAILLARD, Emmanuel, SAVAGE, John. Fouchard, Gaillard, Goldman on International Commercial Arbitration. The Hague: Kluwer Law International, 1999, pp. 865-866; MOSES Margaret L. The Principles and Practice of International Commercial Arbitration. Cambridge: Cambridge University Press, 2008, pp. 76-77.

2 In this contribution the terms applicable substantive law and governing law may be used interchangeably.

3 Gaillard & Savage, supra note 1, at 865-866; Moses, supra note 1, at 76-77.

4 Each approach has its distinct processes, making the two means differ in nature. Whereas parties have the freedom to determine the terms and conditions of their agreement, allowing them to shape the contract according to their preferences and mutual consent, arbitrators would have to choose the applicable law, having regard for the parties' expectations and circumstances of each case. This contribution focuses on the instances where arbitrators must assign the applicable substantive law.

5 BELOHLAVEK, Alexander J. Substantive Law Applicable to the Merits in Arbitration. *Romanian Review of Arbitration,* vol. 30, no. 2, p. 1, 2014.

6 UNCITRAL Model Law on International Commercial Arbitration with amendments adopted in 2006 (1985).

7 Article 28(2) of the UNCITRAL Model Law 1985.

8 UNCITRAL Arbitration Rules with art 1, paragraph 4, as adopted in 2013 and art 1, para 5, as adopted in 2021, 1976.

9 Article 35(1) UNCITRAL Arbitration Rules, 1976.

10 BERMANN, George A. International Arbitration and Private International Law. Leiden: Brill, 2017, p. 341.

the two methods is predominantly artificial.[11] Assuming the arbitral tribunal is to apply the indirect method, one may wonder if they in practice follow the two-step system when assigning the applicable law or directly identify the applicable law without following the required steps. Conversely, assuming the direct method is to be followed in a particular scenario, it is improbable that arbitrators will choose the applicable law without any choice of law analysis. Though it would appear that the direct choice of the substantive law exists in an analytical vacuum, in practice, arbitrators may have referred to an unacknowledged choice of law rule.[12]

The reality is that, despite the method used by arbitrators to assign the applicable substantive law, some policy considerations are pertinent to the decision-making process. The flexibility inherent in arbitrator discretion rests on deeply entrenched, practical considerations.[13] In this contribution are some significant policies underlying the arbitrator's choice of the applicable substantive law in international commercial arbitration. The article identifies and evaluates the nature of such policies. The critical question is, what are the possible extremes and, or irreconcilable elements of these policy considerations, and how are they likely to shape the arbitrator's standard for assigning the applicable substantive law?

2 Methodology

This contribution is grounded in a desktop study that utilized a comprehensive blend of secondary research and analytical methodologies. The secondary research encompassed a thorough assessment of available literature, including books, journal articles, legislation, and regulations on international commercial arbitration. These sources facilitated the identification and examination of pertinent policies that could impact the arbitrators' selection of the applicable substantive law in international commercial arbitration. Furthermore, an analytical strategy was adopted to evaluate the relevant policies that may affect arbitrators' choice of the applicable substantive law in international commercial arbitration, with emphasis on potential extremes and, or irreconcilable elements.

3 Three perspectives on policy considerations

In international commercial arbitration, where an arbitrator must determine the applicable substantive law, there are three perspectives to consider in terms

[11] *Idem* at 342.

[12] Although the arbitrator must give reasons for their choice, they might not have indicated the specific choice of law rule they relied on but merely describe the process they followed.

[13] PARK, William W. The 2002 Freshfields Lecture - Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion. *Arbitration International*, vol. 2, no. 2, p. 285, 2003.

of policy considerations.[14] The first perspective is the transnational one. The transnational nature of international arbitration means that the dispute necessarily involves elements that are foreign vis-à-vis a particular country. Numerous factors may connect an arbitration to a specific jurisdiction – the parties, arbitrators, or the underlying contract itself.[15] For this contribution, transnational policy considerations are concerned with the extent to which one ought to consider the fact that an international arbitration dispute involves a range of legal systems and their collective and individual impact on the arbitration process. Although international commercial arbitration does not automatically have a direct link to any particular national legal system,[16] it is prudent for arbitrators to, for instance, take greater account of the involvement of the various jurisdictions that may have a connection to a dispute.[17] Here, arbitrators may consider questions such as which jurisdiction has a substantial connection to the dispute and in which jurisdiction may enforcement potentially be sought by parties. It is also essential to acknowledge that the collective adherence to norms and practices by countries underpins the validity and legitimacy of the international arbitration process.[18]

Second, there is the party perspective. Every arbitration case is inherently unique, differing in sets of facts, circumstances, arbitrators, and parties involved.[19] Party policy considerations, for this contribution, are concerned with the individuality of the facts of the arbitration and how they affect the ultimate result. The diverse needs and interests of the parties must be carefully considered when determining the applicable substantive law. The parties' intention to apply a non-national standard to their arbitration, for instance, can be deduced from the terms of their contract and, or their peculiar circumstances.[20] Also, what is just and fair in one case may be unjust and unfair in another. Arbitrators therefore must strive to select a rule that considers all case-specific factual connections. This is important because the choice of law can significantly affect the outcome of the arbitration, and the rights of the parties involved.

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14 GAILLARD, Emmanuel. International Arbitration as a Transnational System of Justice in Albert Jan van den Berg (ed.), In: Arbitration: The Next Fifty Years. The Hague: Kluwer Law International, 2012, pp. 66-73; CHEATHAM, Elliott E. Problems and Methods in Conflict of Laws. *Collected Courses of The Hague Academy of International Law*, vol. 99, pp. 291-307,1960. http://dx.doi.org/10.1163/1875-8096_pplrdc_A9789028613621_04.

15 Gaillard & Savage, supra note 1, at 45-51.

16 Gaillard & Savage, supra note 1, at 868.

17 This is because the disputes that come before international arbitrators involve parties from different countries or regions, each of which may have its own laws and legal systems that could impact the outcome of the case.

18 Gaillard, supra note 14, at 67.

19 BORN, Gary B. International Commercial Arbitration. 3rd ed. The Hague: Kluwer Law International, 2021, pp. 4080-4081.

20 KÖNIG, Michal. Non-State Law in International Commercial Arbitration. *Polish Yearbook of International Law* pp. 265, 269-275, 2015.

Third, there is the jurisprudential perspective. Like any other rule, one can evaluate a choice of law rule used in international commercial arbitration based on its jurisprudential merits — it can be, for instance, praised for producing consistent and predictable results.[21] Conversely, it also can be criticized for the complexity it could introduce into the arbitration process.[22] In this contribution, jurisprudential policy considerations are concerned with identifying qualities that are most desirable for a choice of law rule used in international commercial arbitration and how the arbitrators' choice of the substantive law is likely to be influenced by prevailing jurisprudential expectations.

3.1 Transnational policy considerations

This section outlines two significant transnational policy considerations that may influence an arbitral tribunal's choice of applicable substantive law when the parties have failed to select one – dependence on sovereign support, and reliance on the collective actions of legal systems.

a. Dependence on sovereign support

The legality and effectiveness of international arbitration depend upon the support of different national systems of law, mainly, the arbitration laws of the country which is the seat of the arbitration and those of the country or potential countries within which recognition and enforcement of arbitral awards are to be sought.[23] Even a staunch contractual theorist will attest that international arbitration, to an extent, operates and, or exists due to sovereign benevolence.[24] An interplay between the private arbitration process and the different national legal systems is present and may manifest at almost any phase of the arbitration proceedings.

Often, national arbitration laws stipulate a category of disputes deemed incapable of resolution by arbitration, even if the parties have otherwise agreed to arbitrate such matters.[25] A country may legislate to make a subject matter non-arbitrable for various reasons – from the desire to protect the exclusive interests

[21] FAWCETT, James J. Policy Considerations in Tort Choice of Law. *Modern Law Review*, vol.47, no. 6, p. 650, 1984.

[22] Although arbitrating international disputes presents advantages over litigation in national courts, it can also give rise to the choice of law issues that can be just as complex as those encountered in litigation.

[23] REDFERN, Alan, HUNTER, Martin, BLACKABY, Nigel, & PARTASIDES, Constantine. Redfern and Hunter on International Arbitration: Student Version. 6th ed. New York: Oxford University Press, 2015 p. 58.

[24] BARRACLOUGH, Andrew, WAINCYMER, Jeff. Mandatory Rules of Law in International Commercial Arbitration. *Melbourne Journal of International Law*, vol. 6, p. 214, 2005.

[25] BORN, Gary B. International Arbitration: Law and Practice. The Hague: Kluwer Law International, 2012 pp. 1412, 1427-1429.

of parties, to safeguarding the parties deemed weak.[26] Regardless of the reasons for setting the boundaries of arbitrability, sovereign interests undeniably play a role in arbitration.

Furthermore, national courts are generally ready to aid the arbitration process once a dispute is arbitrable in a jurisdiction.[27] A party in the initial stages of arbitration may have to ask the relevant national court to enforce an agreement to arbitrate or, in some instances, ask the court to appoint the arbitral tribunal by instituting legal proceedings. During the arbitration, a court retains certain general statutory powers and functions, which it may exercise in support of arbitration proceedings at any time, on the application of any party.[28] Such powers and functions are facilitative and supervisory and are essential for the collaboration between the courts and arbitral tribunals in resolving disputes between parties. By supporting arbitration conducted within their territory, countries reasonably can claim some degree of control over it, ensuring that certain minimum standards of justice are met, especially in procedural matters.[29] After the arbitral tribunal renders a final award, it typically has nothing more to do with the dispute.[30] It is generally accepted that national courts may be called upon to recognize and enforce an international arbitral award. In this regard, national courts may have to determine whether the parties involved adhered to specific minimum standards of due process, whether the subject matter of the award was arbitrable in terms of its laws, and whether the award does not violate any public policies.[31]

When the arbitral tribunal must determine the applicable substantive law, it must take cognizance of the role played by national legal systems in the survival and development of international arbitration as an institution. Although arbitrators have no obligation to uphold the public policy interests or mandatory rules of any particular national legal system, they must take them into account when assigning the applicable substantive law.[32] An arbitrator's refusal to take cognizance of such interests imperils the arbitrability of disputes or enforceability of awards linked to those national interests.[33] Ideally, arbitrators should aim to find a correspondence between the actions taken by national legal systems, to safeguard their national or international commercial interests, and the parties' interests and reasonable expectations.

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[26] Determining whether or not a specific type of dispute is arbitrable under a particular law is fundamentally a question of public policy that the respective legal system must address. Redfern et al., supra note 23, at 112.

[27] Barraclough & Waincymer, supra note 24, at 214.

[28] *Idem*.

[29] Redfern et al., supra note 23, at 58-59.

[30] *Idem* at 606.

[31] *Idem*.

[32] ELCIN, Mert. Lex Mercatoria in International Arbitration. Doctor of Laws thesis: European University Institute, 2012, p. 388.

[33] *Idem*.

Acknowledging the significance of sovereign support for effective international arbitration is crucial, but it is essential not to exaggerate its importance.[34] It is imperative to acknowledge that the transnational nature of international commercial arbitration severs its mechanical connection to any specific national legal system. Presently, the effectiveness of international arbitration does not require that its binding effect stems from the national legal system of the country where an award happens to be issued.[35] The harmonization of the national laws that regulate the conduct of international arbitration and the recognition and enforcement of an award has created the potential for the recognition of arbitral awards in one or more enforcement jurisdictions without being ultimately anchored in the national legal system of the country where it was rendered.[36]

b. Reliance on the collective actions of legal systems

The legitimacy of arbitration can also find its basis in the collective actions of legal systems.[37] Views developed collectively through instruments like the UNCITRAL Model Law, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention)[38] and a variety of guidelines express common viewpoints held by national legal systems, on the proper conduct of arbitration to ensure its recognition as a legitimate adjudication method.[39] International arbitration does not promote a system of justice entirely divorced from national legal systems.[40] Rather, national legal orders through collective effort provide a relevant source of legitimacy for the arbitration agreement, the arbitration process, and the ensuing award.[41] Although an individual legal system may ultimately recognize an award on a territorial basis, it usually operates within a body of rules that numerous national legal orders have collectively agreed upon.[42]

Acknowledging that national legal systems collectively contribute to the validity and legitimacy of arbitration allows room for arbitrators to make evaluations that embrace international trends and standards.[43] Assuming the arbitral tribunal must determine the applicable law, they may consider international trends that reflect the consensus of nations to resolve the substantive issue. In such situations,

34 Redfern et al., supra note 23, at 58.
35 *Idem* at 59.
36 PAULSSON, Jan. Arbitration Unbound: Award Detached from the Law of Its Country of Origin. *International and Comparative Law Quarterly,* vol. 30, p. 359, 1981.
37 Gaillard, supra note 14, at 68; GAILLARD Emmanuel. The Representations of International Arbitration. *Journal of International Dispute Settlement,* vol. 1, no. 2, pp. 277-278, 2010.
38 The New York Convention, *available at* www.newyorkconvention.org/ (accessed 22 June 2023).
39 Gaillard, supra note 14, at 68.
40 Gaillard, supra note 14, at 69.
41 *Idem*.
42 Redfern et al., supra note 23, at 58.
43 Gaillard, supra note 14, at 68; Gaillard, supra note 37, at 278.

the arbitral tribunal may promote certainty in the arbitration process by endorsing majoritarian principles and rejecting outdated rules of law.[44] When the arbitral tribunal exercises its discretion based on laws and principles developed through a consensus among countries, it is unlikely that the legitimacy of the arbitrators' performance will be disputed.[45]

3.2 Party policy considerations

The section further highlights two crucial party policy considerations that may influence an arbitral tribunal's choice of the applicable substantive law when the parties fail to select one – party expectations, and justice and fairness.

a. Party expectations

Arguably, deliberation is one of the most crucial aspects of any arbitration process.[46] The term 'deliberation' connotes carefully considering or discussing something.[47] The broad nature of the term suggests that it does not confine itself to any specific stage within the arbitration process. It would therefore be erroneous to assume that only the final award is subject to arbitral deliberations.[48] It is more probable that the arbitral tribunal would render several decisions before reaching a final resolution in a case. Whether a decision qualifies as an award or is merely an act of procedural administration, it is subject to arbitral deliberations.[49]

In general, parties usually do not know how the arbitral tribunal ultimately arrives at and agrees on the various decisions they make within the arbitration process.[50] Apart from the totality of all arguments and motions put forward in the arbitration proceedings, the dispositive parts of the arbitral award and the reasons given for arbitration decisions, the deliberations of the arbitral tribunal generally remain obscured from the parties.[51] This, nevertheless, does not take away the obligation of arbitrators to make decisions that reflect party expectations and promote the integrity and legitimacy of international arbitration. Speaking of expectations may seem tenuous where parties have neglected to indicate the

44 Gaillard, supra note 14, at 70.
45 *Idem*.
46 DERAINS, Yves. The Arbitrator's Deliberation. *American University International Law Review* vol. 27, no. 4, p. 911, 2012; MOSK, Richard M. Practising virtue inside international arbitration: Deliberations of Arbitration. 1st ed. New York: Oxford University Press, 2015, p. 486.
47 GARNER, Bryan A., BLACK, Henry C. Black's Law Dictionary 9th ed. Minnesota: West, 2009, p. 492.
48 Mosk, supra note 46, at 486; Derains supra note 46, at 911-912.
49 Derains, supra note 46, at 912.
50 PRINCE, Nathalie A., HOOKER, William, TURNER, David. How Can Arbitrators Best Protect Their Deliberations from Disclosure: New Challenges and Opportunities in England. *Journal of International Arbitration* vol. 36, p. 259, 2019. https://doi.org/10.54648/joia2019011.
51 *Idem*.

applicable substantive law. Nevertheless, it is not surprising that these expectations and intentions guide arbitration proceedings.[52]

The question arises, therefore, what are party expectations of arbitration? Firstly, international arbitration itself has evolved from being viewed as a way of resolving relatively simple commercial disputes (or technical ones) by neutral third parties to a system that involves complex legal and factual issues, multiple jurisdictions and participants from diverse legal systems with varying levels of experience.[53] International commercial arbitration today is a significant legal business,[54] and it would be ignorant to assume that perceptions about it remain the same. Previously, parties primarily chose arbitration because they viewed it as a quick and efficient alternative to litigation.[55] Currently, it is simplistic to assume that parties choose international commercial arbitration merely to save costs and time.

International arbitration in the twenty-first century has become as formal, costly, time-consuming, and subject to uncompromising advocacy as litigation.[56] Parties engaging in international commercial arbitration today opt for this method over litigation for a multitude of reasons that extend beyond merely saving time and costs. These reasons include confidentiality, neutrality, privacy of process, finality of awards, utilization of decision-makers' expertise, and the ability to shape the arbitration proceedings.[57] The parties' decision to opt for arbitration signifies their expectation that a neutral, impartial, and independent decision-maker will resolve their dispute. In addition to these, commercial parties today are also increasingly attracted by the guarantee of fairness and justice in the arbitration process.[58] These virtues do not only attract parties to arbitration but also indicate what they expect from it as a dispute resolution mechanism.

Certainly, parties can have a contract that clearly outlines their desires and expectations from a dispute resolution mechanism. Yet, parties articulate minimal expectations about the proper role of arbitrators by merely selecting arbitration as their preferred dispute resolution mechanism.[59] Typically, it is their clear selection

[52] HAYWARD, Benjamin. Conflict of Laws and Arbitral Discretion - the Closest Connection Test. Oxford: Oxford University Press, 2017, p. 44.

[53] GLUCK, George. Great Expectations: Meeting the Challenge of a New Arbitration Paradigm. *American Review of International Arbitration* vol. 23, p. 236, 2012; Redfern et al., supra note 23, pp. 2-5.

[54] DEZALAY, Yves, GARTH, Bryant. Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes. *Law and Society Review*, vol. 29, pp. 27-64, 1995.

[55] Gluck, supra note 53, at 236.

[56] STIPANOWICH, Thomas J. Arbitration: The "New Litigation". *University of Illinois Law Review* vol. 2010, no. 1, pp. 8-9, 2010.

[57] *Idem* at p. 53.

[58] JAPARIDZE, Nana. Fair Enough? Reconciling the Pursuit of Fairness and Justice with Preserving the Nature of International Commercial Arbitration. *Hofstra Law Review* vol. 36, p. 1415, 2008.

[59] FRANCK, Susan D. The Role of International Arbitrators. [2006] 12 *ILSA Journal of International & Comparative Law*, vol. 12, p. 502.

of particular institutional arbitration rules under which the arbitral tribunal must exercise its discretion, or their agreement to a specific national arbitration law, that indicates and manages, to an extent, party expectations about the appropriate role of arbitrators or arbitration.[60] Assuming a dispute is submitted to the International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules 2022[61] instead of the International Chamber of Commerce (ICC) Arbitration Rules 2021,[62] it gives some indication of the expectation of the parties about the appropriate role of arbitrators. In the case of the former, for example, it is reasonable to expect the arbitral tribunal to consider the principles of international law and the preferences of the relevant Contracting States parties when reaching their decisions. Whereas in the latter's case, one can expect the arbitral tribunal to consider the autonomy of the disputing parties and the significance of commercial expectations when making decisions.

It is trite that when adjudicating a case, the arbitral tribunal must treat parties equally, fairly, and impartially to reach a just solution.[63] To achieve this, the arbitral tribunal usually leans towards decisions they are convinced to be fair and balanced in the particular circumstance. In arriving at such decisions, the arbitral tribunal would typically invoke arguments based on the analysis of what objectively conforms to the reasonable expectations of the parties at the relevant time – either when they conclude a contractual agreement or at its termination, even if there were external factors such as third-party interventions or force *majeure*.[64] In other words, the arbitral tribunal considers what the parties would have reasonably anticipated in the given circumstances.

When the arbitral tribunal must determine the applicable substantive law, for instance, the parties' expectations also guide its decisions. In the initial stages, where the arbitrator has to determine the applicable substantive law because the parties have failed to select one, they may consider the hypothetical will or intention of the parties.[65] Here, to satisfy the parties' expectations, arbitrators,

[60] *Idem* at 502-503.

[61] World Bank Group, International Centre for Settlement of Investment Disputes – ICSID, *available at* www.icsid.worldbank.org/ (accessed 24 June 2023).

[62] ICC Arbitration Rules 2021, *available at* www.iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/ (accessed 23 June 2023).

[63] FORTESE, Fabricio, HEMMI, Lotta. Procedural Fairness and Efficiency in International Arbitration. *Groningen Journal of International Law*, vol. 3, no.1, p. 112, 2015.

[64] NAIMARK, Richard W., KEER, Stephanie E. International Private Commercial Arbitration- Expectations and Perceptions of Attorneys and Businesspeople- A Forced-Rank Analysis. *International Business Lawyer*, pp. 203-209, 2002.

[65] Likely, this position would not be popular among common law jurisdictions arbitrators. An English arbitrator is unlikely to search for the applicable law using the hypothetical will of the parties. A tacit choice of law of law can only be inferred when it is reasonably clear that it is the genuine choice of the parties. BLESSING, Marc. Choice of Substantive Law in International Arbitration. *Journal of International Arbitration*, vol. 14, no. 2, p. 43, 1997.

when determining the governing law of the arbitration, are likely to remain as closely as possible within the parties' contractual intentions, whether tacitly or positively expressed. Instead of imposing extraneous concepts on the parties, it is preferable for the arbitral tribunal, as far as possible, to honor the genuine common intention of the parties in such situations.[66]

Also, in an instance where the arbitral tribunal merely takes notice of the absence of an express choice of law without considering the hypothetical will of the parties and then proceeds to determine the applicable law, party expectations may influence their ultimate choice of governing law.[67] In their search for the governing law, whether by applying appropriate conflict of laws rules or directly selecting the substantive law, the arbitral tribunal places significant emphasis on the parties' reasonable expectations during their deliberations. Assuming an established conflict of laws rule designates a particular national law as the governing law and the parties reasonably expected its application, the arbitral tribunal will presume the individual provisions of this national law are in line with the reasonable expectations of the parties in the context of their transaction. This presumption, however, may face rebuttal when one can demonstrate that the individual provisions of the national law conflict with the express or implied intentions of the parties, and thus no longer reflect the reasonable expectations of the parties to the dispute.[68]

The following two ICC cases illustrate the arbitrators' inclination to search for the mutual expectation of the parties either through the careful analysis of the correspondence exchange or by observing the parties' actions, reflecting what they hope to achieve or avoid. In these cases, the parties' instructions, even in the absence of their choice of governing law, were respected and valued to the same extent as if they had made a clear choice of law.

In the first case in point, ICC Case No 7375,[69] the dispute concerned a contract for the supply of goods (one of the nine contracts) concluded between an Iranian buyer (claimant) and an American seller (defendant). None of these contracts contained a choice of law clause. In this case, the defendant argued for the application of the law of Maryland, according to which the period specified by the statute of limitations had expired in their favor. They reasoned that the law of Maryland was applicable because Maryland was the place where significant contractual obligations were performed, specifically the manufacture of the goods. On the other hand, the claimants argued that Iranian law should apply and asserted

66 *Idem* at 44.
67 *Idem* at 43.
68 DOUG, Jones. Choosing the Law or Rules of Law to Govern the Substantive Rights of the Parties. *Singapore Academy of Law Journal,* vol. 26, pp. 926-927, 2014.
69 UNILEX, ICC Award No 7375, 1996, *available at* https://www.unilex.info/principles/case/625 (accessed 6 September 2023).

that there was no relevant limitation period under it. They argued that the law of Iran should apply since the contract was negotiated, and concluded, and its performance was closely connected to Iran.

Based on these arguments, the arbitral tribunal deduced that there was an implied negative choice[70] between the parties, and as such, the contract could not be subjected to the laws of either party.[71] The arbitral tribunal in this case considered the possibility of applying a neutral national law, the *tronc commun* doctrine,[72] or transnational rules of law and general principles of law. They ultimately decided to apply general principles of law and rules applicable to international contractual obligations that are recognized as legal standards and have gained widespread acceptance in the global community. In this case, the UNIDROIT Principles of International Commercial Contracts 2016 (UNIDROIT Principles)[73] were deemed to be the appropriate choice. Although the parties had not expressly chosen the governing law for their contracts, their conduct or silence indicated the laws they expected the arbitral tribunal to refrain from applying when resolving their case. The arbitral tribunal was empowered to select a governing law that was non-controversial and acceptable to all parties involved. The arbitral tribunal's ultimate decision to apply general principles of law and rules of law applicable to international contractual obligations, in this case, revolved around meeting the needs and expectations of the parties while respecting perceptions of sovereignty.[74]

The second case in point is ICC Case No 7110.[75] This was a case involving an Iranian government agency (claimant) and an English company (respondent). The parties entered several contracts relating to the sale, supply, modification, maintenance, and operation of specific equipment, and support services related to it. None of these contracts contained an express choice of law favoring a national law. However, some contracts contained provisions directing that the dispute settlement be conducted according to 'laws or rules of natural justice'. The claimant argued for the application of Iranian law since the contracts were signed

[70] An implied negative choice occurs when the arbitral tribunal reaches a negative inference, indicating that both parties sought to circumvent a specific national law. Blessing, supra note 65, at 45.

[71] In this sense, under no circumstances should the contracts be governed by the national law of either one of the parties.

[72] The *tronc commun* doctrine is based on the proposition that if parties to an international commercial transaction are free to choose, they would choose their national laws to establish a common consensus over international commercial arbitration. Redfern et al., supra note 23, at 201.

[73] UNIDROIT Principles of International Commercial Contracts of 2016, *available at* https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016/overview/ (accessed 10 October 2023).

[74] An analysis of the facts reveals that the Iranian claimant would probably not have entered the contracts if it had meant subjecting itself to the USA laws. Consequently, the arbitral tribunal's decision to apply general principles of law in this case helped maintain the claimant's sense of sovereignty. Blessing, supra note 65, at 45-74.

[75] UNILEX, ICC Award No 7110 1995, *available at* https://www.unilex.info/principles/case/713> (accessed 6 September 2023).

and performed there. They also later argued in the proceedings that, alternatively, the reference to 'natural justice' should be understood as an expression of the parties' intent for their dispute to find resolution through general principles of law. The respondent, however, argued that the arbitral tribunal should apply either English law or the general principles of law. As the party responsible for the characteristic performance, the respondents argued that English law had the closest connection with the contracts or that it was the place of habitual residence of the characteristic performer. In this case, the alternative claims of the parties both pointed to the applicability of the *lex mercatoria* to the substance of the case.

The majority of the arbitral tribunal held that the parties intended to exclude the application of any specific domestic law to their dispute.[76] In their view, the parties intended to have their contracts governed by the general principles and rules that are not enshrined in any specific national legal system. In this instance, the arbitral tribunal decided the UNIDROIT Principles reflected such general rules and principles that enjoy broad international consensus. To establish the applicable substantive law in this case, the arbitral tribunal did not consider the parties' contract in isolation. They analyzed the contracts considering the long-term relationship between the parties to infer the reasonable intentions and expectations of the parties regarding the governing law. The arbitral tribunal's mandate when establishing the applicable substantive law, in this case, considered the parties' concerns and expectations for the application of a neutral law, one that does not impose the law of one of the parties or any third-party country.[77] The authority of the arbitral tribunal stems from agreements between parties, underscoring the need to consider party intentions and expectations.

As will be demonstrated later in this contribution, regardless of the policies that might influence the arbitral tribunal's decisions, they typically consider party expectations when determining the applicable substantive law. Caution, however, is necessary when the arbitral tribunal considers party expectations. Specifically, arbitrators must take cognizance that many legal rules are designed to defeat the expectations of parties who, due to their dominant position, seek to take unfair advantage of others or, conversely, who require special protection.[78] Considering the expectations of the parties alone does not readily determine the range of application of such protective laws.[79] In such situations, the question of what substantive law is

[76] UNILEX, ICC Award No 7110, 1995, *available at* https://www.unilex.info/principles/case/713 (accessed 6 September 2023).

[77] UNILEX, ICC Award No 7110, 1995, *available at* https://www.unilex.info/principles/case/713 (accessed 6 September 2023).

[78] CHEATHAM, Elliott E., RESSE, Willis LM. Choice of the Applicable Law. *Columbia Law Review,* vol. 52, pp. 971-972, 1952.

[79] Party expectations have, for instance, been relied on to decide on the application of mandatory rules in international arbitration matters. However, it is essential to note that these expectations might conflict with the provisions of such regulations. Doug, supra note 68, at 928.

applicable must be determined by other considerations. Although the expectations of the parties are a valuable guide for determining the applicable substantive law, the arbitral tribunal may not always be able to accurately determine what these expectations are or what they were in the context of the contractual relationship.[80] In a complex multiparty international arbitration, for instance, establishing the common intention of parties may be impossible.

b. Justice and fairness

At an initial glance, one might have the impression that justice and fairness are the same concepts and that there is no need to distinguish between them.[81] The reality, however, is that these two concepts may be perceived and interpreted differently depending on the context in which they are employed. An all-encompassing definition of fairness or justice can thus not easily be given.[82] Nevertheless, by considering the variety of meanings and characteristics attached to fairness and justice, one would appreciate and comprehend the distinction between the concepts.

Fairness, in a broad sense, can be understood as a way of evaluating people or situations free from bias.[83] It ensures that every person within a group or situation is afforded an equal opportunity to benefit while guarding against the imposition of subjective views that could sway the outcome. Regardless, what may be fair to one person in a particular situation may not be perceived as fair to another. Fairness seeks to establish an equitable approach to handling decisions that impact others. In the context of a common law judicial system, fairness, in its broadest sense, includes the rules and procedures developed over the years which regulate how cases are conducted and the substantive results that the courts seek to attain.[84] In this sense, fairness, among other things, includes the right to be heard by an unbiased, independent court.[85] In other words, fairness deals with the impartiality of outcomes and the process by which the outcomes are achieved.[86] It may also include the fact that the court decided based only on the evidence and arguments before it. In legal settings, fairness refers to how people react to the law.[87] In a civilized society, fairness gives the justice system its moral force and acceptability.

[80] *Idem*.
[81] RAWLS, John. Justice as Fairness. *Philosophical Review*, vol. 67, p. 164, 1958.
[82] *Idem* at 64.
[83] GOLDMAN, Barry, CROPANZANO, Russell. "Justice" and "Fairness" Are Not the Same Thing. *Journal of Organizational Behavior,* vol. 36, pp. 313-318, 2015.
[84] TAVENDER, EDD. Considerations of Fairness in the Context of International Commercial Arbitrations. *Alberta Law Review,* vol. 34, pp. 509-510,1996.
[85] *Idem*.
[86] WAINCYMER, Jeffrey. Procedure and Evidence in International Arbitration. Alphen aan den Rijn: Kluwer Law International, 2012, pp. 13-14.
[87] Goldman & Cropanzano, supra note 83, at 315.

Over the years, philosophers have among other things considered the nature of justice as a desirable quality of society,[88] a moral virtue of behavior,[89] as well as how it applies to ethical and social decision-making.[90] It has been described as the virtue by which all people are given what is their due.[91] Others have suggested that justice is what the broader social structure has determined to be legally or ethically fitting.[92] This should, however, not be confused with an all-inclusive vision of what society considers suitable; it is only a part of it.[93] Justice is a standard to which society must adhere, whether willingly or unwillingly. The laws of civil society are like artificial chains binding people to obey the sovereign authority of the state in the pursuit of justice.[94] The diverse perspectives on the nature of justice make it challenging to generalize the term easily. It shifts and changes depending on how the situations to which it is being applied change.[95]

Despite the differences between the terms, scholars have described justice as fairness.[96] Justice is a broad and encompassing term that provides a standard to which social institutions apply the concept of fairness to different situations.[97] It is a standard by which political and legal systems seek to achieve fair and equitable results.[98] Perceivers of fairness judge it according to its consistency with their understanding of justice. Adherence to the rules and principles of justice should ideally promote perceptions of fairness.[99]

Justice and fairness are significant to the participants in international commercial arbitration.[100] The aim of international arbitration as a dispute resolution mechanism is to create efficient solutions while ensuring that parties receive fair and equal treatment, at the same time providing them with a sense of justice. Typically, parties decide to use arbitration as a method of dispute resolution because arbitrators, unlike judges, can draw on external factors when making decisions without being restricted by law.[101] While courts are obliged to make just decisions,

88 KENT, Immanuel. Metaphysical Elements of Justice. 2nd ed. Cambridge: Hackett Publishing Company,1999.
89 MILL, JS. Utilitarianism, Liberty & Representative Government. London: Dent, 1910.
90 Rawls, supra note 81, at 164-194; RAWLS, John. A Theory of Justice. Cambridge: Belknap Press of Harvard University Press, 1971.
91 Plato, The Republic of Plato. vol 1, London: Cambridge University Press, 1902, pp. 5-11, 331b-335e.
92 Rawls, supra note 81, at 165.
93 *Idem*.
94 HOBBES, Thomas. Leviathan: Revised Student Edition. Cambridge: Cambridge University Press, 1996, p. 147.
95 Then, there is also the matter of the various types of justice that the term may encompass. It further complicates the matter. Some examples include social justice, descriptive justice, restorative justice, procedural justice, compensatory justice, and retributive justice. PARNAMI, Komal. Concept of Justice Difficulties in Defining Justice. *International Journal of Law Management & Humanities,* vol. 2, pp. 1-7, 2019.
96 Rawls, supra note 81, at 164-194.
97 Goldman & Cropanzano, supra note 83, at 313.
98 *Idem*.
99 *Idem* at 316.
100 Japaridze, supra note 58, at 1416.
101 Franck, supra note 59, at 507-513.

no imperative legal instruments prescribe that disputes settled through arbitration must be resolved fairly. Courts must strictly adhere to the law, precedents and evidence when making their decisions.[102] A litigating party who is invested in the outcome of a case expects the judge to be impartial and to correctly apply the law, without any subjective influences.

Meanwhile, in arbitration proceedings, arbitrators may potentially be influenced by personal values and principles of business when making decisions.[103] To arrive at an arbitration decision, the arbitral tribunal does not need to derive its conclusions from a consistent line of logical and legal arguments.[104] This is not to say that arbitrators do not take legal norms and their interpretation into account – to the contrary. To avoid challenges from the parties, it is essential for arbitrators to correctly apply the law and make decisions that do not violate public order.

In the arbitration process, arbitrators may have to find the correct balance between doing what is just and fair, either in the view of the parties who appointed them or the wider community. For instance, when establishing the applicable law, the arbitral tribunal may aim for a substantive law that guarantees private justice between the parties, unfettered by national interests. In this situation, it may be challenging to balance the public nature of justice and the necessarily private nature of international commercial arbitration. The guarantee of justice and fairness in the arbitration process may influence parties to select arbitration as their dispute resolution mechanism.[105] Participants in arbitration place a premium on justice and fairness of the process, above factors such as receipt of a monetary award, speed, cost, arbitrator expertise and finality.[106] When the arbitral tribunal must establish the applicable law, it is therefore only prudent that they analyze the extent to which the competing rules are consistent with a balance of fairness and justice between the parties to the dispute.

3.3 Jurisprudential policy considerations

This section identifies two essential jurisprudential policy considerations that may impact an arbitral tribunal's selection of the applicable substantive law in the absence of the parties' choice: consistency and predictability, the ease of assigning the applicable substantive law, and the simplicity of the arbitration task.

[102] *Idem*.
[103] MANIRUZZAMAN, Abul FM. The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration? *American University International Law Review,* vol. 14, pp. 717-719.
[104] *Idem* at 717-718.
[105] Naimark & Keer, supra note 64, at 203.
[106] *Idem* at 203-210.

a. Consistency and predictability

Consistency, as used here, describes the extent to which arbitrators align in their assessment of a specific case.[107] On the other hand, predictability, as used here, describes the level of convergence between the arbitrator's actual award for a particular case and the award others would expect the arbitrator to make in the given instance. Overall, consistency in arbitral decision-making engenders predictability, thereby contributing to the legitimacy and credibility of arbitration as a dispute resolution system.[108] The decision of parties to submit to an arbitration often depends on their ability to accurately predict the legal risk to their relative positions. Disputing parties can make such predictions when arbitration produces consistent outcomes upon which they can rely. However, the discretionary power exercised by the arbitral tribunal at various stages of the arbitration process complicates such predictions, especially when they must determine the applicable substantive law.

The arbitrators' preferences, advocated views or mental attitudes, for instance, may reflect in their legal reasoning when determining the governing law.[109] Unlike in court proceedings, in arbitration, the arbitrator often seriously considers subjective aspects when assigning the applicable substantive law, to facilitate its connection to the underlying contract.[110] Irrespective of the method ultimately used by the arbitral tribunal to determine the applicable law, they endeavor to identify with maximum precision, the expectation of the parties regarding the substantive law result. To do this, the arbitral tribunal strives to select an applicable law that reflects what the parties could have legitimately and reasonably expected as the result of a transaction at the time of the conclusion of the contract.[111] The selection of the applicable law relies on projecting the outcomes of applying various possible applicable legal systems and comparing them with each other. Arbitrators, acting as agents of the disputing parties, tend to focus on the intended purpose of the parties' contract when determining the applicable law. They are often motivated by the desire to select a law that provides relief that will work the least hardship on the parties as opposed to the stringent application of particular rules of law.[112]

[107] KAUFMANN-KOHLER, Gabrielle. Is Consistency a Myth?' in GAILLARD, Emmanuel, BANIFATEMI, Yas. (eds). In: Precedent in International Arbitration. Paris: Juris Publishing Incorporated 2007) pp. 137-147.

[108] Barraclough & Waincymer, supra note 24, at 212.

[109] This approach has been referred to as the arbitrators' psycho-legal approach to the choice of law process. Maniruzzaman. supra note 103, at 717.

[110] Belohlavek, supra note 5, at 1, 7.

[111] *Idem* at 5.

[112] CALKINS, Hugh, FISHER, Roger D. Predictability of Result in Commercial Arbitration *Harvard Law Review Association,* vol. 61, no. 6, p. 1026, 1948.

Arbitral tribunals may also disregard legal rules where ethical notions underlying rules of law have little or no appeal, particularly in business contexts.[113] In some cases, business ethics and trade usage influence the arbitrator's selection of the appropriate applicable law. The issue is that what is ethical in one case may not be so in another. Even within the same trade, certain practices may be peculiar to the disputing parties. The flexible nature of arbitration decision-making allows for tailor-made solutions to disputes.[114] Although arbitrators may refer to past arbitral awards in support of their arguments, the legal community commonly accepts that international arbitration has no system of legally binding precedents.[115] An inconsistent and incoherent set of arbitration decisions persists as there is no binding value for having an award based on precedent. Assuming controversy over the price of goods arises between a South African buyer and an Egyptian seller, and the arbitral tribunal is required to act as an appraiser to establish a fair price for the parties, there would be no legal reference points to aid such a determination. In this situation, any decision the arbitral tribunal renders would be peculiar to the dispute.

As Goode has opined, "The man of affairs wishes to have his cake and eat it; to be given predictability on the one hand and flexibility to accommodate new practices and developments on the other".[116] The reality is that flexibility is necessary in the arbitration process to empower arbitrators to reach a fair outcome that considers the facts and peculiarities of each case. Nevertheless, it is essential to acknowledge that predictable rules and outcomes play a crucial role in fostering a fair legal system. Consistency in arbitration decision-making is a fundamental factor in ensuring the fairness of the law.[117] In situations where the application of a legal rule is uncertain, a valid justification for such uncertainty must exist.[118] It is essential to question the necessity of this uncertainty and determine whether there are any compelling reasons to justify its existence within the legal framework.

Nevertheless, since predictability is a direct product of consistency, disputing parties require arbitration to produce consistent outcomes. If arbitration fails in this task, it is likely to increase the cost of dispute resolution generally and potentially even risk its extinction.[119] Although it is an oversimplification to link the extinction of arbitration to the inconsistencies present in arbitration decision-making,

[113] *Idem* at 1024.
[114] *Idem*.
[115] DHAWAN, Pulkit. Application of Precedents in International Arbitration. *International Journal of Arbitration, Mediation and Dispute Management,* p. 550, 2021.
[116] GOODE, Roy. The Codification of Commercial Law. *Monash University Law Review*, vol.14, p. 150, 1988.
[117] YAP, Ji Lian. Predictability, Certainty, and Party Autonomy in the Sale and Supply of Goods. *Common Law World Review,* vol. 46, p. 270, 2017.
[118] *Idem*.
[119] Barraclough & Waincymer, supra note 24, at 212.

consistency and predictability are still pertinent considerations that influence how arbitrators deal with the selection of the applicable substantive law.

b. Ease of assigning the applicable substantive law, simplicity of the arbitration task

Arbitration is essentially a straightforward method of dispute resolution.[120] It provides a system of resolving disputes far less complex than litigation. The arbitration procedure is relatively easy for parties of different nationalities to understand and apply. Over the years, the desire for straightforward and effective methods or procedures has driven many developments in arbitration law. Consider, for instance, the New York Convention, by contrast to the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 (1927 Convention),[121] which provides a much more straightforward and effective method for obtaining the recognition and enforcement of awards.[122] The text of the UNCITRAL Model Law also goes through the arbitration process from beginning to end, in a simple and readily understandable way.

When discussing how the arbitral tribunal assigns the substantive law, it is relevant to consider the simplicity and ease of the arbitration task.[123] Irrespective of the method used to assign the applicable substantive law, for instance, it is conceivable that arbitrators are likely to follow a simple approach that makes sense in a particular circumstance. They may resolve to do this because it makes determining the applicable law relatively straightforward in that instance. Assuming all the relevant conflict of law rules in a particular case led to the exact solution of the dispute, the arbitral tribunal is likely to apply that law directly.[124] Arbitral tribunals have also resorted to applying non-national rules to some of the complex issues that arise from transnational commercial relations because it was easier than applying national law.[125]

Simplicity and ease of application are not ends in themselves. Still, they are nevertheless desirable in a choice of law system.[126] The simplification of

[120] Redfern et al., supra note 23, at 2.

[121] United Nations, Geneva Convention for the Execution of Foreign Arbitral Awards of 1927, *available at* https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/LON/PARTII-7.en.pdf. (accessed 10 September 2023).

[122] Redfern et al., at 14.

[123] Simplicity and flexibility are notable attributes of arbitration rules. They allow the parties to adjust dispute resolution to suit their particular relationship. TRACTENBERG, Craig R. Nuts and Bolts of International Arbitration. *Franchise Law Journal,* vol. 38, p. 456, 2019.

[124] In situations like this, a false conflict arises among the relevant conflict of laws rules. CROFF, Carlo. The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem. *International Lawyer,* p. 629, 1982.

[125] Arbitrators have relied on non-national rules such as the UNIDROIT Principles (2016) to supplement the governing law because it allowed them to find proper solutions. König, supra note 20, at 286.

[126] LEFLAR, Robert A. Choice-Influencing Considerations in Conflicts Law. *New York University Law Review,* vol.41, p. 288, 1966.

the arbitration task is for the convenience of the arbitration participants and not the arbitrators *per se*. The need for expedited and cost-effective arbitration, for instance, may be justification for an arbitral tribunal considering simple mechanical rules, such as the law of the place of the conclusion of the contract, the law of the place of performance or the law of the seat of arbitration, which may be easy to apply in a particular case. Although other considerations such as justice, fairness, and the parties' expectations may influence the arbitral tribunal's ultimate decision to apply one rule or the other, the simplicity and ease of the arbitration task remain relevant to the discussion.[127]

4 Attaching significance to the relevant policy considerations

As deduced from the discussion above, attempting to list every policy relevant to solving the various choice of law problems in international commercial arbitration is impractical. Nevertheless, in international commercial arbitration, undoubtedly, the above-identified transnational, party and jurisprudential policy considerations may, in one way or another, influence the choice of an appropriate substantive law. They will likely be evaluated before the arbitrator can intelligently decide which law to apply.

Usually, one's views on practical options and solutions in arbitration will inevitably reflect one's theoretical views on what arbitration is.[128] The essential nature of arbitration is vital to determining how different arbitrators approach contentious questions and exercise their discretionary powers. Assuming arbitration is fundamentally viewed as jurisdictional by nature, then procedural solutions consistent with the values of those very same national systems or consistent with transnational norms may be appealing. Conversely, if arbitration is considered a consent-based agreement, then the parties' expectations and intentions would be seen as the dominant means to resolve procedural questions.[129] It is essential to acknowledge that the theoretical views may affect the significance and order in which various procedural options are ranked.[130]

It is also important to note that very little can be said regarding which policy consideration, in case of conflict, should take precedence over the other since this necessarily depends upon the facts and the circumstance of the particular case.[131] As the applicable substantive law and the choice of law methodologies vary from case to case, so do the considerations that affect the arbitrators'

[127] *Idem.*
[128] Waincymer, supra note 86, at 7.
[129] *Idem.*
[130] *Idem* at 7, 26-30.
[131] Leflar, supra note 127, at 267-327.

decisions about the law applicable to the merits of the case. Neither policy is more dominant nor preferred when determining the applicable law. Regardless of this, the decision about the applicable substantive law in a particular case may involve a consideration of more than one of these policies.[132] Assuming parties expect a non-national law to govern the merits of their dispute, they would hope for the just and fair application of these rules in line with international standards, ensuring the enforceability of their ultimate award.

When identifying the substantive law, there will inevitably be some trade-offs between the above-identified policy considerations to arrive at a reasonable solution. General rules and procedures inherently involve compromises, and their application may seem biased toward or against one or both parties in a specific case.[133] In arbitration, evaluating the policies underlying procedural issues reveals that the rules reflect certain preferences.[134] Therefore, such rules may carry both advantages and drawbacks when they are applied. To manage the benefits and disadvantages of using these rules, arbitrators must be proactive and reactive in their application. To do this, arbitrators can, for instance, adopt a case-by-case solution informed by general principles or consider identifying different institutional rules and their different approaches to crucial elements and select according to the parties' preferences.[135] International arbitration faces difficulties in reconciling a range of potentially conflicting goals. These may include respect for party autonomy, fairness to disputing parties, predictability, neutrality considering the distinct values and norms of different legal cultures, and respect for the legitimate concerns of governments regarding the provision of the legal infrastructure for international arbitration. These challenges are crucial for developing an efficient procedural model essential for arbitration to meet the objectives set by its users.

5 Conclusion

The aim of this contribution is not to suggest a rigid formula that can always lead to optimal decisions regarding the applicable substantive law in all cases. For many aspects, it is crucial to rely on the insight and integrity of the arbitral tribunal involved. This contribution highlights the significant considerations that could influence the arbitrator's choice of the law applicable to the merits of a

[132] *Idem*; Fawcett, supra note 21, at 650-670.
[133] Waincymer, supra note 86, at 25-26.
[134] For instance, in Art 35(1) of the UNCITRAL Arbitration Rules, as revised in 2010, parties have a broader freedom to select any law, including non-national laws, to govern their contracts. Such privilege is not extended to the arbitrators when they are obliged to choose one. MA, Winnie Jo-Mei. The Law Applicable to the Substance of Arbitral Disputes: Arbitrators' Choice in the Absence of Parties' Choice. *Contemporary Asia Arbitration Journal,* vol. 8, no. 2, pp. 193-194, 2015.
[135] Waincymer, supra note 86, at 25.

dispute. In complex matters with multiple options, such as when arbitrators have to assign the applicable substantive law in international commercial arbitration, policy considerations will not always point to one solution.[136] As alluded to in this contribution, there may be the need to have some trade-offs between relevant considerations. It is vital for arbitrators to carefully consider the applicable policy considerations on a case-by-case basis to decipher the appropriate trade-offs for the particular circumstance. Such deliberation will ensure that the resulting award appears fair, equitable, and consistent with the expectations and needs of the parties.

Considerações políticas subjacentes para a atribuição do direito material aplicável na arbitragem comercial internacional

Resumo: Na arbitragem comercial internacional, quando as partes não escolhem nenhuma lei para reger a matéria de suas disputas, os árbitros são responsáveis por fazê-lo. A flexibilidade inerente à discrição do árbitro torna essa tarefa crítica, já que sua decisão pode impactar significativamente o resultado da arbitragem. Este artigo tem como objetivo examinar as políticas relevantes que fundamentam a escolha do direito material aplicável pelo árbitro na ausência da escolha das partes. Utilizando uma combinação abrangente de pesquisa secundária e metodologias analíticas, o artigo identifica e avalia a natureza dessas políticas, destacando seus possíveis extremos e elementos irreconciliáveis. O artigo ressalta a distinção entre os métodos diretos e indiretos utilizados para atribuir o direito material aplicável e questiona a aplicação prática desses métodos pelos árbitros. Além disso, explora as políticas relevantes de três perspectivas – uma perspectiva transnacional, uma perspectiva das partes e uma perspectiva jurisprudencial. Os resultados sugerem que considerações específicas de política influenciam o processo de tomada de decisão do árbitro, independentemente do método utilizado para atribuir o direito substancial aplicável. Ao compreender e avaliar essas considerações de política, os árbitros podem tomar decisões informadas ao atribuir o direito material aplicável na arbitragem comercial internacional.

Palavras-chave: Arbitragem Comercial Internacional. Direito Substancial Aplicável. Discrição do Árbitro. Escolha de Lei. Considerações Políticas.

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[136] *Idem* at 12-13.

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Mediação coletiva: o procedimento e o mediador em uma análise de casos concretos

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Resumo: O artigo possui como objetivo traçar, sob perspectiva doutrinária e de estudo de casos, as distinções entre as mediações coletivas com participação da Administração Pública e as mediações entre pares. Sendo assim, o artigo possui como hipótese de investigação as diferenças da mediação coletiva tanto em termos de procedimento quanto na atuação do mediador. Para tanto, fez-se necessária análise da atuação dos profissionais nas duas modalidades. O trabalho possui abordagem descritivo-prescritiva, apresentando em um primeiro momento a revisão de literatura e, por conseguinte, realizando análise casuística com ênfase nos casos relacionados ao déficit do sistema de transporte público do Estado do Rio Grande do Sul. Conclui-se com apontamentos sobre as principais distinções da mediação coletiva demonstrando seus desafios aos profissionais mediadores, delineando-se perspectivas futuras para a mediação coletiva.

Palavras-chave: Mediação. Mediação coletiva. Mediador. Administração pública. Transporte público.

1 Introdução

O presente artigo apresenta como objetivo geral estabelecer, através de análise teórica e prática, a diferença entre a mediação entre pares e a mediação coletiva, em especial as que ocorrem com a Administração Pública e em casos de repercussão social.

Por conseguinte, foram traçados os objetivos específicos que seguem: realizar revisão de literatura sobre o tema; estabelecer as principais diferenças na atuação do mediador; avaliar nos casos concretos de mediação coletiva seus elementos (tempo, presença de entes públicos, pontos de destaque da mediação e atuação dos mediadores).

O artigo possui relevância tanto pelo tema eleito quanto pela sua abordagem teórica e empírica de modalidade de mediação ainda pouco explorada na literatura nacional e internacional. A mediação coletiva demonstra-se modalidade essencial na solução de conflitos de grandes proporções como, por exemplo, desastres ambientais, acidentes aéreos, questões fundiárias, e mobilidade urbana. A administração pública direta vem utilizando a ferramenta cada vez mais no cenário nacional. Para tanto, a abordagem empírica de casos do Rio Grande Sul possibilitará conexão entre a literatura e a prática. Em suma, a mediação entre pares se desenvolve no Brasil a passos largos, no entanto, a mediação coletiva ainda possui poucos profissionais com experiência e habilitados, dado a especificidade de sua atuação e a necessidade de uma caixa de ferramentas mais robusta.

Para tanto, foi utilizada metodologia qualitativa com análise de casos concretos de mediação coletiva. Assim, o trabalho possui viés descritivo, uma vez que especifica o procedimento sob análise em sua primeira parte, e prescritivo ao analisar casos concretos, para em segundo momento, trazer sugestões ao instituto na conclusão. O recorte metodológico, por sua vez, é temático em virtude de se restringir a análise da mediação coletiva. Já a análise de casos possui um recorte temático, geográfico e cronológico, dado que analisa casos de mediação coletiva com a participação de ente público, que trata de conflitos urbanos na deficiência do transporte público, mediados através dos CEJUSCs em quatro municípios do Rio Grande do Sul, no período de 2015 a 2023, considerando acordos firmados e suas homologações como sentenças judiciais.

Cabe ressaltar que foram utilizadas apenas fontes de pesquisa primárias e casos que observam o princípio da publicidade.

2 A importância da mediação para os conflitos coletivos

O sistema multiportas consolidado no Brasil pela Resolução nº 125/2010, coloca à disposição da sociedade variadas e adequadas alternativas para a resolução dos conflitos, valorizando os mecanismos de pacificação nos quais a decisão é das partes e não imposta judicialmente. A mediação e a conciliação, conjuntamente com as ações judiciais, representam uma *porta* a ser utilizada conforme a necessidade do interessado e a expectativa de resolver o litígio de forma justa.[1]

Como método de resolução de conflitos no Brasil, amparado também pela Lei nº 13.105/15 do Código de Processamento Civil – CPC e a Lei nº 13.140/15, Lei da Mediação, a mediação é pertinente às pessoas envolvidas em desavenças e que acreditam em revolvê-las em uma negociação. Os conflitos que tratam

[1] CAHALI, Francisco José. *Curso de Arbitragem*: mediação, conciliação, resolução CNJ 125/2010. São Paulo: Revista dos Tribunais, 2017, p. 53.

dos direitos disponíveis ou dos direitos indisponíveis transacionáveis poderão ser solucionados via mediação, através de relação judicial,[2] com processo já instaurado podendo estar em perenidade no tempo, ou extrajudicial, antes mesmo da judicialização.

A mediação incorpora método eficiente na solução de controvérsias de espectro transindividual,[3] viabilizando prática de natureza democrática e dialética na resolução de conflitos coletivos. Nesse âmbito, em sua natureza de atos e procedimentos de complexidade que lhe são inerentes, assegura a participação social, bem como a gestão do método pelo qual as distintas manifestações de grupo possam convergir de forma construtiva, com o foco de elaborar claramente, decisões que percorram o sentido de proteger todos os interesses envolvidos. Configura instrumento apropriado para a solução do litígio, consolidando amplos requisitos jurídicos, com incorporação da aceitação por todos os participantes, resultado do potencial de diálogo prospectivo frente aos interesses. Sejam conflitos provindos de ações populares, ações civis públicas ou outras ações coletivas, ou por atingirem pluralidade de titulares de direitos no polo ativo e, no polo passivo envolver mais de um órgão público que tenha competência na proteção destes direitos, ou, ainda, por configurarem conflitos multifacetados, envolvendo direitos fundamentais divergentes de outros direitos, também de natureza fundamental. A perspectiva de adequada ponderação para solução mútua viável e juridicamente aceitável, torna-se verdadeiro desafio para o Poder Judiciário.[4]

As assertivas sobreditas, revelam o entendimento de que a participação colaborativa, amplia representatividade e legitimidade, comparativamente aos demais métodos.[5] Importante aferir-se que grupos mais frágeis estejam devidamente incluídos e assistidos perante os debates. Outrossim, não existe na mediação dilema entre o interesse individual e o interesse coletivo, em razão dos diálogos estarem

[2] Sobre a institucionalização da mediação no Brasil, *vide* WAQUIM, Bruna Barbieri; SUXBERGER, Antonio Henrique Graciano. A institucionalização da mediação no Brasil e o protagonismo do Poder Judiciário. *Civilistica.com*. Rio de Janeiro, a. 7, n. 2, 2018. Disponível em: http://civilistica.com/a-institucionalizacao-da-mediacao-no-brasil/. Acesso em: 24 jan. 2024.

[3] Que ultrapassa aquilo que pertence ou diz respeito a somente uma pessoa, sendo de interesse coletivo ou pertencente a uma coletividade. Abarcando o direito transindividual, os grupos, categoria ou classe de pessoas, cuja relação jurídica seja de interesse coletivo. Disponível em: https://www.dicio.com.br/transindividual/. Acesso em: 18 out. 2023.

[4] SOUZA, Luciane Moessa. *Meios Consensuais de solução de conflitos envolvendo entes públicos e a mediação de conflitos coletivos.* Universidade Federal de Santa Catarina, Florianópolis, 2010, p. 353.

[5] Diferentemente do Brasil, nos EUA a mediação vem sendo utilizada na judicialização de políticas públicas desde a década de 1970. A solução de conflitos dificilmente se concretiza pela via judicial, mas pela construção de consenso, acreditando que a solução através da implementação das políticas públicas com envolvimento de todos os interessados, tenha mais eficiência. O poder público americano também utiliza a mediação no âmbito do Poder Executivo, através das Agências Públicas, que comparadas ao modelo brasileiro, seria o Ministério Público Federal e a Advocacia-Geral da União conjuntamente (SOUZA, Luciane Moessa. *Resolução consensual de conflitos coletivos e políticas públicas*. Brasília: Fundação Universidade de Brasília – FUB, 2014, p. 238).

direcionados para conciliar amplamente os interesses envolvidos, diferenciando dos modelos tradicionais, em que não existe este esforço de integração.[6]

Na mediação coletiva deve-se levar em consideração as políticas públicas e os direitos coletivos. A Política Judiciária Nacional de tratamento dos conflitos de interesse, com a função de assegurar a todos o direito à solução dos conflitos por meios adequados[7] à sua natureza e peculiaridade, é instituída em art. 1º da Resolução nº 125/2010.

A Política Pública de forma acentuadamente convergente aos objetivos da mediação coletiva, trata da política do público voltada a avanço de objetivos coletivos e a interdependência social: "A utilização da expressão política pública serve para designar a política do Estado, mas a política do público, de todos".[8]

O sistema considera dois caminhos importantes: a busca por justiça com isonomia[9] e respeito ao ordenamento jurídico; e a busca por eficiência, ou seja, a garantia da solução da demanda de forma adequada, com baixo custo e rapidez. Em convergência, a coletivização das demandas que envolvem políticas públicas se fortaleceu a partir da Constituição de 1988, criando direitos tuteláveis de forma coletiva e fortalecendo o Ministério Público, que tem sido protagonista dos interesses coletivos.[10]

A política pública, nos termos da Resolução nº 70, de 18 de março de 2009 do CNJ, estipulou a eficiência operacional, o acesso ao sistema de Justiça e a responsabilidade social como objetivos estratégicos do Poder Judiciário e que o direito de acesso à justiça, conforme o previsto no art. 5º, XXXV, da Constituição Federal, implicará também a ordem jurídica justa.[11] Além de assegurar a participação social, necessário dotar-se a utilização dos métodos que possibilitem a manifestação da

6 INNES, Judith E.; BOOHER, David E. Reforming public participation: strategies for the 21st century. *Planning Theory & Practice*, V. 5, n. 4. Dezembro, 2004, p. 430.

7 Recentemente passou-se a afirmar que os meios de solução de conflitos não são alternativos e sim adequados, formando um sistema de justiça multiportas. Para cada tipo de controvérsia, será adequada uma forma de solução (CUNHA, Leonardo Carneiro. Disposições gerais do art. 2º. *In*: CABRAL, Trícia Navarro Xavier; CURY, Cesar Felipe (Coord.). *Lei de mediação comentada artigo por artigo*. 3. ed. Indaiatuba, SP: Foco, 2022, p. 1).

8 MASSA-AZABE, Patrícia Helena. Dimensão jurídica das políticas públicas. *In*: BUCCI, Maria Paula Dallari (Org.). *Políticas Públicas*: reflexões sobre o conceito jurídico. São Paulo: Saraiva, 2006, p. 60.

9 Veja mais sobre o princípio da isonomia no art. 5º, *caput* e inciso I; e 37, *caput*, CF/88 e no art. 139, I, do CPC. No contexto da mediação, o tema da *isonomia* encontra-se no art. 2º da Lei nº 13.140/2015.

10 SOUZA, Luciane Moessa. *Mediação de Conflitos Coletivos*. A aplicação dos meios consensuais à solução de controvérsias que envolvem políticas públicas de concretização de direitos fundamentais. Belo Horizonte: Fórum, 2012, p. 39.

11 OLIVEIRA, Luthyana Demarchi de. A mediação como política pública de tratamento dos conflitos de guarda. *In*: SPLENGER, Fabiana Marion; SPLENGER NETO, Theobaldo (Org.). Mediação enquanto política pública: o conflito, a crise da jurisdição e as práticas mediativas. Santa Cruz do Sul: EDUNISC, 2012 [recurso eletrônico], p. 159.

coletividade com suas distintas opiniões, provendo clareza do conflito com geração de opções que concentrem na proteção dos interesses envolvidos.[12]

Na compreensão das políticas públicas alinhada pela perspectiva da mediação, entende-se que grande parte das ações, colocadas em prática, objetivam-se por percursos em múltiplos conflitos e ressignificações. Tais conflitos, levados à mediação, motivam desdobramentos sociais, nem sempre idealizados. Os múltiplos procedimentos e técnicas, que normalmente fluem, em sentido prospectivo na busca do entendimento, proporcionam engajamento e satisfação ao grupo dos envolvidos.

O poder é uma relação social que envolve vários atores com interesses diferenciados, por isso, há necessidade de mediações sociais e institucionais, para que se possa obter o mínimo de consenso e, assim, as políticas públicas possam ser legitimadas com eficácia. Ao considerar que as políticas sejam públicas, é preciso verificar a quem se destinam os resultados e seus benefícios, e se o seu processo de elaboração é submetido ao debate público.[13] Sendo que a sociedade civil está cada vez mais ativa nas questões de interesse geral, a publicização se torna necessária, uma vez que tratam de recursos públicos, isenções ou regulação de relações de interesse público. Por esse motivo, há necessidade de debates com total transparência.

No âmbito coletivo das mediações, identifica-se a natureza dos Direitos Coletivos[14] aferindo o melhor e mais justo enquadramento das ações e opções a serem desenvolvidas: – os direitos difusos, são essencialmente coletivos e indivisíveis, sendo as titulares indeterminadas, ligadas circunstancialmente, por situações de fato. Trata-se de direitos indisponíveis, devendo ser preservados em sua integridade, sem admitir disposição de seu conteúdo; – os direitos coletivos *stricto sensu*, são essencialmente coletivos, indisponíveis materialmente, com titularidade de classes ou grupos de pessoas ligadas entre si ou relação jurídica; – e os direitos individuais homogêneos, que admitem tutela coletiva, objetivando efetividade e economia processual. A origem deve ser comum e homogênea na sua configuração, oportunidade em que os direitos individuais homogêneos são disponíveis.[15]

Nesse contexto, importante salientar que não há relacionamento entre pessoas em qualquer sociedade, ou comunidade, sem incidência de conflito. As práticas sociais são exercitadas sob sistemas conflituosos que estimulam os elos desenvolvidos pelas relações pessoais. As diferenças interpessoais são naturais

[12] BACCELAR, Roberto Portugal. *Juizados especiais: a nova mediação paraprocessual.* São Paulo: Revista dos Tribunais, 2003.

[13] TEIXEIRA, Elenaldo Celso. *O papel das políticas públicas no desenvolvimento local e na transformação da realidade.* Bahia: Associação de Advogados de Trabalhadores Rurais – AATR, 2002, p. 2.

[14] Saiba mais sobre Direitos Coletivos através de resumo esquematizado disponível em: https://www.institutoformula.com.br/resumo-esquematizado-direitos-difusos-e-coletivos-direitos-difusos-coletivos-e-individuais-homogeneos/. Acesso em: jun. 2023.

[15] MERÇON-VARGAS, Sarah. *Meios alternativos na resolução de conflitos de interesses transindividuais.* São Paulo: Faculdade de Direito da Universidade de São Paulo – USP, 2012, p. 98.

e proporcionam a diversidade de ideias e percepções que motivam a renovação das pessoas, impulsionando a inovação e a criatividade.

Os impactos sociais da globalização despontam prolongadas relações intersubjetivas e constantemente envolvem direitos coletivos gerando desavenças entre grupos. No senso comum, a palavra conflito remete à negatividade por estar associado à ideia da desavença, contudo, os meios autocompositivos de solução de controvérsias apresentam potencial para estimular processos de transformação, seja no âmbito individual ou social. Juan Carlos Vezzulla define: "O conflito consiste em querer assumir posições que entram em oposições aos desejos do outro, que envolve uma luta pelo poder e que sua expressão por ser explícita ou oculta atrás de uma posição ou discurso encobridor".[16]

O conflito coletivo diferencia-se por envolver direitos coletivos. Em geral, a maior complexidade dos conflitos coletivos, envolvem políticas públicas. Esses conflitos ocorrem tanto na esfera administrativa quanto nos conflitos judicializados, que decorrem dos questionamentos de ações ou omissões da Administração Pública ou de litígios envolvendo grupos sociais ou econômicos.[17]

Os conflitos coletivos nos centros urbanos desencadeiam disputas diversas com origem na propriedade indébita de terras ou imóveis,[18] na deficiência da mobilidade urbana, entre outros. O que essas circunstâncias distintas têm em comum é a necessidade de construção de uma solução adequada na qual colaborem entes públicos e particulares envolvidos em possível risco ou dano à comunidade afetada.[19]

O cenário da mediação coletiva fica evidenciado quando há formação de múltiplos agentes envolvidos no procedimento, como instituições administrativas, órgãos de poderes Judiciário e Legislativo.

Nesse contexto, são conjugados procedimentos atinentes a dimensões políticas e sociais, como notoriamente observados na deficiência na mobilidade urbana. Refere às questões que envolvem o transporte e as dinâmicas de deslocamento e fluxo de pessoas, sejam individuais ou coletivos. De acordo com o Plano

[16] VEZZULLA, Juan Carlos. *La mediación para una comunidad participativa.* Instituto de Mediação e Arbitragem de Portugal. IMAP, 2005. Acesso em: 20 out. 2023.

[17] SOUZA, Luciane Moessa. *Resolução consensual de conflitos coletivos e políticas públicas.* Brasília: Fundação Universidade de Brasília – FUB. Brasília, 2014, p. 76.

[18] Trata-se da invasão de propriedade alheia. Autora define como: "Fenômeno social urbano complexo e consistente no ingresso de coletividades de pessoas em áreas urbanas públicas e privadas para fins de moradia". *Vide* Lei nº 11.977/2009 – em que as ocupações eram chamadas de assentamentos; e a Lei nº 13.465, de 11 de julho de 2017, quando as ocupações passaram a ser chamadas de núcleo informal urbano. Cabe citar ainda, o art. 11, III, da Lei, que denomina *ocupante* "aquele que mantém poder de fato sobre lote ou fração ideal de terras públicas ou privadas em núcleos urbanos informais" (SOUZA, Luciane Moessa. *Meios Consensuais de solução de conflitos envolvendo entes públicos e a mediação de conflitos coletivos.* Florianópolis: Universidade Federal de Santa Catarina, 2010, p. 232).

[19] SOUZA, Luciane Moessa. (2010). *Meios Consensuais de solução de conflitos envolvendo entes públicos e a mediação de conflitos coletivos.* Florianópolis: Universidade Federal de Santa Catarina, 2010, p. 232.

de Mobilização Urbana do Ministério das Cidades,[20] a mobilidade nas cidades tem relação, de natureza essencial, na qualidade de vida dos cidadãos. A estruturação da circulação de pessoas e cargas no território urbano, se vincula diretamente ao desenvolvimento econômico do país.

Os serviços de transportes coletivos urbanos ocupam parte significativa da rotina dos habitantes de uma cidade. A pandemia de Covid-19 acelerou a ineficiência dos contratos existentes entre Prefeituras e Concessionárias. A pandemia no Brasil trouxe relevante percentual de 45,3% de mudança na modalidade das pessoas se deslocarem. A pandemia impôs ao mundo nova rotina e protocolo atípico de cuidados. O afastamento de aglomerações elevou 40,2% aos usuários de transporte por veículo particular e o percentual de 31,6% aos usuários de bicicletas ou deslocamento a pé. O transporte coletivo foi a modalidade de maior rejeição, em razão de 83,5% das pessoas não se sentirem seguras como usuários de ônibus, durante o período pandêmico.[21]

Os meros exemplos discorridos pouco ilustram as inúmeras desavenças urbanas desencadeadores de conflitos. As mobilizações coletivas emergentes, os distúrbios urbanos e as concentrações espontâneas tendem a indicar que o cenário do conflito social seja propício à resolução de contendas através da mediação.

3 Peculiaridades do procedimento de mediação coletiva

A mediação caracteriza-se por procedimento em presença do contraditório, estimulando aos envolvidos atuarem em busca da solução da disputa. Desenvolve-se incorporando vontade, interesse e participação das partes, denominando-se como método autocompositivo e informal. Trata-se, assim, de processo com peculiaridades, com desenvolvimento realizado em etapas que evoluem consoante a atuação dos atores, como descrito no *Manual de Mediação de Conflitos para Advogados* da Escola Nacional de Mediação e Conciliação – ENAM: "A mediação é tida como um método autocompositivo baseado em práticas, em problematizações, norteadas por procedimentos inspirados na psicologia, na sociologia, na antropologia, no direito, na filosofia da linguagem e na teoria dos sistemas. E é também, como tal, uma arte, em face das habilidades de sensibilidades próprias do mediador".[22]

[20] Veja o Plano de Mobilização Urbana do Ministério das Cidades para conhecer a mobilidade nas cidades como fator preponderante na qualidade de vida das pessoas: PlanMob – Plano de Mobilização Urbana das Cidades. Secretaria Nacional de Transporte e Mobilidade Urbana. Ministério das Cidades. Brasil, 2015, p. 28.

[21] Conheça os infográficos a respeito da mobilidade urbana brasileira afetados pela pandemia em: https://www.mobilize.org.br/estatisticas/67/infografico-pandemia-e-a-mobilidade-urbana.html. Acesso em: 14 out. 2023.

[22] *Manual de Mediação de Conflitos para Advogados*. Escola Nacional de Mediação e Conciliação. Ministério da Justiça, 2014, p. 39.

Para fins de natureza didática, o mesmo Manual da ENAM divide o processo de mediação em cinco fases básicas: i) pré-mediação; ii) discursos de abertura; iii) elaboração de uma agenda; iv) negociações mediadas; e v) possível acordo e encerramento.[23] As múltiplas fases descritas são conhecidas e reconhecidas pelos mediadores, e recomendadas pela necessidade da provocação lógica distinta de cada uma. A mediação de âmbito coletivo, embora inclua tais fases em sua prática, tem peculiaridades diferenciadas em cada uma. Nessa construção, alguns autores destacam a importância da visão sistêmica para o diagnóstico de uma situação conflituosa e para apontar o rumo em termos de políticas públicas.[24] Vê-se que, quando há interesse público, as intervenções são distintas.

Compartilhando a mesma ótica, cabe elencar as etapas do processo de mediação de conflitos coletivos, considerando delineadas as hipóteses de cabimento e os limites jurídicos para o possível acordo: i) análise do contexto e identificação dos grupos e entes públicos participantes; ii) planejamento do processo; iii) sessões de mediação; iv) realização de estudos técnicos; v) a necessidade de assegurar a representatividade de todos os participantes do processo; vi) redação do acordo; vii) da previsão de prazos e monitoramento do cumprimento; e viii) avaliação do processo.[25]

O mediador precisa ter conhecimento sobre a possível relação e o conflito existente entre as partes para a análise do contexto e identificação dos grupos e entes públicos participantes. Em mesma forma, identificar o(s) grupo(s) que possui(em) representatividade técnica, política e/ou social no tema abordado, a fim de colaborar para uma solução legal e de viável aplicação. O mediador, através desses atores, receberá subsídios para identificar as convergências e divergências que apontarão o desenrolar do diálogo, e consequentemente, o caminho da solução. Nessa fase, cabe a emissão de relatórios ao processo com relatos pertinentes à presença dos entes públicos e outras informações relevantes sobre o caso.[26]

[23] FALECK, Diego. *Manual de Design de Sistemas de Disputas* – Criação de estratégias e processos eficazes para tratar conflitos. Rio de Janeiro: Lumen Juris, 2023, p. 119.

[24] FALECK, Diego. *Manual de Design de Sistemas de Disputas* – Criação de estratégias e processos eficazes para tratar conflitos. Rio de Janeiro: Lumen Juris, 2023, p. 24.

[25] SOUZA, Luciane Moessa. *Mediação de Conflitos Coletivos*. A aplicação dos meios consensuais à solução de controvérsias que envolvem políticas públicas de concretização de direitos fundamentais. Belo Horizonte: Fórum, 2012, p. 156-157.

[26] SOUZA, Luciane Moessa. *Mediação de Conflitos Coletivos*. A aplicação dos meios consensuais à solução de controvérsias que envolvem políticas públicas de concretização de direitos fundamentais. Belo Horizonte: Fórum, 2012, p. 158.

O diagnóstico amplo e preciso do espectro do conflito é etapa crucial para o *design*[27] da mediação coletiva. A apuração detalhada do problema[28] com a identificação dos aspectos convergentes e divergentes entre as partes, causas, características, consequências, pessoas afetadas, tempo, recursos, entre outros, são essenciais para a geração de possíveis soluções.

Planejar[29] o procedimento de mediação envolve a elaboração de proposta de trabalho compilando sequência de tópicos a serem desenvolvidos. A proposta elaborada é claramente apresentada aos envolvidos em primeira sessão, conjuntamente com os procedimentos normais de explanação sobre os princípios, objetivos das etapas, agenda prevista e informações que nortearão o trabalho a ser realizado perante a gestão do mediador. O *Manual de Mediação Judicial*[30] refere que o planejamento de todo o procedimento deve ser voltado à melhor forma de atender as expectativas do usuário, afinal a pretensão é que as partes saiam satisfeitas.

Embora as sessões de mediação sigam o planejamento estabelecido, são flexíveis e não engessadas, incorporando os esclarecimentos dos interesses legítimos das partes, a troca de informações, as constatações do diagnóstico do conflito e a geração das opções a serem negociadas – alternativas e suas adequações, análise das opções apresentadas contemplando ao grupo dos envolvidos, e por fim, a construção da solução consensualmente aceita pelas partes.[31]

A realização de estudos técnicos antes e durante o procedimento é característica bem peculiar da mediação coletiva. Portanto, deve-se levar em conta: matérias técnicas em controvérsia, quem preenche os requisitos para a realização dos estudos, a metodologia e critérios a serem aplicados, e os recursos para a realização de tais estudos. Para evitar divergências, cabe a opção de um time de especialistas com abordagens distintas, bem como elaboração de registros.[32]

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[27] O Desenho de Solução de Disputas (DSD) foi desenvolvido pela Escola de Negócios de Harvard, a fim de analisar os conflitos na sua integralidade, envolvendo interesses, posições, suas regras e situação econômica, a fim de estabelecer estratégia/desenho para determinado tratamento do conflito, adequando metodologia específica e individualizada para cada situação, seja social e/ou individual. Tal técnica serve para atuação dos mediadores em conflitos coletivos. Disponível em: https://www.cmarp.com.br/designer-de-sistema-de-disputas-dsd/. Acesso em: 18 out. 2023.

[28] Os grupos interessados e os órgãos públicos são participantes na construção da decisão de um processo que busca o consenso, os participantes precisam educar e persuadir uns aos outros sobre suas necessidades e interesses (SOUZA, Luciane Moessa. *Resolução consensual de conflitos coletivos e políticas públicas.* Brasília: Fundação Universidade de Brasília – FUB. Brasília, 2014, p. 84).

[29] Saiba mais sobre protocolo, diagnóstico e planejamento da mediação coletiva em: FERREIRA, Daniel B., SEVERO, Luciana. Multiparty mediation as solution for urban conflicts: a case analysis from Brazil. *BRICS Law Journal*, Vol. VIII. 2021. Disponível em: https://www.bricslawjournal.com/jour/article/view/535/204. Acesso em: 10 out. 2023.

[30] AZEVEDO, André Gomma. (Org.). *Manual de mediação judicial.* Escola Nacional de Mediação e Conciliação. Ministério da Justiça. Brasília, 2013, p. 110.

[31] SOUZA, Luciane Moessa. *Mediação de Conflitos Coletivos.* A aplicação dos meios consensuais à solução de controvérsias que envolvem políticas públicas de concretização de direitos fundamentais. Belo Horizonte: Fórum, 2012, p. 160.

[32] SOUZA, Luciane Moessa. *Resolução consensual de conflitos coletivos e políticas públicas.* Fundação Universidade de Brasília – FUB. Brasília, 2014, p. 140.

Na cadeia de procedimentos das diversas modalidades e natureza da mediação é função do profissional mediador assegurar a representatividade de todos os envolvidos. Na mediação coletiva não é diferente, porém, como se trata de coletividade, há de se ter cautela de que todos sejam informados durante o processo, isso em razão de que em mediações com grande número de pessoas envolvidas, participam das reuniões apenas os representantes eleitos, a fim de facilitar o diálogo e evitar prováveis tumultos.

Embora todas as fases do procedimento de mediação tenham ocorrido em convergência, é imprescindível lembrar que a gestão pública é dinâmica e sujeita a frequentes mudanças, naturais por sua natureza política, portanto, o acordo deve expressar o contexto da realidade futura perante o conteúdo da mediação, que trata da previsão de prazos e monitoramento do cumprimento. Incorpora-se no contexto discorrido *supra*, o esclarecimento de previsão de etapas de implementação, obrigações das partes, prazos com datas definidas e qualquer outro elemento no sentido de clarificar os termos consolidados ao acordado, inclusive no tocante a punições para o descumprimento do acordo.

Autores destacam relevante diferencial no procedimento de mediação coletiva: "As disputas públicas se baseiam nos critérios de consultas públicas,[33] de formação de consenso e de regulamentação".[34] A assertiva significa oportunidade de a população expressar suas reivindicações e influenciar os tomadores de decisão na representação de seus interesses. A mediação coletiva é composta por múltiplos fóruns de decisão, necessidades de decisões interorganizacionais, múltiplas partes e questões, e ainda apresenta complexidade técnica, desequilíbrio de poder e recursos, e incertezas perante futuras decisões.

No Brasil, na área trabalhista, as mediações coletivas judiciais, distintamente das mediações cíveis,[35] são realizadas, em sua maioria, internamente nos Tribunais do Trabalho, com a atuação de funcionários públicos qualificados em

[33] O mecanismo de consulta pública objetiva a interação entre a comunidade local diretamente envolvida em determinada questão, o poder público e outras partes também interessadas (ROSSI, Maria Teresa Baggio; SILVA, Victor Paulo Azevedo. Mediação ambiental. *In*: ALMEIDA, Tania; PELAJO, Samantha; JONATHAN, Eva (Coord.). *Mediação de conflitos*: para iniciantes, praticantes e docentes. 2. ed. rev. atual. e ampl. Salvador: Juspodivm, 2019, p. 551).

[34] ROSSI, Maria Teresa Baggio; SILVA, Victor Paulo Azevedo. Mediação ambiental. *In*: ALMEIDA, Tania; PELAJO, Samantha; JONATHAN, Eva (Coord.). *Mediação de conflitos*: para iniciantes, praticantes e docentes. 2. ed. rev. atual. e ampl. Salvador: Juspodivm, 2019, p. 551.

[35] 1. Resolução CSTJ nº 174/2016 – Dispõe sobre a política judiciária nacional de tratamento adequado das disputas de interesses no âmbito do Poder Judiciário Trabalhista e dá outras providências. 2. Recomendação CSTJ GVP nº 01/2020 – Recomenda a adoção de diretrizes excepcionais para o emprego de instrumentos de mediação e conciliação de conflitos individuais e coletivos em fase processual e fase pré-processual por meios eletrônicos e videoconferência no contexto da vigência da pandemia COVID-19. 3. Resolução CSTJ nº 288/2021. Dispõe sobre a estruturação e os procedimentos dos Centros Judiciários de Métodos Consensuais de Solução de Disputas (CEJUSC-JT) da Justiça do Trabalho; e altera a Resolução nº 174/CSJT, de 30 de setembro de 2016, que dispõe sobre a política judiciária nacional de tratamento adequado das disputas de interesses no âmbito do Poder Judiciário Trabalhista.

mediação. A formação dos mediadores é diferenciada[36] da justiça comum, voltada especificamente a esse fim. Ou seja, as mediações judiciais no âmbito da justiça do trabalho são realizadas somente sob a supervisão dos TRTs.

Ao espectro abordado e em análise "mediação coletiva", é importante destacar gerenciamento por *Dispute System Design*[37] – DSD, que corresponde a Desenho de Sistema de Disputas, aplicável conforme tem-se as peculiaridades dos conflitos coletivos. O DSD permite a customização de sistemas que abordem o conflito em toda sua complexidade. A metodologia DSD pressupõe a existência de um *designer* que, em cooperação com os envolvidos no conflito, desenvolve produto para tal necessidade, analisando as peculiaridades dos personagens, da relação, do objeto conflituoso, e com isso, estabelece os métodos adequados de solução de conflitos (ADRs) que serão utilizados para a situação.[38]

Importante diferencial entre a mediação entre pares e a mediação coletiva é a participação dos entes públicos. Na mediação de conflitos coletivos é necessário o comparecimento de entes públicos, no enfrentamento da complexidade técnica e legal, conjugada aos desafios de natureza democrática e política. A resolução consensual desses conflitos abrange processos administrativos e judiciais, e da mesma forma a implementação de políticas públicas. São evidentes as vantagens da participação, especialmente nos aspectos que extrapolam os legitimados e diretamente atingidos, bem como aos demais envolvidos na implementação dos direitos ou interesses. Nesses casos, se permite melhor adequação da política pública às reais necessidades daqueles a quem ela se destina.[39]

Entre os sujeitos participantes da mediação coletiva envolvendo entes públicos, o Ministério Público, fazendo jus aos artigos 127 e 129 da Constituição Federal da República Federativa do Brasil, representa a coletividade, a fim de garantir o princípio da isonomia[40] entre as partes. O Poder Público estará engajado nessa solução e poderá protagonizar resposta mais adequada do que a simples resolução judicial da controvérsia.[41] Ainda que seja incomum sua participação, o

[36] Resolução CSTJ nº 174/2016 rege as mediações trabalhistas, ainda que sob o guarda-chuva da Lei da Mediação.

[37] Exemplos da utilização do método DSD foram as indenizações aos familiares dos acidentes aéreos em 2007 e 2009 que ocorreram com a TAM e Air France.

[38] COSTA, Monica Teresa; CASTRO, Maíra Lopes. Desenhando modelos de sistema de disputas para a administração pública: Proposições acerca da política pública de fornecimento de medicamentos pelo viés do diálogo internacional. *Revista Brasileira de Políticas Públicas – UNICEUB*. V. 8, n. 3, 2018, p. 107.

[39] GAVRONSKI, Alexandre Amaral. *Técnicas extraprocessuais de tutela coletiva*. São Paulo. Revista dos Tribunais, 2010, p. 256.

[40] É muito importante um desfecho harmônico entre os envolvidos**.** É necessário ter cuidados ao tratar as partes de forma igualitária, propiciando os mesmos critérios de participação e as mesmas chances (MARIONONI, Luiz Guilherme, ARENHART, Sergio Cruz, MITIERO, Daniel. *Curso de Processo Civil*. V. 3. São Paulo: Revista dos Tribunais, 2015, p. 176).

[41] MARINONI, Luiz Guilherme; ARENHART, Sergio Cruz; MITIERO, Daniel. *Curso de Processo Civil.* V. 3. São Paulo: Revista dos Tribunais, 2015, p. 176.

Ministério Público deverá ser convidado. Sua omissão ou recusa não implicará no prosseguimento do processo de resolução consensual do conflito sem sua participação. Porém, é recomendável o posicionamento ao final, sobre os termos de eventual acordo.

Em condição igualitária ao Ministério Público, a Defensoria Pública[42] também não tem a obrigatoriedade da participação nas negociações, porém cabe a ela a responsabilidade e legitimidade, como expressão e instrumento do regime democrático, zelar pelos desfavorecidos economicamente envolvidos no conflito, fundamentando a orientação jurídica e a promoção dos direitos humanos. O art. 134 da Constituição Federal brasileira garante os direitos individuais e coletivos, de forma integral e gratuita, aos necessitados.

Os Poderes Executivo e Legislativo configuram importante atuação nas mediações coletivas. O Poder Executivo proporciona a participação de qualquer ente detentor de competência técnica sobre o conflito nas negociações. Essas contribuições evoluem para a identificação da solução técnica e o reconhecimento da extensão do problema, incluindo as questões orçamentárias. Por sua vez, o Poder Legislativo legitima as possíveis alterações normativas, as inconstitucionalidades, bem como fiscaliza a atuação do Poder Executivo. Nesse aspecto, para melhor atender os interesses da coletividade, cabe observar que não se trata de normas sobre os direitos e deveres, ou mesmo diretrizes políticas para os cidadãos, mas de normas que tratam dos procedimentos, estimulando as competências para melhor equipar o Poder Público.[43]

Podem ser incorporadas às Entidades Representativas afetadas pelas políticas públicas os representantes de titulares de direitos individuais homogêneos integrantes do conflito e entes privados com interesses e responsabilidades relacionadas à controvérsia. Assim, compõe-se o quadro de atores na mediação de âmbito coletivo. A participação desses não corresponde diretamente a atuação de negociadores assentados à mesa. Atuam como auxiliares técnicos perante as partes em conflito, na emissão de parecer de natureza técnica de decisão do contexto conflitado.[44]

Outra distinção relevante nos modelos de mediação entre pares e coletiva é a relativização da confidencialidade.

A confidencialidade caracteriza importante princípio entre os múltiplos que norteiam a mediação, dá segurança às partes para que se sintam com absoluta

[42] A Lei da Ação Civil Pública, Lei nº 11.448, de 2007, no seu art. 5º, inclui a Defensoria Pública entre os legitimados para ajuizar ação civil pública.

[43] SOUZA, Luciane Moessa. *Resolução consensual de conflitos coletivos e políticas públicas.* Fundação Universidade de Brasília – FUB. Brasília, 2014, p. 97.

[44] SOUZA, Luciane Moessa. *Resolução consensual de conflitos coletivos e políticas públicas.* Fundação Universidade de Brasília – FUB. Brasília, 2014, p. 101.

liberdade de expor entendimentos e sentimentos em relação ao conflito. Nos termos do parágrafo 1º do art. 166 do CPC, "estende-se a todas as informações produzidas no curso do procedimento, cujo teor não poderá ser utilizado para fim diverso daquele previsto por expressa deliberação das partes". Objetivamente, isso significa que o que for narrado, conversado, debatido, deverá ser mantido em sigilo, não podendo ser divulgado por qualquer pessoa em mesa de mediação, incluindo o mediador, e não poderá ser usado como prova ou argumento em qualquer questão judicial. Cabe ao mediador e/ou equipe de mediação o dever de prover o sigilo absoluto, sem prestar depoimento em juízo, operando em testemunho sobre o que lhe foi confidenciado durante o procedimento.[45]

Teoricamente, a confidencialidade deverá ser mantida pelo instituto da mediação, representando ainda, relevante vantagem em relação ao do processo judicial, no qual as exposições dos fatos inviabilizam futuras transações. Porém, as mediações coletivas reservam certa distinção devido aos interesses tratados serem de ordem pública. Portanto, deve-se aplicar ao princípio da confidencialidade a existência de outros atos institucionais que o complementam.

Nas mediações coletivas de interesse público, cabe considerar o Princípio da Publicidade da Administração Pública a partir da Lei de Acesso à Informação, Lei nº 12.527/2011,[46] caso em que excepcionalmente prevalecerá a transparência exigida pelo setor público. A Lei institui como princípio fundamental que o acesso à informação pública é a regra, e o sigilo deverá ser a exceção. Define mecanismos, prazos e procedimentos para a entrega das informações solicitadas à administração pública.

Relevante observar que a Lei da Mediação prevê em seu artigo 30, parágrafos 3º e 4º algumas exceções: não está abrigada pela regra da confidencialidade a informação relativa a ocorrência de crime de ação penal; e a regra de confidencialidade não afasta o dever de as pessoas abrangidas pela confidencialidade prestarem informações à administração tributária após o término da mediação, obrigando-se os seus servidores a manterem sigilo das informações conforme termos do art. 198 da Lei nº 5.172 de 25.10.66 do Código Tributário Nacional. Da mesma forma, a Lei nº 12.527/2011 de acesso às informações, prevê a preservação do sigilo das informações no caso de violarem o respeito à intimidade, vida privada, honra e imagem das pessoas, risco à soberania nacional, e que envolvam segredos industriais.

[45] Código de Processo Civil, art. 166, §2º.

[46] A Lei nº 12.527/2011 no seu art. 1º, "dispõe sobre os procedimentos a serem observados pela União, Estados, Distrito Federal e Municípios, com o fim de garantir o acesso a informações previsto no inciso XXXIII do art. 5º, no inciso II do §3º do art. 37 e no §2º do art. 216 da Constituição Federal".

Ao ressaltar as exceções à confidencialidade, as normativas citadas referem também, que o princípio pode ser excepcionalizado se as partes expressamente decidirem o contrário. O Princípio da Autonomia da Vontade – Lei nº 13.140/15, art. 30 da Lei, *caput* – é considerado como o poder das pessoas optarem por participar do procedimento de mediação, podendo tomar as próprias decisões durante ou ao final do conflito.

Percebe-se, assim, contraponto das disposições; por um lado a mediação prevê a confidencialidade das informações trazidas em sessão, e por outro, a administração pública necessita ampla publicidade dos seus atos. Assim, a equipe de mediação deve divulgar o que for de interesse público, mantendo em sigilo informações pertinentes à individualidade de cada parte.

4 A atuação do mediador na mediação coletiva

As estratégias e táticas utilizadas nas mediações são flexíveis e criativas, repercutindo na evolução e melhoria da comunicação entre as partes. Como procedimento sistêmico, a prática da mediação é iniciada e conduzida observando três importantes objetivos: mostrar os efeitos e a dinâmica da negociação, apresentar teoricamente como será desenvolvido o procedimento prático da mediação; e proporcionar aos envolvidos estratégias e técnicas concretas e efetivas para ajudá-los na solução do conflito.

A tarefa básica do mediador consiste em reconciliar os interesses competitivos dos adversários, auxiliar as partes no exame de seus interesses e necessidades, negociar opções, bem como definir relação que venha a ser mutuamente satisfatória e que corresponda aos padrões de justiça de ambos.[47] Tais premissas básicas, nas mediações coletivas, representam a base para o qualificado desempenho do mediador.

Distintamente das mediações entre pares, nas mediações que envolvem grande número de pessoas e outros atores como entes públicos e classes representativas, faz-se necessário equipe de mediação, ou no mínimo, dois mediadores (comediação). Para desempenharem seus distintos papéis na mediação, a equipe, antes mesmo de iniciar o procedimento, deve estar alinhada com o conjunto de suas responsabilidades profissionais perante as partes e perante eles próprios. Os mediadores devem ser honestos e não tendenciosos, agir de boa-fé, serem proativos e não buscar satisfazer seus próprios interesses em preferência dos interesses das partes.[48]

[47] MOORE, Christopher W. *O processo de mediação*: estratégias práticas para a Resolução de Conflitos. Tradução de Magda França Lopes. 2. ed. Porto Alegre: Artmed, 1998, p. 30.

[48] MOORE, Christopher W. *O processo de mediação*: estratégias práticas para a Resolução de Conflitos. Tradução de Magda França Lopes. 2. ed. Porto Alegre: Artmed, 1998, p. 328.

Os distintos papéis exercidos pelos mediadores são divididos e planejados pela equipe. As mediações de grande porte exigem tarefas como: estudos prévios, discussões de alinhamento, emissão de atas e relatórios, controle de agenda, observação, muita escuta ativa e as negociações. Essas combinações e mecanismos são distribuídos entre os mediadores para a melhor estratégia no desenvolvimento da mediação. Cabe lembrar que os profissionais serão capazes de atuar em qualquer das funções atribuídas. Dentro deste ou qualquer outro formato de trabalho planejado para mediações coletivas, os mediadores têm o potencial de promover a alternativa para dividir a política em vários âmbitos e para ajudar a construir consenso social sobre as questões de preocupação fundamental.[49]

No que se refere às técnicas, inúmeras literaturas apresentam ferramentas oficiais que fazem parte da formação do mediador, e que são de grande utilidade na função de provocar mudanças. Entre elas, a recontextualização (ou parafraseamento), audição de propostas implícitas, afago (reforço positivo), silêncio, *caucus* (sessões individuais), troca de papéis, geração de opções, normalização, organização de questões, enfoque prospectivo, teste de realidade e validação dos sentimentos. Essas ferramentas, entre outras existentes de igual importância, apresentam eficácia quando utilizadas adequadamente pelo mediador.[50] No entanto, as mediações de grande complexidade, como as coletivas de transporte urbano, exigem, além das ferramentas comuns aplicáveis, técnicas que dependem da habilidade, criatividade e experiência do mediador. As técnicas se formam a partir de um *mix* de conhecimento sobre o tema do conflito, *rapport*[51] bem estabelecido com as partes, habilidade nas questões autoimplicativas,[52] identificação da pauta de trabalho, visão prospectiva do conflito, zelo nas narrativas e debates proferidos nos encontros, confirmação assertiva das interpretações, identificação precisa dos interesses convergentes e divergentes, equilíbrio entre as partes, construção de critérios objetivos, atenção à expressão corporal, harmonização de distintas culturas, percepção dos interesses e sentimentos de natureza subjetiva, incluindo elementos que sobrevêm pela especificidade de cada caso em situação de conflito.

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[49] MOORE, Christopher W. *O processo de mediação*: estratégias práticas para a Resolução de Conflitos. Tradução de Magda França Lopes. 2. ed. Porto Alegre: Artmed, 1998, p. 325.

[50] CONSELHO NACIONAL DE JUSTIÇA. *Manual de mediação judicial*. 6. ed. 2016, p. 233.

[51] *Rapport* – é um conceito do ramo da psicologia que significa uma técnica usada para criar uma ligação de sintonia e empatia com outra pessoa. Relação de confiança que permite que os mediandos se sintam seguros quanto ao processo de mediação e ao mediador. Saiba mais em: https://www.significados.com.br/rapport/. Acesso em: 23 out. 2023.

[52] Perguntas autoimplicativas, como nos ensina Tânia Almeida, são aquelas que o mediador formula em busca da "possibilidade de alguém identificar, no curso do processo de diálogo voltado à autocomposição, sua participação como corresponsável – pelo desentendimento e pelo entendimento, ou por qualquer outro evento correlato" (ALMEIDA, Tania. *Caixa de ferramentas na mediação*: aportes práticos e teóricos. Portuguese ediction. E-book: Schaffer Editorial, 2014, p. 76).

O mediador de conflitos coletivos deve desenvolver conhecimento sistêmico a fim de proporcionar melhor alcance das necessidades dos participantes. São muitas as possibilidades de formação continuada como a Comunicação Não Violenta de Marshall Rosenberg, empatia, escuta ativa, perguntas eficientes, entre outros. A sociologia contribui com o conhecimento do comportamento coletivo, a psicologia com o controle do ambiente emocional, e os estudos técnicos antecipados, com a clareza sobre o tema conflitante. E ainda, de extrema importância, o *feeling,* que possibilita ao mediador tomar decisões imediatas caso não haja evolução no procedimento de mediação, e a experiência, que faz do mediador um *expert* na sua função.

Mediações coletivas requerem conhecimentos técnicos e habilidades que o mediador necessariamente precisa desenvolver na vivência das condições estabelecidas como: grande número de envolvidos, distintas posições de advogados, validação dos entes públicos, necessidades e interesses diversos, considerar os direitos fundamentais, uso das técnicas na hora certa para obtenção de êxito nas suas estratégias. Isso não exclui confidencialidade, competência, imparcialidade, neutralidade, independência e autonomia, respeito à ordem pública e às leis vigentes que regem os mediadores judiciais conforme os termos do Código de Ética anexo à Resolução 125, art. 1º, do Conselho Nacional de Justiça.[53]

5 Análise de casos de conflitos coletivos no transporte público no Rio Grande do Sul

Trata-se de conflitos coletivos de grande complexidade, que apresentam a prática da mediação coletiva, com participação conjunta dos entes públicos em conflitos de mesma natureza, desequilíbrio econômico-financeiro e as deficiências na relação contratual na concessão do transporte público em quatro municípios do estado do Rio Grande do Sul, porém com soluções diferenciadas, respeitando as necessidades, possibilidades e características de cada um.

Cabe destacar que nas situações apresentadas o ente público é parte do processo, ou seja, o município é parte integrante na relação contratual do serviço de concessão em contenda e participou diretamente vinculado aos atos do processo de mediação até a finalização/formalização do acordo. Já quanto aos entes públicos, indiretamente envolvidos na relação de concessão do serviço, houve flexibilidade na participação em razão de seu vínculo de característica coadjuvante, entretanto, restaram efetivos na formalização do Termo de Entendimento.

[53] SOUZA, Luciane Moessa. *Resolução consensual de conflitos coletivos e políticas públicas.* Fundação Universidade de Brasília – FUB. Brasília, 2014, p. 39.

O importante cenário da pandemia no transporte público teve o foco na considerável queda da demanda de passageiros no mundo inteiro. No Brasil, as empresas de transporte coletivo por ônibus chegaram a registrar, no início da pandemia, queda de 80% da demanda, devido à quantidade expressiva de passageiros que procuraram outros meios de transporte, seja por receio do contágio e/ou pela redução da qualidade do serviço consequente da redução da oferta costumeira.[54]

No mesmo contexto sobredito, os municípios do Estado do Rio Grande do Sul passaram a prestar serviços de transporte público ineficientes e com baixa qualidade, devido aos altos índices de tarifa, redução da oferta dos sistemas regulares, crescente aumento do óleo diesel, e o envelhecimento da frota, desestruturando os contratos de concessões.[55] Embora tais problemas já estivessem sendo apontados desde o ano de 2015, as consequências pandêmicas aceleraram a necessidade de reformulação do sistema e dos contratos a fim de manter a sobrevivência das empresas/concessionárias responsáveis pelo transporte público urbano. Sendo assim, as prefeituras, conjuntamente com as empresas concessionárias, procuraram o CEJUSC Empresarial, depositando sua confiança no propósito do instituto da mediação para resolver os impasses de forma a atender os anseios de ambas, e principalmente, garantir o serviço de transporte público à população.

Para facilitar a análise, os casos foram divididos em cinco tópicos quais sejam: 1. Características; 2. Conflito; 3. Desenvolvimento; 4. Pontos de destaque; 5. Acordo.

Os tópicos são autoexplicativos com exceção do tópico de número 4, "Pontos de Destaque". Nesse tópico os autores trazem peculiaridades dos casos com observações internas dos casos e detalhes dos procedimentos.

5.1 Caso 1 – Porto Alegre

– Características: o procedimento de mediação empresarial coletiva com ente público iniciou em 2020, na gestão do Prefeito Nelson Marchezan Júnior, como mediação judicial, com dez processos envolvidos[56] relacionados ao desequilíbrio de parâmetros tarifários da Concessão e a respectiva inauguração do CEJUSC Empresarial em Porto Alegre/RS. Posteriormente, na gestão sucessora

[54] ROMEIRO, D. L.; CARDOSO, F. L.; SCHECHTMAN, R.; BRIZON, L. C.; FIGUEIREDO, Z. M. *Transporte público e a Covid-19*: o abandono do setor durante a pandemia. Centro de Estudos em Regulação e Infraestrutura da Fundação Getulio Vargas (FGV CERI). Rio de Janeiro, 2021, p. 12.

[55] SOLUÇÕES SISTEMA DE TRANSPORTE. *Transporte coletivo urbano de Porto Alegre*. 2021. Disponível em: https://drive.google.com/file/d/1KTHQPC4DVFWxOQt_efivbSPfQZSMoYm8/view. Acesso em: 03 out. 2023.

[56] Processos: 0168906.03.2014.8.21.0001 – 0168898.26.2014.8.21.0001 – 0158993.94.2014.8.21.0001 – 5021981.40.2020.8.21.0001 – 5021983.10.2020.8.21.0001 – 5030084.36.2020.8.21.0001 – 0212301.74.2016.8.21.0001 – 021229907.2016.8.21.0001 – 9042531.90.2017.8.21.0001 – 0045610.70.2016.8.21.0001.

do Prefeito Sebastião Melo, como segunda fase, foi instaurada mediação pré-processual[57] objetivando tratar a reformulação do sistema de transporte público da capital gaúcha.

No desenvolvimento dos trabalhos foi identificada a multiplicidade das partes envolvidas no conflito: o Município de Porto Alegre e os consórcios privados de ônibus – Via Leste, MOB, Mais e Viva Sul – que se fizeram representar pela ATP – Associação dos Transportadores de Passageiros de Porto Alegre.

– **Conflito**: o setor de transportes contava com problemas crescentes, anteriores ao ano de 2015; com a Emenda Constitucional nº 6/2015 o Transporte Público passou a ser um direito social, devendo ser prestado pelos municípios. O setor de transporte foi um dos segmentos de serviços mais afetados pelas medidas de distanciamento social adotadas para conter o avanço da Covid-19, iniciados em março de 2020, em razão das empresas terem seu custo arcado somente pelos usuários. As empresas de ônibus de Porto Alegre chegaram a registrar diminuição de 72% no número de usuários, queda provocada pela pandemia, com situação de "força maior".[58] A ação coletiva reclamava a reposição de todos os custos no sistema que totalizam montante de R$67 milhões. Tal modelo de transporte coletivo atingia circunstâncias insustentáveis, correndo risco de extinção.

– **Desenvolvimento**: foi realizado o mapeamento do conflito com posterior desenvolvimento do planejamento do fluxo de atividades da mediação coletiva. Destacou-se, inicialmente, o Transporte Urbano como Direito Social e, principalmente, a interdependência dos demais direitos como a saúde, a educação e o trabalho, entre outros. Prioridades foram consideradas: o aporte financeiro semanal, focar a mediação na urgência das empresas, a imediata manutenção do funcionamento do sistema de transporte durante a Covid-19, o funcionamento do sistema em etapa posterior à pandemia, o retorno gradual e a não aplicação de sanções durante a pandemia. Em estágio não urgente: a política pública a favor das empresas de ônibus, o equilíbrio da oferta e da demanda, a manutenção de subsídio e o ajuste da métrica por quilômetro rodado.

Em face da complexidade e vulto do contexto circunstancial perante a sociedade, a mediação contou com importantes participações institucionais: Ministério Público, Coordenação do CEJUSC, Vice-presidência do TJRS e Corregedoria-Geral da Justiça. Essas participações atuaram no respaldo às mediadoras, focando sobretudo o âmbito de natureza coletiva e de interesse público, e, nesse viés, considerados os aspectos intrínsecos vinculados à publicidade e neutralidade perante o princípio da confidencialidade.

[57] Número 6000084-02.2021.8.21.0001.

[58] O Código Civil brasileiro define como força maior (artigo 393, parágrafo único) os fatos humanos ou naturais cujos efeitos são inevitáveis ou impossíveis de serem impedidos.

No curso dos trabalhos foram desenvolvidas dezesseis sessões, contando com caráter conjunto e individual. Presente nos atos, de modo intenso, o intuito de estimular o diálogo recíproco e prospectivo na viabilização de entendimentos e transações, com respectiva estruturação entre as partes. Na mediação buscou-se: acolher estimativas e contraposições distintas, afastar/desestimular propostas inviáveis e encorajar a elaboração de opiniões. As mediadoras realizaram estudo comparativo, liderado pela Juíza Coordenadora do CEJUSC Empresarial, abordando experiências exitosas ocorridas em âmbito nacional e mundial, atuando em pesquisas de alternativas já implantadas no setor de transporte público, assim, agregando notáveis subsídios para respaldar opções na solução da controvérsia em tela.

Em razão das medidas restritivas impostas no período da pandemia, a mediação da mobilidade urbana adotou os trabalhos na modalidade não presencial, ou seja, como ODR *(Online Dispute Resolution)*, aplicando recursos tecnológicos para a realização das reuniões virtuais. Embora a complexidade dos trabalhos decorrente da multiplicidade e diversidade de participantes, o núcleo de mediação obteve absoluto controle e liderança na integralidade das sessões. As mediadoras agiram estrategicamente, com pleno domínio do fator humano envolvido e da respectiva utilização dos recursos tecnológicos que fluíram de maneira integrada perante todos os envolvidos. Os trabalhos foram rigorosamente organizados obtendo diferenciada qualidade na condução das reuniões. A dinâmica foi segmentada para melhor agilidade no curso das seções, fixando-se funções especificas, como a de uma mediadora com foco na relatoria, consolidando a integralidade dos tópicos/tratativas abordados do andamento das negociações.

– Pontos de destaque: A integração e sintonia do planejamento, da organização, das estratégias e estudo prévio do transporte público pela equipe de mediadoras e o respectivo respaldo institucional pela Coordenação do CEJUSC foram os aspectos essenciais no engajamento e a contribuição prospectiva dos envolvidos em aspectos importantes: a colaboração dos advogados, a detecção e superação de ações protelatórias da mediação, a garantia da continuidade gradual consolidando acordos parciais perante a transição de governo municipal ocorrida durante a mediação.

A mediação contou com a participação de cerca de quinze advogados que acompanharam exaustivos trâmites processuais desde a origem, litigando em prol de seus clientes. Outrossim, cabe ressaltar o domínio das mediadoras em manterem total controle da administração da mediação, acolhendo a manifestação de todos com *rapport* seguro, imparcialidade e oralidade, visando, como diz Eligio Resta,[59] ser "um tradutor que deve estar no meio das linguagens diversas, deve

[59] RESTA, Eligio. *O direito fraterno* [recurso eletrônico]. 2. ed. Santa Cruz do Sul: Essere nel Mondo, 2020, p. 87.

conhecer duas línguas e servir de trâmite, de meio, entre uma e outra; quanto mais línguas, linguagens, culturas, mundos entram em contato e têm necessidade de transformar o conflito potencial em comunicação, mais importante sua função".

Enfrentou-se momento em que o município ficou estagnado diante das negociações, com intuito protelatório que foi observado e agilmente rechaçado, consoante definido no instituto da mediação. As mediadoras declararam que haveria o provável encerramento dos procedimentos, impulsionando os participantes na reflexão sobre o tempo, sobre o custo e reais desdobramentos do andamento processual na retomada dos dez processos judiciais a serem enfrentados.

A pronta homologação dos acordos parciais já consensados, sem possíveis retrocessos nas negociações, garantiram o estímulo necessário para continuidade, em ritmo progressivo, da mediação perante a retomada das negociações. Essas medidas exitosas proporcionaram onze acordos parciais e quatro acordos para implementar aditivos na relação contratual.

De suma relevância abordar a força da homologação de acordos da mediação como sentença judicial, independente de transições nas gestões de governo municipal. A mediação foi instaurada com acordos celebrados na gestão do Prefeito Marchezan,[60] e foram respeitados e cumpridos na gestão seguinte pelo Prefeito Melo.[61] Essa experiência demonstra o potencial de planejamento e organização similar em futuras aplicações para municípios, estados, ou mesmo o país, independente da ideologia política de seus gestores.

– **Acordo**: as concessionárias renunciaram à quantia de R$27,8 milhões, referente ao montante de remuneração de capital, da depreciação e da receita do serviço – período compreendido entre 19 de março e 31 de julho de 2020 – com o aporte pelo município do valor monetário de R$39,3 milhões. Os recursos aportados pelo município de Porto Alegre serão revertidos em créditos da utilização de pessoas inscritas no Cadastro Único do Governo Federal, e, assim, priorizando-se segmento da população de maior vulnerabilidade social, exclusivamente, nos horários das 9h às 16h59m e das 20h às 5h59min. Por derradeiro, o município e as concessionárias tiveram pleno êxito na consolidação, de forma amigável e responsável, viabilizado por diálogo produtivo em prol da comunidade. Os acordos firmados incorporam outros secundários além dos principais aspectos sobreditos.

[60] Sobre acordo realizado na gestão do Prefeito Nelson Marchezan Júnior, disponível em: https://www.tjrs.jus.br/novo/noticia/acordo-inedito-sobre-transporte-coletivo-de-porto-alegre-e-firmado-no-cejusc-empresarial/. Acesso em: 20 out. 2023.

[61] Além de cumprir acordo realizado em gestão anterior, o Prefeito Melo celebrou novos acordos que trataram temas diferenciados. Sobre o acordo realizado na gestão do Prefeito Sebastião Melo, disponível em: https://www.tjrs.jus.br/novo/noticia/cejusc-celebra-acordo-entre-municipio-e-consorcios-associacao-dos-transportadores-de-passageiros-em-porto-alegre/. Acesso em: 20 out. 2023.

A mediação, que contou com trinta e oito sessões discorridas em dois anos e onze meses, desenvolveu-se em quatro fases, firmou quatro acordos de aditivos ao contrato e nove acordos parciais. Tais acordos firmados propiciaram a remodelação do transporte público, com transformações que beneficiam a população através do Programa Mais Transportes.

O Município de Porto Alegre conjuntamente com as concessionárias ainda permanece em mediação para ajuste de acordo final que encerrará a quinta e última fase do procedimento, após a experiência do Programa Mais Transporte.

5.2 Caso 2 – Passo Fundo

– **Características**: trata-se de mediação pré-processual[62] do desequilíbrio perante a relação de concessão do Município de Passo Fundo/RS e a empresa COLEURB – Coletivo Urbano Ltda. A empresa é prestadora do serviço público de transporte urbano, entretanto, a formalização contratual da concessão encontrava-se descontinuada da renovação em razão do processo licitatório estar pendente de realização pela Administração Municipal. O município detém empresa própria de transporte público, a CODEPAS – Companhia de Desenvolvimento de Passo Fundo, também em situação deficitária por consequência da pandemia. A mediação teve início em 18 de outubro de 2022, com a participação da PGM e da Câmara de Vereadores de Passo Fundo.

– **Conflito**: a pandemia da Covid-19 refletiu gravemente no equilíbrio da receita/despesa da empresa, decorrente da dificuldade de manter a operação perante a questão impositiva da redução de serviços. Nesse cenário, a concessionária ainda foi compelida a assumir três linhas deficitárias da empresa municipal CODEPAS, além do fato pretérito de, em 2020, a COLEURB ter assumido duas outras linhas da Transpasso, concessionária que encerrou suas atividades na época. No ápice da pandemia, em 2021, o município insistiu para o restabelecimento da operação com os serviços similares aos parâmetros qualitativos/quantitativos realizados em período de normalidade anterior à pandemia. Nessa ocasião, foi exposto ao Secretário de Transporte a inviabilidade do retorno integral da operação, em razão dos vultosos prejuízos causados pela Covid, em decorrência da massiva redução da demanda e queda do faturamento, associados à severa elevação dos custos perante a ociosidade da frota e demais recursos operacionais internos vinculados ao transporte público.

Considerando a gravidade da situação, a empresa pautou com o município tratativas com objetivo de obter o reequilíbrio econômico-financeiro contratual,

[62] Pré-processo número 6000269-06.2022.8.21.0001.

concomitantemente aos procedimentos da nova licitação, indicando conjunto de alternativas para permitir o reequilíbrio, e, principalmente, mitigar-se o prejuízo que superava R$16 milhões (até set./2022), montante respaldado no parecer técnico da empresa LASTRAN, do Laboratório da Universidade Federal do Rio Grande do Sul. O parecer demonstrou o desequilíbrio na prestação do serviço, o aumento do custo da operação decorrente dos acréscimos de despesas do combustível em seus recursos de pessoal e de peças atreladas à manutenção da frota e instalações, bem como no tocante à queda acentuada da demanda provocada pela pandemia, respectiva queda da quilometragem rodada vinculada à demanda e à redução do IPK.

Por outro lado, outra problemática a se considerar, foi a redução de 50% na compra de vales-transportes pela Prefeitura de Passo Fundo, ou seja, o município deixou de adquirir cerca de R$1,8 (um milhão e oitocentos mil reais) de vales-transportes no período de 2020/2021, em relação ao exercício de 2019.

– **Desenvolvimento**: a Prefeitura de Passo Fundo reconheceu a inequívoca necessidade da empresa COLEURB superar as graves consequências da pandemia, porém, colocou a importância de que a empresa CODEPAS, por equiparação, não deveria deixar de ser contemplada com benefícios resultantes do processo de decisão/negociação realizada em mediação a favor do transporte público.

Os primeiros movimentos se deram através da busca incessante pelo subsídio. O subsídio municipal dependia de Projeto de Lei a ser aprovado na Câmara de Vereadores, e o subsídio federal,[63] repasse destinado à gratuidade de idosos exclusivamente destinado ao transporte público, seguiria o cumprimento das regras da Portaria nº 9 de 30 de agosto de 2022 do Ministério de Desenvolvimento Regional.

Todos os esforços foram realizados pela PGM para o encaminhamento do Projeto de Lei para o subsídio municipal, porém não obteve êxito. Embora algumas comissões já tivessem manifestado seu parecer favorável, muitos deputados não compreenderam a composição da tarifa e o fato de o repasse não ser para a empresa, e sim para o Sistema de Transporte.

Nesse contexto, as sessões de mediação mantinham clima de elevada preocupação, pois o Município pretendia aguardar a aprovação do PL para agilizar o aporte federal, que estava em mãos da Prefeitura, com limite temporal do repasse à empresa se dar até o dia 31 de dezembro, consoante o regramento federal. Respaldando-se na robusta cooperação da Prefeitura que acreditou em outras

[63] Saiba sobre o repasse e as regras definidas pelo Governo Federal para o transporte público em: https://diariodotransporte.com.br/2022/08/30/governo-federal-define-regras-para-o-repasse-dos-r-25-bilhoes-destinados-a-gratuidade-dos-idosos-no-transporte-publico/. Acesso em: 13 nov. 2023.

possibilidades para o PL, deu-se novos encaminhamentos sugeridos como: reuniões com a nova composição da Câmara de Vereadores, que estava em transição, pois Passo Fundo é o único município do estado que não tem lei autorizativa para subsídio. Em seu marco regulatório, art. 25, parágrafo único, há a possibilidade de conceder benefício com a Câmara atuando previamente nos devidos encaminhamentos formais.

Com a transição havida na gestão municipal, as mediadoras consideraram pertinente trazer à mediação, consoante anuência de todos envolvidos, o novo Presidente e o Procurador-Geral da Câmara de Vereadores, a fim de que as partes pudessem esclarecer as necessidades das empresas COLEURB e CODEPAS, assim como: tecer as possibilidades legais e políticas da Prefeitura e o direito social da população em receber transporte público. Essa iniciativa estimulou sobremaneira o curso das negociações. Com o inestimável apoio do Presidente Câmara de Vereadores houve encaminhamento agilizado para a nova solicitação de PL.

A mediação permanece ora em andamento com notável engajamento das partes e da Câmara de Vereadores, tão somente aguardando os trâmites legais exigidos pela Administração Pública, com a plena possibilidade de acolhimento das demandas pleiteadas pela empresa.

– **Pontos de destaque**: as mediadoras reconheceram o diferencial do município em ser representado diretamente pela PGM, fato que se revelou chave na agilidade de múltiplas decisões importantes.

A mediação foi sensível em perceber a imperativa necessidade da inclusão da empresa CODEPAS, não de modo específico nos procedimentos, mas em agir conjuntamente nas tratativas perante as possibilidades da concessão de benefícios nas transações. O reconhecimento da situação da CODEPAS por parte da equipe de mediação, foi condição indispensável para o impulso positivo na dinâmica da Prefeitura e consequentemente a aceitação da COLEURB diante do fato.

Cabe destacar-se a habilidade, a experiência prévia e a percepção das mediadoras no entendimento de que, pela falta de informações e de conhecimento, a Câmara de Vereadores não estava conectada às tratativas realizadas em mediação. Nesse viés, as mediadoras expuseram aos envolvidos, de modo pedagógico, o extraordinário potencial de respaldo na participação direta do Presidente, bem como se necessário fosse também a participação de outra autoridade institucional. A estratégia consistiu em pertencimento e empoderamento, ou seja, uma vez que os Vereadores integrassem como parte na solução do problema, incorporando as necessidades das empresas e as possibilidades do município, estariam engajados e empoderados prospectivamente para a solução.

– **Acordo**: este caso aguarda a votação da Câmara de Vereadores para aprovação de PL referente ao aporte municipal.

5.3 Caso 3 – Erechim

– **Características**: a mediação, iniciada em 10 de maio de 2021, foi um procedimento judicial[64] entre Empresa de Transporte Gaurama Ltda. e o Município de Erechim. Dois processos foram encaminhados pelo juiz, um versando sobre o desequilíbrio econômico-financeiro, e outro, sobre a busca e apreensão dos ônibus pelo Banco Volkswagen S.A.

A mediação contou com a presença dos atores Banco Volkswagen S.A., Agência Reguladora de Serviços Públicos Municipais de Erechim – AGER, e Conselho Municipal de Trânsito e de Transporte de Passageiros do Município de Erechim, o Prefeito Paulo Alfredo Polis e o Ministério Público.

– **Conflito**: a relação entre as partes iniciou sem contrato estabelecido, regulamentado com contratação em 2004, com nova licitação aberta em 2016 que, por inúmeros fatores, só foi realizada em 2018.

No ano de 2018, quando a empresa venceu o processo licitatório, teve início a nova concessão, objeto do processo em comento, no qual a empresa buscou o reequilíbrio econômico e financeiro do contrato para obter capacidade de cumpri-lo. A partir de 2018 e em 2019, a venda de passagens para o transporte urbano arrecadava R$200 (duzentos) mil mensais e o faturamento da empresa atingia a média de R$1,2 milhões. Esses valores em queda foram acirrados pela pandemia em 2020. O município passou a não adquirir vales-transportes, reduzindo o faturamento para a média mensal entre de R$700 e R$500 mil reais apenas.

Os aumentos nos preços dos insumos, a folha de pagamento e demais obrigações foram agravando a situação da empresa, principalmente o dissídio previsto da categoria na época, fazendo com que a empresa buscasse financiamento bancário. Somente com o atendimento ao reequilíbrio solicitado seria possível retornar à normalidade, pois a receita estava menor que a despesa, acumulando um déficit de quase R$5 milhões de reais. Tendo ainda o compromisso anual, a título de parcela da outorga fixa, o valor de R$1 milhão de reais a ser pago ao município.

Outro problema para a empresa foi sua situação crítica, inscrita no SERASA, com restrições para contrair qualquer tipo de financiamento e quitar seus compromissos.

– **Desenvolvimento**: o município se mostrou sempre colaborativo, considerando os pedidos da empresa. Tendo recebido o valor da outorga referente a 2018 e 2019, decidiu por diluir o valor de R$1 milhão referente a 2020, e também reduziu algumas linhas de ônibus de menor fluxo de passageiros. Além disso, a

[64] Número do processo: 5003248-20.2020.8.21.0003.

partir de abril de 2021 retomou a aquisição dos vales-transportes aos servidores municipais, interrompido por força de lei municipal, datada de janeiro de 2020.

Do ponto de vista do Banco Volkswagen, embora sensibilizados, tratativas foram iniciadas antes mesmo do banco ingressar com a ação, algumas propostas foram feitas e recusadas na época. Referiram sobre não ter alçada em propostas realizadas em mediação, contudo, sempre seriam consultados os órgãos superiores na hierarquia do banco, que iriam deliberar sobre as possibilidades de reparcelamento e condições de pagamento, podendo, ainda, haver decisões vindas da Alemanha. Sugeriram que as tratativas se realizassem apartadas da mediação. A equipe de mediação, no entanto, contestou a atitude, pois o intuito era justamente aproximar as partes para geração de propostas.

O órgão fiscalizador relatou acompanhar a execução do contrato de concessão, afirmando que o índice de reclamações era baixíssimo e considerou a empresa exemplar na prestação de serviços de transporte urbano.

Nesse contexto, a empresa manifestou interesse em compor o acordo, abdicando dos pedidos de subsídio mensal constantes no processo de 2020, relativo ao contrato de 2004, reiterando que atendidos os pedidos, desistiria dos anteriores. A proposta consistia em: valor de entrada de R$840 mil reais; o saldo de R$3,5 milhões de reais a ser pago em 07 (sete) parcelas mensais e consecutivas de R$500 mil cada uma; o compromisso de retomada significativa das linhas que foram limitadas e campanhas da administração pública de conscientização, com 50% da frota disponibilizada para este fim. Com o montante de R$840 mil a empresa quitaria o valor aproximado de R$530 mil em atraso com o banco Volkswagen, facilitaria a suspensão temporária do contrato e evitaria a busca e apreensão dos ônibus, evitando o vencimento antecipado do contrato.

Como contraproposta, o município apontou a redução de R$340 mil reais no valor inicial solicitado; aporte inicial de R$1 milhão de reais, mediante aprovação de projeto de lei a ser encaminhado ao Poder Legislativo; e novos aportes que dependeriam de perícia contábil nos cálculos do valor para reequilíbrio. O município não poderia concordar com o valor total muito alto, sendo a perícia o meio legal encontrado dentro dos princípios da administração pública.

Embasados nas propostas sobreditas, a mediação se desenvolveu em meio a intempéries como: manifestação de funcionários em frente à Prefeitura, ajustes através de análise técnica, insegurança por se tratar de um contrato de grande vulto de valor, incerteza da aprovação do PL, parcelas atrasadas no banco, e a preocupação quanto à interrupção dos serviços. Porém, todos os participantes estiveram comprometidos em manter o serviço público à população de Erechim, e assim caminharam conjuntamente para o ajuste das devidas soluções.

– **Pontos de destaque**: o grande trunfo identificado pela equipe de mediação foi a positiva intenção do município em resolver a situação de forma participativa

e colaborativa, respeitando as limitações inerentes ao poder público, mas cientes do principal objetivo: evitar a paralisação do serviço de transporte urbano de passageiros em Erechim. Esse fato se concretizou pela participação do Prefeito, recomendada em todas as mediações do transporte público urbano, mas nem sempre possível de ser atendida. A mediação versou sobre os dois processos interdependentes durante toda sua duração.

A convite dos mediadores, e concordância das partes, o Ministério Público participou durante todo o processo de mediação, exercendo sua missão institucional de defender os interesses da coletividade, fornecendo seu parecer favorável ao acordo.

Visualizar possibilidades e apontar caminhos diante de impasses necessita habilidade e experiência do mediador. Foi o que ocorreu diante dos ajustes financeiros propostos pelo Prefeito de Erechim. A equipe de mediação recontextualizou alguns pontos relevantes: aliar a necessidade com a possibilidade das partes, a série de fatores que contribuíram com as diferenças apontadas e o agravamento da situação frente à pandemia, bem como a existência de um contrato de concessão de responsabilidade da Prefeitura em garantir transporte público, direito essencial dos trabalhadores, porém, reconhecendo o limite para a negociação. Este foi o cenário introdutório para questionar a empresa quanto ao seu planejamento e reprogramação, qual seu déficit, quais são as demais possibilidades de renegociações, quais as linhas existentes e passíveis de redução, reprogramação de itinerários, e alternativas afins. Em fechamento, disponibilizaram modelos de acordos realizados em outros municípios, a fim de gerar opções plausíveis para opções sobre transporte público urbano de Erechim.

Intervenção importante dos mediadores referiu-se à manifestação por parte do Banco Volkswagen ao mencionar que as tratativas seriam apartadas da mediação. Muitas vezes isso acontece por falta de conhecimento sobre o alcance e as possibilidades jurídicas do procedimento. A equipe, de imediato, procurou inserir/enquadrar a instituição no contexto da solução do conflito por método autocompositivo. No contexto temporal, com pleno conhecimento, foi necessário assegurar a veracidade e legalidade das tratativas, explicar o caminho a ser traçado para um acordo eficiente, eficaz e principalmente seguro para todos, com aval do MP.

– **Acordo**: o caso do município de Erechim teve desfecho com dois acordos. Primeiramente, acordo parcial para impedir a busca e apreensão dos ônibus, com total apoio do Ministério Público. Posteriormente, acordo sobre o envio de Projeto de Lei ao Poder Legislativo, para a aprovação do valor a ser alcançado pela empresa para a retomada dos serviços.

Ainda, com ajuda financeira da Prefeitura, houve o pagamento da negociação da dívida entre a empresa e o Banco Volkswagen.

Os processos foram extintos em mediação, com a segurança jurídica e homologação do juízo competente, com parecer favorável do Ministério Público, tendo como efeito o trânsito em julgado dos processos, não cabendo recurso. Dessa forma, cumpriu-se, em três meses, o objetivo inicial da mediação: garantir o atendimento do interesse público.

5.4 Caso 4 – Caxias do Sul

– **Características**: a mediação pré-processual[65] inaugurada entre a empresa Viação Santa Tereza de Caxias Sul Ltda. – VISATE e o Município de Caxias do Sul, demonstra mais um caso de desequilíbrio econômico-financeiro do Transporte Público atingido pelas consequências da pandemia. As sessões iniciaram em 12 de agosto de 2021, com a presença do representante da Câmara de Vereadores e o Prefeito Adiló Didomenico.

A empresa sempre representou modelo a ser seguido em transportes coletivos por ônibus, tanto na região urbana quanto no interior do município. As partes constituem relação contratual tranquila, diferente da maioria dos municípios gaúchos. O transporte licitado teve prorrogação por dez anos em 2010, até a nova licitação em 2021, vencida pela VISATE com concessão por quinze anos, ainda vigente. Em Caxias do Sul apenas a VISATE opera o transporte público, em relação direta com o município, sem interferência de consórcio.

– **Conflito**: nos últimos anos, o serviço público prestado pela VISATE vinha com tendência a queda gradual de demanda em função do incentivo ao deslocamento individual, do desemprego com redução da quantidade de vales-transportes, da concorrência desleal dos aplicativos de transporte, como Uber e outros, que não pagam tributos, não têm gratuidades, não cumprem horários, não prestam serviço em regiões de baixa demanda, como as empresas regulares.

No Rio Grande do Sul, por meio do Decreto Estadual nº 55.128, de 19 de março de 2020, o Governador do Estado decretou estado de calamidade pública em razão da pandemia da Covid-19. Com o sistema de bandeiras,[66] foram estabelecidas regras específicas sobre o transporte de passageiros, como limitação do número de passageiros, e a necessidade de higienização especial. Tais restrições obrigaram a empresa a utilizar o dobro da frota que seria necessária em condições normais, para transportar as mesmas pessoas.

Quanto ao transporte intermunicipal de passageiros, a situação foi ainda mais grave. As notórias dificuldades do sistema já demandavam soluções urgentes

[65] Pré-processo número: 60002650320218210001.
[66] Decretos Estaduais números 55.240/2020 e 55.241/2020.

para a queda no número de usuários. A crise era sistêmica, e com a pandemia a situação se intensificou.

Deve-se ter em mente que a tarifa do transporte nada mais é do que o rateio do custo da prestação do serviço e da remuneração do investimento, menos os eventuais subsídios, pelos usuários pagantes. Com a queda da demanda, aumenta o custo, e consequentemente aumenta a tarifa, causando enorme descompasso entre receita e despesa gerando grande dificuldade de caixa para a empresa.

Antecedente à pandemia, a empresa possuía quadro de mil e quinhentos funcionários, passando a oitocentos e trinta e quatro em 2020. Foi preciso reduzir cerca de setecentos funcionários, com rescisões em acordo firmado pelo Tribunal Regional do Trabalho, com pagamentos em até vinte e duas vezes. A VISATE precisou vender quarenta ônibus, retirando de seu ativo, restando sem alternativas.

– **Desenvolvimento**: a empresa VISATE havia renovado seu contrato através de licitação recentemente, tendo o compromisso concedido por mais quinze anos.

Com o advento da pandemia, em março de 2020 deu-se desarranjo geral na economia e especialmente no transporte, devido a dois fatores: o baixo índice de deslocamento das pessoas e as normas exigidas para o transporte de passageiros nos ônibus. Com isso, reduziu a quantidade de usuários, chegando a empresa a operar com a metade da capacidade durante a bandeira preta. No horário de pico precisaria ter o dobro da frota para cumprir a demanda.

Embora pareça contraditório, para cumprir os requisitos exigentes do novo contrato, a empresa investiu cerca de R$20 milhões, através de financiamento, por entender que a maneira de atrair o usuário seria prestando um bom serviço com qualidade, como sempre fez. Apesar de ter apontado desequilíbrio econômico-financeiro na pandemia, na vigência do contrato anterior, não deixaram de investir na qualidade do serviço para cumprir os requisitos do novo edital. Houve investimento em frota (31 ônibus), atualização do sistema de bilhetagem, sistema de monitoramento, acessibilidade em toda a frota.

Os problemas que afetaram a empresa foram relatados e protocolados na Prefeitura de Caxias do Sul desde o mês seguinte ao início da pandemia. Não havia mais onde buscar recursos, nos últimos oito meses houve a necessidade de parcelar R$8 milhões para pagamento de funcionários. Cada protocolo acompanhou estudo técnico realizado pela equipe técnica, sem a devida manifestação por parte da Prefeitura. Enquanto isso, a empresa estava afundando em dívidas e prejudicando o serviço de transporte público do município.

A empresa apostou na mediação com o intuito de tentar uma solução para a manutenção do serviço de transporte reconhecido pela população, mas para isso precisava também, do reconhecimento da Prefeitura. Com o valor da tarifa em R$4,75, a empresa alertou não adiantar fazer campanha política alegando tarifa

mais barata, se não houvesse a ação. No entanto, a preocupação estava em qual seria o valor da nova tarifa, estimada em R$6,00. A previsão do edital de licitação era de mais de R$2 milhões/mês, que atualizado em julho se manteve na metade da expectativa da demanda.

No decorrer de quinze sessões conjuntas, foram apontadas questões como: a apresentação de estudo técnico referindo déficit da empresa no volume de R$26 milhões; a Secretaria de Trânsito já havia tomado algumas medidas durante a pandemia no sentido de reduzir o número de ônibus circulantes, alterar algumas linhas, em auxílio à concessionária; a necessidade de definição dos riscos suportáveis pelo município; o reconhecimento da necessidade do subsídio por parte da Prefeitura, contudo, sob detalhada análise técnica; a incerteza de o município atender o pedido da VISATE na sua integralidade.

A Câmara de Vereadores, através de seu representante, reconheceu a qualidade e esforço referente aos serviços prestados pela VISATE. Demonstrou grande preocupação com a possibilidade da falta do serviço de transporte para a população caxiense. Porém questionou a veracidade do montante apresentado pela empresa, concordando com a Prefeitura em realizar estudos técnicos para comprovação dos cálculos.

Os estudos técnicos foram o tema de sucessivas sessões de mediação. Foram solicitados exaustivos envios de documentação técnica e financeira comprovativas. Segundo os técnicos da Prefeitura, os estudos não poderiam basear-se apenas em planilhas, mas em documentação contábil, por se tratar de administração pública. Além disso, o município entendeu o dever de socorrer a empresa na medida que garantisse a viabilidade mínima para a sobrevivência e para não deixar a população sem o serviço de transporte. Para isso, o município apresentou como argumentos: a população da cidade não teria que cobrir a expectativa de lucro da empresa, e a viabilidade econômica da VISATE.

Após várias tentativas frustradas dos técnicos em chegar ao consenso sobre valor a ser aportado, a Prefeitura acolheu o exemplo de outros municípios, apresentado pelas mediadoras no início do procedimento, em contratar avaliador externo imparcial para apresentação do cálculo do valor do subsídio. Embora as partes tenham concordado com a contratação do profissional externo, o tempo foi verdadeiro inimigo para a empresa.

– **Pontos de destaque**: a mediação coletiva com ente público realizada entre a empresa VISATE e o Município de Caxias do Sul exigiu mais que esforços negociais e experiência das mediadoras em administrar a gestão do conflito.

A mediação apresentou evolução baseada no diagnóstico e particularidades da cidade de Caxias do Sul, identificando o município como o melhor transporte público urbano do Rio Grande do Sul.

Em tratativas, um primeiro acordo possibilitou à empresa urgente aporte, a fim de suprir as emergências do desequilíbrio econômico-financeiro causadas pela pandemia. Esse acordo foi motivado pelo fato de o sistema ser suportado integralmente pelos usuários.

A partir da celebração do acordo, as mediadoras observaram surgimento de bloqueios referente ao entendimento já consensado. O principal obstáculo detectado foi o interesse político por parte da Administração Pública, também levado em consideração no procedimento da mediação, mas que preponderou sobre o interesse público. Como Caxias do Sul é uma cidade culturalmente italiana, onde a relação de confiança é muito difícil nos negócios, repercutiu o embate político e a não adesão das instituições, tanto do MP como do Poder Legislativo ao procedimento de mediação.

A todo momento as mediadoras usaram, como poderosa ferramenta, a possibilidade de incluir pessoas/entidades que pudessem contribuir com a evolução das tratativas, porém o Poder Executivo não acolheu dividir a participação no êxito do acordo, ou não se sentiu confortável em chamar o Legislativo para mediação.

Nesse viés, intencionalmente ou não, desencadearam-se sucessivos retardos das decisões, ou seja, a mediação estava sendo usada como instrumento protelatório. Foi momento decisivo para a equipe de mediação, conceber que o procedimento estava prejudicando o interesse público em manter o transporte ainda com qualidade, e consequentemente, a empresa acumulando dívidas a cada dia.

A não adesão do Poder Legislativo, assim como os entraves apontados pelo MP em questionar a veracidade dos acordos realizados em mediação empresarial fora da jurisdição de Caxias do Sul, levou o Judiciário a manifestar sua própria insegurança de tratar o caso fora da Comarca de sua competência, sendo que o CEJUSC Empresarial tem como sede, o Foro de Porto Alegre.

As mediadoras inferiram que as limitações sobreditas refletiram efeitos diretos nos Poderes Judiciário, Executivo, Legislativo e no Ministério Público impedindo a relação de interdependência de interesses. Ainda que todos os esforços tenham sido concretizados na gestão da mediação, não sobrepôs aos interesses políticos da Administração Pública. Na mediação empresarial do transporte urbano em Caxias do Sul houve evolução e retrocesso, sendo o retrocesso maior que a necessária evolução, obtendo êxito no primeiro acordo, mas sem a devida satisfação das partes no restante dos entendimentos.

– **Acordo**: a mediação se encerrou após quinze sessões realizadas no período de um ano e um mês, com a celebração de acordo entre as partes, no qual o Município de Caxias do Sul deveria aportar R$4 milhões para suprir o déficit causado pela pandemia ao transporte público realizado pela VISATE.

Em contrapartida, por questões políticas, a Administração Pública de Caxias do Sul não contribuiu para a evolução do segundo acordo, ficando incerta a situação de como os operadores do transporte público conseguirão lidar com as perdas financeiras ocorridas.

6 Conclusão

Em ritmo acelerado, a sociedade global moderna se renova, evoluindo as suas relações de natureza legal e em âmbito institucional, cultural, econômico, social, contratual e comercial. Na medida em que os conflitos recorrem à solução pela via judicial, a estrutura do Poder Judiciário se revelou com dificuldade para responder o volume crescente dos litígios. Deparou-se, assim, com o crescente desafio da sociedade encontrar meio de solução de controvérsias e autocomposição de conflitos na Administração Pública, superado com o ato decretado pelo Congresso Nacional, e sancionado pelo Presidência da República, da Lei da Mediação nº 13.140 em 26 de julho de 2015. Respaldada nesse marco histórico da Lei da Mediação a sociedade passou a adotar o Instituto da Mediação para solucionar seus conflitos, e, em poucos anos estruturaram-se os CEJUSCs e as Câmaras especializadas acreditadas pelo Tribunal de Justiça. Por conseguinte, a atuação de mediadores profissionalmente qualificados consoante a Classificação Brasileira de Ocupação 3514-35 desafogou o Poder Judiciário em seu rito processual tradicional.

Com a pandemia – Covid-19 – ocorreu a quebra generalizada do equilíbrio das relações contratuais e demanda recorde de conflitos urgentes e de natureza coletiva. O transporte público e suas respectivas concessões sofreram grande impacto no Brasil e em outros países.

O efeito no setor de transporte acirrou a problemática já existente, caracterizada pela queda da demanda de passageiros no transporte público por ônibus. Esse vetor crônico da queda de demanda se deve a vários fatores conjuntamente incidentes, incluindo o aumento do trabalho remoto em *home office*, o transporte por aplicativos, a redução das atividades e eventos sociais, a adoção de medidas protetivas de distanciamento social, entre outras razões que foram determinantes no desequilíbrio tarifário/financeiro nas relações contratuais de concessões. Nesse viés, se tornou imprescindível a revisão bilateral das condicionantes estruturais e demais parâmetros tarifários/financeiros das relações contratuais.

O Poder Judiciário acolheu os métodos adequados de solução de conflitos como melhor meio para atender as inúmeras e graves contendas decorrentes da pandemia. Nesse sentido deliberou, com ênfase e prioridade, a mediação para atuar na solução das consequências negativas nas relações de consumo. Ao longo dos procedimentos de mediação coletiva com respaldo da Administração Pública, proferiu-se grande potencial de alcance e convergência nos acordos estabelecidos.

Relevante destacar-se que a mediação coletiva com ente público se revelou com características distintas se comparada com a mediação entre pares. A participação do ente público gera vantagem uma vez que possibilita e valida diálogo direto com a população realçando a importância do consenso dialógico na democracia contemporânea. Outrossim, a mediação coletiva com setor público possui fatores intrínsecos: rígidos protocolos institucionais e de natureza legal; complexidade e pluralidade das dimensões da mediação coletiva, que tiveram que ser flexibilizadas e harmonizadas para solução do conflito; convergência de entendimentos entre o Ministério Público, Defensoria Pública, Poder Legislativo, Poder Executivo, Advocacia Pública e Entidades Representativas; consolidação e legitimação da solução consensual de forma institucional pela Administração Pública bem como pelo Poder Legislativo local.

Nos quatro casos analisados em que houve a superação da quebra do equilíbrio contratual de concessões do transporte público perante os seus municípios, ficou demonstrada que a mediação dispende tempo e custos insignificantes se comparada com o litígio judicial. A possibilidade de estudos e debates colaborativos em sessão de mediação coletiva gera opções de remodelagem do sistema, com o empenho dos entes públicos necessários para os devidos encaminhamentos e validações dos acordos.

Independentemente de o instituto da mediação disponibilizar técnicas e condições legais para celebrar acordos prospectivos, a capacidade cognitiva e estratégica dos profissionais mediadores é condição fundamental para a gestão e superação do conflito. Importante salientar que os mediadores experientes designados, interagiram com elevado quantitativo de pessoas nas seções, com interesses plurais e controversos, com questões multidisciplinares de natureza tarifária legal, social, técnica, financeira e política, componentes essas intrínsecas da lide. O vulto e a complexidade da pauta vinculada ao transporte público urbano, demonstra que a formação básica exigida pelo CNJ, embora eficiente, não é suficiente para o perfil necessário aos mediadores perante enfrentamentos com características sistêmicas institucionais da mediação coletiva com ente público. Na mediação coletiva torna-se impraticável o trabalho do facilitador inexperiente diante da gestão complexa e específica do conflito.

Por todo o exposto, podemos afirmar que a hipótese de pesquisa foi ratificada tanto pela revisão de literatura quanto pela análise casuística. Em suma, a mediação coletiva possui distinções significativas da mediação entre pares, tanto na fase processual quanto em sua fase pré-processual. Logramos êxito em demonstrar tal distinção ao analisarmos o procedimento em si e a atuação do mediador.

Por oportuno, é imperativo propor que as futuras licitações, contratos de concessão e contratos de outra natureza, contemplem a inclusão regular de cláusula

assentando a adoção da mediação para superar eventual ocorrência de conflitos perante partes e entes envolvidos. Salutar também, que a prática da mediação coletiva seja observada pelos órgãos responsáveis pela aplicação dos métodos de solução de conflitos, com o propósito de qualificar o serviço prestado à sociedade, bem como solidificar positivamente o Instituto da Mediação.

Multiparty Mediation: The Procedure and the Mediator through a case analysis

Abstract: The article aims to delineate the distinctions between multiparty mediations involving Public Administration participation and peer mediation from a doctrinal perspective and through case studies. Therefore, the article hypothesizes an investigation into the differences in multiparty mediation in terms of procedure and the mediator's role. Analyzing the professionals' performance in both modalities was vital to achieve this. The paper adopts a descriptive-prescriptive approach, initially presenting the literature review and subsequently conducting a case analysis with emphasis on cases related to the deficit in the public transportation system of the Brazilian state of Rio Grande do Sul. The article concludes with remarks on the main distinctions of multiparty mediation, highlighting its challenges for mediation professionals and outlining future perspectives for this modality.

Keywords: Mediation. Multiparty mediation. Mediator. Public administration. Public transportation.

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Enhancing deliberation in land acquisition for public interest: Realizing a responsive Agrarian Legal Policy grounded in justice

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Abstract: This research examines the implementation of deliberation in determining the form and amount of compensation in land acquisition for public purposes and the Legal Politics of Deliberation in ideal land acquisition for public development. This paper aims to understand the implementation of deliberation in determining the form and amount of compensation in land acquisition for public purposes and the efforts to optimize the Legal Politics of Deliberation in ideal land acquisition for public purposes. This research is based on the constructivist paradigm with a socio-legal approach method. The authors find that the implementation of deliberation in determining the form and amount of compensation in land acquisition is merely procedural and requires optimization of the legal politics of deliberation regarding ideal land acquisition for public purposes, conducted with caution based on Pancasila values.

Keywords: Deliberation. Land Acquisition. Compensation. Legal Politics. Public Interest.

Introduction

Land carries substantial significance and value in the existence of human beings. It functions as the primary residence for the majority of the human population,

providing a means of sustenance for those involved in farming or gardening and finally serving as the ultimate resting place for the departed.[1] The importance of land for human existence is multifaceted.[2] First and foremost, from an economic perspective, land functions as a productive resource that has the potential to generate wealth and success. Furthermore, from a political standpoint, land ownership can significantly influence an individual's role in shaping societal decision-making processes. Furthermore, from a cultural perspective, it can ascertain the social standing of its possessor. Furthermore, land possesses profound significance, as it serves as the final resting place for all individuals.

In antiquity, human factions were eager to engage in conflicts with one another in order to assert their territorial claims.[3] The winners of these conflicts would acquire dominion over the territory, while the losers would be compelled to surrender it and seek new land elsewhere. Land has a vital role in the existence of living organisms, especially people, to the extent that every piece of land must be passionately protected, even if it means sacrificing lives. According to Wignjodipoero, this can be attributed to two factors: Nature: Land is the sole asset that remains unchanging in its state, irrespective of conditions, and may even become more beneficial. The land has multiple functions, including providing a place for people to live, supporting life, serving as a burial site, and housing the guardian spirits and ancestors of the community.[4]

Indonesia's land policy is based on its constitution, specifically Article 33 paragraph (3) of the 1945 Constitution. This article requires the state to use land and natural resources in a way that benefits the Indonesian people the most, which includes allocating land for development purposes. In addition, land policy is governed by Law Number 5 of 1960, which is commonly referred to as the Basic Agrarian Regulations.[5]

Development as a deliberate endeavour carried out by a nation, state, and government to accomplish national objectives through organised progress and transformation towards a contemporary society.[6] Legal politics are essential in the context of legal matters throughout the reform era. It refers to the official policy direction established by the state. The democratic political structure of the

1 Abdurrahman, *Masalah Pencabutan Hak-Hak Atas Tanah Dan Pembebasan Tanah Di Indonesia*, Seri Hukum Agraria (Bandung: Alumni, 1983).

2 Heru Nugroho, *Menggugat Kekuasaan Negara* (Yogyakarta: Muhammadiyah University Press, 2021).

3 Suroyo Wignyodipuro, *Pengantar Dan Asas-Asas Hukum Adat* (Jakarta: Haji Masagung, 1987).

4 Rosalina Rosalina, "Eksistensi Hak Ulayat Di Indonesia", *SASI* 16, no. 3 (September 30, 2010): 44–51, https://doi.org/10.47268/sasi.v16i3.786.

5 Try Widiyono and Zubair Kasem Khan, "Legal Certainty in Land Rights Acquisition in Indonesia's National Land Law", *Law Reform* 19, no. 1 (2023): 128–47, https://doi.org/10.14710/lr.v19i1.48393.

6 Lukman, "Pengembangan Masyarakat Sebagai Konsep Dakwah", *Jurnal Bina Ummat: Membina dan Membentengi Ummat* 2, no. 02 (June 25, 2020): 21–44, https://doi.org/10.38214/jurnalbinaummatstidnatsir.v2i02.49.

reform era requires the creation of laws that are adaptable and responsive. Law, sometimes regarded as a "tool", encapsulates the fundamental principle of legal supremacy, providing direction and guidance in the pursuit of national objectives.[7]

Infrastructure development necessitates the use of land; hence, the government is required to either supply land or obtain it for public use.[8] Nevertheless, the state's access to state-owned land is restricted, leading it to obtain land that is owned by the community, regardless of whether it is governed by customary law or other rights specified in the Basic Agrarian Law.[9]

This scenario gives rise to divergent interests between the government, which requires property for development, and the community (comprising individuals or groups) who own or have control over the land. Land acquisition must comply with the legal principles of public interest to prevent infringement upon the rights of landowners. The regulation governing land acquisition is Law Number 2 of 2012, which specifically addresses the acquisition of land for public development purposes.[10]

Property acquisition is a governmental process of obtaining property for development, primarily for public use. The process of land acquisition entails discussions between the entities in need of land and the individuals or organisations that possess the rights to the property that is necessary for development purposes. According to Article 19, paragraph (1) of Law Number 2 of 2012, Legal Negotiation Politics is governed by the requirement of public consultations for development plans. These consultations aim to reach an agreement among the relevant parties regarding the placement of the development plans.[11]

These public consultations provide a forum for stakeholders to foster mutual comprehension and consensus in the process of acquiring land for public development. The statement emphasises the significance of legal negotiation politics in the process of acquiring land, not only as a required procedure but also as a method for parties to come to agreements in the event of disagreements or conflicts over land. Negotiations are voluntarily performed between parties of equal standing, free from any external pressure.[12]

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7 Moh Mahfud MD, *Politik Hukum Di Indonesia*, Cetakan ke-10 (Depok: Raja Grafindo Persada, 2020).

8 Paul N Balchin, David Isaac, and Jean Chen, *Urban Economics: A Global Perspective* (Bloomsbury Publishing, 2019).

9 Natasha Meutia Emiliania, "Pelaksanaan Pengadaan Tanah Untuk Kepentingan Umum Di Atas Objek Tanah Dengan Luasan Kurang Dari 5 Hektar Dan Dibebani Hak Tanggungan (Studi Kasus Pada Pembangunan Gis 150 Kv Grogol Ii)", *Indonesian Notary* 3, no. 4 (2021): 438–59.

10 Siti Nur Faida Said and Irwansyah Irwansyah, "Land Acquisition by the Government and the Impact for the Community", *Papua Law Journal* 3, no. 2 (2019): 117–33, https://doi.org/10.31957/plj.v3i2.788.

11 Dendy Laksana Wirakusuma and Sri Setyadji, "Perlindungan Hukum Terhadap Pemegang Hak Pengelolan Tanah Atas Dampak Pengadaan Tanah Oleh Negara", *Jurnal Sains Riset* 13, no. 2 (September 30, 2023): 476–92, https://doi.org/10.47647/jsr.v13i2.1622.

12 Lawrence Susskind, *Using Assisted Negotiation to Settle Land Use Disputes* (Cambridge: Lincoln Institute of Land Policy, 1999).

Nevertheless, in reality, the land purchase procedure is not always ideal. Many negotiations are ceremonial and lack effective execution, resulting in disputes over land rights between communities with land rights and parties interested in acquiring land.[13] Article 28H, paragraph (4) of the 1945 Constitution affirms the state's recognition of individual rights, namely the right to private ownership. This provision emphasises that such ownership cannot be unlawfully seized by any party, highlighting the state's respect for land ownership rights.[14]

Several examples of agrarian cases regarding land acquisition for public development include: Land Acquisition for Infrastructure development of an alternative road in Gumingsir Village, Wanadadi District, Banjarnegara Regency; Land Acquisition for the construction of the Jombang-Mojokerto toll road in Watudakon Village, Jombang Regency; Land Acquisition for the construction of the Cisumdawu toll road; Land Acquisition for Public Interest Development in the Oil and Gas Sector; Land Acquisition for the construction of the Krian Legundi Bunder toll road in Gresik Regency, East Java; Land Acquisition for the construction of the Batang-Semarang toll road; Land Acquisition for the public interest development of the Manado-Bitung toll road in Manado City; Land Acquisition for the construction of the Bener Dam in Purworejo; Land Acquisition for the development of the Yogyakarta International Airport in Kulon Progo Regency; and Land Acquisition for the construction of an alternative road in Mekarsari Village, Suela District, East Lombok Regency.

In Indonesia, the Basic Agrarian Law was enacted over 60 years ago as a crucial step towards agrarian reform. However, it has not had a substantial effect thus far. In the year 2022, there were a total of 212 agrarian disputes, which indicates a 2.36% rise compared to the previous year's 207 conflicts. The year-end report for 2022 by the Agrarian Renewal Consortium, launched in Jakarta on Monday, January 9, 2023, emphasises the growing number of agrarian conflict cases. This year-end report centres on agrarian problems encountered by communities, particularly farmers, and the several initiatives undertaken by the government during 2022.[15]

The plantation sector had the highest number of agrarian conflict instances (99), followed by infrastructure (32), property (26), mining (18), forestry (24), military facilities (7), agriculture/agribusiness (2), and coastal and small island areas (5). Agrarian conflicts in Indonesia have impacted a total land area of 1.04 million

[13] Adrian Sutedi, *Implementasi Prinsip Kepentingan Umum Di Dalam Pengadaan Tanah Untuk Pembangunan* (Jakarta: Sinar Grafika, 2020).

[14] Kukuh Fadli Prasetyo, "Two Ideas of Economic Democracy: Contextual Analysis on Role of Indonesian Constitutional Court as a Guardian of Democracy", *Indonesia Law Review* 9, no. 1 (2019): 86–105, https://doi.org/10.15742/ilrev.v9n1.357.

[15] Yanis Maladi, "Reforma Agraria Berparadigma Pancasila Dalam Penataan Kembali Politik Agraria Nasional", *Mimbar Hukum – Fakultas Hukum Universitas Gadjah Mada* 25, no. 1 (2013): 27–41.

hectares (ha), affecting 346,402 households across 459 areas. The regions with the highest number of agrarian disputes were West Java (25), North Sumatra (22), East Java (13), West Kalimantan (13), and South Sulawesi (12). North Sumatra had the highest number of agrarian conflicts, covering an area of 215,404 hectares. In 2022, the Agrarian Renewal Consortium documented a total of 497 instances of criminality faced by activists advocating for land rights throughout the entire country. This result represents a substantial surge in comparison to 150 cases reported in 2021 and 120 cases reported in 2020. Dewi Kartika, the Secretary-General of the Agrarian Renewal Consortium, asserted that the government, at both the federal and regional levels, has not implemented any substantial or fundamental alterations in addressing and resolving agrarian conflicts. The government's response has been feeble and sluggish in curbing the escalation of violence.[16] [17]

The objective of this research is to examine the utilisation of negotiations in deciding the structure and magnitude of compensation in land acquisition for public purposes and to establish an optimal framework for legal negotiation strategies in the context of land purchase for public reasons.

Research methods

This research method utilises a multidimensional approach that is based on multiple complementary conceptual frameworks. Firstly, Stand Point examines legal science by considering two perspectives: normative and reality-oriented. The normative approach examines law as a normative entity that supports ideals, while the reality perspective examines the application of law in actual settings. The researcher, taking on the position of an impartial observer, undertakes the duty of observing and comprehending both perspectives equitably.

Furthermore, the constructivist paradigm offers a philosophical basis that presents law as a subjective and contextual social construct rather than an absolute truth. In this framework, the research seeks to reconstruct current understandings of law through the use of hermeneutic and dialectical methodologies, with the goal of reaching a consensus and producing informative and meaningful research findings.

The selected study Type is a non-doctrinal legal study that focuses on comprehending law within empirical and social frameworks. The socio-legal technique

[16] Pradipta Pandu, "Konflik Agraria Meningkat Sepanjang 2022, Kemauan Politik Kunci Penyelesaian", Kompas.id, January 9, 2023, https://www.kompas.id/baca/humaniora/2023/01/09/konflik-agraria-meningkat-sepanjang-2022-kemauan-politik-jadi-tumpuan-penyelesaian.

[17] Alie Zainal Abidin and Lely Indah Mindarti, "Policy Evaluation of the Land Registration System in Malang City", *Journal of Law and Sustainable Development* 12, no. 1 (2024): e2694–e2694, https://doi.org/10.55908/sdgs.v12i1.2694.

used entails analysing the text and application of laws in everyday life, using frameworks from both the legal and social sciences.

Additionally, regarding Research Methodology, data is acquired through fieldwork and literature study, encompassing both primary and secondary sources. Afterwards, a qualitative analysis is performed, taking into account validity through data triangulation techniques and talking with peer researchers to ensure the correctness and trustworthiness of the research findings.

Ensuring fair and land acquisition for public development: Principles, practices, and challenges in Indonesia

Land acquisition is a process that involves a sequence of acts with the goal of obtaining land by offering compensation.[18] Another viewpoint posits that land acquisition refers to any endeavour focused on obtaining land by offering recompense to the lawful proprietors. The process often entails the relinquishment or conveyance of land entitlements. The process of releasing or transferring land rights involves legally separating the landholder from the land they own and giving compensation through negotiated means. Hence, when carrying out land acquisition for public purposes, it is crucial to initiate negotiations with landowners to separate them from the land they hold legally.[19]

The government has implemented Law Number 2 of 2012, which deals with the acquisition of land for development projects that serve the public interest. According to Article 2 of this law, land acquisition is defined as the process of providing land to the proper parties by offering them fair and just compensation.[20]

Presidential Regulation Number 71 of 2012 on the Execution of Land Acquisition for Development Purposes for Public Interest states that land acquisition is the process of obtaining land by offering equitable and lawful compensation to legitimate owners. In addition, Presidential Regulation Number 30 of 2015, the Third Amendment to Presidential Regulation 71 of 2012, and Presidential Regulation 148 of 2015, the Fourth Amendment to Presidential Regulation Number 71 of 2012, stipulate that land acquisition necessitates the provision of equitable and impartial compensation to the lawful parties involved.[21]

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[18] Suhartoyo Suhartoyo, "Analisis Terhadap Penetapan Nilai Ganti Untung Pengadaan Tanah Untuk Kepentingan Umum Dalam Pembangunan Jalan Tol", *Administrative Law and Governance Journal* 4, no. 2 (2021): 326–38, https://doi.org/10.14710/alj.v4i2. 326–338.

[19] Sutedi, *Implementasi Prinsip Kepentingan Umum Di Dalam Pengadaan Tanah Untuk Pembangunan*.

[20] Surjanti and Rendra Eka Sanjaya, "Pemberian Ganti Rugi Terhadap Tanah Yang Terkena Pembangunan Jalan Umum Di Kabupaten Tulungagung", *Yustitiabelen* 6, no. 2 (2020): 1–15, https://doi.org/10.36563/yustitiabelen.v6i2.242.

[21] Meka Azzahra Larasati and Suparjo Sujadi, "Implications of the Law of Land Acquisition for Development in the Public Interest on Land Acquisition Conflict Resolution", *Al-Ishlah: Jurnal Ilmiah Hukum* 24, no. 2 (2021): 281–96, https://doi.org/10.56087/aijih.v24i2.286.

John Salindego[22] and other scholars have stated that the concept of "provision" of land may be found in Minister of Home Affairs Regulation No. 15 of 1975, which specifically addresses the procedures for land acquisition. The phrase "acquisition" of land is mentioned in Minister of Home Affairs Regulation No. 2 of 1985, which outlines the procedures for obtaining land for development projects in district areas. Both phrases aim to procure or obtain land for government use in accordance with government initiatives.

Land acquisition, as defined by Imam Koeswahyono,[23] is a lawful process conducted by the government to obtain land for particular objectives. This is done by offering compensation to the landowner, whether they are individuals or legal entities, in accordance with specific protocols and predetermined sums. Maria Sumardjono[24] defines land acquisition as a governmental process of obtaining land for development goals, particularly for public use, primarily through negotiations between the land-seeking party and the landowner.

The implementation of Law Number 2 of 2012 concerning Land Acquisition for Development Purposes for Public Interest is important to facilitate land acquisition activities based on many definitions and terms related to land acquisition. Adhering to the principles mentioned in Article 2 of this law is of utmost importance during the land acquisition process. These principles include Humanity, Justice, Utility, Certainty, Transparency, Agreement, Participation, Welfare, Sustainability, and Harmony.[25] [26]

Adhering to these standards guarantees that all impacted communities experience the advantages of land acquisition. Boedi Harsono[27] outlines six fundamental legal principles that must be taken into account while acquiring land: Land ownership and utilisation by individuals must be based on legal justification. All land rights, whether obtained directly or indirectly, stem from national legislation. The acquisition of land rights must be carried out through agreements between the necessary parties in accordance with the applicable rules. Typically, landowners cannot be compelled to give up their land. In situations where it is necessary, if attempts at negotiation are unsuccessful in reaching an agreement, the government

[22] John Salindeho, *Masalah Tanah Dalam Pembangunan* (Jakarta: Sinar Grafika, 1987).

[23] Imam Koeswahyono, "Melacak Dasar Konstitusional Pengadaan Tanah Untuk Kepentingan Pembangunan Bagi Umum", *Jurnal Konstitusi* 1, no. 1 (2008): 1–19.

[24] Maria S. Sumardjono, *Tanah Dalam Perspektif Hak Ekonomi, Sosial, Dan Budaya* (Jakarta: Penerbit Buku Kompas, 2008).

[25] Nurnaningsih Nurnaningsih, "Legal Interpretation of Regulation Law No. 2 of 2012 Concerning Land Acquisition for Development in The Public Interest", *Veteran Law Review* 6, no. Special Issues (2023): 70–84, https://doi.org/10.35586/velrev.v6iSpecialIssues.5761.

[26] Muhtadi et al., "Public Interest Development in Indonesia: Considerations Regarding Land Acquisition and Its Impact on the Environment". *International Journal of Sustainable Development & Planning* 17, no. 8 (2022): 2585–91, https://doi.org/10.18280/ijsdp.170827.

[27] Budi Harsono, *Hukum Agraria Indonesia: Sejarah Pembentukan Undang-Undang Pokok Agraria, Isi, Dan Pelaksanaannya* (Jakarta: Djambatan, 2003).

(specifically, the President of the Republic of Indonesia) has the authority to forcibly acquire the required land without the consent of the landowner by revoking their rights. Whether through mutual agreement or revocation of rights, individuals who give up their land must receive equitable compensation in the form of monetary compensation, facilities, and alternative land, ensuring that their social and economic circumstances do not worsen. Individuals who are requested to surrender their land for development projects possess the entitlement to receive safeguarding from the local government.[28]

Maria Sumardjono[29] highlights that land acquisition entails the concerns of two entities: government agencies seeking land and communities whose land is necessary for development. Given that land is an essential requirement for human existence and encompasses economic, social, and cultural rights, the acquisition of property should be carried out in a manner that guarantees the absence of any force from either side involved.

Given that communities are required to surrender their property for development, it is crucial to ensure that their socio-economic well-being does not decline and remains at a minimum level that is equal to their former state. Hence, the process of acquiring land must strictly comply with the following fundamental principles: Humanity: Ensuring the equitable safeguarding and upholding of the human rights and dignity of all individuals, including citizens and residents, in Indonesia. Protocol: Carrying out all land procurement operations in accordance with the agreements made between the party requiring land and the landowners. Execution of physical development activities is contingent upon the establishment of agreements and the provision of pay. Benefit: The purchase of land is anticipated to have favourable effects on the party requiring the land, the communities affected, and society as a whole. The entire community should experience the advantages of development initiatives. Justice entails offering harmed populations adequate compensation to fully restore their socio-economic situations, returning them to their previous state. This compensation should account for both tangible and intangible damages. Ensuring compliance with legislation when conducting land acquisition, guaranteeing that all parties have a clear understanding of their rights and responsibilities. Transparency involves disseminating information to impacted communities regarding the project and its consequences, compensation methods, construction timelines, plans for relocating residents (if necessary), and alternative locations.

[28] Embun Sari et al., "Comparison of Land Law Systems: A Study on Compensation Arrangements and Reappraisal of Land Acquisition for Public Interest between Indonesia and Malaysia", *International Journal of Criminology and Sociology* 10 (April 2021): 872–80, https://doi.org/10.6000/1929-4409.2021.10.103.

[29] Sumardjono, *Tanah Dalam Perspektif Hak Ekonomi, Sosial, Dan Budaya*.

Additionally, it includes informing people about their rights to voice objections. Participation: Engaging all stakeholders throughout the whole process of land acquisition (including planning, execution, and evaluation) to foster a sense of ownership and reduce community resistance; Equality: Ensuring equitable treatment for both the entity seeking land and the community impacted by the land acquisition process. Reducing adverse effects and guaranteeing the ongoing well-being of society and the economy; Welfare: Ensuring that the process of acquiring property for development benefits both the legal owners and the larger community. Sustainability refers to the practice of ensuring that development operations are carried out in a manner that can be maintained over the long term, with the aim of achieving the desired goals.

The occurrence of land acquisition for public development projects in Indonesia, including the Mesuji conflict, the Batang power plant construction, and the ongoing agrarian conflict in Wadas Purworejo Village, brings attention to the difficulties and disputes that arise between landowners and the government. These stories demonstrate the significance of following correct protocols in land acquisition to avoid undesirable outcomes. The process of negotiating the type and quantity of compensation in land acquisition should not be treated as a mere formality, as exemplified by the recent agrarian conflict in Wadas Village, which was highlighted in the media two months ago.

Originally, this was a component of the National Strategic Project, specifically the implementation of the Bener Dam building in 2017. The government intended to utilise andesite material sourced from the hills of Wadas Village. The disagreement originated from the government's proposal to commence open-pit mining for andesite rocks near the village, specifically for the purpose of constructing the Bener Dam. In February 2022, the community, expressing their disagreement with the project, organised rallies that escalated into violent incidents and resulted in arrests by the authorities.

The government's mining activities in Wadas Village continued despite the conflict, justified by the goal of national development. The government should have established appropriate channels for negotiation with the impacted communities. Individuals who have experienced the loss of their means of earning a living and the disruption of their residences should get appropriate compensation to improve their quality of life.

Alternative Dispute Resolution for agrarian conflict in Indonesia

Land disputes typically occur as a result of various factors, such as inadequate regulations, conflicting regulations, unresponsive land officials, inaccurate or incomplete data, erroneous land records, limited human resources allocated to

resolving disputes, improper land transactions, applicant misconduct, or overlapping authority due to settlements made by other institutions. In less developed regions, the resolution of land disputes is typically facilitated by esteemed community members, such as traditional leaders, tribe chiefs, village heads, or clan leaders. Furthermore, community leaders play a crucial role in determining how land is allocated and supervised by local inhabitants. The reason for this is that local traditional leaders usually possess data pertaining to the land within their specific jurisdictions, which includes details about the quantity, boundaries, and local utilisation of the property. While the documentation of land data is infrequent, the traditional leaders are knowledgeable about the historical ownership of land in their areas. The community leaders' understanding of the historical record of land ownership, bolstered by the strong confidence and unity of their constituents, is what guarantees that the decisions taken by traditional leaders in settling land disputes are followed by all parties concerned.[30]

Based on the year-end report of the Agricultural Reform Consortium, the majority of violence in agricultural conflicts in 2013 was carried out by the Police, with 47 incidents. The company security forces were responsible for 29 incidents, while the Indonesian National Army had nine incidents. Agrarian conflicts mostly revolve around matters of authority and governance. Therefore, agrarian conflicts pose significant challenges for a nation and its entire populace. Resolving these conflicts is a challenging task due to the multitude of vested interests involved. To attain social justice for all members of Indonesian society, it is necessary to make ongoing endeavours to address and settle agrarian issues.[31]

Many people claim that conversations concerning law typically arise when there is a dispute between two parties, which is subsequently settled with the assistance of a third party. In a legal system, the judge in a court of law is a third party that can help resolve conflicts. During a legal procedure, judges serve as impartial individuals and render decisions on the disputes that emerge. Conflicts that are brought before the judiciary will acquire legal authority through enforceable rulings, obliging both parties involved in the conflict to comply with them. The judge's ruling is contingent upon the procedural steps completed in the judicial process. Indonesia has specific legislation in place regarding the procedures for settling disagreements through the judiciary. The judge's duty is facilitated by legal professionals and specialised mediators who handle various legal issues, allowing judges to effectively carry out their responsibilities and generate The crux of comprehending agrarian conflicts

[30] Mudjiono, "Alternatif Penyelesaian Sengketa Pertanahan Di Indonesia Melalui Revitalisasi Fungsi Badan Peradilan", *Jurnal Hukum Ius Quia Iustum* 14, no. 3 (2007): 458–73.

[31] Suwardi, *Pembaharuan Sistem Hukum Agraria Di Indonesia* (Surabaya: Narotama University Press, 2022).

resides in our consciousness, specifically in recognising the crucial significance of land as a fundamental natural asset that supports nearly all facets of existence.

The land is categorised under private law in the Civil Code. However, in actuality, land regulation is significantly impacted by government activity. The fundamental legislation that governs land law regulation in Indonesia includes Article 33 Paragraph (3) of the 1945 Constitution, the Decree of the People's Consultative Assembly of the Republic of Indonesia No. IV of 1973 regarding the Outline of State Policy, Article 2 Paragraph (1) of the Land Law, and various implementing regulations. Land dispute resolution is typically handled not only by the District Court but also by the State Administrative Court. It is worth noting that land conflicts often have criminal components, which can lead to the involvement of criminal law in the resolution process.

The District Court or the State Administrative Court often resolves fewer land issues compared to the number of disputes submitted before each court. Moreover, only a limited number of court decisions can be carried out. As a result, a significant amount of land is left unattended, and ownership status becomes ambiguous. According to Article 4 Paragraph (2) of the Law on the Supreme Court of the Republic of Indonesia, the land dispute settlement procedure in judicial institutions shall be characterised by promptness, simplicity, and cost-effectiveness. The purpose of this is to guarantee that neither the opposing parties nor the community engaged in property disputes face any disadvantages or financial burdens in their efforts to seek legal clarity regarding the disputed land. Extended resolution periods and intricate administrative protocols will solely contribute to the escalation of land conflicts. Furthermore, there exists a disparity between the perspectives of judges and the viewpoints of opposing parties on their court proceedings.

To effectively resolve land conflicts, it is recommended that mediation be employed as a method to attain a mutually beneficial outcome for all parties concerned. Mediation is an expedited and cost-effective method that enhances the availability of justice for individuals by facilitating the discovery of mutually agreeable solutions to conflicts and assuring fairness. Integrating mediation into court processes can effectively handle the backlog of cases in court and enhance the functions of non-judicial institutions for resolving disputes, in addition to the adversarial court process. Individuals who feel wronged and desire to regain their entitlements must follow the appropriate protocols, which may involve legal action or alternative methods of resolving conflicts. They should refrain from taking issues into their control. The process of resolving a legal dispute commences with initiating a lawsuit with the appropriate court. The process of resolving legal disputes through the judiciary consists of three distinct stages: initiation, determination, and

implementation.[32] Every level necessitates a considerable duration, entails high costs, and encompasses intricate processes. Critiques of litigation institutions have emerged due to increasing expectations for expediency, confidentiality, productivity, and efficacy, as well as the need to preserve relationships among opposing parties. In reality, courts are perceived as being sluggish, costly, inefficient in their use of resources, time-consuming, and frequently unable to reach mutually beneficial resolutions. Alternative dispute resolution has gained significant recognition, particularly in the business sector, where there is a need for effectiveness, secrecy, the maintenance of cooperative relationships, non-rigid methods, and resolutions that prioritise fairness. An alternate option is mediation, which is best pursued prior to the commencement of litigation in a court of law.

Mediation, as defined by Black's Law Dictionary, is a non-binding conflict settlement procedure that involves the intervention of a neutral third party. The mediator's role is to assist the disputing parties in reaching a mutually acceptable solution. Mediation is a process in which a third party is engaged to assist in resolving a disagreement. The job of the mediator is to provide advice and guidance, but they do not have the power to make decisions to end the issue. According to the definition provided, mediation is a type of alternative dispute resolution that takes place outside of the court system. Mediation aims to resolve conflicts between involved parties by employing an unbiased and impartial third party. Mediation can facilitate the attainment of a lasting and sustainable peaceful agreement since it places all parties on an equal footing, without either party emerging as a winner or loser (win-win solution). During the process of mediation, the parties involved in the dispute take an active role and possess complete authority to make decisions. The mediator lacks decision-making power and serves solely to facilitate the mediation process in order to help the parties reach a peaceful agreement.[33]

Chapter III of Supreme Court Regulation Number 1 of 2008 delineates the various phases involved in the mediation process. Article 13 outlines the procedure for submitting case summaries and specifies the time frame for the mediation process. Article 14 outlines the mediator's power to deem a mediation procedure unsuccessful if a party or its legal representative fails to attend two consecutive mediation sessions. Article 15 delineates the responsibilities of the mediator in managing a mediation procedure. According to Article 16, the mediator has the authority to request the assistance of one or more specialists in a certain area under specific conditions. Article 17 elucidates the successful attainment of agreements

[32] Indriati Amarini, "Court Connected Mediation: Civil Dispute with A Local Society Cultural Approach", *Jurnal Dinamika Hukum* 20, no. 1 (2021): 256–73, https://doi.org/10.20884/1.jdh.2020.20.1.2599.

[33] Reko Dwi Salfutra and Rio Armanda Agustian, "Alternatif Penyelesaian Konflik Agraria (Suatu Telaah Dalam Perspektif Reforma Agraria Dan Pembangunan Berkelanjutan)", vol. 1, 2019, 1–17, https://www.prosiding.fh.ubb.ac.id/index.php/prosiding-serumpun/article/view/14.

during a mediation procedure, whereas Article 18 deals with the inability to achieve the desired aims in the mediation process. Article 19 delineates the distinction between mediation and litigation.

The regulation that governs mediation for land disputes is Regulation Number 21 of 2020, which was issued by the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency. This rule permits the initiation of mediation by government entities, such as ministries, regional offices, or municipal offices within their respective areas of authority, as well as by people or institutions, upon the request of the parties involved in the dispute. Participation in parties is obligatory during the mediation process, although solicitors or proxies may represent parties if they are unable to attend in person after receiving three valid invitations. Mediation may entail the involvement of specialists and pertinent organisations. Once an agreement is reached, the specific conditions are recorded in a settlement agreement, which is subsequently filed with the District Court to establish the settlement officially. If mediation is unsuccessful, the governing authority will exercise its jurisdiction to make the final decision.

Navigating land acquisition for public interest: Legal frameworks, consultation, and challenges in Indonesia

According to Article 33, paragraph (3) of the 1945 Indonesian Constitution, "The land and water and the natural riches therein are controlled by the State and are utilised to the greatest extent possible for the welfare of the people". Article 2 of the Basic Agrarian Law elaborates on Article 33, paragraph (3) of the 1945 Indonesian Constitution by emphasising that the Right of Control is not ownership.[34]

In practice, land acquisition laws do not entirely satisfy landless people. Existing laws still hinder development plan execution. Thus, Law Number 2 of 2012 on Land purchase for Development for Public Interest solved the sluggish land purchase for infrastructure development problem.[35]

The land purchase remains problematic and does not guarantee a land clearance timeframe. The President issued Presidential Regulation Number 71 of 2012, amended by Presidential Regulation Number 99 of 2014, and Presidential Regulation

[34] Suparto, "Interpreting The State's Right to Control In the Provisions of Article 33 Paragraph (3), The Constitution of 1945 Republic of Indonesia", *UIR Law Review* 4, no. 2 (October 25, 2020): 1–8, https://doi.org/10.25299/uirlrev.2020.vol4(2).6889.

[35] Debby Khristina, Kurnia Warman, and Hengki Andora, "Deposit of Compensation in Land Acquisition for the Construction of the Padang-Pekanbaru Toll Road in Public Interest", *International Journal of Multicultural and Multireligious Understanding* 7, no. 8 (2020): 285–309, https://doi.org/10.18415/ijmmu.v7i8.1877.

Number 40 of 2014 on the Implementation of Land Acquisition for Development for Public Interest to implement Law Number 2 of 2012 on land clearance technicalities.[36]

Public interest land purchase requires equitable remuneration to landowners and their assets. As the land demander, the government must fulfil this communal entitlement. Many compensation issues arise between the government and impacted communities, resulting in losses for both parties.

The state consults to show goodwill toward constitutional property rights. Article 28H, paragraph (4) of the 1945 Indonesian Constitution reads, "No one can arbitrarily revoke individual property rights". The constitutional protection of land acquisition emphasises the noble value of consultation to avoid landholder property rights breaches. Fairness in consultation should include respecting citizens' fundamental land rights.[37]

Consultation involves listening, offering, and receiving perspectives to establish a voluntary and equal agreement on compensation and other land purchase concerns. However, consultations are often ineffective since the parties participating are not equal, leading to directive behaviour.

Maria Sumardjono[38] states that even if formal consultations match the requirements, pressure-influenced conclusions cannot be called an agreement because they involve coercion from one party to force the other to comply. Under duress, the agreement is made. The involvement of non-committee members further obscures the consultation process.

Experience suggests that consultations focus more on formalities or processes. For a consultation to result in an agreement, the parties must be equal and consult without coercion. Article 2(f) of Law No. 2 of 2012 defines "the principle of agreement" as land acquisition through negotiations without force to establish a mutual agreement. All land acquisitions are based on an agreement between the landowner and the landowner. Physical development activities can only be done with an agreement and pay.

Consultation represents respect, especially agreement. All parties must be equal in consultations. No compulsion, fraud, error, or abuse of circumstances should occur during consultation. The consultation process is like negotiating in an agreement, where parties try to compromise to reach a win-win outcome.

Law No. 2 of 2012 implements consultations in two parts. The initial step is public consultation to determine the development site. Its implementation lasts 90

[36] Muhammad Hero Soepeno, Revy SM Korah, and Presly Prayogo, "Role of Assessment Team in Land Procurement as One of the Reference Determination of Land Prices by the North Sulawesi Regional Government", *Journal of Law, Policy and Globalization* 79 (2018): 168–79.

[37] Hasan Basri et al., "Legal Reconstruction Of Compensation System 'Proper' And 'Fair' In Land Acquisition For General Interest", *Journal of Positive School Psychology* 6, no. 10 (2022): 3483–87.

[38] Sumardjono, *Tanah Dalam Perspektif Hak Ekonomi, Sosial, Dan Budaya*.

days. The second step is compensation consultation. The National Land Agency and entitled parties shall consult within 30 days after receiving the evaluation results.

Presidential Regulation No. 65 of 2006 on land acquisition for public interest development states, "Land acquisition is any activity to obtain land by providing compensation to those who release or surrender land, buildings, plants, and other objects related to the land". As stated above, land acquisition involves compensating owners of land, plants, buildings, and other land-related goods. Article 1, number 11 of Presidential Regulation No. 65 of 2006, defines *compensation* as the replacement for physical and non-physical losses caused by land acquisition, buildings, plants, and other objects related to the land that can improve the socio-economic level before land acquisition.[39] [40]

Presidential Regulation No. 65 of 2006 states that land rights, structures, plants, and other land-related objects be compensated for land acquisition under Article 11. Legally eligible landowners or endowment land custodians receive recompense. According to Presidential Regulation No. 65 of 2006, compensation for land acquisition for public interest development can be money, replacement land, resettlement, a combination of two or more of the above, or other forms agreed upon by the parties.[41]

According to Article 15 of Presidential Regulation No. 65 of 2006 on land acquisition for public interest development, compensation is based on the Tax Object Sales Value or the actual value considering the current Tax Object Sales Value based on the committee's Land Price Appraisal Institution or Team. The regional building agency's estimated building value. Regional agriculture apparatus-regulated plant value. The form and quantity of compensation or calculating method are deliberate. Considerations for considerations include Article 11 of Presidential Regulation No. 65 of 2006, which states that the Land Acquisition Committee decides the form and amount of compensation if the land rights holder and the government institution and local government requiring land reach an agreement. If negotiations fail, the land acquisition committee determines the compensation and deposits it with the district court, whose jurisdiction covers the land. Depositing

[39] Rebecca Meckelburg and Agung Wardana, "The Political Economy of Land Acquisition for Development in the Public Interest: The Case of Indonesia", *Land Use Policy* 137 (February 1, 2024): 107017, https://doi.org/10.1016/j.landusepol.2023.107017.

[40] Rizky Amalia, "Perlindungan Hukum Bagi Pemegang Hak Atas Tanah Dalam Penetapan Ganti Rugi Terkait Dengan Pengadaan Tanah Untuk Kepentingan Umum", *Yuridika* 27, no. 3 (2012): 267–80, https://doi.org/10.20473/ydk.v27i3.301.

[41] Natasha Marcella Geovanny, Marchelina Theresia, and Devina Felicia Widjaja, "Analysis of Revocation of Land Rights by the Government Reviewed from the Concept of Loss", *Cepalo* 3, no. 2 (November 25, 2019): 63–70, https://doi.org/10.25041/cepalo.v3no2.1845.

compensation with the district court or consignment goes against land acquisition standards.[42]

Presidential Regulation No. 36 of 2005 and Presidential Regulation No. 65 of 2006 define deliberation as listening, giving and receiving opinions, and a willingness to reach an agreement on the form and amount of compensation and other land acquisition issues based on voluntariness and equality between the parties owning land, buildings, plants, and other land-related objects and the party requiring them. To determine the form and amount of compensation, the Government Institutions requiring land, land rights holders, and owners of buildings, plants, and other objects related to the respective land meet at a location determined by the Committee. The Committee Chairman leads debates. If the number of land rights holders and owners of buildings, plants, and other items associated with the land prevents efficient deliberation, partial or appointed representatives can be used. The Committee decides whether to hold deliberations on a rotating basis or with representatives based on the number of participants, the amount of land needed, the types of related interests, and other factors that can help while still considering the land rights holders' interests.

After Law No. 2 of 2012 on land acquisition for public interest was passed, Presidential Regulation No. 71 of 2012 stated that "Land acquisition is the activity of providing land by providing fair and just compensation to the entitled party". Suppose an agreement is not reached during deliberations on the form and amount of compensation. In that case, the Land Acquisition Committee will deposit the compensation with the chairman of the District Court in the jurisdiction of the public interest development location. Now, land acquisition issues can be directly related to the land acquisition process from planning to delivery, and property acquisition requires notifying the community whose property and structures are being acquired. In public interest land purchase planning, parties must communicate and deliberate to reach a consensus. The agreement achieved in deliberations in paragraph (1) is used to compensate entitled parties. According to Article 37 paragraph (1), the entitled party may object to the local district court within 14 working days of the compensation deliberation if there is no agreement on the form and amount of compensation.[43] Within 30 working days of receiving the objection, the District Court decides on compensation form and amount. The

[42] Are S Hutagalung and Triska Sationo, "Consignment in Land Acquisition", *Indonesian Journal of International Law* 8, no. 1 (2010): 128–48, https://doi.org/10.17304/ijil.vol8.1.253.

[43] MG. Thesa Deta Murbasasi and Lego Karjoko, "The Mechanism of Establishing Compensation in Land Procurement of the Construction of the Kulon Progo Yogyakarta Solo Toll Road in Klaten District", *IJRAEL: International Journal of Religion Education and Law* 1, no. 2 (2022): 135–42, https://doi.org/10.57235/ijrael.v1i2.140.

party appealing the district court's ruling in paragraph (2) has 14 working days to appeal to the Supreme Court of Indonesia.[44]

The Supreme Court must rule within 30 working days after receiving the cassation appeal. The District Court/Supreme Court's final and legally binding ruling determines the objecting party's compensation. Suppose the entitled party rejects the form and amount of compensation but does not object within the timeframe specified in Article 38 paragraph (1). In that case, the party is presumed to have accepted the compensation as stated in Article 37, paragraph (1).[45] The main obstacle to property purchase discussions is residents' refusal to have their land razed. A Deliberation Forum without eroding landowner confidence is vital. Local governments and agencies are expected to contact landowners with sincerity when building double-track railway lines. Community voices must be heard. Their expectations and government promises. It goes beyond hearing the Subdistrict Government. Socialising with the government's techniques and promoting the double-track railway project is not enough. This forum should be a community sitting forum, especially with landowners, not just a formality.

Consultative processes in Agrarian Law Politics: Enhancing participation and justice in land acquisition

Law politics, as defined by Mahfud MD,[46] refers to the formulation and implementation of legal policies by the government at a national level. It involves analysing how politics influences the creation and enforcement of laws by evaluating the power dynamics involved. Agrarian Law refers to legislation that pertains to the ownership, use, and distribution of agricultural land and resources. Politics encompasses the legislative framework and official directives that pertain to the formation or modification of laws, with the aim of achieving the state's objectives in the agricultural sector. Article 33, paragraph (3) of the 1945 Constitution establishes the constitutional foundation for the development of national law and policy, specifically in relation to agrarian law. This article mandates the state to guarantee that land, water, and natural resources are under state control and utilised to the fullest extent possible for the benefit of the entire population.[47]

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[44] Sudjito, "Maladministration In Land Acquisition Of Public Interest (Case Study: Solo-Yogyakarta Highway Project)", *Jurnal Dinamika Hukum* 23, no. 1 (2023): 89–110, https://doi.org/10.20884/1.jdh.2023.23.1.3436.

[45] King Faisal Sulaiman and Iwan Satriawan, "Land Dispute Settlement Post Law No. 2 of 2012; Glagah Village Case Study Related to Nyia Airport", *Indonesia Private Law Review* 2, no. 2 (December 31, 2021): 109–24, https://doi.org/10.25041/iplr.v2i2.2328.

[46] MD, *Politik Hukum Di Indonesia*.

[47] Diyan Isnaeni, "Kebijakan Landreform Sebagai Penerapan Politik Pembaharuan Hukum Agraria Yang Berparadigma Pancasila", *JU-Ke (Jurnal Ketahanan Pangan)* 1, no. 2 (2017): 83–97.

The Agrarian Law recognises the presence of several rights, including those of the nation, customary rights, individual rights, and legal entity rights. These rights are all defined by Article 6, which asserts that all land rights entail social obligations. The positioning of the Indonesian nation as the beneficiary of divine favour over the territory of Indonesia suggests that the land of Indonesia is collectively owned by all elements of the nation, thereby granting every citizen equal rights and responsibilities in the conservation, utilisation, and distribution of Indonesian land. According to Article 9, paragraph (2) of the Agrarian Law, all Indonesian citizens, regardless of gender, have an equitable chance to acquire land rights and derive advantages from it for themselves and their families. Agrarian law politics is intrinsically linked to the implementation of the Property Acquisition Law. Boedi Harsono[48] asserts that the process of acquiring property for public development is contingent upon four key factors: The legal status of the land in question, whether it is classified as state land or community-owned land with unique rights; The legal standing of the party seeking land; The assignment of land to be obtained; and The disposition or reluctance of the land-owning community to relinquish the land (in relation to the consultation process between the two parties).[49]

These laws align with the second principle of Pancasila, which promotes fairness and civilised behaviour towards others. This includes acknowledging and respecting others as equals. Moreover, according to Article 11 paragraph (2) of the Agrarian Law, variations in socioeconomic circumstances and legal requirements of the population are taken into account as long as they are essential and do not contradict national interests. This is done to safeguard the interests of economically disadvantaged groups. This essay encompasses profound theological and social-ethical principles, particularly its emphasis on the existence of several realities in human existence. The Agrarian Law in Indonesia has offered equal rights and possibilities to every citizen in regard to land ownership. However, the outcomes may vary. The inevitability of the establishment of powerful economic conglomerates and vulnerable economic entities cannot be denied. The clause of "safeguarding the interests of socioeconomically disadvantaged groups" is a legal standard imbued with humanitarian principles.

Aristotle categorises justice into distributive justice and corrective justice, forming the foundation for all theoretical debates on key matters.[50] Distributive

[48] Harsono, *Hukum Agraria Indonesia: Sejarah Pembentukan Undang-Undang Pokok Agraria, Isi, Dan Pelaksanaannya*.

[49] Kristianingsih Kristianingsih, Litari Elisa Putri, and Nurfauziah Astiqmalia, "Politik Hukum Agraria Dalam Penyelesaian Ganti Rugi Pengadaan Tanah Untuk Kepentingan Umum", *Fairness and Justice: Jurnal Ilmiah Ilmu Hukum* 18, no. 2 (2020): 67–77, https://doi.org/10.32528/faj.v18i2.6540.

[50] Mariusz Jerzy Golecki, "Synallagma as a Paradigm of Exchange: Reciprocity of Contract in Aristotle and Game Theory", in *Aristotle and The Philosophy of Law: Theory, Practice and Justice*, ed. Liesbeth

justice pertains to the allocation of resources and services to individuals based on their social standing, as well as ensuring equitable treatment and fairness within the legal system. Distributive justice refers to the principle of justice that governs the allocation of resources and recognition to individuals based on their social position. Everyone is afforded equal and equitable treatment under the law. According to Aristotle, corrective justice requires the establishment of a single and universal standard in the enforcement of laws.[51] This standard is applied when determining the appropriate consequences for an action performed by an individual in relation to others. The norm must be just and enforced without prejudice. The objective is to reinstate what has been deprived of an individual as a result of societal injustice. Corrective justice ensures that one individual's rights do not infringe upon another individual's rights.[52]

The legal framework governing the process of consulting stakeholders in land acquisition for public purposes is established in Law No. 2 of 2012. The purpose of Land Acquisition is to facilitate Infrastructure Development within the context of regional development. It is the government's responsibility to ensure equitable distribution of prosperity and welfare among the population. Article 33 of the 1945 Constitution delineates the authority of the State in regulating land that is exclusively utilised for the betterment and well-being of the populace. Thus, the community that has their land designated for social uses must willingly relinquish their land rights in favour of the broader community's interests. The community voluntarily transfers its land rights to the government for public use. In return, the government is obligated to give just and suitable compensation in accordance with the relevant rules. Article 18 of the Agrarian Law stipulates that land rights holders have a legal obligation to relinquish their land for public benefit purposes. In return, they are entitled to receive appropriate compensation.

Agrarian Law Politics pertains to the protection of individual land rights and the guarantee of fair compensation, as outlined in Article 28H paragraph (4) of the 1945 Constitution. This article states that every individual has the inherent right to personal property, which any entity cannot unjustly confiscate. This principle ensures that the land rights held by an individual, as defined by the national land law, are safeguarded from any external interference. Likewise, it is impermissible for government to unlawfully and randomly confiscate an individual's land rights.[53]

Huppes-Cluysenaer and Nuno M.M.S. Coelho (Dordrecht: Springer Netherlands, 2013), 249–64, https://doi.org/10.1007/978-94-007-6031-8_14.

51 Ernest J. Weinrib, "Corrective Justice", in *The Idea of Private Law*, ed. Ernest J Weinrib (Oxford University Press, 2012), 0, https://doi.org/10.1093/acprof:oso/9780199665815.003.0003.

52 Suteki and Galang Taufani, *Metodologi Penelitian Hukum (Filsafat, Teori Dan Praktik)* (Depok: Rajawali Pers, 2018).

53 Sugina Hidayanti, Indra Koswara, and Yopie Gunawan, "The Land Legal System in Indonesia and Land Rights According to the Basic Agrarian Law (UUPA)", *Legal Brief* 11, no. 1 (2021): 366–78.

The primary objective of land acquisition is to serve the public interest. This process is conducted with fairness and equity, ensuring that land rights are respected in a balanced manner and through consultation. In reality, the ideals of fairness and consultation are frequently treated as mere formalities and fail to be implemented properly, leading to numerous instances of Agrarian Conflict during the process of land acquisition. Consultation plays a crucial role in all stages of land acquisition. If this consultation aspect is not correctly executed, only partially executed, or deliberately altered, the consequences will have a significant impact on the outcomes achieved. The execution of this consultation must be carried out genuinely rather than only being documented as supplemental material and a justification of Indonesia's status as a law-abiding state that values justice and consultation.

Reinstating Pancasila values: Ensuring Justice and people's rights in land acquisition consultations

Pancasila is the primary and ultimate basis of all legal sources in the Indonesian state. It functions as the fundamental principle that shapes the Indonesian people into a nation characterised by high moral values.[54] The principles encompassed in Pancasila are the principles of Monotheism, Humanitarianism, Solidarity, Democratic Governance, and Fairness. Pancasila can be described as the overarching ideology and worldview of the Indonesian nation. It functions as a guiding principle and point of reference in all aspects of national operations, serving as a unifying force for the country. The values of Pancasila can be further explained as follows: Religiosity can be understood as the conviction in the presence of a supreme deity and the commitment to follow their instructions and avoid their prohibitions. Humanity refers to the acknowledgement of the inherent worth of individuals and the equitable treatment of others, along with the comprehension of cultured individuals who possess ingenuity, emotions, cognition, and convictions.

The concept of national unity refers to the cohesive bond among the people of Indonesia who reside inside the geographical boundaries of the country. The Indonesian nation refers to the collective identity of the people who inhabit the geographical area known as Indonesia. The acknowledgement of Unity in Diversity among different ethnic groups and cultures serves as a guiding principle in promoting national unity. Democracy entails the transfer of state sovereignty to the people. Democratic leadership is a form of governance that is guided by rationality and

[54] Joko Setiyono and Aga Natalis, "Universal Values of Pancasila in Managing the Crime of Terrorism", *Cosmopolitan Civil Societies: An Interdisciplinary Journal* 15, no. 2 (July 28, 2023): 48–63, https://doi.org/10.5130/ccs.v15.i2.8084.

practicality. Indonesians, both as citizens and members of Indonesian society, hold equal roles, rights, and obligations. Consensus is achieved by engaging in thoughtful discussion among the elected representatives of the people. Social justice is the achievement of fairness and equality for all members of the Indonesian society. Justice in social life encompasses various domains, including ideology, politics, business, social affairs, culture, and national defence and security. The goal is to create a fair and prosperous society in Indonesia that satisfies both material and spiritual needs. This society should ensure equal treatment for all individuals and maintain a balance between individual rights and responsibilities while also respecting the rights of others.[55]

Consultation must be accompanied by awareness and a firm commitment to finding a balance between the government's land requirements and the people's land ownership.

Attaining consensus through consultation is an essential prerequisite in land acquisition, rather than a mere procedural need to be attached to Pancasila. The benchmark is the Application of the People's Consultative Assembly No. II/MPR/1978, which provides guidelines for comprehending and implementing Pancasila. It states that the Indonesian people, as citizens and members of Indonesian society, possess equal positions, rights, and obligations, guided by the Sila of Democracy and the Wisdom of Deliberations/Representation. When individuals exercise their rights, they recognise the importance of consistently taking into account and giving priority to the interests of the State and society.

Given that individuals possess equivalent roles, rights, and responsibilities, it is inherently inappropriate to impose one's will upon others. Deliberations are conducted prior to making decisions concerning shared interests. Attempts are being made to achieve a consensus. The process of reaching a consensus is infused with a sense of camaraderie, which is a defining trait of the Indonesian country. The Indonesian populace demonstrates reverence and adherence to each deliberative choice, thereby necessitating all concerned parties to embrace and execute it with genuine intents and a conscientious mindset. Here, the focus is on prioritising the common good rather than individual or group interests. Discussions in debates are carried out rationally and in accordance with moral principles. Decisions must adhere to moral accountability to God Almighty while safeguarding human dignity and the values of truth and justice. Unity and solidarity should be

[55] Erik Meza Nusantara, "Relevansi Nilai-Nilai Pancasila Dalam Pemberlakuan Putusan Arbitrase Internasional Di Indonesia", *Jurnal Pembangunan Hukum Indonesia* 6, no. 1 (2024): 1–17, https://doi.org/10.14710/jphi.v6i1.1-17.

prioritised for the greater good. During consultations, trust is placed in those who are deemed trustworthy.[56]

The primary focus in consultation is the establishment of genuine dialogue. If the quantity of land rights holders is insufficient for efficient consultation, it is feasible to designate representatives from among the land rights holders who also serve as their proxies. If many consultations are unsuccessful in reaching an agreement, the land acquisition committee is responsible for making choices about the type and amount of compensation. These judgements should consider the desires and goals that have been expressed during the consultations. Hence, it is imperative to enhance the standing of land rights holders in negotiating land purchases for public purposes. This can be achieved by legal education, ensuring openness in land acquisition rules and compensation measures, and fostering political will within the government to uphold individual rights.

By striking a fair balance between land ownership rights and obligations, the aim is to foster shared prosperity. This can only be achieved by, for instance, upholding or reinstating the rights of individuals that have been unjustifiably suppressed or revoked. To achieve this equilibrium, the most practical approach is to regularly and fully enforce agricultural legislation. The implementation of agrarian law should not be carried out in a biased manner, where only certain favourable provisions are put into effect. In contrast, others are ignored or considered insignificant, thus disrupting the interconnected agrarian regulation system.

The implementation of the Law Politics of Consultation in land acquisition has not been effectively achieved due to two main factors. There have been numerous deviations in the implementation of the Agrarian Law and its derivative implementing laws, as required by the Agrarian Law up to this point. Hence, it is imperative to optimise the legal framework governing the process of land acquisition, namely through enhanced oversight of those engaged in such endeavours. Strict adherence to regulations is necessary for the government as the entity responsible for land acquisition. Violators must be promptly and transparently sanctioned and penalised. The revitalization of Pancasila values in the realm of Law Politics of Consultation concerning land acquisition, particularly with regards to the people's rights to land ownership and possession, necessitates the government to exercise prudence in order to ensure planned development and uphold justice for individuals whose land is impacted by projects for public interest. Additionally, it is imperative to conduct evaluations of each completed activity to enhance the effectiveness of subsequent endeavours.

[56] Sutedi, *Implementasi Prinsip Kepentingan Umum Di Dalam Pengadaan Tanah Untuk Pembangunan*.

Conclusion

The overwhelming emphasis on formalities has impeded the successful implementation of consultation in deciding compensation for public interest objectives, resulting in agricultural conflicts between landholding groups and the government. Moreover, the complete implementation of the legal framework for consultation in land acquisition has been hindered by discrepancies in the enforcement of the Basic Agrarian Law and its subsidiary laws. In order to tackle these problems, it is necessary to enhance the efficiency of the legal framework for consultation by enhancing oversight, enforcing legislation, implementing precautionary principles, and rejuvenating the principles of Pancasila.

Pancasila functions as the fundamental and ultimate underpinning for all legal authorities in Indonesia, molding the nation's identity with elevated ethical principles. The guiding ideology for the Indonesian nation encompasses values of Monotheism, Humanity, Solidarity, Democracy, and Fairness. These principles encompass respect for a supreme deity, recognition of human worth, cohesion among many ethnic groups, democratic rule, and fairness in society. The Indonesian population, in their capacity as both citizens and members of society, possess equal duties, rights, and responsibilities guided by democratic principles and the sagacity of representation.

The primary focus of land acquisition consultation should be to prioritise the attainment of consensus between the government's land requirements and the landowners' rights. This entails authentic discourse, reliance on reliable delegates, and placing collective welfare above personal interests. The process should guarantee sufficient inclusion of land rights holders and take into account their preferences during decision-making. Ensuring equitable outcomes requires empowering individuals with land rights through legal education, transparent regulations for property acquisition, and political will to preserve their rights.

Ensuring a fair distribution of land ownership rights and responsibilities is crucial for promoting collective well-being and fairness. To achieve this, it is necessary to enforce agrarian rules without bias and carry out comprehensive evaluations to improve future efficiency. To ensure planned development and justice for impacted individuals, it is imperative to optimise the legal framework for land acquisition by implementing improved oversight, rigorous adherence to laws, and revitalising Pancasila ideals.

Aperfeiçoamento da deliberação na aquisição de terras para o interesse público: realizando uma política agrária responsiva fundamentada na justiça

Resumo: Esta pesquisa examina a implementação da deliberação na determinação da forma e do valor da compensação na aquisição de terras para fins públicos e a Política Jurídica da Deliberação na aquisição de terras ideal para o desenvolvimento público. O objetivo deste artigo é compreender a

implementação da deliberação na determinação da forma e do valor da compensação na aquisição de terras para fins públicos e os esforços para otimizar a Política Jurídica da Deliberação na aquisição de terras ideal para fins públicos. A pesquisa baseia-se no paradigma construtivista com um método de abordagem sociojurídica. Os autores concluem que a implementação da deliberação na determinação da forma e do valor da compensação na aquisição de terras é meramente procedimental e exige a otimização da política jurídica da deliberação em relação à aquisição ideal de terras para fins públicos, realizada com cautela e baseada nos valores do Pancasila.

Palavras-chave: Deliberação. Aquisição de Terras. Compensação. Política Jurídica. Interesse Público.

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Indigenous land dispute resolution in Indonesia: Exploring Customary Courts as an alternative to formal judicial processes

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Abstract: Indigenous tribes struggle to protect their lands, identities, and livelihoods throughout conflicts. Indigenous areas are threatened by resource exploitation and development-related land ownership conflicts, requiring efficient conflict resolution. International frameworks for post-conflict property recovery rarely address customary land rights. This study examines Indonesian traditional courts as alternatives to indigenous land disputes. It investigates the legal coherence, justice, and utility of traditional judicial proceedings using secondary legal sources in a juridical-normative manner. The study compares customary and formal legal systems, evaluates traditional court procedures for fairness, and examines their effects on sustainable land management and community empowerment. Customary justice procedures should be integrated into the legal system to promote inclusive and sustainable development and safeguard indigenous rights and traditions. The paper recommends stronger cooperation between formal and customary legal systems and suggests future research to resolve constraints and improve understanding of customary law dynamics in settling indigenous land issues in Indonesia.

Keywords: Indigenous populations. Land conflicts. Customary courts. Legal pluralism. Indonesia.

Introduction

Indigenous populations living in conflict-affected areas around the world face ongoing dangers to their lives as they go about their daily routines, provide for their families, and safeguard the ecosystems that are crucial for their survival. These conflicts arise from many circumstances, such as historical remnants of colonisation, military confrontations, organised criminal activities, disagreements over land

and resources, initiatives to conserve the environment, large-scale development projects, and extractive industries. The complex and diverse obstacles significantly hinder the capacity of indigenous peoples to shape their futures. The issue of land ownership is a key factor in many of these conflicts, as indigenous territories are frequently targeted due to their valuable resources. This involvement often leads indigenous populations to catch up in battles for control.

Contrary to traditional viewpoints that consider land a simple commodity, indigenous groups regard it as essential to their identity, heritage, and overall welfare. They prioritise taking care of the land for the benefit of future generations.[1] A widely held idea exists within various indigenous cultures: "The Land Does Not Belong to Us; We Belong to the Land!".[2]

The Pinheiro Principles and the Voluntary Guidelines for the Responsible Governance of Tenure of Land, Fisheries, and Forests (VGGT) are examples of soft international law and public policy frameworks that have been established to address property recovery after conflicts. Although these standards provide answers for resolving property losses during conflicts, they do not sufficiently cover losses under customary tenure systems. Considering the rapidly increasing need for land for development, it is crucial to recognise the importance of customary rights. Nevertheless, there are differing viewpoints on this issue. There is a belief that customary rights, previously seen as no longer relevant, are now becoming more important. On the other hand, some people emphasise the need to safeguard traditional rights due to increasing demands for land.[3]

The incorporation of customary rights into the Basic Agrarian Law in Indonesia is justified by their existence prior to the formation of the state.[4] The legal system acknowledges traditional rights as long as they align with the country's interests and do not violate higher-level rules and regulations. Customary land tenure in indigenous societies includes personally owned and collectively held lands, which are customary land rights. These rights include a range of land kinds that are essential for survival and cultural traditions. Governmental actions, such as forest land policy, threaten customary land rights, especially when customary forests are transformed for commercial use.[5]

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1 Anne Ross et al., *Indigenous Peoples and the Collaborative Stewardship of Nature: Knowledge Binds and Institutional Conflicts* (Routledge, 2016).

2 Lourdes Torres, "The Land Does Not Belong to Us We Belong to the Land!", *Diálogo* 13, no. 1 (2010): 1.

3 Sandra F. Joireman and Rosine Tchatchoua-Djomo, "Post-Conflict Restitution of Customary Land: Guidelines and Trajectories of Change", *World Development* 168 (August 1, 2023): 106272, https://doi.org/10.1016/j.worlddev.2023.106272.

4 Maria Sumardjono, *Kebijakan Pertanahan: Antara Regulasi Dan Implementasi* (Jakarta: Penerbit Buku Kompas, 2006).

5 Sukirno, *Politik Hukum Pengakuan Hak Ulayat* (Jakarta: Kencana, 2018).

The persistent conflicts around traditional land highlight the intricate difficulties native populations encounter. These conflicts frequently arise from confrontations between customary law factions, investors, governments, or even within indigenous communities themselves.[6] The societal and governmental consequences of customary land disputes are significant, necessitating fair and unbiased processes for resolution.[7] An example of such conflicts may be seen in the industrial sector development in Pulau Rempang, Batam City, where traditional heritage and business interests collide. Furthermore, there is a conflict between the Indigenous Dayak Marjun Community and P.T. Tanjung Buyuh Perkasa Plantation in Berau, East Kalimantan, exemplifies the corporate exploitation of ancestral territories, leading to environmental deterioration and social unrest.[8]

The ineffectiveness of current dispute resolution methods, which fail to consider fundamental interests and prioritise immediate results, highlights the necessity for alternative methods. Based on indigenous legal traditions, customary courts effectively settle problems while emphasising communal unity and cultural standards.[9] Recognising and utilising customary courts empowers indigenous people by safeguarding their land rights and contributing to greater social, economic, and environmental objectives.[10] By incorporating indigenous legal systems into official structures and granting power to traditional courts, significant advancements can be made in attaining the Sustainable Development Goals established by the United Nations. This approach facilitates collaborations, safeguards cultural heritage, and supports environmental sustainability.[11]

This research aims to improve the clarity and accuracy of customary land disputes in Indonesia by promoting customary courts as an alternative approach to resolving conflicts. This will contribute to the promotion of inclusive and sustainable development while also upholding the rights and traditions of indigenous communities.

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6 M Sofyan Pulungan, "Menelaah Masa Lalu, Menata Masa Depan: Sejarah Hukum Tanah Ulayat dan Model Penanganan Konflik Sosialnya", *Undang: Jurnal Hukum* 6, no. 1 (2023): 235–67, https://doi.org/10.22437/ujh.6.1.235-267.

7 Festus A. Asaaga, "Building on 'Traditional' Land Dispute Resolution Mechanisms in Rural Ghana: Adaptive or Anachronistic?", *Land* 10, no. 2 (2021): 143, https://doi.org/10.3390/land10020143.

8 Salma, "Rempang Conflict: Land Disputes Triggered by Development Project", ugm.ac.id, September 26, 2023, https://ugm.ac.id/en/news/rempang-conflict-land-disputes-triggered-by-development-project/.

9 Sunarno and HannaAmbaras Khan, "Customary Land Disputes in Indonesia", *International Journal of Academic Research in Business and Social Sciences* 13, no. 10 (October 27, 2023): 2038–47, https://doi.org/10.6007/IJARBSS/v13-i10/19103.

10 Henry P. Panggabean, *Praktik Peradilan Menangani Kasus Kasus Hukum Adat Suku* (Jakarta: Bhuana Ilmu Populer, 2021).

11 Kamaljit K. Sangha, Jeremy Russell-Smith, and Robert Costanza, "Mainstreaming Indigenous and Local Communities' Connections with Nature for Policy Decision-Making", *Global Ecology and Conservation* 19 (July 1, 2019): e00668, https://doi.org/10.1016/j.gecco.2019.e00668.

Research methods

This study utilises a juridical-normative methodology to examine the settlement of indigenous land conflicts through traditional courts as a substitute for the formal legal system in Indonesia, with a specific emphasis on statutory rules. Indonesia, known for its varied cultural terrain and intricate legal framework, encounters multiple obstacles in settling land conflicts, particularly those involving indigenous tribes and their ancestral territories. Customary courts have gained increasing respect in recent years for their effectiveness and significance in resolving such issues. Nevertheless, traditional courts frequently suffer from inadequate authority and recognition within the official legal system despite their importance in indigenous communities.

The main aim of this study is to investigate the function and potential of traditional courts in settling land disputes among indigenous communities, taking into account their legal structure and the wider context of official rules. This research uses a juridical-normative approach to analyse the legal principles, coherence, justice, and utility of traditional court processes in resolving land disputes.

To accomplish this goal, the study relies on secondary data sources, which include primary legal materials such as legislation, secondary legal materials consisting of relevant studies, and tertiary legal materials. The sources are collected through an extensive examination of literature, which forms the basis for analysing the legal structure concerning traditional courts and their use in settling land disputes.

Legal reasoning plays a crucial role in this research, guiding the examination and interpretation of legal concepts within the framework of customary court practices. Legal reasoning involves interpreting, organising, and assessing legal norms to gain a thorough grasp of how customary courts play a role in effectively settling property disputes. An essential focus of this research is to investigate the alignment between customary courts and statutory norms and their contribution to ensuring legal clarity and coherence in resolving land disputes. The study seeks to find potential for enhancing the authority and recognition of customary courts within the broader legal system by analysing the compatibility and integration of customary law principles with formal legal systems.

Moreover, the study evaluates the consequences of traditional court procedures on many aspects of justice, such as the fairness of the process, the equitable distribution of resources, and the ability of indigenous groups to seek justice. The study aims to assess the fairness and efficacy of traditional court procedures to tackle inequality issues and guarantee equal access to legal remedies for all parties involved in property disputes. In addition, the project investigates the effectiveness of traditional court methods in advancing sustainable land management, community empowerment, and dispute resolution. The research seeks to emphasise the wider

advantages of incorporating customary justice procedures into the legal system by evaluating customary court rulings' tangible results and societal effects.

The evolution of customary courts in Indonesia: From colonial era to present day

The role of formal law in managing the lives of many Indonesian residents, particularly those residing in rural areas, is rather insignificant. On the other hand, customary law systems offer efficient and readily available justice services that are consistent with the prevailing culture. Customary courts supervise and enforce informal customary rules and behaviour, typically based on local egalitarian and redistributive norms. Legal institutions consist of formal and informal systems and play a crucial role in maintaining the "rules of the game" that regulate everyday life. Written constraints, such as formal laws and constitutions, are usually supervised by formal legal institutions, which are formed and implemented by external legislative authorities.

Conversely, customary legal institutions regulate the "codes of behaviour, norms, and conventions" within a particular social framework. Nevertheless, the formal and informal legal systems frequently intersect significantly rather than completely distinct. Legal pluralism is a prevalent phenomenon in numerous countries and locations across the globe.[12]

According to Stevens,[13] the following reasons are also recognised as constraints on communities' access to the legal system: Trial processes often experience substantial delays, primarily because of the high volume of cases handled by a limited number of courts. The distance to the nearest court can be significant for many residents residing in rural areas. State-administered justice seldom focuses on restoration or providing compensatory justice. However, it frequently diverges from the community's expectations rooted in conventional justice frameworks. Moreover, the laws and procedures employed in formal courts remain new and intricate to most individuals.

Customary law is integral to society and cannot be detached from it. This is because law and society develop together, meaning that wherever there is society, there is also law (*ubi societas ibi ius*). Customary law is a tangible representation of societal and cultural values. Customary law, although primarily unwritten, holds

[12] Francesco Cecchi and Mequanint Biset Melesse, "Formal Law and Customary Change: A Lab-in-Field Experiment in Ethiopia", *Journal of Economic Behavior & Organization* 125 (May 1, 2016): 67–85, https://doi.org/10.1016/j.jebo.2016.01.006.

[13] Joanna Stevens, *Access to Justice in Sub-Saharan Africa: The Role of Traditional and Informal Justice Systems* (London: Penal Reform International, 2000), https://www.penalreform.org/resource/access-justice-subsaharan-africa/.

relevance in the lives of customary societies that adhere to its principles. Customary law is applicable within a restricted domain, specifically inside the customary community where it is recognised. This arrangement permits each customary community to have distinct customary laws. According to Soekanto, customary law can be defined as a set of customs that are mostly not written down and are mandatory, with consequences for non-compliance. Customary justice refers to the regulations of customary law that dictate the process of resolving a dispute and making legal judgements by customary law. The act of resolving and establishing a legal matter's verdict is called "customary justice". "Justice" (*rechtspraak*) examines legal matters and fairness through thoughtful deliberation. Customary justice can be administered by community members acting independently, by families, relatives, or traditional leaders (according to customary law), village heads (known as village judges), or officials of organisation associations.[14]

The draft law on indigenous communities defines customary justice as a procedure for resolving issues conducted by customary institutions on behalf of the administration of customary law. Indigenous groups are entitled to enforce traditional legal systems and methods of resolving conflicts about traditional rights and the management of traditional law. Customary justice is an integral part of the operation of customary institutions.

According to Article 28I paragraph (3) of the 1945 Constitution of the Republic of Indonesia, traditional communities' cultural identity and rights are to be respected by the progress of society and civilisation. Article 61 paragraph (1) of Law No. 39 of 1999 on Human Rights strengthens this principle by stating that the rights and needs of customary law communities must be taken into account and safeguarded by the law, society, and the government to uphold human rights. Therefore, customary legal courts in Indonesia are constitutionally and legally recognised, providing opportunities for their continued operation. Law No. 22 of 1999 on Regional Government acknowledged the role of village peace judges as one of the responsibilities of village heads. This recognition was based on Article 101 of the law above, which mandates villages to mediate conflicts among community members within the village. This item also confirms the obligatory nature of settling matters at the village level by declaring that any dispute resolved by the village head is legally binding on the parties involved. Following that, Law No. 32 of 2004 regarding Regional Government was enacted to assign the responsibilities of village heads according to regional regulations. As a result, the only legal foundation for village peace judges in terms of legislation is Law No. 1 of 1951 concerning

[14] Nelwitis A and Riki Afrizal, "Pemberdayaan Peradilan Adat Dalam Menyelesaikan Perkara Pidana Menurut Hukum Adat Salingka Nagari Di Sumatera Barat", *UNES Journal of Swara Justisia* 7, no. 2 (July 3, 2023): 469–83, https://doi.org/10.31933/ujsj.v7i2.342.

Temporary Measures for Organising the Unity of Power Structure and Civil Court Procedures. According to Article 1, paragraph (2b) of the said law, autonomous courts, excluding religious courts, will be disbanded over time if the court, based on current law, is considered a distinct component of customary courts.[15]

Precisely, the concept of "customary justice" was acknowledged before Indonesia's independence, particularly through legislation enacted during the rule of the Dutch East Indies government. During that period, there existed five distinct categories of courts, including Government Courts (*Gouvernementsrechtspraak*), Indigenous Courts or Customary Courts (*Inheemsche Rechtspraak*), Swapraja Courts (*Zelfbestuurrechtspraak*), Religious Courts (*Godsdienstige Rechtspraak*), and Village Courts (*Dorpjustitie*). The regulations about customary courts are outlined in Article 130 of the Indische Staatsregeling, which serves as a fundamental regulation within the Dutch government in the Dutch East Indies. This article argues that in addition to the courts regulated by the Dutch government, there exist original courts, such as customary courts in certain places under the direct authority of the Dutch East Indies government, as well as Swapraja courts, which are acknowledged and permitted to function. The recognition of customary courts and village courts by the Netherlands was prompted by the realisation that the European judicial system alone was insufficient to address all the challenges encountered by the inhabitants of the Dutch East Indies (Indonesia). Hence, to address these issues, the Dutch categorised the population into three distinct categories - the European, the Eastern Foreign, and the Indigenous Population.[16]

In the early 1950s, Indonesia underwent a process of revamping its legal system to achieve unification. This was evident through implementing several legislations, including the termination of the Royal Courts in Java and Sumatra and the eventual eradication of swapraja courts and customary courts, as mandated by Emergency Law Number 1 of 1951. The practice proceeded with the implementation of Law Number 19 of 1964 regarding the Fundamental Principles of Judicial Power, which expressly declared the exclusion of customary and swapraja courts, mandating that state courts must address all matters. The policy of eliminating customary courts persisted during the Soeharto regime, as seen by Law Number 14 of 1970 regarding the Fundamental Principles of Judicial Power, which granted the government the power to dissolve customary and swapraja courts. Nevertheless, this abolition aimed not to ignore customary law but to shift the adjudication

[15] Siska Lis Sulistiani, *Hukum Adat Di Indonesia* (Jakarta: Sinar Grafika, 2021).

[16] Herlambang Perdana Wiratraman, "Perkembangan Politik Hukum Peradilan Adat", *Mimbar Hukum – Fakultas Hukum Universitas Gadjah Mada* 30, no. 3 (October 15, 2018): 490–505, https://doi.org/10.22146/jmh.38241.

process to the state courts. Over time, only formal courts became the predominant and universally applicable legal system.[17]

Restorative justice ideas, deeply rooted in customary law, provide a robust basis for fostering societal harmony in an ongoing environment. The religious elements of customary law establish the foundation for communal spiritual cohesion, perceiving the community as a spiritual entity intricately linked to both nature and one another. This framework recognises justice in secular terms and spiritual realms that mirror the interdependence of individuals, communities, and the cosmos. The collective nature of customary law underscores that people are not isolated entities but essential community components. They are obligated by the norms that their society has agreed upon, which impose social and moral duties on each person to uphold harmony in communal existence. In this context, the objective of community cohesion is to uphold equilibrium among individual interests, groups, and the environment, with every community member being accountable for accomplishing shared objectives.[18]

The notion of cosmic order, often known as cosmos, forms the basis for comprehending the equilibrium between the physical and spiritual dimensions in customary law. The community's interests are considered essential for maintaining peace and alignment with nature and spiritual forces. From this perspective, transgressions of traditional legal norms are regarded as infringements upon the universal order, capable of disturbing both societal equilibrium and ecological stability. Consequently, when individuals or societies break the cosmic boundaries set by traditional law, the repercussions are physical and spiritual. Disruptions to the equilibrium of the natural environment and the community's overall welfare can arise if the established standards are not adhered to and taken seriously by all community members. Hence, within the continuous flow of existence, the concepts of restorative justice in traditional legal systems establish a strong basis for perpetuating peace and equilibrium in society.[19]

Throughout customary courts, judges have the responsibility of fostering the development of customary law throughout the community. In the absence of applicable legal precedents, judges can render judgements by considering the specific circumstances and evolution of the community. Judges possess the authority to make various decisions to resolve issues, including aligning, adapting, diverging, sidelining, rejecting, or changing old customary legal principles with new

[17] Ibid.

[18] Nur Rochaeti and Rahmi Dwi Sutanti, "Kontribusi Peradilan Adat Dan Keadilan Restoratif Dalam Pembaruan Hukum Pidana Di Indonesia", *Masalah-Masalah Hukum* 47, no. 3 (2018): 198–214, https://doi.org/10.14710/mmh.47.3.2018.198-214.

[19] Ibid.

ones. Past rulings do not constrain these decisions. All decisions are made to deliver equitable judgements grounded in the principle of the Divine Being.[20]

Factors contributing to customary rights conflicts

The term "customary rights" refers to a collection of authorities and obligations that individual communities that adhere to customary law have over a certain place considered their customary land. The right to benefit from natural resources, including land, located within that territory is granted to the organization's members. Every member of the community is the subject of these customary rights, and the object of these rights is the entire land located within the community's customary environment. Suppose they have the consent of the local customary authorities. In that case, individuals not members of that customary community are permitted to use the land inside that customary territory.[21]

A definition of customary rights is provided by Regulation 5 of 1999, issued by the Minister of Agrarian Affairs and Head of the National Land Agency. This definition describes the authority that communities that adhere to customary law have over particular territories to benefit from natural resources, including land, for their sustenance. Among the things that fall under the purview of customary rights is communal land, which refers to land subject to customary rights from a particular community that adheres to customary law. Several modifications have been made to this term due to subsequent rules. Community and private land rights are two categories that might be distinguished among these customary rights. It is only within communities that adhere to territorial and genealogical customary law that communal rights, also called customary or lordship rights, are recognised. On the other hand, individual rights make it possible for community members to participate in legal relationships with the land. This connection has the potential to develop into ownership rights over the land or rights of enjoyment, which would make it possible for the land to be utilised for a single harvest.[22]

The term "customary land" refers to communal land that is supposed to be used by one generation and subsequent generations. As a result, this common land needs to be managed appropriately to satisfy both the collective and individual requirements. In addition, customary rights include the right to jointly own land and the obligation to manage, regulate, and direct land usage at certain times. Three factors need to be taken into consideration in order to ascertain whether or not customary rights are still in existence: the existence of a community that adheres

[20] Aprilianti and Kasmawati, *Hukum Adat Di Indonesia* (Bandar Lampung: Pusaka Media, 2022).
[21] H.M. Arba, *Hukum Agraria Indonesia* (Jakarta: Sinar Grafika, 2021).
[22] Muhammad Ilham Arisaputra, *Reforma Agraria Di Indonesia* (Jakarta: Sinar Grafika, 2021).

to customary law, the presence of particular customary land, and the authority of the community to carry out particular actions that are associated with that land can all be considered customary land. If all three conditions are satisfied, customary rights are still regarded to be in circulation.[23]

Different parties' competing interests in land ownership are sometimes the root cause of property conflicts. To prevent communities from suffering harm, the government is working to speed up the process of resolving these disputes. Several factors, including regulatory inconsistencies, a lack of responsiveness from land officials, inaccurate data, and transaction mistakes, can cause land conflicts. Various parties may be involved in land conflicts, including local residents, local governments, or resource management challenges. Land disputes may entail the acknowledgement of ownership, the transfer of rights, the encumbrance of rights, or the occupation of land parcels that were previously private. Because of this, resolving land disputes is essential for preserving legal clarity and ensuring the general welfare of society. Conflicts that arise from problems about customary rights frequently have roots that are both complicated and diverse. In certain instances, these disputes can be classified into two primary categories: conflicts between indigenous groups and the government and investors and between indigenous communities distinct from one another. Differences in customary rights can give rise to various problems in either of these circumstances.[24]

First, disagreements arise due to acts taken by the government on nationalisation. Land lease agreements between communities that adhere to customary law and private corporations or governments in place during colonial rule are frequently the source of such problems. Immediately upon the nationalisation of these territories by the Indonesian government, the state asserts ownership of them without providing proper compensation to the indigenous populations that originally inhabited them. Second, the government's decision to designate certain places as conservation zones can create contentious situations. Conflicts of this nature frequently develop when the government designates regions that are inhabited by indigenous tribes as conservation zones without taking into consideration the aspirations and rights of the indigenous populations in question. Thirdly, conflicts develop due to concessions provided by the government to prospective investors. These concessions have the potential to damage the customary rights of indigenous groups directly. One example is the practice of awarding mining or plantation businesses the right to exploit natural

[23] Ernila Erfa and Syania Ubaidi, "Konsep Dan Bentuk Perlindungan Hak Penguasaan Atas Tanah Masyarakat Hukum Adat Di Indonesia (Studi Kasus Putusan Pengadilan Negeri Balige No. 42/Pdt.Plw/2016/PN BLG)", *Indonesian Notary* 3, no. 2 (2021): 18–35.

[24] Ayu Meiranda et al., "Upaya Hukum Terhadap Penyelesaian Sengketa Tanah Ulayat di Kabupaten Kampar Guna Menjaga Keamanan Nasional", *Jurnal Analisis Hukum* 6, no. 1 (April 25, 2023): 99–114, https://doi.org/10.38043/jah.v6i1.4232.

resources, which frequently goes against the customary rights of indigenous tribes that have occupied and managed those places for a significant amount of time. There are also disagreements between indigenous people regarding the ownership of customary land, which brings us to the fourth consideration. Several potential causes exist for these conflicts, including overlapping claims to land ownership or historical disagreements between various indigenous communities.[25]

The circumstances that lead to conflicts over customary rights are diverse, but they frequently include opaque land acquisition processes, a lack of respect for indigenous rights, inadequate compensation, and the establishment of protected areas without considering the desires of the local community. Therefore, to resolve conflicts concerning customary rights, it is necessary to take a cautious approach, which includes receiving active participation from all relevant parties and considering the rights and interests of indigenous groups comprehensively.

Land conflict resolution: Approaches and methods

Conflict, whether in the form of competitiveness or contradiction, has frequently been a defining characteristic of human history. The taming and mastery of nature, inequities between social classes, discrepancies between globalism and localism, and tensions between economic interests and the environment are all potential sources of conflict. Conflict can develop from a variety of factors. Even though conflict is frequently regarded as a hindrance to the progression of society, it may also act as a driving force behind change and innovation.[26] Within the framework of the history of agrarian reform, it is essential to have a solid understanding of the effects of such activities on the communities involved. This includes whether the land distribution process is peaceful or produces internal and foreign conflicts.[27]

The question of who truly profits from the land distribution is also included. In order to facilitate the resolution of social problems, Law No. 7 of 2012 emphasizes the significance of giving precedence to the social and customary institutions already present within the community. It is generally acknowledged that the dispute resolution outcomes through these procedures are legally binding for the

[25] Kurnia Warman & Syofiarti, "Pola Penyelesaian Sengketa Tanah Ulayat Di Sumatera Barat (Sengketa Antara Masyarakat Vs Pemerintah)", *Masalah-Masalah Hukum;* 41, no. 3 (July 24, 2012): 407–15, https://doi.org/10.14710/mmh.41.3.2012.407-415.

[26] Ruxandra M□lina Petrescu-Mag et al., "Agricultural Land Use Conflict Management—Vulnerabilities, Law Restrictions and Negotiation Frames. A Wake-up Call", *Land Use Policy* 76 (July 1, 2018): 600–610, https://doi.org/10.1016/j.landusepol.2018.02.040.

[27] Rogelio Jiménez Marce, "Conflictos Agrarios Y Formación De Un Poder Político Agrario En Santiago Tuxtla, Veracruz (1922-1950)", *Relaciones Estudios de Historia y Sociedad* 37, no. 148b (February 16, 2017): 125–67, https://doi.org/10.24901/rehs.v37i148b.232.

participants in the conflict. If a resolution cannot be reached through customary institutions, it is carried out using specialised task forces.[28]

Within the land tenure framework, land conflicts present several complicated difficulties. Several circumstances, such as regulatory mismatches, transaction errors, and a lack of reaction by land officials, can cause disagreements. It is possible for the parties concerned to settle their disagreements through a variety of channels, including litigation or other non-litigation methods. The resolution of land conflicts can be accomplished through various means, including formal agreements, conciliation, arbitration, mediation, and taking legal action in the courts. Even though mediation outside of court is considered more efficient and cost-effective, many people still prefer litigation because they do not have a fundamental grasp of mediation. Therefore, it is essential for the parties concerned to evaluate several possibilities for conflict resolution that are by their requirements and interests, focusing on achieving peace and justice. Land disputes need to be resolved as soon as possible since they can have detrimental effects on society and the economy. Land disputes that last for an extended period can result in economic losses, legal ambiguity, and social conflicts, all of which damage the level of stability and development in an area.[29]

Disagreements over land ownership are a complicated matter that requires considerable consideration in Indonesia. Regulatory mismatches, land shortages, flawed regulations, and a lack of data accuracy are the primary causes of land conflicts. Other variables that contribute to land conflicts include a lack of data correctness. The resolution of land disputes in Indonesia also focuses on ownership, rights transfers, encumbrances, and the occupation of land formerly under feudal rule. When a dispute is resolved by a process that does not involve litigation, it is often accomplished through mediation by either the National Land Agency or municipal land offices. Through the use of expert advisers or mediators, this mediation process entails the parties involved in the dispute agreeing with one another. Even though mediation is considered more efficient and cost-effective, many people continue to favour litigation because they do not know enough about it. In addition to mediation, arbitration is another tool that can be utilised to settle land disputes outside the court system. In arbitration, parties in conflict submit their dispute resolution to arbitrators mutually agreed upon to render conclusions legally enforceable for both parties.[30]

When it comes to land disputes, various approaches are utilised to arrive at equitable and suitable solutions for all parties involved. Consultation, mediation,

[28] Novianti, Dian Cahyaningrum, and Luthvi Febryka Nola, *Pemanfaatan Tanah Ulayat Untuk Kepentingan Investasi* (Publica Indonesia Utama: Jakarta, 2022).

[29] Adonia Ivonne Laturette, "Penyelesaian Sengketa Hak Ulayat pada Kawasan Hutan", *SASI* 27, no. 1 (April 13, 2021): 102–12, https://doi.org/10.47268/sasi.v27i1.504.

[30] Ibid.

conciliation, and arbitration are some of the procedures that fall under this category. When it comes to conflict resolution, it is essential to consider structural, cultural, and substantive components. These aspects include the judges' comprehension of land concerns, society's legal principles, and customary law application. Land conflict resolution can be carried out effectively and efficiently thanks to utilising a holistic approach and considering numerous issues. This would establish justice and peace for all parties involved.[31]

Indigenous wisdom and customary institutions in land conflict resolution

Globally, conflicts within joint-stock companies often find resolution through alternative dispute resolution (ADR) mechanisms rather than resorting to formal judicial proceedings. These ADR methods facilitate dispute resolution and lead to significant cost and time savings compared to the traditional court route, which entails expenses such as court fees and legal representation costs, along with the prolonged duration of court proceedings. In traditional litigation, it is common for at least one party to be dissatisfied with the outcome, prolonging the conflict and potentially damaging business relationships. Conversely, ADR offers a more collaborative approach, where the interests of all involved parties can be fully addressed, leading to more satisfactory outcomes. By choosing ADR, companies can preserve relationships, maintain confidentiality, and expedite the resolution process, allowing them to refocus their resources on their core business activities. Moreover, ADR methods such as mediation and arbitration provide flexibility and customization, allowing parties to tailor solutions that best suit their needs and circumstances. This adaptability enhances the likelihood of reaching mutually acceptable agreements and fostering long-term stakeholder cooperation.

In urban communities, the local wisdom inherent in each region can serve as a guide for resolving social, cultural, and economic disputes arising from rapid and irreversible changes in the urban environment. These changes frequently result in alienation and harm to urban identities. Within this framework, the distinctive capabilities of every region can serve as the foundation for conflict resolution. There is a strong emphasis on the significance of cultural adaptation in social conflict resolution, with indigenous wisdom being the key to effectively handling disagreements. Not only does indigenous wisdom encompass the knowledge

[31] Agung Basuki Prasetyo, "Penyelesaian Sengketa Tanah Masyarakat Adat Karuhun Urang (AKUR) Di Desa Cigugur Kuningan Melalui Lembaga Peradilan", *Law, Development and Justice Review* 2, no. 1 (May 29, 2019): 72–84, https://doi.org/10.14710/ldjr.v2i1.5003.

and intelligence of local people, but it also shows the ability of these cultures to manage both their physical and spiritual circumstances.[32]

Using customary courts to resolve conflicts involving customary land rights is extremely important. Disputes that include violations of customary law can be handled through the mechanisms that customary courts utilise. Individuals and legal entities not a part of the indigenous community must comply with the decisions made by customary courts, and those who violate these rulings may be subject to criminal sanctions or fines. The resolution of internal conflicts that arise within indigenous groups can be accomplished through the utilisation of customary institutions and customary justice procedures. In the indigenous legal community, the fundamental obligation of traditional leaders is to protect the welfare and interests of members of the indigenous legal community. Customary court decisions are final and binding. Several phases are often included in the process of settling land disputes. These processes include receiving reports, participating in customary discussions, attending witness hearings, and having decision-making conducted by leaders of customary institutions. Without any shadow of a doubt, customary institutions' decisions are legally obligatory on the entire indigenous legal community. It is hoped that communities will discover solutions to the problems they are facing that are both equitable and sustainable if they give indigenous wisdom a higher priority and involve customary institutions in conflict resolution.

When seen from the perspective of Minangkabau Customary Law, the conflict resolution process is carried out through a consultation system based on reaching an agreement and emphasizing justice ideals. Consultation based on reaching a consensus is the final phase in conflict resolution. Traditional leaders are positioned as the ultimate arbiters of truth. This approach is a reflection of the Minangkabau adage that states that truth is found by agreements that are based on consensus. It is common practice for communities to seek resolution through direct negotiations between themselves and the commercial corporations engaged in the conflict if earlier efforts to address the dispute have been unsuccessful. For this particular scenario, the conclusions reached must be legally binding on all parties involved in the dispute.

Consequently, in order to have the ability to enforce such agreements legally, it is essential to register them with the Notary Office and the Court system. Because they have an in-depth understanding of the historical land transfer to private firms, the local government is regarded as an acceptable choice if the engagement of a third party is required in the dispute settlement process. The Local Government

[32] Ashadi L Diab et al., "Accommodation of Local Wisdom in Conflict Resolution of Indonesia's Urban Society", *Cogent Social Sciences* 8, no. 1 (December 31, 2022): 2153413, https://doi.org/10.1080/23311886.2022.2153413.

also possesses comprehensive facilities designed to facilitate the process of resolving land disputes, and it is their job to guarantee that the outcomes are fair and sustainable.[33]

In Sulahan Customary Village, the resolution of disputes about the land in the village courtyard is typically accomplished by mediation, headed by the Bendesa Adat, the Traditional Village Leader taking on the role of mediator. In order to ensure that the ritual goes off without a hitch, mediation takes place in the Sulahan Village Temple following prayers. The steps of mediation consist of the following: the acceptance of the report, the inspection of the report, the establishment of a team to analyse the report, the planning of a resolution, the summoning of the disputing parties, the implementation of the mediation, and the making of decisions based on the laws that are currently in effect in Sulahan Customary Village. If the disputing parties do not accept the decisions that the Village Court has made, the resolution will either be referred back to mediation or given over to positive law. Additionally, the Local Government is involved in this mediation process as witnesses from the government element. However, because the court does not have jurisdiction over the resolution of customary land disputes, it is imperative that the customary rules regulated in the laws of Sulahan Customary Village be adhered to and that the resolution be carried out customarily.[34]

Regarding the Moi Tribe Community, conflict resolution methods require hearings. These proceedings involve the participation of various members of the indigenous community as well as traditional authorities. As part of the evidence, the opposing parties will provide evidence concerning the geographical location of their customary land rights. In some instances, customary oaths will also be administered as part of the evidence. Eating Earth, Molobelo, Tikam Kayu, Besi Merah, and Potong Bambu Tui are some rites that may be performed during the traditional oath-taking ceremony.[35]

On the other hand, these activities are becoming less common as a result of the possibility of harsher sanctions, which may even include threats of death. The individuals who are seen to be at fault in the dispute will be subject to the customary consequences that are in place. These punishments may include monetary payments or the gift of Eastern cloth as a form of punishment. However, compensating parties are also expected to acknowledge and listen to the claims

[33] Sal Sabilla Syafira and Devi Siti Hamzah Marpaung, "Penyelesaian Sengketa Tanah Ulayat Masyarakat Di Minangkabau", *Jurnal Hukum Positum* 5, no. 2 (2020): 79–90.

[34] I Putu Ade Surya, I Made Suwitra, and I Ketut Sukadana, "Penyelesaian Sengketa Tanah Pekarangan Desa di Desa Adat Sulahan Kecamatan Susut Kabupaten Bangli", *Jurnal Interpretasi Hukum* 1, no. 2 (September 26, 2020): 78–83, https://doi.org/10.22225/juinhum.1.2.2439.78-83.

[35] Moldi Semuel, "Mekanisme Penyelesaian Sengketa Hak Atas Tanah Adat Dan Perlindungan Hukum Hak Ulayat Masyarakat Adat Suku Moi Di Kabupaten Sorong", *Equality Before The Law* 1, no. 2 (2022): 60–78.

made by other family members. Additionally, the conflict resolution process will comprise customary court proceedings conducted by traditional leaders such as the Raja (King). During the customary court proceedings, the disputing parties and witnesses, such as Seniri, Orang Kai, Soa, and Tuan Tan, who play an important part in elucidating the truth about the contested customary land, will be called before the court. The customary court process is carried out to encompass complete fairness, impartiality, and transparency. The Raja will decide the location and time of the proceedings before the conventional court proceedings begin. He will also make sure that all of the parties concerned are present throughout the time of the hearings. In addition, the community's elders are present to offer explanations and testimonials that can assist the Raja in making equitable choices. It is anticipated that the presence of the Raja as the judge in the proceedings of the customary court will result in decisions that restore the situation of the community and return it to the normal state it was in prior to the occurrence of the customary land dispute.[36]

Conclusion

It is impossible to emphasise the significance of customary law in regulating the lives of Indonesian communities, particularly in rural regions, to ensure that individuals have prompt access to justice that conforms with the culture of the place. As a component of the customary legal system, customary justice plays a role in maintaining informal behavioural standards by considering the norms of redistribution and egalitarianism prevalent in the community. Formal and informal legal institutions frequently overlap in practice even though formal law plays a role in textual limits and the execution of laws by legislative authorities.

Legal pluralism is prevalent in many nations, including Indonesia, and is characterised by the coexistence of formal and customary legal systems. Conflicts over indigenous land are complicated issues that arise from a variety of sources, including the government's nationalisation of indigenous communities and disagreements between indigenous communities. In order to successfully resolve conflicts, strategic approaches that involve the active engagement of all relevant parties are required.

A tighter working relationship between the formal legal system and the customary legal system is required in order to increase access to justice. At the same time that principles of justice and indigenous community engagement are being taken into consideration, there is a need for improvements in transparency, responsiveness, and efficacy in resolving indigenous land disputes. The strengthening of customary legal institutions and processes for dispute resolution must be supplemented by

[36] Cornelia Junita Welerubun, "Perlindungan Hukum Hak Atas Tanah Ulayat Masyarakat Hukum Adat Di Kabupaten Maluku Tenggara.", *Jurnal Media Hukum Dan Peradilan* 5, no. 1 (2019): 133–46.

the teaching and socialisation of communities regarding their rights and how they can access existing justice systems.

It is important to realise that this research has drawbacks, such as lacking empirical data or in-depth case studies. Additionally, mapping customary legal practices and resolving indigenous land conflicts in different regions of Indonesia should be the primary emphasis of future study development. Additionally, the factors that influence the application of these practices should be identified. There is the potential for a more thorough knowledge of the dynamics of customary law, legal pluralism, and the resolution of indigenous land conflicts in Indonesia to be obtained through in-depth case studies and research from multiple disciplines.

Resolução de disputas de terras indígenas na Indonésia: explorando os tribunais consuetudinários como uma alternativa aos processos judiciais formais

Resumo: As tribos indígenas enfrentam dificuldades para proteger suas terras, identidades e meios de subsistência em meio a conflitos. Áreas indígenas são ameaçadas pela exploração de recursos e por conflitos de propriedade relacionados ao desenvolvimento, exigindo uma resolução eficiente de disputas. Os marcos internacionais para a recuperação de propriedades no pós-conflito raramente abordam os direitos de terra consuetudinários. Este estudo examina os tribunais tradicionais indonésios como alternativas para disputas de terras indígenas. Investiga a coerência legal, a justiça e a utilidade dos procedimentos judiciais tradicionais, utilizando fontes jurídicas secundárias de maneira jurídico-normativa. O estudo compara os sistemas legais consuetudinários e formais, avalia os procedimentos dos tribunais tradicionais quanto à sua equidade, e examina seus efeitos na gestão sustentável de terras e no empoderamento comunitário. Os procedimentos de justiça consuetudinária devem ser integrados ao sistema legal para promover o desenvolvimento inclusivo e sustentável, além de salvaguardar os direitos e tradições indígenas. O artigo recomenda uma cooperação mais forte entre os sistemas legais formais e consuetudinários e sugere futuras pesquisas para resolver limitações e melhorar a compreensão das dinâmicas do direito consuetudinário na resolução de questões fundiárias indígenas na Indonésia.

Palavras-chave: Populações indígenas. Conflitos de terras. Tribunais consuetudinários. Pluralismo jurídico. Indonésia.

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Alternative Dispute Resolution in commercial transactions: A comparative study between the UK and Bangladesh Jurisdiction*

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Abstract: Alternative Dispute Resolution (ADR) entities have been authorized by national law to either offer a solution that, if accepted by both parties, will become binding on them or to impose a solution that will become binding on them regardless of their acceptance. According to the Money Loan Court Act 2003 of Bangladesh, ADR bodies have to appoint natural people who fulfill the criteria of knowledge, independence, and impartiality to complete the entire process of ADR successfully. Therefore, ADR processes can only be run by court-ordered mediation or autonomous administrative agencies, not the financial sector. The Code of Civil Procedure 1908 in Bangladesh clarifies that this procedure has been provided so that "the principles of independence and impartiality have been observed". ADR is an avenue to resolve a civil case without going to the court. There are diverse mechanisms of ADR that can resolve the issue. Undoubtedly, ADR has many advantages. However, it is pertinent to note that it has disadvantages as well. ADR has been promoted, and the concerned parties have been encouraged to use it before or during the trial. Lord Justice Woolf, a prominent jurist of the UK, solicited for ADR to avoid cost, delay and complexity in civil cases. On the other hand, ADR is not so familiar in Bangladesh. This paper aims to discover how Bangladesh promotes ADR in commercial disputes and how Bangladesh can follow the UK approach in this respect.

Kewwords: Alternative Dispute Resolution. Commerciality. Civil Procedure Code.

1 Introduction

Dispute settlement strategies and techniques that don't involve formal legal proceedings have been included in the umbrella term 'Alternative Dispute Resolution' (ADR). It's a catch-all phrase for any scenario where two parties work out their differences with or without a neutral third person. Even though many

* This paper is a part of the author's LL.M. dissertation submitted to Leeds Trinity University, UK.

powerful interests and their supporters were initially opposed to alternative dispute resolution, this approach has now acquired universal support from the public and the legal community. It becomes standard practice for certain courts to insist that parties exhaust all available forms of ADR before their cases can even have been heard in the Court. The growing caseload of traditional courts, the belief that ADR imposes fewer costs than litigation, a choice for confidentiality, and the willingness of some parties to have greater control over the choosing of the person or people who will decide their dispute all contribute to the expanding popularity of ADR.[1]

2 Objectives of the study

Disputes arise often in commercial interactions between individuals and organizations. Multiple methods have been conducted to settle such conflicts. The legal system is the most typical example. The court system has its flaws, and there are times when individuals start to consider non-judicial methods of conflict settlement. ADR is an avenue to resolve a civil case without going to the Court. There are diverse mechanisms of ADR to resolve the issue. ADR is much cherished in the legal system of the UK. On the other hand, ADR is not so familiar in the context of Bangladesh. The objectives of this research are to find out the question how Bangladesh promotes ADR in disputes concerning commercial transactions and how Bangladesh can pursue the UK approach in this regard.

3 Methodology of the study

This study was conducted using the doctrinal research method. This approach, sometimes known as the 'black letter' technique, is concerned with interpreting and applying the law according to its strict letter rather than its spirit. Research that employs this strategy provides in-depth, narrative analyses of primary-source legal standards (case laws, statutes and regulations). This study compares and contrasts the laws concerning ADR of the United Kingdom and Bangladesh. The data used in this study have been gathered secondarily. Both systematic database searches and internet-based 'snowballing' strategies (following one link that leads to another) have been used to locate relevant literature. Besides, information has been collected from credible sources such as academic journals and government policies on arbitration. The findings have been evaluated using the broad perspective of the study. There was an attempt to combine data from different sources.

[1] J. Gillis Wetter, *The Internationalization of International Arbitration: Looking Ahead to the Next Ten Years,* 11(2) Arbitration International 117-135 (1995).

4 Arbitration in the Dispute Resolution Process

In the United Kingdom and Bangladesh, like in the rest of the globe, arbitration is a well-known form of alternative dispute resolution. The only way to begin the arbitration procedure is for the parties to agree to settle dispute through ADR in writing. Worldwide commercial parties frequently resort to arbitration as an alternative to going to Court. There are various factors play here, and the rising number of conflicts have been submitted to various arbitral organizations is indicative of the growing acceptance of arbitration. It is needless to discuss in detail to explain the primary benefits of arbitration. Disputes may be settled in a private and impartial setting with the help of arbitrators mutually agreed upon by the disputing parties through arbitration. Arbitration may be less expensive and swifter than litigation, and the final judgment will be enforceable, all without the involvement of state courts (and the associated costs, delays, and uncertainty commonly inherent in litigation).[2]

ADR is gaining prominence in the American justice system as well. The ADR models available are diverse. There are two main categories of ADR. Those are Adjudicative ADR and Non-Adjudicative ADR. Adjudicative ADR requires compliance with the decision of an arbitrator or expert. Regarding ADR that does not include an impartial third party to render a ruling, the parties have not legally been compelled to comply with the outcome. Non-adjudicative ADR includes negotiation, mediation, conciliation, and early neutral evaluation. Adjudicative ADR includes arbitration and expert decisions. There are no discrepancies between EU Member States' complaint systems regarding the industries they cover and the quality processes that should have been followed. Because of these disparities, many customers are wary of buying products or services from other Member States. They also have of lack faith that any complaints with merchants may be resolved in a simple, quick, and economical manner. As a result of these problems, it has been decided that all Member States should follow the same guidelines for responding to consumer complaints.

5 Procedure of ADR in the UK

A commercial party needs to consider ADR before going to the Court as per the provisions of Civil Procedure Rules 1998 of England. According to CPR 1998, Member States must make it easier for consumers to use ADR procedures of a dispute involving the performance of a contractual obligation, such as a sale or the provision of a service, both within and across national borders. In this regard, the following standards have been set for ADR entities: The people in charge of

[2] Ibid.

alternative dispute resolution (ADR) should have relevant experience, be free from bias, and be able to make objective decisions.

5.1 Transparency

ADR entities shall make readily available to the public, in a manner that they deem suitable, clear, and easily understandable information on both the entity and the procedure via their websites, on the durable media upon request, and via any other methods they deem fit; – efficiency: ADR procedures should be efficient if they meet specific requirements. These requirements include that the procedure be available and easily accessible online and on paper for both parties regardless of where they are. The process is offered free of charge or at moderate costs to consumers. The outcome of the ADR procedure is made available to the parties within ninety calendar days of the date on which the ADR entity has received the complaint this rule for EU consumer dispute.[3]

5.2 Fairness

There are established criteria that ADR procedure must meet. Those are: (i) the parties have the opportunity to express their point of view; (ii) the parties are provided by the ADR entity with the reasoning, proof, papers, and facts put forward by the other party; (iii) any statements made and opinions given by experts; (iv) the parties are made aware of the outcome of the ADR procedure in written form or on a durable medium, and issued a statement of the reasons for the outcome. If a consumer and a merchant agree before a dispute arises that requires the consumer to submit complaints to an ADR entity and has the effect of depriving the consumer of his right to bring a claim before the courts for the settlement of the dispute, the deal is not conclusive on the consumer and the merchant.[4]

At the present time Online Dispute Resolution (ODR) is common for commercial disputes. Such as in EU, Regulation (EU) No. 524/2013 establishes the framework for an online dispute resolution platform (from now on 'ODR platform') to serve as a single point of entry for consumers and professionals seeking online alternative dispute resolution through ADR entities located within the European Union. This process has been provided so that both parties can more easily access and use the ADR procedure concerning a dispute arising from purchasing goods or services made online. Regarding information technology, the ODR platform will take the shape of an easily accessible and multilingual website where users may submit

[3] Ibid.
[4] Ibid.

and track disputes at no cost. This site will offer an online complaint form for the applicant to fill out and advance; it will notify the defendant of the complaint; it will pinpoint appropriate ADR entities; etc. Thus, the Directive 2013/11/EU and the Regulation (EU) no. 524/2013 are two linked and supplementary pieces of legislation. The Directive stipulates the recognition of one or more competent authorities and the jurisdiction of a competent authority as a contact point for the European Commission to verify that ADR organizations are satisfying the quality standards.

England and Wales have a long tradition of alternative dispute resolution. Numerous changes occurred over ADR's past, and it has been intended to cover them here. The phrase "access to justice" became the rallying cry for overhauling the civil judicial system. While Lord Woolf was in office in 1997 and 1998, he introduced the Civil Procedure Rules (CPR) 1998 that was a monumental change to the civil justice system in England and Wales. Significant emphasis has been given to the ADR in CPR 1998, and it has been examined here as well.

Since 1960, when the efficacy of the state and its institutions has been called into doubt, the ADR has stagnated in its growth. Many citizens of the period, especially in North America, were unhappy how the state did things and demanded change. Additionally, the judicial system and courts came under fire. There were a lot of factors at play here. Reforms have been made in large part because of advances in legal theory. Alternative Dispute Resolution (ADR) is not a new phenomenon in English Law. It is quite evident that ADR mechanisms have been applied in English Law as early as the 1400s. Anon [1468] YB 8 Edw IV, fo1, p1 (English) is a leading case where arbitration has been applied. The very first law concerning arbitration came into force in England in 1697. Before going to Court, the parties may try for a compromise. The London Court of International Arbitration, which has been established in 1892, is one of the oldest and most prestigious centers for international dispute resolution. As early as 1915, the Chartered Institute of Arbitrators has been formed. While the practice of negotiation and mediation were not unknown at the period, neither the courts nor official institutions recognized them as valid options. The ombudsman, however, has been present in the United Kingdom since 1967. Beginning in 1970, the ADR saw rapid expansion in the UK. At the same time, the American public has been debating the virtues of litigation, the effectiveness of settlements, and the fairness of the adjudication process. The Advisory, Conciliation, and Arbitration Service (ACAS) was established in 1975 in the UK to promote ADR. A labor dispute resolution board or panel attempts to settle a disagreement between two or more parties involved in an employment dispute. The government provides the funding for this group. The Court strongly suggests that the parties take this opportunity to settle. The case at hand is Calderbank v. Calderbank [1976] Fam 93.

In 1994, the Commercial Court issued the practice note Commercial Court: Alternative Dispute Resolution [1994] 1 All ER 34, which stipulated that lawyers in commercial cases should consider mediation, conciliation, or otherwise (negotiation) to resolve the dispute between the parties and that parties should have been fully informed about the cost-effective method of determining the dispute. There was an increase in customer satisfaction with ADR due to this campaign, particularly in business situations. High Court Practice Note (Civil Litigation: Case Management) [1995] likewise emphasized the need of ADR. This memo offers the Court further oversight of the case by asking the attorneys and parties about alternative dispute resolution (ADR) and whether or not it has been considered as a means of resolving the disagreement before going to Court. The London County Court's mediation pilot program for claims of more than £3,000 has been established in 1996. In 2004, this has been ultimately implemented nationally.

The Woolf Reform provided the possibility of application of ADR in England and Wales. The English civil court system has been criticized for its high costs, lengthy proceedings, and overall difficulty for quite some time. The onus of silencing that critique rests squarely on Lord Woolf's shoulders. Due to its adversarial nature, the English civil court system is scandalously slow, costly, and complicated, as suggested by Lord Woolf. In 1996, Lord Woolf argued that the judge should have more say over the handling of civil cases to reduce costs, delays, and complexity in the system. Case management has often been left up to the parties involved in an adversarial system. Lord Woolf's suggestion became part of the Civil Procedure Rule 1998. Rule 1.1 of CPR outlines the overriding purpose and suggests using ADR to achieve the end of justice. Under rule 1.1 of the CPR 1998, the judge in a civil case is required to facilitate alternative dispute resolution (ADR) between the parties. Even the Civil Procedure Rules of 1998 (CPR 1998) recommend that parties attempt ADR before resorting to litigation or pre-action protocols. The Ministry of Justice has created a new protocol known as "Pre Action", which covers 13 distinct areas of civil law and one umbrella area dealing with contracts. Since 2007, the proceedings in the Country Court have increasingly frequently included mediation. Since 2011, the English government and the civil mediation council have backed a web-based program to provide this drug. The Minor Claims Mediation Service has offered free mediation for small claims up to £1000 in value since 1 April 2011. This issue relates to CPR 26.4 (1998). Case law decided after the year 2000 also favors ADR. If the parties cannot settle the dispute through alternative dispute resolution, the Court may impose penalties on them, as stated in Dunnett v. Railtrack [2002] 1 WLR 2434. Even if a party wins in Court, the Court still has the option of imposing sanctions to concerned parties. So, the point is not who wins the case but whether or not the parties in the litigation contemplate ADR at an early stage of the case or during the period of pre-action protocol, both of which are

relevant for imposing penalties. After two years of this case, in 2004, the English Court in Halsey v. Milton Keynes NHS Trust [2004] 1 WLR 3002 considered the possible value of voluntary contemplation of ADR by the parties to their disputes. The Court ruled that the parties were not required to engage in ADR but that they may incur financial penalties if they did not comply with the Court's directives. ADR is also discussed, with the Jackson's Reform has been offered. According to Sir Geoffrey Vos, Chancellor of the High Court, "the parties are obligated to pursue litigation jointly and engage constructively in a settlement process" in the case of OMV Petrom SA v. Glencore International AG [2017] EWCA Civ 195. This decision adds more support to the ADR procedure.

In addition to advancements mentioned earlier concerning ADR, the Family Producer Rules of 2010 became law on April 6th, 2011. The Pre-Application Protocol for Mediation Information and Assessment is the focus of both Part 3 and Practice Direction 3A. The parties in a family disagreement require to have been informed of the mediation process and its benefits, and the Court will have the authority to hear cases involving family issues through that method. EU directive 2008/52/EC also promotes mediation across the EU, and the Civil Procedure (Amendments) Rules 2011 updated the mediation process in the UK. The mediation agreement between the parties must be recorded as a Court order and in support of mediation per Rule 78 of CPA 1998. Simultaneously, alternative dispute resolution (ADR) flourished inside the English Civil justice system. In February 2015, the Online Disputes Resolution Advisory Group of the Civil Justice Council released a paper titled Online Dispute Resolution for Low-Value Civil Claims. It suggested a new online court system for settling minor civil cases. When the Arbitration Acts of 1697 and 1996, the Civil Procedure Rules of 1998, the decisions of the Courts, and other institutional initiatives for ADR have been applied, ADR has got the momentum to flourish in the civil litigation process in England and Wales.[5]

The Arbitration Act 1996 governs arbitration in England and Wales. One way in which arbitration differs from traditional litigation is that the parties themselves appoint the arbitrators, rather than the state appointing them in the instance of appointing arbitrators for mandatory arbitration. Though this method may be used to any issue, it is most commonly used to resolve disagreements that arise as a result of a contract between the parties. Some arguments, however, cannot be settled by consensus. In situations of public law, one cannot rely on assertions to determine one's legal standing. However, arbitration cannot be used in the following situations: relationship status, child care arrangements, license legitimacy, liability in criminal cases, insolvency, and the standing of a public option to proceed.[6]

[5] Ibid.

[6] Susan Blake, Julie Browne & Stuart Sime, A Practical Approach to Alternative Dispute Resolution, (Oxford University Press, 2020).

To sum up, it may be argued that in the previous forty years, there has been a major rise in the number and range of acceptable dispute-resolution (ADR) institutions and processes in England and Wales as a crucial part of enhanced access to justice. Although more individuals have access to ADR procedures, the questions of whether or not this access is shared evenly among the community, how the disadvantaged fare in these processes, and what kind of justice is offered by the various ADR processes have been investigated. ADR has been emphasized on its goal to ensure justice. Access to justice has been believed as the overriding goal that should inform the design and implementation of ADR processes, which in turn should consider the kind or nature of the dispute, the parties involved, and the availability of resources. Equally important, assessing the success of alternative dispute resolution (ADR) processes regularly is essential for enhancing access to justice.

6 Arbitration in Bangladesh

Regarding ADR in commercial disputes, arbitration is one of the most common methods used in Bangladesh. Arbitration is a relatively new idea in Bangladesh, and most people still are not so familiar with it. As a result, people with legal difficulties in Bangladesh are increasingly turning to the courts for help. Though alternate dispute settlement has been applied in Bangladesh earlier, arbitration has been governed by its own set of laws since 2001.[7] Bangladesh's agriculture sector is usually popular with foreign investment because of the country's status as a thriving textile industry hub. As a result, arbitration is now widely used in commercial disputes in Bangladesh. When Bangladesh gained independence in 1971, it adopted the Arbitration Act of 1940. The UNCITRAL Model legislation served as the inspiration for this statute. The arbitration procedure has been hampered by the various flaws in this 1940 Act. A significant issue is that parties have to face difficulties to enforce international arbitral rulings under the 1940 Act, which gives the national Court broad power over the arbitration process and procedure. The foreign arbitral decision has not been addressed by this Act of 1940. Therefore, it has created difficulties to solve dispute. The government of Bangladesh passed a new arbitration law in 2001 to replace the outdated 1940 Act. The year 2001 saw the passing of a law regulating arbitration proceedings. This legislation from 2001 borrows heavily from the UNCITRAL Model Law. Arbitration in civil cases in Bangladesh is addressed not only by the 2001 law but also by the Civil Procedure 1908 and the Money Loan Court Act of 2003. Notably, neither the Civil Procedure Act of 1908 nor the Money Loan Court Act of 2003 has provided any provision for

[7] Sameer Sattar, *Asian Pacific Arbitration Review on Bangladesh,* Country Chapter, (2016).

the parties to have an agreement in advance. The parties have also been bound by the arbitration rules established by the Bangladesh Energy Regulatory Commission in the event of a disagreement. The commission has the authority to settle energy-related issues between licensees and customers according to Section 40 of the Bangladesh Energy Regulatory Commission Act 2003.

The domestic and foreign varieties of commercial arbitration are treated differently in the Bangladesh Arbitration Act of 2001. International arbitration is an option in Bangladesh if foreign parties are involved in the issue. Possible participants in the arbitration procedure in Bangladesh are listed in Section 2(c) of the Arbitration Act 2001. Those are: (i) any person whose primary place of residence is not in Bangladesh; (ii) any corporation whose administration and control are carried out mostly outside of Bangladesh; and (iii) any government not located in Bangladesh. In Bangladesh, arbitration procedures between two domestic parties must be launched in the Dhaka District Judge Court. In contrast arbitration proceedings between foreign parties must be initiated in the High Court division of the Supreme Court of Bangladesh.

However, other than the arbitral council sponsored by the Bangladesh Energy Regulatory Commission, there is no professional arbitration tribunal available under the overall legal framework in Bangladesh to mediate commercial arbitration matters. Assuming there is an arbitration clause in the parties' agreement, disputes have been often settled by private arbitral councils made up of retired Appellate Division and High Court Division Judges.[8]

The Arbitration Act of 2001 attempted to streamline the process by which international arbitral judgments may have been implemented in Bangladesh. But in practice, this has proven to be a daunting task. Dhaka's District Court (for domestic arbitration) or High Court (for international arbitration) must have been petitioned by the awarding party, and the grounds for the Court's refusal to recognize the award are listed. For instance, if granting an award would go against Bangladeshi law, it would likely have been denied. It is to be noted that the Act of 2001 does not define "public policy", leaving it up to the national courts to determine what that term means. One of the most significant challenges to the growth of arbitration in Bangladesh is the difficulty to enforce international arbitration rulings. Reforms in this area are necessary in Bangladesh.

In Bangladesh, institutional arbitration has initially been carried out by the Bangladesh International Arbitration Center (BIAC). Bangladesh International Mediation & Arbitration Center (BIMAC) has just begun assisting in arbitration in Bangladesh. They assist to business parties during arbitration. They're offering

[8] Ibid.

their services as a place to hold the arbitration. In Bangladesh, they routinely had seminars and courses on arbitration. Because of their efforts, arbitration is now well-known in Bangladesh. However, the idea of institutional arbitration is not as widespread in Bangladesh.[9]

The Arbitration Act of 2001 is relevant to this discussion because of its application to arbitration in Bangladesh. If the parties can agree on a single arbitrator or select their own arbitrators, the appointment process can go rapidly in Bangladesh. However, the contesting parties may be unable to agree on an arbitrator or, in the event of a three-member Tribunal, that one of the parties would be unable or unwilling to propose an arbitrator due to the enmity between them. Under Section 12 of the Act, a concerned party must request the intervention of the appropriate Court to have an arbitrator appointed. Appointing arbitrators under Section 12 of the Act will not pose a significant obstacle until virtual courts begin operating, as was previously indicated.[10]

International arbitration has been treated differently from domestic arbitration under Bangladeshi Law. When one of the disputing parties is a foreign firm and the arbitration agreement specifically refers to the case as international business arbitration, the case is indeed international business arbitration. However, if both litigants are citizens of Bangladesh, the proceeding at hand would have been categorized as a local arbitration rather than an international one.[11] Arbitration involving disputes arising out of legal relationships, whether contractual or not, that are considered to have been commercial under the law prevailing in Bangladesh and where at least one of the parties is from a country other than Bangladesh, is defined as international commercial arbitration in Section 2(c) of the Arbitration Act, 2001 as "(i) A person who is neither a citizen nor a permanent resident of Bangladesh; (ii) a company that is not headquartered in Bangladesh but is instead has been recognized by the laws of another country; (iii) A company, association, or group of persons is considered to be foreign if its principal place of business is in a country other than Bangladesh and its top officers do not reside in the country; (iv) An overseas administration". It has been made clear throughout the definition that every one or any corporation, firm, or other organization not located in Bangladesh is a foreign entity and hence subject to international commercial arbitration. Surprisingly, a literal interpretation of the term of international commercial arbitration shows that the Arbitration Act does not apply to commercial disputes involving two Bangladeshi nationals with distinct places of business, even

9 Ibid.
10 Ibid.
11 Ibid.

though they have been situated in the same country. Therefore, the arbitration's nature is largely has been determined by the nationality of the disputing parties.[12]

If a foreign company has been involved in an international commercial arbitration, then entire procedure of the arbitration would be initiated and conducted in the High Court Division of the Supreme Court of Bangladesh. Any party seeking injunctive or other interim relief in an international commercial arbitration must apply to the High Court Division, in contrast, in a domestic arbitration the application must have been filed with the District Judge Court of Dhaka. Interim proceedings in domestic arbitrations are appealable to the High Court Division. If any party has been aggrieved he would file an appeal to the Appellate Division of the Supreme Court of Bangladesh as the procedure begins in the district courts. In-fact, there is no material differences in the methods of applying ADR in both the Courts. The legislature may have wrongly presumed that the High Court Division has been better equipped to judge the difficulties of international arbitrations as it settles important legal problems in international commercial arbitrations.[13]

Under Section 25 of the 2001 Act, the parties to a dispute in Bangladesh have total discretion over the method to be followed in the arbitration procedures, making arbitration a desirable means of conflict resolution. It is to be noted that the Tribunal is not bound by the Code of Civil Procedure or the Evidence Act in its proceedings, as per Section 24 of the Act 2001 Act. In addition, virtual or in-person hearings have not been required since Section 30 of the 2001 Act allows the Tribunal to undertake the processes solely based on papers supplied by the parties unless the parties agree differently.[14]

The administration of commercial arbitration procedures is, unfortunately, decentralized. The arbitration process is managed and administered by the concerned parties. Only if an arbitration award has been contested will the existence of any procedures become part of the public record. According to BIAC representatives, however, 54 arbitration cases involving over 294 sessions have been initiated at BIAC by parties from the energy sector, non-banking financial institutions, and non-governmental organizations since the center's founding in 2011.[15]

When it comes to improving the effectiveness of arbitrations in Bangladesh during this epidemic, the Bangladeshi legislature might play a pivotal role by enacting certain required adjustments to the Act as soon as possible, even if such amendments remain in force for a brief duration. Without going into great detail on all the essential adjustments (which is a different issue for considerable

12 Ibid.
13 Ibid.
14 Ibid.
15 Ibid.

discussion), the amendments that have been urgently required during this epidemic include, among others: the Act should: a) impose a strict time limit on arbitrations held under the Act; b) establish a structure for the fees that an arbitrator may charge; c) further restrict and make unambiguous the grounds for challenging an award; d) give exclusive jurisdiction to the High Court Division to hear challenges to domestic and international commercial arbitration awards and impose a strict time limit for passing such orders; and e) establish a streamlined procedure for enforcing arbitration awards.

While the Money Loan Court Act of 2003 established specialized courts to hear cases involving the recovery of loaned funds, no expedited business dispute resolution courts exist in the country. The existing judicial system does not require any form of mediation or alternative conflict resolution before trial. Except if arbitration has been expressly required by the parties in an agreement, parties are free to bring lawsuits in a court of law. Arbitration as a means of resolving legal disagreements is not required by Bangladeshi law but has been made binding when agreed upon by the parties to a contract. In the event of a dispute, Bangladeshi courts will consider the matter to have been led with the official court system and they will refer the parties to arbitration if an arbitration provision is present (Section 7 read with Section 10 of the Arbitration Act). However, under Section 89B of the Code of Civil Procedure, 1908, the parties to an action may petition with the Court at any time to withdraw the complaint on the pretext that they would send the issue or disputes to arbitration for settlement.[16]

Mediation and arbitration are two notable accessible alternatives to traditional courtroom litigation. The Court can mediate disputes between litigants at its discretion under Section 89A of the Code of Civil Procedure, 1908. The Court may also refer disputes to the parties' pleaders, to the parties themselves if they have not retained pleaders, or to a mediator from the panel of mediators. The Arbitration Act governs one of the most used alternative dispute resolution mechanisms, private arbitration proceedings.[17] An arbitration ruling, which has been contested in Court cannot be quickly resolved or enforced by any alternative means. In the event of a formal challenge to an award, the Code of Civil Procedure, 1908 would be applied, and the matter may be heard by the Supreme Court. The Money Debt Court Act does not mandate any form of alternative dispute resolution or pre-action process be followed before filing suit to collect a loan and interest.[18] Notwithstanding the restrictions of the Code of Civil Procedure 1908, under Section 22 of the MLCA, the Court shall select a chosen lawyer for settlement through arbitration when the

[16] Ibid.
[17] Ibid.
[18] Ibid.

defendants in money loan recovery litigation submit a written declaration to the Court. The lawyer is often chosen from a reserved panel at the Court and cannot be one of the lawyers for the parties. If the parties are unable to settle their disagreement through arbitration, as required by Section 45 of the MLCA, the case will go to trial.

7 Conventions and Procedures of Arbitration Institutions in Bangladesh

Rules for initiating arbitration procedures filed under the Arbitration Act have not been drafted by the government yet. The parties may use their own rules, those of their choice, or any rules those have been recognized globally (i.e., the ICC rules when commencing arbitration proceedings under the Arbitration Act). The whole set of BIAC's arbitration rules may have been seen on the organization's website.[19]

When no binding regulations for arbitration institutions are in place, the parties to a contract may agree to utilize the rules established by the BIAC in the event of arbitration. But in both international and local arbitration, it is standard practice for the parties to develop their own rules.[20]

8 Conclusion

Finally, arbitration may have been defined as "one of the ways where the parties resolve their issue without going to court". As a result of its many benefits, arbitration has found widespread usage in the business sector. Arbitration is a voluntary procedure in which a third party hears arguments from both sides of a business dispute and then decides based on the applicable legislation agreed upon by the parties. Due to its suitability of business practice, arbitration has gained widespread acceptance in the business sector. One side of an international conflict comes from one country, whereas the opposing side often comes from another. Consequently, business litigation and conflict arbitration on a global scale are pretty significant.

Furthermore, in cross-border conflicts, especially those involving complicated international commercial links, arbitration "is the most widely employed technique to settle disputes, typically dealing with considerable financial concerns". "The United Kingdom is one of the most arbitration-friendly jurisdictions in the world".

Rather than going to Court, business partners increasingly turn to arbitration as a dispute resolution method. To settle disputes concerning commercial

[19] Ibid.
[20] Ibid.

transactions in Court might be costly and time-consuming, therefore, ADR grew popular in commercial arena. The caseloads of Courts may have been lightened when parties choose arbitration instead of going to Court by using one of the many available arbitral organizations.

Since the Second World War, arbitration has become one of the most reliable and often used approaches to settling legal disputes. The importance of an arbitrator's independence and impartiality increases when the dispute has been resolved through international arbitration. When compared to the conventional court system, arbitration offers several benefits. Due to its status as a separate, impartial, and independent mechanism, arbitration helps keep the courts out of the judicial system. Arbitration is executed by private citizens rather than by the government. Due to its efficiency, privacy, and autonomy for both parties, arbitration plays a pivotal role in business disputes. Regarding commercial disputes, arbitration has been a significant player in recent history, and it continues to play a crucial role today. Since the interest of justice in the business world rests in the hand of the Arbitrator, it follows that the Arbitrator must carry out their duties in the interest of justice.

Arbitration is a well-established practice in the UK. In contrast it is an emerging footing in Bangladesh. To settle prevalent disputes in Bangladesh, a more radical strategy is needed. It's crucial to highlight Bangladesh's exceptional work during the epidemic; especially certain arbitration proceedings take place virtually. Commercial arbitration provisions are now standard practice in Bangladesh following implementing the country's Arbitration Act 2001. If the parties to a business dispute agree and the contract does not contain an arbitration clause, then they may submit the disagreement to arbitration under the said Act.

Arbitration as a method for settling legal disputes is still in its early stages of development in Bangladesh. It implies that a delay in enforcing otherwise enforceable award may occur if the award is contested in Court, as is commonly the case. As a result, the arbitration procedure in Bangladesh may result in extra delays and may be eventual litigation, despite its efficacy in the business environment, assuming the opposing side is equally willing and rational. Prospective investors have been cautioned to do their homework on their local company partner's legal standing before entering into any contracts with an arbitration clause.

To get the most output of an agreement, it's ideal to have the arbitration take place in a country with clear rules for such matters, such as Singapore if doing so is financially feasible under the conditions of the proposed commercial contract. However, the problem with this choice is that domestic courts in Bangladesh cannot provide interim measures while the award has been enforced.

The United Kingdom remains one of the most sought-after locations for international arbitration. The Act provides a solid framework. It is the Court's

jurisdiction to implement the Act's underlying principles that gives the UK its practical appeal of a seat. The English legal system, which has extensive experience with complicated arbitration cases, will not be significantly impacted by Brexit. Further, Brexit has not been expected to have a significant impact on London's abundance of highly skilled arbitrators. The United Kingdom, and more specifically England and Wales, is a popular choice as an arbitration seat because of the country's familiarity with the process and its appreciation for the policy considerations and procedural advantages. Most recently decided cases have shown that the English courts are entirely behind international arbitration.

Last but not the least one may make the case that Bangladesh is a relatively tiny country. However, the arbitration system is quite similar to that of the United Kingdom and other developed nations. While the scope of arbitration in civil disputes in Bangladesh is limited, the arbitration procedure in the United Kingdom is extensively covered. The use of arbitration has grown in popularity in both nations. Commercial parties in Bangladesh followed the arbitration and avoided court action to save time and money despite ongoing issues with arbitration rulings in Bangladesh. As a result of the high cost of arbitration, several businesses prefer to resolve their disputes through mediation instead. However, unlike arbitration, mediation in this case has no legal weight and must be resolved via that process. Therefore, there are problems here. Without a shadow of a doubt, arbitration is one of the most successful means of resolving disputes around the global disputes.

Resolução Alternativa de Disputas em Transações Comerciais: um Estudo Comparativo entre as Jurisdições do Reino Unido e Bangladesh

Resumo: As entidades de Resolução Alternativa de Disputas (ADR) foram autorizadas pela legislação nacional a oferecer uma solução que, se aceita por ambas as partes, se tornará vinculante para elas, ou impor uma solução que será obrigatória independentemente de sua aceitação. De acordo com o Money Loan Court Act de 2003 de Bangladesh, os órgãos de ADR devem nomear pessoas físicas que atendam aos critérios de conhecimento, independência e imparcialidade para concluir com sucesso todo o processo de ADR. Portanto, os processos de ADR só podem ser conduzidos por mediação ordenada pelo tribunal ou por agências administrativas autônomas, e não pelo setor financeiro. O Código de Processo Civil de 1908 de Bangladesh esclarece que este procedimento foi estabelecido para que "os princípios de independência e imparcialidade sejam observados". ADR é um caminho para resolver um caso civil sem a necessidade de recorrer ao tribunal. Existem diversos mecanismos de ADR que podem resolver a questão. Sem dúvida, as vias alternativas de solução de conflitos oferecem vantagens e desvantagens e têm sido promovidas para utilização antes ou durante o julgamento. Lord Justice Woolf, um jurista proeminente do Reino Unido, defendeu o uso das ADR para evitar custos, atrasos e complexidade em casos civis. Por outro lado, as ADR não são tão familiares em Bangladesh. Este artigo tem como objetivo descobrir como Bangladesh promove tais vias alternativas em disputas comerciais e como o país pode seguir a abordagem do Reino Unido.

Palavras-chave: Resolução Alternativa de Disputas. Comercialidade. Código de Processo Civil.

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Rethinking diversion programs in Indonesia: A critical analysis through the lens of social and cultural context

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Abstract: This research aims to critique how diversion programs have been implemented in Indonesia from the point of view of the social and cultural environment. The gathered information will be subjected to a qualitative analysis that uses inductive and deductive reasoning techniques. According to the findings, at least three aspects are deficient: legal substance, which refers to the concordance of underlying regulations and guidelines for its implementation; legal structure; and cultural factors, which play a role in its implementation internally and externally (within law enforcement). In addition, the study highlights the necessity for additional research on the success rate of adopting diversion and building a new legal culture in society that promotes diversion as a method for resolving criminal cases involving children. This is a necessity brought to light by the study's findings. This research may provide valuable insights into the advantages and disadvantages of the system already in place.

Keywords: Diversion Programs. Juvenile Justice System. Pancasila Justice. Legal Culture.

Introduction

In the sociocultural component, criminal behavior is questioned because it is seen as a disruption to social order,[1] which is equated with a deviation from the values and morals that society adheres to or, at the very least, believes in. How crimes (acts of criminality) are dealt with is strongly associated with criminal law enforcement, which is carried out according to particular patterns related to

[1] Jonathan Jackson, "Experience and Expression: Social and Cultural Significance in the Fear of Crime", *The British Journal of Criminology* 44, no. 6 (May 2004): 946–66, https://doi.org/10.1093/bjc/azh048.

policies that lawmakers choose to be given to law enforcers (criminal law policies). In this framework, criminal activity needs to be acknowledged as a threat to values, order, and security; moreover, from the point of view of the laws governing criminal law, its management (eradication) contributes more toward the achievement of the goal of social protection and the promotion of social welfare. Without a doubt, the settlement of criminal offenses is invariably carried out by referring to the applicable criminal law and its policies as defined in the legislation.[2]

The resolution of criminal crimes, also known as the enforcement of criminal law, which refers to the policies of criminal law, offers several different potential solutions, namely through both penal and non-penal measures.[3] When enforcing criminal law using means other than imprisonment, it is important to prioritize restoring the victim's rights. However, it is also important to consider the rights of the person who committed the crime. However, resolving a criminal act through means other than imprisonment is only open for consideration in particular circumstances, such as certain offenses or age groups (children). Diversion is resolving criminal acts through non-penal means with certain limitations stipulated by the law.[4] It can only be applied to criminal acts punishable by less than seven years of imprisonment and committed by non-recidivist offenders. It only applies to age groups under 18 years old. Additionally, it can only be applied to crimes punishable by less than seven years of imprisonment. The "agreement" between the victim (or the victim's family) and the offender (or the perpetrator's family) is extremely important to the successful operation of the diversion program, which is strongly dependent on this "agreement".[5]

The application of diversion in handling criminal acts involving children as perpetrators is determined when a child is designated as a suspect, referring to Law Number 11 of 2012 concerning the Juvenile Justice System as an improvement from the weaknesses of handling children in conflict with the law that was previously regulated in Law Number 3 of 1997 concerning Juvenile Courts.[6] Diversion in handling criminal acts involving children as perpetrators is determined when a child is designated as a suspect. In addition, and this is related to the earlier description of the conditions for the operation of the diversion program, the investigator is

[2] Henry M. Hart, "The Aims of the Criminal Law", *Law and Contemporary Problems* 23, no. 3 (1958): 401–41, https://doi.org/10.2307/1190221.

[3] Anggita Anggraeni, "Penal Mediation as Alternative Dispute Resolution: A Criminal Law Reform in Indonesia", *Journal of Law and Legal Reform* 1, no. 2 (January 26, 2020): 369–80, https://doi.org/10.15294/jllr.v1i2.35409.

[4] Dyah Listyarini, "Juvenile Justice System Through Diversion and Restorative Justice Policy", *Diponegoro Law Review* 2, no. 1 (April 28, 2017): 168, https://doi.org/10.14710/dilrev.2.1.2017.168-184.

[5] John Braithwaite and Stephen Mugford, "Conditions of Successful Reintegration Ceremonies: Dealing with Juvenile Offenders", in *Restorative Justice* (Routledge, 2017), 3–35.

[6] Lafri Prasetyono, "The Problem of Diversion in Children Perpetrators of Traffic Violations in Indonesia", *Jembura Law Review* 4, no. 1 (2022): 38–51, https://doi.org/10.33756/jlr.v4i1.11419.

the only person with the authority to decide whether or not the diversion program should be implemented.[7] This can become a problem that extends to the practical level since it implicates violations of the right to legal help for children, particularly with making the greatest possible efforts to divert the child from a potentially harmful path to protect the child's best interests.

Because the adoption of diversion is geared toward the welfare of children, it finally resulted in forming a juvenile justice system that accommodates law enforcement activities based on restorative justice values through the implementation of diversion.[8] This was done so that children could have a better chance at a successful future. Although, in theory, diversion seems like an ideal effort that can restore the rights of victims whose rights were violated by "child offenders" while protecting the interests of the offenders, who are still children and are believed to have a long way to go and lack the mental maturity of their adult counterparts, diversion is not always as effective as it may sound.[9] In addition, in the Law on the Juvenile Justice System, the term "diversion" refers to the process of diverting child cases from the process of a criminal court to an alternative process that is outside of the criminal justice system.[10] This is done to achieve peace between the victim and the child, resolving child cases outside of the judicial process, avoiding the deprivation of liberty for children, encouraging community participation in efforts to resolve crime, and instilling a sense of According to this point of view, the application of traditional punishment to children who have been in trouble with the law not only breaches the rights of such children, but it also leaves open questions regarding the rights of the victims.[11]

A "dialogue" or "consultation and consensus" process involving the child and their parent or guardian, the victim and their parent or guardian, probation officers, professional social workers, representatives, and other parties involved is required for the implementation of diversion by the regulations that are currently in place, as stated in the Supreme Court Regulation of the Republic of Indonesia No. 4 of 2014. This regulation was issued in 2014. This law includes a provision requiring consultation, which is meant to convey the idea that the procedure for

7 Beniharmoni Harefa, *Kapita Selekta Perlindungan Hukum Bagi Anak* (Yogyakarta: Deepublish, 2019).

8 Mustakim Mahmud, "The Rights of Diversion in the Children's Criminal Jurisdiction System as the Intent of Legal Protetion", *Indonesia Prime* 5, no. 1 (2020): 51–67, https://doi.org/10.29209/id.v5i1.105.

9 Yunan Prasetyo Kurniawan et al., "Restorative Justice (Diversi): A Harmonization Effort of Legal Protection Against Child Criminal as Offender and Victim", in *Proceedings of the International Conference on Law, Economics and Health (ICLEH 2020)* (International Conference on Law, Economics and Health (ICLEH 2020), Semarang, Indonesia: Atlantis Press, 2020), https://doi.org/10.2991/aebmr.k.200513.135.

10 Hafrida - Hafrida, "Restorative Justice In Juvenile Justice To Formulate Integrated Child Criminal Court", *Jurnal Hukum Dan Peradilan* 8, no. 3 (December 12, 2019): 439–57, https://doi.org/10.25216/JHP.8.3.2019.439-457.

11 Alison Diduck, Noam Peleg, and Helen Reece, *Law in Society: Reflections on Children, Family, Culture and Philosophy: Essays in Honour of Michael Freeman* (Brill, 2015).

putting a diversion into effect is intricately connected to the norms and values that already exist in society. This provides evidence for the proposition that "law reflects society" while at the same time implying that the operation of the legal system in a society is always in interaction with the social and cultural facets of legal systems. In addition, legal culture will play a significant role in determining the success of implementing diversion in Indonesia. This will be determined by the degree to which diversion coincides with the legal culture or even with the more general values and norms upheld by society.[12]

The connection between the practice of diversion and the background of society's values and norms also alludes to the fundamental principle of justice, which is the major source of law enforcement. This is because justice is the end goal of law enforcement. Because the execution of diversion is never too far removed from the pursuit of justice through the use of pre-existing legal instruments (both within and outside of the formal court process). This is made possible by placing punishment as a last resort (*ultimum remedium*) and using informal channels without rigid guidelines in its implementation. As a result, the presence of a "facilitator" is an essential component in achieving resolution through diversion in a manner congruent with society's pre-existing morals and standards. In this scenario, the term "facilitator" refers to members of law enforcement, namely those who are active participants in the process of pretrial inquiry.[13]

Some people are concerned that the introduction of diversion would lead to an increase in criminal behavior.[14] Even though this problem has been addressed in the standards for implementing diversion, there is still the worry that mild sanctions will not deter children, leaving the possibility for them to repeat the criminal activity wide open. Although this concern has been addressed in the requirements for implementing diversion, there is still the worry that lenient sanctions will not deter children. The application of diversion should be seen as an effort to advocate for the rights of minors (as offenders) and for the public good rather than as a means of "mitigating sanctions", as this would be a better way to frame the discussion. Even though diversion may not be as effective in practice as it is in theory, Scott and Steinberg[15] content that children who are punished through the formal process

[12] Wikan Sinatrio Aji, "The Implementation of Diversion and Restorative Justice in the Juvenile Criminal Justice System in Indonesia", *Journal of Indonesian Legal Studies* 4, no. 1 (April 23, 2019): 73–88, https://doi.org/10.15294/jils.v4i01.23339.

[13] Dani Muhtada and Ridwan Arifin, "Penal Policy and the Complexity of Criminal Law Enforcement: Introducing JILS 4(1) May 2019 Edition", *Journal of Indonesian Legal Studies* 4, no. 1 (May 7, 2019): 1–6, https://doi.org/10.15294/jils.v4i01.30189.

[14] Kelly Richards, "Blurred Lines: Reconsidering the Concept of 'Diversion' in Youth Justice Systems in Australia", *Youth Justice* 14, no. 2 (August 1, 2014): 122–39, https://doi.org/10.1177/1473225414526799.

[15] Elizabeth S. Scott and Laurence Steinberg, "Adolescent Development and the Regulation of Youth Crime", *The Future of Children* 18, no. 2 (2008): 15–33, https://doi.org/10.1353/foc.0.0011.

of the criminal justice system are more likely to continue their criminal behavior into adulthood when compared to juvenile offenders who are punished outside of the formal process.

In actual use, Diversion continues to throw up several problems, most notably with protecting public interests (security), which leads to the conclusion that it could be more effective. For instance, if a youngster becomes a drug courier in Indonesia, diversion is not applied to the child even though they are "just" a courier, and the quantity of drug disseminated is on the lower end of the spectrum. This is the case even though the threat to public safety and interests is significant. In addition, it is possible to ensure that they operate under the direction of adults at all times. When juvenile misbehavior has resulted in victims, the victims or their families frequently perceive attempts at alternative settlement as an opportunity to act in their best interests. This is particularly common in circumstances where the victim is a child. This is because diversion may only be carried out if the victim or their family gives their permission to do so.[16]

Supposing that diversion is used in a particular instance and that the follow-up to such diversion is deemed insufficient in fulfilling the interests of helping the offender transition into expected adulthood, then the diversion itself is regarded as insufficient.[17] It is commonly accepted that "youth delinquency" results from the child's immaturity, which is then expressed as anti-social behavior. Diversion based on this school of thought is nevertheless subject to criticism. This criticism focuses on whether diversion can truly accommodate the protection of children's rights and the execution of justice or, at the very least, protecting public interests. The research findings critique the implementation of diversion in Indonesia from the perspective of the social and cultural context that already exists in society. This critique is then evaluated based on the core principles of Pancasila justice.

When put into reality, diversion, which refers to alternative forms of conflict resolution for juvenile offenders, has several obstacles, particularly when public concerns like safety are considered. As a direct consequence, the efficiency of its implementation has been reduced. For instance, in Indonesia, if a kid is involved in drug trafficking, diversion is not applied to the child because of the perceived harm to public safety and interests. This is the case even if the child is acting as a courier and the number of drugs involved is on the lower end of the spectrum. In addition, it is possible to determine that the adult is giving the youngster instructions on behaving in situations where juvenile misbehavior results in victims. The victim or

[16] Katherine van Wormer, "Restorative Justice", *Journal of Religion & Spirituality in Social Work: Social Thought* 23, no. 4 (November 29, 2004): 103–20, https://doi.org/10.1300/J377v23n04_07.

[17] Simon B Little, "Impact of Police Diversion on Re-Offending by Young People" (PhD Thesis, School of Criminology and Criminal Justice Arts, Education and Law Griffith University, 2015), https://research-repository.griffith.edu.au/handle/10072/367597.

the victim's family will frequently look to alternative resolutions as an opportunity to behave in a manner that is most beneficial to themselves. This is because diversion can only be prosecuted if the victim or their family gives their permission to do so.[18]

Suppose diversion is used in a given instance. In that case, the subsequent steps taken are frequently regarded as insufficient in addressing the interests of guiding the offender through their transition into responsible adulthood. This is because diversion is designed to satisfy the court's interests rather than the offender's. It is commonly believed that juvenile delinquency results from a child's immaturity, which is then expressed through anti-social behavior. The application of diversion, based on this fundamental premise, is nevertheless subject to criticism, notably regarding its capacity to legitimately accommodate the protection of children's rights and the pursuit of justice, or at the very least, to safeguard public interests. The research serves as a critique of the implementation of diversion in Indonesia from the perspective of the social and cultural framework within which it exists. This critique is evaluated based on the fundamental principles of Pancasila justice.

Research methods

By taking a critical approach grounded in the Pancasila Justice framework, this investigation intends to rekindle research on alternative sentencing in the juvenile justice system. An improvement in applied research is required to realize this objective. In this situation, it is essential to select the appropriate paradigma,[19] and it is important to remember that the selected paradigm will affect the development of research techniques.

An interpretive paradigm is an approach that can be taken into consideration. The author plans to conduct a socio-legal study analysis and is critical of the system used for diverting criminals in Indonesia. Thus, the author chose this technique. Within the framework of the interpretive paradigm, the research employs a library research design by way of doing a review of laws and regulations that are associated with diversion.

In addition to this, a qualitative approach was taken to the investigation. This method was chosen because it is consistent with the interpretative paradigm, and both of these approaches share commonalities in taking a holistic perspective, which involves considering the phenomenon as a whole within the context of its

[18] Detlev Frehsee, "Restitution and Offender-Victim Arrangement in German Criminal Law: Development and Theoretical Implications", *Buffalo Criminal Law Review* 3, no. 1 (1999): 235–59, https://doi.org/10.1525/nclr.1999.3.1.235.

[19] Thomas S. Kuhn, *The Structure of Scientific Revolutions*, [2d ed., enl, International Encyclopedia of Unified Science. Foundations of the Unity of Science, v. 2, No. 2 (Chicago: University of Chicago Press, 1970).

surroundings. In addition, the qualitative method emphasizes acknowledging the truth that others have to offer. In addition, an analytical technique will be utilized in this research project to investigate the legal diversion standards applicable in Indonesia.

To carry out this study, the writers will collect data from various sources, such as applicable laws, rules, policies, and published literature. The data that was collected will undergo a qualitative analysis that makes use of both inductive and deductive methods. During the analysis process, you will be tasked with locating patterns, coming to conclusions about overarching themes, and providing detailed interpretations of the data acquired.

In addition, knowledgeable participants from the juvenile justice system, including judges, corrections officers, social workers, and young offenders who have been diverted from their original sentence, will participate in this study project. To ensure that a wide variety of viewpoints are considered during this research, participants will be chosen using a method known as purposive sampling.

In addition, the privacy and confidentiality of participants' information and their informed consent will be maintained throughout this study. In addition to that, the use of ethical guidelines in human research will be investigated as part of this project.

Diversion: safeguarding children's rights and well-being within the framework of Pancasila Justice

The concept of "diversion" in the context of the negotiation and resolution of criminal cases is strongly related to the connotation of the word "diversion", which refers to a change in direction or course.[20] Historically speaking, the idea of diversion was first presented in a study on the application of juvenile justice written in 1960 in the United States by the President of the Australian Crime Commission.[21] This report was presented in the United States. The major goal was to protect children from adverse impacts linked with the criminal justice system, especially the stigma commonly attached to it. This research emphasized the necessity of finding new ways to treat children's situations and directing them away from the regular channels that are currently in place.[22]

[20] D.S. Dewi and Fatahillah A. Syukur, *Mediasi Penal: Penerapan Restorative Justice Di Pengadilan Anak Indonesia* (Indie Pub., 2011).

[21] Gordon Bazemore, Joe Hudson, and Mara Schiff, *Juvenile Justice Reform and Restorative Justice* (Willan, 2013).

[22] Robert Agnew and Timothy Brezina, *Juvenile Delinquency: Causes and Control* (New York: Oxford University Press, 2012).

Despite this, our conceptualization of diversion in everyday life has progressed beyond the literal sense of the term. Diversion is interpreted as giving law enforcement officials the authority to take appropriate measures to resolve criminal cases involving children through alternative means outside of formal channels, according to The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules).[23] [24] Among these measures are the cessation of the criminal justice process for children, the return of the children to the community, and the children's participation in activities related to social service. The first emphasis was placed on the investigation stage; nevertheless, it is noted that diversion can be used throughout law enforcement to lessen the harmful impact of conflict with the law on children.

Children who do unlawful conduct have rights that should take precedence over the legal punishment process. The protection and promotion of the rights of children should be a top priority.[25] In her work on juvenile criminal justice in Indonesia, Marlina[26] believes that removing cases from the official channels of the justice system protects minors from the possibility of growing up to commit crimes as adults. As detailed by Nasir Djamil in his book "Children Not to Be Punished",[27] the most important aspect of implementing diversion for children in dispute with the law recognizes that children are ill-suited and unable to traverse formal law enforcement processes. This is the essence of implementing diversion for children who conflict with the law. A diversion is a form of alternative dispute resolution that prioritizes the peaceful resolution of criminal cases involving juvenile offenders.[28] The overarching goal of diversion is to harmonize the interests of the victims and the children involved. This necessitates the participation of a third-party facilitator, such as the community, Child Community Advisors, law enforcement, prosecutors, and judges, to aid in reconciling the parties involved.[29]

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[23] Vivi Nurqalbi, "Analysis of Diversion Arrangements in the Beijing Rules and the Juvenile Criminal Justice System in Indonesia", *European Journal of Law and Political Science* 2, no. 1 (February 26, 2023): 52–55, https://doi.org/10.24018/ejpolitics.2023.2.1.53.

[24] Katherine Hunt Federle, "Making Meaningful the Right to Appeal under the Convention on the Rights of the Child", *The International Journal of Children's Rights* 25, no. 1 (June 20, 2017): 3–23, https://doi.org/10.1163/15718182-02501001.

[25] Syamsuddin Muchtar, "The System of Sanctions for the Child and Its Implementation (Studies in Child Protection Perspective)", *Journal of Humanity* 2, no. 1 (July 1, 2014): 122–39, https://doi.org/10.14724/02.09.

[26] Marlina, *Peradilan Pidana Anak Di Indonesia: Pengembangan Konsep Diversi Dan Restorative Justice* (Bandung: Refika Aditama, 2009).

[27] Nasar Djamil, *Anak Bukan Untuk Dihukum: Catatan Pembahasan UU Sistem Peradilan Anak (UU-SSPA)* (Jakarta: Sinar Grafika, 2013).

[28] Sriwiyanti Sriwiyanti, Wahyu Saefudin, and Siti Aminah, "Restorative Justice for Juvenile Offenders in Indonesia: A Study of Psychological Perspective and Islamic Law", *JIL: Journal of Islamic Law* 2, no. 2 (August 4, 2021): 168–96, https://doi.org/10.24260/jil.v2i2.335.

[29] I Wayan Aryana, "The Reformulation of Restitution Concept in Juvenile Cases (A Comparative Study with Philippines and Thailand)", *Padjadjaran: Jurnal Ilmu Hukum (Journal of Law)* 7, no. 3 (January 2021): 400–420, https://doi.org/10.22304/pjih.v7n3.a6.

Protecting children's human rights and restoring rights for victims whose rights have been violated by child offenders are the driving forces behind efforts to find a middle ground between these two competing goals.[30] It is essential to acknowledge that children in trouble with the law may commit crimes with a level of understanding comparable to that of an adult; nevertheless, it is also necessary to consider the influence of environmental variables. Children are often thought to lack the emotional maturity necessary to appreciate the repercussions of their actions fully, and this belief is supported by research. Charles M. Borduin et al.[31] has pointed out that juvenile delinquency or criminal activities perpetrated by children, especially those under 18, are frequently the result of their psychological state, which is the outcome of anti-social conduct. This is particularly true for those who are younger than 18 years old. Borduin[32] has identified several elements that contribute to developing anti-social behavior in youngsters, which can ultimately lead to delinquency or criminal acts by those children. The individual traits of the kid, the dynamics of the family, the impacts of the child's peers, the educational aspects, and the social milieu in which the child grows and develops are all included in these factors.

Table 1 – Factors Triggering Children's Anti-Social Behavior According to Borduin

(Continua)

No.	Source	Factor
1.	Individual Children	Low level of verbal intelligence (Verbal IQ)
		Immature moral reasoning
		Cognitive bias to associate hostile intentions with others
		Children's tendency to prefer anti-social behaviors/traits
2.	Family Characteristics	Low affection and cohesion
		High level of conflict and hostility in the family
		Loose and ineffective application of discipline by parents
		Poor supervision from parents
		Parents abuse illegal drugs, have bad psychiatric conditions, and are criminal offenders.

[30] Syukron Salam, "Perkembangan Doktrin Perbuatan Melawan Hukum Penguasa", *Nurani Hukum* 1, no. 1 (December 1, 2018): 33–44, https://doi.org/10.51825/nhk.v1i1.4818.

[31] Charles M. Borduin et al., "Multisystemic Treatment of Serious Juvenile Offenders: Long-Term Prevention of Criminality and Violence.", *Journal of Consulting and Clinical Psychology* 63, no. 4 (1995): 569–78, https://doi.org/10.1037/0022-006X.63.4.569.

[32] Ibid.

Table 1 – Factors Triggering Children's Anti-Social Behavior According to Borduin

(Conclusão)

No.	Source	Factor
3.	Friendship Environment	Be familiar with friends who commit behavioral deviations.
		Poor social skills
		Not getting along with pro-social friends.
4.	Education/School	Poor academic performance
		Expelled from school
		Low commitment to Education
		Poor school quality and weak school environment structure
5.	Social Environment	Have a criminal subculture (being in an environment of drug trafficking, prostitution, etc.)
		Inactive community organizations
		Low social support from the environment around the child
		High community mobility

The idea that even while children engage in mischief or criminal acts, these activities are not necessarily carried out with full knowledge justifies the description of elements influencing anti-social attitudes in children.[33] These views are justified by children engaging in mischief or criminal acts. Both the people in their families and their communities impact their behavior. In addition, children lack the mental maturity to analyze the results of their activities or the effects of specific behaviors on themselves or others. According to this point of view, it is feasible for youngsters to get into mischief or commit criminal acts due to outside influences, whether direct (such as instructions) or indirect (such as the internalization of deviant values and standards). Consequently, it is inappropriate to respond to a kid who has committed criminal conduct in the same manner as an adult who has committed the same crime.

At its core, the purpose of the law is to control everyday life in society and make it possible for individuals to grow to their highest potential.[34] The same

[33] Mimi Fitriana and Nur Hamizah Ramli, "Psychosocial Determinants of Antisocial Behavior among Young Adults in Kuala Lumpur", in *Proceedings of the 2nd International Conference on Intervention and Applied Psychology (ICIAP 2018)* (Proceedings of the 2nd International Conference on Intervention and Applied Psychology (ICIAP 2018), Depok, Indonesia: Atlantis Press, 2019), https://doi.org/10.2991/iciap-18.2019.8.

[34] Jessica T. Mathews, "Power Shift", *Foreign Affairs* 76, no. 1 (1997): 50–66, https://doi.org/10.2307/20047909.

applies to youngsters; the law should not hinder their maturation into well-rounded individuals as they grow older. It is made abundantly clear in the laws of Indonesia, more specifically in Law Number 4 of 1979 concerning Child Welfare; that children have the right to protection and care from the moment, they are still developing inside of their mothers' wombs.[35] This provision can be found in Law Number 4 of 1979. In addition, children have the right to be protected against potentially harmful or restrictive environments that could stunt their physical or mental development. In particular, Article 2 of Law Number 35 of 2014 on Amendments to Law Number 23 of 2002 on Child Protection establishes that child protection encompasses all aspects related to the fundamental rights of children. This enables children to live, grow, develop, and participate optimally with human dignity while also being protected from all forms of violence and discrimination. In addition, the law ensures that children are shielded from any form of abuse.[36]

The notion that children cannot advocate for themselves freely (given their level of dependency), the child's best interests, continuity, and cross-sectoral principles are the foundations upon which the principles of defending children's rights are built. According to Human Rights Law Number 39 of 1999, which states that every child has the right to protection from their parents, family, society, and the state, protecting children's rights is founded on the larger protection of human rights.[37] This is because the protection of children's rights is a subset of the protection of human rights. The law recognizes and protects children's rights, starting with the prenatal period and continuing until the kid reaches the age of 18 and is considered responsible for themselves. Children's rights are referred to as human rights in that law, and their purpose is to defend children's rights, which are recognized and protected by the law.[38]

The fundamental tenets of safeguarding human rights, including safeguarding children, are applicable everywhere. It is generally agreed upon that the traditional criminal justice system, which emphasizes finding solutions involving punishment, stunts children's growth and development and prevents them from reaching their full potential. Nevertheless, how are these kinds of exceptions allowed? Unlike adult offenders who have already reached their full physical and mental potential, children are still undergoing the maturation process. The idea that adult offenders

[35] Ulya Sofiana, "Komparasi Hukum Islam Dengan UU No. 4 Tahun 1979 Tentang Hak Anak", *Jurnal Hukum Islam* 12, no. 1 (2013): 49.

[36] M Nur Rasyid, "The Realization of Legislative Measure of the Rights of the Child Post-Second Amandement of the Constitution", *Yustisia* 7, no. 1 (2018): 44–57.

[37] Alan Djaini, Fence M. Wantu, and Lusiana Margareth Tijow, "Legal Protection of Child Adoption without Trial by Human Rights Perspective", *Damhil Law Journal* 1, no. 1 (May 26, 2021): 20–30, https://doi.org/10.56591/dlj.v1i1.627.

[38] Winsherly Tan, "Child Marriage within the Sea Tribe of Kelumu Island: Issues and Problems", *Jurnal Media Hukum* 29, no. 2 (December 15, 2022): 120–30, https://doi.org/10.18196/jmh.v29i2.14027.

should have their rights protected stems from the belief that adults are held to a higher standard of individual accountability for their behavior than juveniles are. Given these factors, children are entitled to special treatment or exceptions, especially when they conflict with the law. This is especially true when the kid has restrictions that prevent them from complying with the law.

In its most basic form, diversion is an alternative method of resolving criminal cases that emphasizes restorative justice. Its primary goal is to ensure that the rights of victims, offenders, and the community (public interest) are fairly and adequately protected. The evaluation of justice that has been presented through criminal law instruments has, up until this point, been limited to formal justice values (at the very least, fairness based on applicable rules). Incorporating restorative justice values into criminal case resolution acknowledges and amplifies the public interest and substantive justice. Within this formal justice framework, there is frequent neglect of the rights of victims and the public interest (at least in terms of the judge's verdict). This is because formal resolution primarily focuses on punishing the offender, with the expectation that it serves as a lesson for the offender (to prevent recurrence) or for the general public to understand that such criminal actions have implications that can result in criminal sanctions. Therefore, restorative justice is conducted to restore a sense of safety to the victim, their dignity, and their sense of self-worth, as well as to inculcate a sense of responsibility in the offender so that they can realize the consequences of their prior activities. This is done so that the offender can comprehend the implications of their past actions. In the end, the goals of both points of view are the same: to reassert a sense of control over the desired outcomes of the dispute resolution process (particularly in situations involving criminal activity), with the ultimate goal of realizing substantive justice principles. In the end, restorative justice promotes cultural relativism and sensitivity rather than imposing one culture's norms and values on others through the legal system.

On the other hand, diversion can also be regarded as an endeavor to defend human rights, notably children's rights legally. This is especially important when dealing with juvenile offenders. This type of legal protection needs to comply with the Convention on the Rights of the Child, ratified by Presidential Decree No. 36 of 1990, respecting the Ratification of the Convention on the Rights of the Child in Indonesia.[39] The Law Governing the Juvenile Justice System contains the legal policy formulation for implementing diversion, which the Convention on the Rights of the Child recommends. You may find this policy formulation in the law. According to

[39] Nurini Aprilianda, Mufatikhatul Farikhah, and Liza Agnesta Krisna, "Critical Review Selecting a Proper Law to Resolve Sexual Violence Against Children", *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 6, no. 2 (December 31, 2022): 954–72, https://doi.org/10.22373/sjhk.v6i2.9050.

the law, a child is defined as someone who is 12 years old but has not yet reached the age of 18, and a child in conflict with the law refers to the age, as mentioned, an earlier group that is suspected of committing a criminal offense by Article 1, paragraph 3 of the Law on the Juvenile Justice System. The primary focus of the implementation of diversion programs is on children who are in this age group and who are in conflict with the law.[40] It is not explicitly stated, but the Law on the Juvenile Justice System gives the impression that the legal protection of children's rights is contingent on age restrictions. The restricted nature portrayed in these laws is essentially by what is stated in the Convention on the Rights of the Child, which can also be regarded as an effort to establish legal control over society. These regulations were created to ensure that children have the protections they are entitled to under international law.

Other restrictions can be placed on the investigation depending on the categories or kinds of criminal acts believed to have been carried out by youngsters. These include offenses classified as violations, offenses considered small, offenses that do not involve victims, and situations in which the victim's loss does not surpass the value of the local minimum wage. The application of diversion in the resolution of criminal cases involving children who conflict with the law is restricted by the Law on the Juvenile Justice System, which states that criminal offenses carrying a maximum penalty of one year should be prioritized for resolution through diversion. This fundamental reference limits diversion to resolve criminal cases involving children who conflict with the law. Diversion may or may not be an option for offenses carrying penalties of more than one year and up to five years in prison. Except for situations in which the victim suffers emotional or physical harm as a result of the theft, all cases of theft should be tried to be handled by the application of diversion. When deciding whether or not to adopt diversion, age limits are considered. The younger the criminal, the greater the sense of urgency for diversion. Suppose a study carried out by correctional facilities demonstrates that extrinsic circumstances contribute to transgression beyond the child's control. In that case, the need for diversion becomes more pressing. The need for a diversion becomes more pressing when the damage that has been done is predominantly one of a material nature rather than one that is directly tied to the loss of life or bodily harm. Diversion is also considered in light of the public's worry or disturbance. The victim or a member of the victim's family must give their permission before any diversionary tactics can be implemented. Diversion can only be carried out under certain conditions if such permission is acquired and the offender or the offender's

[40] Brian Septiadi Daud and Irma Cahyaningtyas, "Criminal Justice System Toward Children With Legal Conflict Seen In Justice Restorative Presfective", *Jurnal Hukum Prasada* 7, no. 1 (April 7, 2020): 14–26, https://doi.org/10.22225/jhp.7.1.1223.14-26.

family is willing to participate in the diversion program. If the offense was committed with an adult, the adult must still go through the official criminal proceedings as prescribed by the rules and regulations that are in effect at the time.[41]

In addition, according to the Law on the Juvenile Justice System, other constraints stipulate that alternative pathways can only be explored if the maximum jail sentence for the crime done by the child does not exceed seven years and the offense has not been committed previously. These restrictions act as a kind of control and are an important part of the law's overall goal.

One thing that may be called into question is whether or not youngsters genuinely lack the maturity to make their own decisions or at least have things to think about before doing something. In the end, the funding of research becomes significant as a form of justification for implementing diversion programs for children who are in confrontation with the law. When a child conflicts with the law and formal law enforcement processes are carried out, a practical approach can help bridge this issue by addressing the child's future well-being.[42] This is especially true when the child is in disagreement with the law. This strategy aims to answer how to punish without too punishing. As a result, it proposes separating the resolution of "childish behaviour" from formal law enforcement (criminal justice), which is referred to as diversion.

Moffitt highlights in her research on teenage delinquency that, even if they commit significant crimes, delinquent children still have limitations as "children" who are forced to acquire mental maturity via their anti-social behavior. Even though Moffitt acknowledges that delinquent children must achieve mental maturity through their anti-social behavior, suppose intervention in the form of rehabilitation is carried out that encourages the youngster to continue engaging in criminal activities. In that case, the concerns that they would grow up to become "criminals" can be disproved. However, this intervention should be avoided. In other words, social variables play a key role in preventing recidivism, particularly in the context of children who confront the law during the formal process of the criminal justice system. The criminal law policy should not ignore a child's future, and punishments should be designed to encourage them to transition from childhood to adulthood. These punishments typically address the interests of society and the offender.

The resolution of criminal cases involving children through the implementation of diversion is viewed as a step that upholds and argues for society's interests,

41 Darmini Darmini, "Pelaksanaan Diversi Pada Sistem Peradilan Anak", *QAWWAM* 13, no. 1 (2019): 43–63.

42 Alexander Bagattini, "Child Well-Being: A Philosophical Perspective", in *Handbook of Child Well-Being: Theories, Methods, and Policies in Global Perspective*, ed. Asher Ben-Arieh et al. (Dordrecht: Springer Netherlands, 2014), 163–86, https://doi.org/10.1007/978-90-481-9063-8_8.

particularly in decreasing crime recurrence or recidivism. This is because diversion is seen as a step that upholds and advocates for society's interests in reducing crime recurrence. Formal procedures culminating in minors' custody can potentially prolong or repeat illegal behavior. This is especially true when one considers that the social environment is one of the most important factors in successfully addressing crime. On the other hand, in the specific context of children who have gotten into trouble with the law, intense support focused on resolving the child's anti-social conduct is considered a more successful option for minimizing recidivism, particularly among children. Therefore, based on this argument, programs that emphasize providing psychological support for children become a superior approach to resolving criminal issues compared to punishment measures, and diversion serves as an ideal starting point.

When children who are in confrontation with the law are processed through official settlements, particularly when they wind up being incarcerated, the subject of child welfare becomes increasingly essential. In the name of justice, based on what is stated in legislation (in terms of formal resolution), the chances children normally have for their personal development are forcibly restricted while serving time in prison. This can be seen as a form of formal resolution. In addition, even once these children are finally freed, there is no guarantee that they will immediately be provided equal opportunities for personal development. The stigma will probably continue, and there is a risk that these "former inmates", still youngsters, may be marginalized even further. At this point, the evidence supporting the importance of social variables in efforts to control crime, particularly concerning crimes done by children, becomes clear. This is particularly the case when it comes to crimes committed by children.

It is inappropriate to link separating the areas where children and adults are incarcerated with separating the criminal resolution process for children and adults. Scott and Steinberg have shown that putting children who have broken the law in detention centers does not give them the essential support for their transition into adulthood, and they stress the fact that this increases the risk that these children will become criminals in the future. Again, the concern about recidivism that occurs when diversion is applied to all instances involving young offenders reflects the anticipation that public safety would be compromised, which can be understood (in terms of normalization). Specifically, the apprehension that public safety will be compromised is due to the fear that normalization will occur. Not only for the sake of the rights and welfare of the children but also for the interests and safety of the general public, it is important to prioritize the resolution of criminal cases involving children through diversion or alternative measures outside of the formal system.

This is important not only for the sake of the rights and welfare of the children but also for the interests and safety of the general public.[43]

When resolving criminal cases through diversion, justice should fundamentally refer to human justice and social justice that is fair and civilized for all people of Indonesia if it is to do justice to the values of Pancasila, which should be reflected in that justice. The preservation of children's rights and the promotion of their well-being are key components of both of these values, as is the promotion of the general well-being of society as a whole. Adopting diversion is also meant to defend the child's right to fair treatment and eliminate any hurdles that may hamper the resources necessary for their personal development. This is especially important compared to jail, which invariably limits one's freedom and access to resources. In addition, formal conflict resolution systems may have unintended consequences for the growth and development of children. Because children's "wrong" behavior reflects highly influenced anti-social behavior that stems from social causes, as was previously mentioned, diversion should be extended further to support children as they transition into adulthood. In this approach, the suppression of anti-social behavior meant to be attained can be realized, and concerns about future occurrences of the behavior or the inability of law enforcement to fulfill their aims can be eliminated.

Unveiling the reality of diversion implementation in Indonesia

Indonesia places a definite emphasis on the endeavor to resolve criminal cases involving minors through diversion. This effort has been increased by developing the Juvenile Criminal Justice System, established by Law Number 11 of 2012 governing the Juvenile Criminal Justice System. In addition to this, there are rules for its execution that can be found in Supreme Court Regulation Number 4 of 2014, which is titled Rules for Implementing Diversion in the Juvenile Justice System. As a result of these restrictions, it is possible to comprehend that the objective of the diversion is not limited to the provision of leniency for children; rather, it strives to preserve the rights of children who have committed offenses. In Barda Nawawi Arief's[44] comparing a kid who commits a crime with an adult who conducts an act comparable to the crime is impossible. As a result, it is inappropriate to classify a child as a criminal in that setting because of the circumstances. Instead, we should regard a child who has committed a crime as needing assistance, compassion, and affection. This shift in viewpoint will allow us to better respond to these young people.

[43] Malik AL-Ghazali, "Restorative Justice Approach on The Under Age (Minors) Violator of The Traffic Case Accident (Laka) That Lead to Death in Polres Majalengka", *Jurnal Daulat Hukum* 1, no. 3 (September 7, 2018): 705–12, https://doi.org/10.30659/jdh.v1i3.3371.

[44] Barda Nawawi Arief, *Perbandingan Hukum Pidana* (Jakarta: Rajawali Pers, 2011).

In addition, Barda Nawawi Arief[45] underlines that punitive measures are inadequate to satisfy children's requirements for aid, understanding, and affection. Therefore, an approach with more persuasion is necessary. At the very least, distraction presents an opportunity to provide an answer to the demand for such an argumentative strategy. Nevertheless, implementing diversion in Indonesia elicits many concerns, questions, and objections. Is it possible that alternative sentencing could answer the goals of law enforcement within the context of promoting welfare and social security? Or is it just a particular treatment that is given to juvenile delinquents in the name of defending their rights?

The rise in the number of juvenile offenses (also known as "juvenile delinquency") is one factor that has contributed to the increased focus on diversion in Indonesia. It is possible to understand juvenile delinquency as a complex social and environmental phenomenon. These factors affect a child's inability to internalize the rules and values of society. Because of the myriad of stimuli that surround these children, it can be difficult for them to differentiate between appropriate and inappropriate behaviors. This tendency eventually develops as anti-social behaviors, usually considered by society or even by positive law as violating criminal statutes.[46]

Long before establishing a formalized criminal justice system, Indonesia had its methods of enforcing "law" by its social ideals, which place a premium on dialogue and reaching agreements via collective effort. During that period, the emphasis on consultation within the community was not dissimilar to what was sought through diversion. Mediation was carried out between the criminal, the victim, their families, and the community to address the disputes successfully. On the other hand, during that period, community leaders served as facilitators, in contrast to the system of juvenile justice, where law enforcement personnel were allowed to perform that function. In addition, the fact that there is a positive law that regulates diversion further strengthens the interest in promoting diversion as a means of resolving criminal cases that involve children.[47]

To put it another way, the compatibility of different social and cultural backgrounds should strengthen the implementation of distraction. However, this compatibility does not automatically produce an ideal scenario where every youngster engaging in criminal activities will be diverted. This is because of the limitations of the compatibility. Concerns have been raised regarding the possibility that youngsters

[45] Barda Nawawi Arief, *Beberapa Aspek Pengembangan Ilmu Hukum Pidana (Menyonsong Generasi Baru Hukum Pidana Indonesia)*, Pidato Pengukuhan Guru Besar Ilmu Hukum Pidana Fakultas Hukum Universitas Diponegoro (Semarang: Penerbit Pustaka Magister, 2011).

[46] Jason J. Washburn et al., "Development of Antisocial Personality Disorder in Detained Youths: The Predictive Value of Mental Disorders", *Journal of Consulting and Clinical Psychology* 75, no. 2 (2007): 221–31, https://doi.org/10.1037/0022-006X.75.2.221.

[47] Mahmud, "The Rights of Diversion in the Children's Criminal Jurisdiction System as the Intent of Legal Protetion".

may not be instilled with the same level of deterrence through the implementation of diversion as they would be through the official criminal processes. Diversion has been put into practice in several different ways in Indonesia, which leads one to believe that there are significant problems with the regulations governing its use. For instance, the laws regarding when diversion may be used differ between the Law on the Juvenile Criminal Justice System and Supreme Court Regulation Number 4 of 2014, particularly concerning the prerequisites for when diversion can be carried out. These variations can be seen in the regulations regarding when diversion can be implemented. The difference in the standards for diversion between these two statutes makes the practice of diversion more difficult, particularly for some types of crimes that do not involve victims, such as drug offenses.

On the other hand, it is imperative that the victim's consent and the victim's family's consent to pursue diversion, which then opens up opportunities for practices that benefit one party, is acknowledged as a widespread phenomenon. This is because such consent opens the door for practices favoring one side. Any criticism should be directed to the consent letters the victim or the victim's guardian signed. The implementation of diversion is intended to support and restore the victim's rights in a criminal case; this is done with the awareness that the victim has experienced losses that cannot be fully restored through formal channels. However, this does not change the fact that the victim's rights are supported and restored through the implementation of diversion. The implementation of diversion does not govern the formulation of agreements or consent letters from the victim's party to proceed with diversion, even though it stipulates that the value of the losses sustained by the victim should not exceed the local Minimum Regional Wage.

Agreements naturally allude to a middle ground between the offender and the victim, but this does not mean there is a possibility that the offender will ultimately be obliged to accept the terms given by the victim to deviate from the official procedure of criminal law. In a circumstance like this, the offender is faced with specific considerations that lead them to meet those requirements, even though they may be difficult to accomplish. When both sets of conditions are "quantified", for instance, the offender can have the impression that the possible punishment that could be inflicted on the child quantitatively exceeds those suggested by the victim. The circumstances of this case make it clear that the offender, who is a child, possesses chances and a priceless future. Because of this, the offender should not be subjected to criminal prosecution; instead, diversion should be sought.

There is also the risk that the offender will deviate from the norm somehow. For instance, in the case of Judge's Decision No. 1/Pid.Sus-Anak/2017/PN. Cbn, it is stated that the first party, Dhewana Alnafis Han Bin Deni Rohmawan, as the offender, intended to pay compensation for a traffic accident case to the family

of the victim, the late Soniu Wijaya bin Muhidin, for IDR 85,000,000 (eighty-five million Indonesian Rupiah)

Both sides agreed that, in light of the compensation payment plan, Dhewana Alnafis Han Bin Deni Rohmawan would be sent back to his parents in his role as the offender. However, once the offender paid fifty million dollars, they refused to meet the second and third parts of the agreement, stating that the cash given had covered the compensation. This was even though the first point had already been fulfilled. This directly opposes the terms of the agreement that the offender and the victim came to. In this case, the perpetrator failed to uphold their half of the bargain, giving the excuse that they lacked the financial means necessary to carry out the terms of the agreement that they had previously signed.

The key focus is ensuring the constant implementation of diversion programs in situations involving children conflicted with the law. This is the fundamental issue that should be the primary concern. The observable facts that might be considered the fundamental issues with implementing the diversion are deviations from the anticipated practices. According to the legal system theory developed by Lawrence M. Friedman,[48] one aspect that is sometimes overlooked in the legal system is the cultural factor, even though it plays a crucial role, particularly in the implementation and enforcement process. In the context of the execution of diversion, the regulations already in place can be regarded as "sufficient" to sustain the core objectives of diversion, which include emphasizing the protection of children's rights as both offenders and victims, as well as the community's interests. In other words, the primary goal of diversion is to prioritize children's rights. Friedman is the one who brought up the point that legal culture has a considerable impact on how the legal system works. As Friedman[49] defines it, legal culture may be regarded as the pre-existing values and norms in society, which, in the context of diversion, relate to how the society interprets "legal leniency" toward the offender (kid) and alternative resolutions of criminal cases. In simpler terms, legal culture can be viewed as society's existing values and standards.

In addition, the execution of diversion from the perspective of law enforcement does not effectively reflect the protection of children's rights, notably the guaranteeing of their well-being. This is evident in the differences in the threshold requirements for criminal sanctions in the Law on the Juvenile Justice System, where it is only stated that the threshold is for offenses with a maximum penalty of fewer than seven years, while in the Regulation of the Supreme Court of the Republic of Indonesia No. 4 of 2014, additional provisions in the form of subsidiary,

[48] L.M. Friedman, *The Legal System: A Social Science Perspective* (Russell Sage Foundation, 1975).
[49] Ibid.

alternative, cumulative, or combination charges are included, resulting in diverse treatment of child offenders. These differences in the threshold requirements for criminal sanctions in the Law on the Juvenile Justice System Every child who satisfies the standards set forth by the Law on the Juvenile Justice System has the right to seek diversion, whereas in this scenario, law enforcement officials, and particularly judges, have the legal capacity to refuse the implementation of diversion for children in certain situations; however, the right to pursue diversion is guaranteed to every kid. This creates a barrier to preserving children's rights, particularly their well-being. It directly contradicts the ideas of justice outlined in Pancasila, prioritizing justice and welfare for the child and society.

Social & cultural dimensions of diversion: A critical analysis

The issue of diversion as a social phenomenon revolves around the persistent belief that law enforcement is synonymous with punishment. This is indicated by the imposition of severe sanctions aimed at instilling a sense of deterrence and serving as a lesson for both the offender and the community, thereby preventing future repetition of acts similar to those committed in the past.[50] The enforcement of criminal law is widely acknowledged to be inextricably linked to the achievement of the goal of social welfare, but just because this is the case does not imply that a "criminal" matter cannot be resolved by alternate means, such as diversion, and still accomplish the same goal. Even when its execution falls short of its intended purpose, deviating practices from the initial projection of diversion execution, such as transactional agreements between the victim and the offender, law enforcement authorities' failure to maximize the implementation of diversion, and the persistent tendency to opt for the criminal punishment of minors (juvenile offenders), indicate that at least one aspect has failed to be considered in the regulation and is therefore impermissible.

The implementation of the diversion can only proceed with the agreement of all of the relevant parties. The participation of the offender, the victim, community representatives, and law enforcement officers as facilitators is an unavoidable prerequisite for successfully implementing diversion.[51] On the other hand, the fact that the substance of the consent only accommodates the interests of some parties proportionally and instead tends to favor one party is evidence that there needs to be a missing piece. In this regard, we postulate that at least three aspects are

[50] Du Preez Nicolien and Muthaphuli Phumudzo, "The Deterrent Value of Punishment on Crime Prevention Using Judicial Approaches", *Just Africa* 2019, no. 1 (December 1, 2019): 34–46, https://doi.org/10.10520/EJC-1d6821df4d.

[51] Hafrida, "Restorative Justice In Juvenile Justice To Formulate Integrated Child Criminal Court".

lacking: legal substance, which is related to the harmony of underlying regulations and guidelines for its implementation; legal structure, which is reflected in how law enforcement agencies have not sufficiently promoted or strived for diversion; and cultural factors, which both internally (within law enforcement) and externally (within society) play a role in the implementation of diversion within the legal system theory. In this regard, at least three aspects still need to be added.

In the context of Pancasila justice, which emphasizes fair and civilized treatment of humanity as well as social welfare for all Indonesian people, the concept of justice can be crystallized as an effort to treat others as they were created, which is as human beings with fundamental rights that need to be protected, with the ultimate goal of achieving social welfare not only for the individual but for the entire population without exception. Diversion inherently contains values congruent with the core principles of Pancasila justice, as seen from the earlier descriptions of such values. The purpose of diversion is to provide appropriate therapy for children who are thought to lack mental maturity and comprehension while recognizing that dominant causes from external sources may be driving the children's participation in criminal activities.[52] Diversion is designed to achieve this goal. How well does the current implementation of the diversion program correspond with the overarching purpose of protecting these particular individuals?

Given the common belief that the most severe penalty or criminal penalties represent the optimum form of law enforcement, it is nevertheless apparent that corrective sanctions bring satisfaction and a sense of security to the public (the interests of society). This view may persist, particularly when talking about children who have run afoul of the law due to the restricted availability of alternative sentencing options, particularly concerning the public's concern that diversion is not sufficient to provide "education" to the offenders (children), leading to an increasing concern about recidivism, studies focusing on the success rate of diversion implementation have not yet been found. A comprehensive assessment of the implementation of diversion in cases involving children as perpetrators or victims is not readily available. In addition, studies focusing on the success rate of diversion implementation have yet to be found.[53]

Recidivism, the key worry in implementing diversion, offers a new challenge about the most effective strategy to decrease or eliminate recurrent criminal acts. This is because recidivism is the primary concern in diversion. The application of severe sanctions is regarded to have a proportional deterrent effect on the offender

[52] François Steyn, "Approaches to Diversion of Child Offenders in South Africa: A Comparative Analysis of Programme Theories" (PhD Thesis, Bloemfontein, University of the Free State, 2010).

[53] Anak Agung Putra Dwipayana, Jawade Hafidz, and Aryani Witasari, "The Implementation of Diversion in Handling of Criminal Actions Performed by Child", *Law Development Journal* 4, no. 2 (2022): 339–46, https://doi.org/10.30659/ldj.4.2.339-346.

when viewed from the point of view of individuals opposed to using non-formal procedures. This thinking may be valid when the offender is an adult. However, when it comes to children who exhibit anti-social conduct as a predominant prelude to criminal activity, this understanding is not applicable because environmental circumstances primarily influence children. This suggests that to reduce the likelihood of juveniles committing future offenses, it is necessary to place youngsters in trouble with the law in a setting that can have a "positive" impact on them. In this instance, "positive" corresponds with the significance of directing the child during the formative years leading up to adulthood. The findings of Scott and Steinberg strengthen this assertion,[54] who found that putting children in correctional institutions (even those designed specifically for children) will only give the offender a greater opportunity to develop highly potential anti-social behavior, which can lead to future criminal activities. The findings of Scott and Steinberg support this assertion. This opinion lends credence to Borduin's[55] the contention is that addressing anti-social behavior in children will positively influence reducing the number of criminal behaviors by youngsters. This is especially true when one considers that the factors influencing behavior often have more than one dimension.

Adopting diversion in Indonesia has yet to significantly influence the development of a new legal culture inside society. It remains to be seen how society will view diversion as a strategy for resolving crimes involving children, which helps not only the child who committed the crime but also the victim and the community. Because the introduction of diversion has not been supported by ongoing support for the offender (kid) until this point, it is impossible to fault persons who believe that diversion is solely a "mitigation" attempt for the offender. In addition to this, the inconsistent implementation of diversion, in which not all law enforcement personnel agree to maximize efforts to implement diversion due to varying interpretations of the criteria for implementing diversion (Supreme Court Regulation of the Republic of Indonesia No. 4 of 2014).

It is suspected that the inconsistent application of diversion in this setting contributes to the perception that diversion is not a good or appropriate solution for resolving criminal cases involving children. However, in reality, diversion carries the value of protecting the rights and welfare of victims, offenders, and the larger community. This perception may have been formed due to the sporadic application of diversion in this setting. Inconsistency in diversion efforts might be perceived as unfairness for the parties involved from the perspective of the Pancasila justice model because the treatment by law enforcement can vary across various

[54] Scott and Steinberg, "Adolescent Development and the Regulation of Youth Crime".
[55] Borduin et al., "Multisystemic Treatment of Serious Juvenile Offenders: Long-Term Prevention of Criminality and Violence".

parties. The Pancasila justice model emphasizes equality and fairness for all parties involved. Given that cases of abuse, such as those stated in the second half, might still be identified, the consensus among the victim, the offender, and community members can also become counterproductive to the execution of diversion programs.

In essence, the existing implementation of diversion has not been able to successfully improve public faith in diversion as a method for resolving criminal cases, particularly those involving minors. As a new value that must be instilled in society, diversions must present evidence or examples demonstrating that diversion is the best step in resolving criminal cases involving children. This is because diversion aligns with the values of Pancasila justice, principles of protecting children's rights and welfare, and comprehensive social well-being. Diversions must present evidence or examples demonstrating that diversion is the best step in resolving criminal cases involving children.

Conclusion

Diversion is an alternate case resolution form used in the juvenile justice system. It emphasizes restorative justice and protects the rights of victims, offenders, and the community. It is based on the principles of restorative justice and has as its primary objectives the re-establishment of the victim's sense of safety and the offender's sense of responsibility. When dealing with juvenile offenders, diversion can also function as legal protection for the children's rights. The implementation of diversion in Indonesia is limited by the Law on the Juvenile Justice System, which constrains the program. These limitations include age requirements for eligibility, restrictions on the sorts of criminal crimes that can be resolved through diversion, and restrictions on the types of criminal actions that can be handled through diversion. This study shows the need for more research on the success rate of implementing diversion and establishing a new legal culture that supports diversion as a strategy for resolving criminal cases involving children. Additionally, the research underlines the need to develop a new legal culture in society that supports diversion as a strategy.

Based on the constraints imposed by the existing implementation of diversion, recommendations can be made to improve the efficiency and coherence of diversion programs. To begin, there should be a thorough analysis of the effectiveness of such programs concerning the goals of lowering the reoffending rate and improving children's health and safety. Participants in this review should include victims, offenders, law enforcement officers, and community leaders. This evaluation should engage all relevant stakeholders. Second, to guarantee that the law governing the juvenile justice system and Regulation Number 4 2014 of the Supreme Court are consistently implemented, measures should be made to unify the threshold

conditions for diversion between the two pieces of legislation. Alternative sentencing should be maximized for qualified situations, and law enforcement officers should be given clear standards and procedures to follow. Thirdly, there should be an emphasis placed on promoting distraction to preserve children's rights and welfare, with particular attention paid to the alignment of this practice with the principles of Pancasila justice and the values of Indonesian society. This can be accomplished by conducting awareness campaigns and training programs for members of the general public, as well as for law enforcement personnel and judges. Last but not least, children who have been in trouble with the law should be offered ongoing support and resources to increase the likelihood of their effective reintegration into society and decrease the likelihood that they would engage in criminal activity in the future.

Researchers can carry out longitudinal studies to evaluate the effects of juvenile diversion programs on the lives of juveniles who have been in confrontation with the law for an extended period. This will allow for the continued development of this research in the future. This can assist in establishing how effective diversion is in reducing the likelihood of future criminal behavior among these youngsters and fostering positive outcomes for them. In addition, comparative studies can be carried out to investigate the use of the diversion strategy in other countries and locate exemplary policies and procedures that apply to the situation in Indonesia. In addition, qualitative research can be undertaken to investigate the viewpoints and experiences of victims, offenders, and other stakeholders participating in diversion programs. This research can provide useful insights into the benefits and drawbacks of the existing system. Overall, continuing research and development are needed to protect children's rights and well-being within the framework of Pancasila justice. This will allow for continual improvement of diversion programs and help ensure the children's well-being.

Repensando os programas de desvio na Indonésia: uma análise crítica sob a ótica do contexto social e cultural

Resumo: Esta pesquisa tem como objetivo criticar a implementação dos programas de mediação no sistema de justiça juvenil da Indonésia sob a ótica do ambiente social e cultural. As informações coletadas serão submetidas a uma análise qualitativa, utilizando técnicas de raciocínio indutivo e dedutivo. De acordo com os resultados, pelo menos três aspectos apresentam deficiências: a substância jurídica, que se refere à conformidade entre os regulamentos subjacentes e as diretrizes para sua implementação; a estrutura legal; e os fatores culturais, que influenciam a implementação tanto interna quanto externamente (no âmbito da aplicação da lei). Além disso, o estudo destaca a necessidade de mais pesquisas sobre a taxa de sucesso da adoção da mediação e a construção de uma nova cultura jurídica na sociedade que promova a mediação como método para resolver casos criminais envolvendo crianças. Essa necessidade foi evidenciada pelos resultados do estudo. Esta pesquisa pode fornecer informações valiosas sobre as vantagens e desvantagens do sistema atualmente em vigor.

Palavras-chave: Programas de Desvio. Sistema de Justiça Juvenil. Justiça Pancasila. Cultura Jurídica.

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Self-Regulation as an alternative mechanism of private governance and dispute resolution in Russia and Kazakhstan

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Abstract: The article seeks to explore self-regulation as an innovative, effective legal mechanism of private governance of any economic or professional activity and dispute resolution, which aims to substitute state regulation and thereby limit state interference in the economy. The research methodology consists of the critical analysis of scholars' publications, different legislative acts and judicial practice of their enforcement in the Russian Federation and the Republic of Kazakhstan as well as finding legal uncertainties and gaps and making solutions for their settlement in the sphere in question. Special attention is paid to the comparative method. On the examples of the law of these two countries, it is argued that self-regulation as such lays down the freedom of economic activity guaranteed in the constitutional, business and other legislative provisions and stipulates uniting the subjects of economic or professional activity within a self-regulatory organization mainly under the scope of corporate law. It includes (a) setting standards and other rules for pursuing any economic or professional activity by members of a self-regulatory organization; (b) monitoring compliance with such requirements and applying different alternative methods of resolution of legal disputes with the participation of its members. Such corporate normative acts adopted by non-governmental actors are suggested to be recognized as a specific type of source of private law to be clearly enshrined in the present legislation of the Russian Federation and the Republic of Kazakhstan. Unlike recommendatory documents of most non-profit organizations, they are mandatory and can be enforced through legal instruments determined in the special legislation on self-regulation. It allows the proper balance of private and public interests under the joint state and private governance of economic and professional activities. The article also stipulates enlarging the application of self-regulation to digital and other new spheres, which require a lot of rules to be adopted.

Keywords: Self-Regulation. Self-Regulatory Organization. Dispute Settlement. Dispute Resolution. Private Regulation. Corporate Governance. Standards of Economic and Professional Activities. Corporate Acts. Sources of Law.

1 Introduction

The function of making rules of law is usually performed by the state throughout adopting a lot of legislative and by-law acts by competent governmental bodies. However, it can be decentralized, while enabling private parties to make law.[1] It is deemed that the freedom of entrepreneurial and other economic activities underlying in law can be maintained and developed more effectively by the private sector itself.[2]

It casts light to understanding why the Russian Federation and the Republic of Kazakhstan, seek to delegate some powers to regulate to private organizations. One of the areas of implementation of the administrative reform in such countries is to abolish redundant and duplicative state's functions performed by executive authorities and to transfer a number of them to self-regulatory organizations. It enables to limit the state interference into the economic activities of subjects of entrepreneurship, including ending the excessive state regulation. In addition, the self-regulation performed throughout making private rules by self-regulatory organizations sometimes can be considered as one of the principles of the business law or the interaction between the subjects of entrepreneurship and state.[3]

Meanwhile, it is necessary to note that the rules adopted by self-regulatory organizations are usually not duly specified in the system of traditional sources of law, for instances, in the legislation of the Russian Federation and the Republic of Kazakhstan. Moreover, the legal mechanism of dispute resolution and enforcement of responsibility of both participants of a self-regulatory organization and such an organization before consumers is not also fully developed. As a result, a number of cases appear before courts, where the internal normative acts of self-regulatory

[1] BONE, R. Decentralizing the Lawmaking Function: Private Lawmaking Markets and Intellectual Property Rights in Law, *International Review of Law and Economics*, v. 38, supplement, p. 132, 2014.

[2] GRAJZL, P., BANIAK A., Industry Self-Regulation, Subversion of Public Institutions, and Social Control of Torts, *International Review of Law and Economics*, v. 29, n. 4, p. 360, 2009.

[3] REPUBLIC OF KAZAKHSTAN. The Business Code of the Republic of Kazakhstan: Law No. 375-V of October 29, 2015, art. 3 (2), https://online.zakon.kz/document/?doc_id=38259854&mode=p&page=1. Access: 12.05.2024.

organizations need to apply, but they might be in contradiction with the legislative and other legal provisions enshrined in different sources of law.[4]

2 Research methods

The article implies the use of legal methods of research, which allow describing, generalizing, classifying, and systematizing the legal knowledge on self-regulation. They include the doctrinal method and black letter approach which imply the critical analysis of scholars' publications, different legislative acts and judicial practice of their enforcement in the Russian Federation and the Republic of Kazakhstan as well as finding legal uncertainties and gaps and making solutions for their settlement in the sphere in question. Special attention is paid to the comparative method, which is employed, first of all, under the analysis of the Federal Law of the Russian Federation No. 315-FZ of December 1, 2007 "On Self-Regulatory Organizations"[5] and Law of Republic of Kazakhstan No. 390-V of November 12, 2015 "On Self-Regulation".[6] The article compares the definition and specifics of self-regulation in such laws and thereby reveals its main features under the state and private governance of any economic or professional activity. It also compares existing legal mechanism of dispute resolution and enforcement of responsibility of both participants of a self-regulatory organization and such an organization before consumers.

3 The concept of self-regulation

The concept of self-regulation is based on the freedom of economic activity which is enshrined in constitutional, business and other legislative acts. Among different branches of law, it is deemed to be originally corporate law which can provide the necessary legal framework for developing self-regulation. As such, it usually allows participating individuals and legal entities in one corporate organization, adopting rules mandatory for participants of such an organization, and excluding them from the organization in case of committing corporate offences.[7] Such relations associated with the participation in or management of corporate organizations are

[4] RUSSIAN FEDERATION. The Resolution of the Constitutional Court No. 12-P of December 19, 2005 "On the Case of Checking the Constitutionality of Article 20 (1, paragraph 8) of Federal Law "On Insolvency (Bankruptcy)" in Connection with the Complaint of Citizen A.G. Mezhentsev". *The Collection of Legislation of the Russian Federation*, n. 3, art. 335, 2006.

[5] RUSSIAN FEDERATION. The Federal Law No. 315-FZ of December 1, 2007 "On Self-Regulatory Organizations". *The Collection of Legislation of the Russian Federation*, n. 49, art. 6076, 2007.

[6] REPUBLIC OF KAZAKHSTAN. The Law No. 390-V of November 12, 2015 "On Self-Regulation", https://online.zakon.kz/Document/?doc_id=36858926. Access: 12.05.2024.

[7] SHITKINA, P. (ed.). *Corporate Law*. Moscow: Knorus, 2011, pp. 32-33, 451-457, 500-508 (in Russian); AMIRAULT, E. & ARCHER M. *Canadian Business Law*. Nelson Canada, 1988, pp. 280-285.

in the scope of private law and they can be also governed by-laws adopted by executive governmental bodies.[8]

In theory, the self-regulation is usually understood as a type of non-state regulation of entrepreneurial relations,[9] in which their participants, in order to regulate and organize their own behavior, determine mutual rights and obligations within the limits established by the state, influence their activity by establishing the rules of conduct binding on themselves.[10] Furthermore, it might be recognized as a special type of corporate governance. If corporate governance is performed within a legal entity, the self-regulation also includes the controlling influence of a self-regulatory organization in relation to the entrepreneurial activities of its members.[11] It stipulates the development and establishment of standards and rules for the implementation of professional activities, as well as sanctions for their non-fulfillment or improper execution.[12]

There are also legislative definitions of self-regulation in the Russian Federation and the Republic of Kazakhstan, which are similar. For instance, it is defined as an independent and initiative activity that is carried out by the subjects of entrepreneurial or professional activity and the content of which is the development and establishment of standards and rules for this activity, as well as monitoring compliance with the requirements of these standards and rules.[13]

Thus, the self-regulation can be considered as a private legal mechanism which is alternative to traditional public regulation and capable to limit the state interference into the economy. It is deemed to contain two main essential elements:

(a) setting standards and other private rules by a self-regulatory organization for its members – subjects of economic (entrepreneurial or business) or professional activity;

(b) monitoring compliance with the requirements of these rules and the application of different alternative methods of resolution of legal disputes with the participation of its members.

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8 RUSSIAN FEDERATION. The Civil Code of the Russian Federation (Part One): Federal Law No. 51-FZ of November 30, 1994, art. 2-3. *The Collection of Legislation of the Russian Federation*, n. 32, art. 3301, 1994.

9 MOKHOV, A.A. Governmental Regulation and Self-Regulation of Economic Activity from the Position of System Theory, *Gosudarstvo i pravo = State and Law*, n. 6, pp. 56-65, 2019 (in Russian).

10 LESKOVA, Y. *Self-Regulation as Legal Way of Organization of Business Relations*: Abstract of Doctor's Thesis. Moscow, 2013, p. 15 (in Russian).

11 Ibid., p. 17.

12 ALGAZINA, A. *Self-Regulation as Type of Governance Activity (Administrative Law Aspect)*: Abstract of Candidate's Thesis. Omsk, 2017, p. 6 (in Russian); BURROWS, P. Combining Regulation and Legal Liability for the Control of External Costs, *International Review of Law and Economics*, v. 19, n. 2, pp. 227-244, 1999.

13 RUSSIAN FEDERATION. The Federal Law No. 315-FZ of December 1, 2007 "On Self-Regulatory Organizations", art. 2 (1, 2). *The Collection of Legislation of the Russian Federation*, n. 49, art. 6076, 2007.

4 The spheres of implication of self-regulation and perspectives for its further implementation

The sphere of implication of self-regulation is diverse. As it follows from the legal definitions concerned, it is carried out on the terms of the association of subjects of any entrepreneurial or professional activity in self-regulatory organizations.[14] It can be voluntary or mandatory. The former one is based on voluntary membership (participation) and it stipulates mandatory private standards of conduct for subjects of self-regulation and their activities, which can be higher and stricter than the requirements established by the legislation. The latter one requires the compulsory membership (participation) and it happens in cases determined in the legislation, usually in the areas of activities associated with the implementation of state functions or the need to delegate certain functions performed by state bodies.[15] For instance, in Russia they are engineering surveys, architectural and construction design, construction,[16] valuation activity,[17] activity of arbitration managers,[18] "auditing",[19] actuarial activity,[20] activity of professional participants of the securities market,[21] etc.

The perspectives of implication of self-regulation in the governance of economic activities are deemed to be much wider. It is not limited to the types or spheres in which the state is mostly interested in their regulation, but those which are now out of any state governance or have some legal gaps and shortages in the present legal regulation.

One of them is digital environment, including Internet, cryptocurrency, digital rights, financial digital assets, electronic documents, artificial intelligence and other informational technologies. It is the sphere where the law falls behind the economic development too much. The matter is that there are no special rules in international and national law which would govern digital economy properly. Such newly appeared

[14] RUSSIAN FEDERATION. The Federal Law No. 315-FZ of December 1, 2007 "On Self-Regulatory Organizations", art. 2 (2). *The Collection of Legislation of the Russian Federation*, n. 49, art. 6076, 2007.

[15] REPUBLIC OF KAZAKHSTAN. The Law No. 390-V of November 12, 2015 "On Self-Regulation", art. 3 (2, 3), https://online.zakon.kz/Document/?docid=36858926. Access: 12.05.2024.

[16] RUSSIAN FEDERATION. The Town-Planning Code of the Russian Federation: Federal Law No. 190-FZ of December 29, 2004, ch. 6.1. *The Collection of Legislation of the Russian Federation*, n. 1, art. 16, 2005.

[17] RUSSIAN FEDERATION. The Federal Law No. 135-FZ of July 29, 1998 "On Valuation Activity in the Russian Federation", art. 15. *The Collection of Legislation of the Russian Federation*, n. 31, art. 3813, 1998.

[18] RUSSIAN FEDERATION. The Federal Law No. 127-FZ of October 26, 2002 "On Insolvency (Bankruptcy)", art. 20. *The Collection of Legislation of the Russian Federation*, n. 43, art. 4190, 2002.

[19] RUSSIAN FEDERATION. The Federal Law No. 307-FZ of December 30, 2008 "On Auditing", art. 4. *The Collection of Legislation of the Russian Federation*, n. 1, art. 15, 2009.

[20] RUSSIAN FEDERATION. The Federal Law No. 293-FZ of November 2, 2013 "On Actuarial Activity in the Russian Federation", art. 7. *The Collection of Legislation of the Russian Federation*, n. 44, art. 5632, 2013.

[21] RUSSIAN FEDERATION. The Federal Law No. 223-FZ of July 13, 2015 "On Self-Regulatory Organizations in the Financial Market", art. 3. *The Collection of Legislation of the Russian Federation*, n. 29, art. 4349, 2015.

objects in the digital form are different from traditional ones in civil law (especially things) so that the general legal instruments stipulated in the contemporary law can be hardly applied. The legislator is now just trying to conceive and sometimes to introduce some new rules into the legal system, taking into account a plenty of various concepts on cryptocurrency and other IT objects, especially in economics and IT science. Meanwhile, a lot of issues, such as the order of appearance, implementation and protection of digital rights as well as conflict of law, are to be clearly settled in the law. IT standards regulation is strongly needed.[22]

It is thought that all such necessary rules can be developed much easier under a self-regulatory organization and then be shared among its participants, taking into account their needs and interests. Moreover, the mechanism of self-regulation can improve the protection of consumers and other counterparties of such members and thereby limit their responsibility throughout the establishment of compensation funds and other legal and economic tools stipulated in the legislation.

5 Self-regulatory organization and its legal status

The function of enacting mandatory private standards for pursuing any economic or professional activity is performed by a self-regulatory organization which is recognized as a legal entity (non-profit organization). It brings together the subjects of the activity of a certain type which is usually based on the unity of the industry of production or the market of manufactured goods (works, services).

As a non-profit organization it is entitled to conduct not business (entrepreneurial) activity itself,[23] but another economic activity, such as making conditions for its members to pursue their business or professional activity in different spheres, including self-regulation. Although there are a lot of non-profit organizations uniting the subjects of entrepreneurial activities (e.g., the Chamber of Commerce and Industry of the Russian Federation, the Russian Union of Industrialists and Entrepreneurs, etc.), not all of them are recognized as self-regulatory organizations. It is important to note that a non-profit organization should acquire the status of a self-regulatory organization under the inclusion of the information about this organization into the state register (official list) of self-regulatory organizations and it loses such a status from the date of exclusion of the information on the organization from the register.

[22] STUURMANM, K. IT standards regulation, *Computer Law & Security Review*, v. 8, n. 1, pp. 2-10, 1992.

[23] LISITSA, V. & PARKHOMENKO, S. Some Aspects of Improving the Efficiency of Criminal Law in the Sphere of Economy: Developing the Categories. *Russian Journal of Criminology*, v. 12, n. 2, p. 196, 2018 (in Russian).

Similar to any legal entity, a self-regulatory organization is to be established in conformity with the general provisions of the civil legislation on legal entities.[24] In addition, a number of additional requirements shall be met, such as:[25]

(a) joining at least twenty-five subjects of an entrepreneurial activity or at least one hundred subjects of professional activity of a certain type, unless otherwise established by federal laws;

(b) existing standards and rules of an entrepreneurial or professional activity that are mandatory for all members of a self-regulatory organization;

(c) ensuring by a self-regulatory organization of additional property liability of each of its members to consumers of manufactured goods (works, services) and other persons in accordance with this Federal Law. For this purpose, a non-profit organization shall create specialized bodies entitled to monitor compliance by the members of such an organization with its requirements and to resolve disputes on the application of disciplinary measures against those members, including their exclusion from the non-profit organization.[26]

The acquisition of the status of a self-regulatory organization gives some privileges in comparison to other legal entities. One of them is the right on its own behalf to challenge any legal acts and (or) actions (inaction) of the state and local authorities that violate the rights and lawful interests of the self-regulatory organization, its members or threatening such an infringement. It is of practical importance for such an organization to bring an administrative lawsuit without a proxy from its member before court.[27]

From this regard, a self-regulatory organization has the dual legal nature. On the one hand, it is a non-profit organization functioning as a person of private law. On the other hand, from the date of its inclusion in the appropriate state register, it acquires the special public-law status of self-regulatory organizations,[28] which

[24] RUSSIAN FEDERATION. The Civil Code of the Russian Federation (Part One): Federal Law No. 51-FZ of November 30, 1994. *The Collection of Legislation of the Russian Federation*, n. 32, art. 3301, 1994; The Federal Law No. 7-FZ of January 12, 1996 "On Non-Commercial Organizations". *The Collection of Legislation of the Russian Federation*, n. 3, art. 145, 1996.

[25] RUSSIAN FEDERATION. The Federal Law No. 315-FZ of December 1, 2007 "On Self-Regulatory Organizations", art. 3 (3). *The Collection of Legislation of the Russian Federation*, n. 49, art. 6076, 2007.

[26] RUSSIAN FEDERATION. The Resolution of the Thirteenth Arbitration Court of Appeal No. 13AP-4140/2017 of March 21, 2017. Case No. A56-59530/2016, http://www.consultant.ru/ Access: 20.04.2024.

[27] RUSSIAN FEDERATION. The Resolution of the Plenum of the Supreme Court No. 50 of December 25, 2018 "On the Practice of Consideration by Courts of Cases on Challenging Normative Legal Acts and Acts Containing Explanations of Legislation and Having Normative Features", http://www.consultant.ru/ Access: 12.05.2024.

[28] RUSSIAN FEDERATION. The Resolution of the Constitutional Court No. 12-P of December 19, 2005 "On the Case of Checking the Constitutionality of Article 20 (1, paragraph 8) of Federal Law "On Insolvency (Bankruptcy)" in Connection with the Complaint of Citizen A.G. Mezhentsev". *The Collection of Legislation of the Russian Federation*, n. 3, art. 335, 2006.

enables them to perform some state's functions.[29] This statement correlates with the conclusions of the European Court of Human Rights, which found that notary chambers cannot be considered as ordinary associations in the sense of Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950.[30] It ascertained that the regulatory bodies of the liberal professions are not associations within the meaning of Article 11 of the Convention. The object of such bodies, established by legislation, is to regulate and promote the professions, whilst exercising important public law functions for the protection of the public. They cannot, therefore, be likened to trade unions but remain integrated within the structures of the State.[31]

6 Standards and other normative acts of self-regulatory organizations as a specific source of law

A self-regulatory organization prepares and approves the mandatory standards and rules of an entrepreneurial or professional activity. They are based on the legislation and contain requirements for its members to be complied with. They should correspond with business ethics, eliminate or reduce the conflict of interests of members of the self-regulatory organization, their employees and members of the permanent collegial control body of the given organization. They must prohibit its members from carrying out activities to the detriment of other subjects of an entrepreneurial or professional activity, and also establish requirements that prevent unfair competition, actions that cause moral harm or damage to consumers of goods (works, services) and other persons, actions that damage the business reputation of a member of the self-regulatory organization or its business reputation.[32]

Unfortunately, it does not cast light to the legal nature of the standards and rules concerned and their place in the system of sources of legal regulation. Moreover, the present Russian civil legislation keeps silence about it. Meanwhile, the existence and broad application of similar private rules often happens in the sphere of private law.[33] In contrast to civil legislation, such sources are usually mentioned only in legal theory.[34]

[29] MASALAB, A.F. Self-Regulatory Organizations as Legal Entities of Public Law, *Law Enforcement Review*, v. 3, n. 4, p. 79, 2019.

[30] UNITED NATIONS. The Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950. URL: https://www.echr.coe.int/Documents/Convention_ENG.pdf Access: 12.05.2024.

[31] EUROPEAN COURT OF HUMAN RIGHTS. *O.V.R. v. Russia*. The Decision No. 44319/98 of April 3, 2001, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-5846%22]} Access: 12.05.2024.

[32] RUSSIAN FEDERATION. The Federal Law No. 315-FZ of December 1, 2007 "On Self-Regulatory Organizations", art. 4 (3-7). *The Collection of Legislation of the Russian Federation*, n. 49, art. 6076, 2007.

[33] LISITSA, V. Responsibility of a Host State in Transnational Investment Disputes. *Journal of Advanced Research in Law and Economics*, v. 31, n. 1, p. 141, 2018.

[34] BIRYUKOV, S.V. National Law and Legal Pluralism, *Law Enforcement Review*, v. 6, n. 4, pp. 7-8, 2022.

At first sight, it is important to note that the given standards are adopted by the competent bodies (usually the meeting of the members) of self-regulatory organizations and, from this regard, they cannot be recognized as contracts. The matter is that such rules are mandatory to all the members of the organization, even where not all of the members agree with the rules adopted by the majority. Meanwhile, the contracts are to be concluded by all the members. However, it hardly happens in fact. In contrast to contractual terms, the standards and other rules of self-regulatory organizations express particular models of conduct addressed to a group of persons and designed for repeated use. From this regard, they are more similar to a normative legal act, which has such specific features, as: (a) issuing in the duly order by an authorized body of state power; (b) containing rules of conduct obligatory for the uncertain circle of persons, which are intended for repeated application; (c) aiming to regulate particular social relations, to modify or terminate an existing legal relationship.[35]

If the standards and other rules of a self-regulatory organization are recognized as rules of law it is necessary to determine their type of sources of law. In theory, there may be a normative act, judicial precedent, legal custom, normative agreement, doctrine.[36] In civil law jurisdictions, including the Russian Federation and the Republic of Kazakhstan, three main sources of law are traditionally recognized. They are an international treaty, legislation consisting of any legislative and other normative acts adopted on different governmental levels, and a legal custom.[37] Unlike the common law systems, civil law jurisdictions do not adopt a stare decisis principle in adjudication.[38]

From these provisions the standards of a self-regulatory organization can be hardly recognized as a legislative or another normative act of the state, given that they are adopted by a private organization rather than the state represented by any authorized governmental body. In this regard it is doubtful to fall such rules into the state regulation, even in its reduced or trimmed form, as some scholars write in their

[35] RUSSIAN FEDERATION. The Resolution of the Plenum of the Supreme Court No. 50 of December 25, 2018 "On the Practice of Consideration by Courts of Cases on Challenging Normative Legal Acts and Acts Containing Explanations of Legislation and Having Normative Features", http://www.consultant.ru/ Access: 12.05.2024.

[36] BOSHNO, S. Doctrinal Forms and Sources of Law, *Gosudarstvo i pravo = State and Law*, n. 9, p. 6, 2018 (in Russian).

[37] EROFEEVA, D.V., SHAGIEVA, R.V. The Sources of Private Law: The Theoretical Aspects of Comprehension and Practice of Their Perfection in Russia, *Gosudarstvo i pravo = State and Law*, n. 10, pp. 23-31, 2013 (in Russian); RUSSIAN FEDERATION. The Civil Code of the Russian Federation (Part One): Federal Law No. 51-FZ of November 30, 1994, art. 3, 5, 7. *The Collection of Legislation of the Russian Federation*, n. 32, art. 3301, 1994; REPUBLIC OF KAZAKHSTAN. The Civil Code of the Republic of Kazakhstan: Law No. 268-XIII of December 27, 1994, art. 3, https://online.zakon.kz/document/?doc_id=38259854&mode=p&page=1. Access: 12.05.2024.

[38] FON, V., PARISI, F. Judicial Precedents in Civil Law Systems: A Dynamic Analysis, *International Review of Law and Economics*, v. 26, n. 4, p. 519, 2006.

publications.[39] It is thought more reasonable to qualify them as quasi-regulation or de-regulation,[40] which are enshrined in normative acts of an authorized private organization.

Unfortunately, such acts have different names taking into account their application in different branches of law (local acts in labour law, internal documents or corporate normative acts in corporate law, etc.).[41] That is why in theory they are argued to be called with the only one unified name.[42] Moreover, it is deemed to recognize them as the separate type of sources of law, especially in business and labour law,[43] which should be clearly specified in the legislation, in particular in the Civil Code of the Russian Federation[44] and the Business Code of the Republic of Kazakhstan.[45]

Such legal ambiguity was noted in judicial practice. For instance, in one case on the challenge of the internal labor regulation of a joint stock company by the prosecutor, it was held by the court that the Civil Procedural Code of the Russian Federation does not contain special rules regulating the challenge of local normative acts. In this regard, the claim procedure used for contracts shall be applied to such acts, although they are in their legal nature are a source of law and different from transactions.[46] In the whole, it can be stated that the Russian judicial practice permits the state to delegate its some public functions to private persons, including making rules of law. Such a transfer is permissible if it does not contradict the Constitution of the Russian Federation and federal laws.[47]

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39 SHISHKIN, S. *Business Law (Economic Law): Framework of State Regulation of Economy*. Moscow: Infotropik Media, 2011, pp. 4, 5, 127 (in Russian).

40 GUBIN, E. *The State Regulation of Market Economy and Entrepreneurship: Legal Problems*. Moscow: Jurist, 2006, p. 37 (in Russian).

41 MOROZOVA, L.A. The Legal Nature and Role of Local Law-Making at the Present Stage, *Gosudarstvo i pravo = State and Law*, n. 9, pp. 71-78, 2018 (in Russian).

42 BOLDYREV, V. Procedure for Adoption and Problems of Challenge of Provisions of Internal Documents. *Bulletin of Arbitration Practice*, n. 5, p. 13, 2015 (in Russian).

43 ANDREEV, V. & LAPTEV, V. *Corporate Law of Modern Russia*. Moscow: Prospekt, 2017, p. 53 (in Russian); CHIKULAEV, R.V. Corporative and Local Norm-Making in the Legal Mechanism of the Securities Market Regulation, *Perm University Herald. Juridical Sciences*, v. 2, n. 8, p. 150, 2010 (in Russian); SULEIMENOV, M. The Theory of Legal Facts: History and Modernity, *Gosudarstvo i pravo = State and Law*, n. 5, p. 23, 2016 (in Russian).

44 RUSSIAN FEDERATION. The Civil Code of the Russian Federation (Part One): Federal Law No. 51-FZ of November 30, 1994. *The Collection of Legislation of the Russian Federation*, n. 32, art. 3301, 1994.

45 REPUBLIC OF KAZAKHSTAN. The Business Code of the Republic of Kazakhstan: Law No. 375-V of October 29, 2015, https://online.zakon.kz/document/?doc_id=38259854&mode=p&page=1 Access: 12.05.2024.

46 RUSSIAN FEDERATION. The Decision of the Tigilskiy District Court of Kamchatskiy Krai No. 2-94-2010 of October 15, 2010, http://www.consultant.ru/. Access: 20.04.2024.

47 RUSSIAN FEDERATION. The Resolution of the Constitutional Court No. 15-P of May 19, 1998 "On the Case of Checking the Constitutionality of Certain Provisions of Articles 2, 12, 17, 24 and 34 of the Fundamentals of the Legislation of the Russian Federation on Notaries". *The Collection of Legislation of the Russian Federation*, n. 22, art. 2491, 1998.

The standards concerned are different from a legal custom as a rule of behavior which has been established and is widely applied in some sphere of an entrepreneurial or other kind of activities, and which has not been stipulated by legislation, regardless of whether it has or has not been fixed in any document.[48] A custom may be fixed in a document (published in the press, set out in a court decision on a specific case containing similar circumstances, witnessed by the chamber of commerce), or existing independently of such a record. It is the party that refers to a custom shall prove its existence. However, the legal effect of the standards of self-regulatory organizations is directly stipulated in the legislation so that there is no need to prove them in courts.

Thus, the standards of a self-regulatory organization should be regarded as a specific source of law to be clearly recognized by the state in conformity with its national legislation.

7 Enforcement of standards and rules of self-regulatory organizations and resolution of the disputes

The enforcement of standards and rules of self-regulatory organizations is performed with the use of some legal means enshrined in the legislation. Firstly, such an organization must establish disciplinary measures against its members for infringement of requirements of its private standards and rules. Secondly, it must perform monitoring (control) the activity of its members by means of inspections to check the compliance with these requirements, conditions of membership in the self-regulatory organization. Thirdly, in case of their violation appropriate materials shall be forwarded to the competent body of the self-regulatory organization which is authorized to consider cases on the application of disciplinary measure (responsibility) against the guilty member of the self-regulatory organization.[49] Such disciplinary measures include:

(a) issuing an order obliging the member of the self-regulatory organization to eliminate the detected violations and setting a time frame for the elimination of such violations;
(b) issuing a warning to the member of the self-regulatory organization;
(c) imposing a fine on the member of the self-regulatory organization;
(d) making recommendation to exclude the person from the membership of the self-regulatory organization, subject to review by the permanent collegial governing body of the self-regulatory organization;

[48] RUSSIAN FEDERATION. The Civil Code of the Russian Federation (Part One): Federal Law No. 51-FZ of November 30, 1994, art. 2-3. *The Collection of Legislation of the Russian Federation*, n. 32, art. 3301, 1994.

[49] RUSSIAN FEDERATION. The Federal Law No. 315-FZ of December 1, 2007 "On Self-Regulatory Organizations", art. 4 (5), 9. *The Collection of Legislation of the Russian Federation*, n. 49, art. 6076, 2007.

(e) other measures established by internal documents of the self-regulatory organization.

Dispute resolution procedure related to disputes arisen from complaints and cases related to application of disciplinary measures is not properly define both in Russian Federation and in Kazakhstan.

Notably, that the procedure for consideration of complaints and cases and applying disciplinary measures against members of the self-regulatory organization shall be determined by its internal documents considered as a specific source of law alongside with the standards under consideration.

In accordance with this fact, we can conclude, that it seems that self-regulatory organizations offer specific way to resolve the disputes. This way can be named as an alternative method of dispute resolution, which is provided within the self-regulatory organization with the use of both private (e.g., the internal documents of the organization) and public (e.g., special public law acts on self-regulatory organizations and enforcement of their decisions) instruments.

However, in authors' opinion, the procedural rules for resolving disputes arising from self-regulatory organizations and its members' activity should be properly developed for faster, cost-efficient and professional alternative dispute resolution.

8 Conclusion

The development of making rules of law by private organizations reflects the formation of civil society and aims to substitute the state regulation and thereby to limit the state interference into the economy. It lays down the freedom of economic activity guaranteed in the constitutional, business and other legislative provisions and stipulates uniting the subjects of any economic or professional activity within a self-regulatory organization mainly under the scope of corporate law. The self-regulation is argued to contain two main elements:

(a) setting private standards and other rules by such an organization for its members;

(b) monitoring compliance with the requirements of these rules and the application of different alternative methods of resolution of legal disputes with the participation of its members.

The rules under consideration are enshrined in the specific type of sources of law such as corporate (internal) normative acts to be clearly stipulated in the present legislation, in particular, in the Civil Code of the Russian Federation and Business Code of the Republic of Kazakhstan. Unlike codes of conduct and other recommendatory documents of most non-profit organizations, the rules of a self-regulatory organization are mandatory to its members and can be enforced throughout both private and public legal instruments established in the special

legislation on self-regulation. One of them is to exclude a guilty member from the self-regulatory organization and as result to deprive him of the special right (privilege) to lawfully pursue his economic or professional activity in a particular sphere of the economy.

The sphere of implication of self-regulation is diverse and can include any economic or professional activity. It is deemed to have great demands and perspectives for further application in digital and other new spheres which need a lot of rules of conducting investment and other activities on the Internet in the present conditions of legal gaps in international and national law. It also requires procedural rules for resolution of the disputes to be properly developed for faster, cost-efficient and professional alternative dispute resolution.

Autorregulamentação como mecanismo alternativo de governança privada e resolução de disputas na Rússia e no Cazaquistão

Resumo: Este artigo explora a autorregulação como um mecanismo legal inovador e eficaz para a governança privada de atividades econômicas e profissionais, bem como para a resolução de disputas, visando substituir a regulação estatal e, assim, limitar a interferência governamental na economia. A metodologia de pesquisa consiste em uma análise crítica de publicações acadêmicas, diversos atos legislativos e práticas judiciais relacionadas à sua aplicação na Federação Russa e na República do Cazaquistão, identificando incertezas e lacunas jurídicas e propondo soluções para sua resolução. Atenção especial é dada ao método comparativo. Usando exemplos das legislações desses dois países, o artigo argumenta que a autorregulação fundamenta a liberdade de atividade econômica, garantida por disposições constitucionais, legislativas e empresariais, e facilita a unificação dos *stakeholders* dentro de organizações autorreguladoras, principalmente sob a perspectiva do direito corporativo. Isso inclui: (a) o estabelecimento de padrões e regras para a condução de atividades econômicas ou profissionais pelos membros de uma organização autorreguladora; (b) o monitoramento do cumprimento desses padrões e a aplicação de vários métodos alternativos para a resolução de disputas legais envolvendo seus membros. Sugere-se que esses atos normativos corporativos adotados por atores não governamentais sejam reconhecidos como um tipo específico de fonte do direito privado, a ser claramente consagrado na legislação vigente da Federação Russa e da República do Cazaquistão. Ao contrário dos documentos recomendatórios da maioria das organizações sem fins lucrativos, esses atos são obrigatórios e podem ser aplicados por meio de instrumentos legais determinados na legislação especial sobre autorregulação. Isso permite alcançar um equilíbrio adequado entre interesses privados e públicos sob a governança conjunta estatal e privada das atividades econômicas e profissionais. O artigo também sugere a ampliação da aplicação da autorregulação para esferas digitais e outras novas, que exigem a adoção de muitas regras.

Palavras-chave: Autorregulação. Organização Autorreguladora. Resolução de Disputas. Regulação Privada. Governança Corporativa. Normas de Atividades Econômicas e Profissionais. Atos Corporativos. Fontes do Direito.

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The role of artificial intelligence in ensuring the efficiency and accessibility of justice

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Abstract: Information technologies are changing our world extremely fast. The availability of information technologies opens new opportunities but presents challenges. The above contributes to the relevance of applying artificial intelligence (AI) in the justice system. E-justice should facilitate digital market development, which is an essential e-government task. The legal industry has always been known for relying on tradition and resisting change. However, recent advances in AI technology are nimble to disrupt the legal landscape, changing how law firms and legal departments work. The article aims to clarify how to use AI to improve the efficiency and speed of judicial processes and analyze examples of successful implementation of AI systems in the legal field. The article determines the advantages and disadvantages of AI used in justice and examines the issue of accessibility and justice in the context of AI in justice. This research is relevant since it offers an in-depth understanding and analysis of new technologies in the context of legal challenges. It is possible to resort to this research when developing effective strategies for implementing artificial intelligence in the legal field, which constitutes its practical implication.

Keywords: Artificial intelligence. Electronic justice. Computer Technologies. Judiciary. International practice. National legislation.

Introduction

Qualitative changes that actively and rapidly affect almost every sphere of human activity are increasingly becoming characteristic features of today. The scientific and technical revolution (STR) is an ongoing process that, having begun in the Middle Ages with the appearance of the works of M. Copernicus and I. Newton, continues in our time thanks to fundamental shifts in scientific knowledge and technical and technological progress. In the middle of the 20th century information technology (IT) appeared and developed rapidly, and the first computer was created. Such technologies are inherently innovative. Thus, computer science achievements are the invention of powerful computer systems and the development of telecommunication networks, application software, and the most promising scientific direction – AI. The fields of application of AI systems are unlimited – from robots that make their decisions to machines with self-learning capabilities.

In 1950, the English mathematician Turing published the article "Computing Machines and Intelligence", noting that our interest in thinking machines arose due to a special kind of machine, usually called "an electronic or digital computer in a computer". He wondered how machines could think. The researcher noted that these machines were designed to perform any operations like a person. Since computing machines solve calculation problems of any complexity and are logically identical (there is no need to create a new machine for each new problem), they will be solved by only one computer, given the corresponding program is set.[1]

Modern IT affects all aspects of human life, and the field of justice is no exception. AI is an innovative technology that can affect the quality of the administration of justice, improve judicial processes, on the one hand, and contribute to the efficiency of the judge's work, on the other. If used in the judicial system, these tools and services increase the potential and quality of the judiciary, and therefore their research is an urgent scientific problem. Since there are few actual results on the AI application in the judicial system of Ukraine and related fields, the study of world practices can be useful and far-sighted.

The relevance of this phenomenon is best characterized by a quote from Google executive director Sundar Pichai: "Artificial intelligence is the new electricity. Very soon, neural networks will penetrate all spheres of life". One of the spheres of "penetration" of new technologies is the sphere of justice. This is not a question of the future but an already available reality. The judicial systems of some countries witness the introduction of the latest technologies and algorithms, which can quite easily and quickly process data and make the system fair, transparent, and

[1] A.M. Turing, 'Computing Machinery and Intelligence' (1950) 59(236) Mind. p.433-460.

efficient. At the same time, there is also a deviation from the "righteous path" since the machine can also detect prejudice.

AI is a set of sciences and methods capable of processing data to address complex computer problems. AI has human qualities and is capable of learning and solving problems. An important part of AI is therefore machine learning, or ML. The crucial condition for training AI in the field of justice is the data availability and unimpeded access to it. This makes it possible to analyze court practice more deeply and predict the outcome. The more data available, the more AI can refine models and improve predictive ability. AI imitates the work of the human brain using a system of neural networks built on the principle of organization and functioning of biological neuron cells — nerve cells of a living organism. However, an obvious shortcoming of AI is the lack of such a human quality as empathy, that is, empathy: while the judge may accept the arguments of the defendant, for example, in the case of late payment of alimony or debt repayment, the machine will not make any concessions.

Materials and methods

The methodological basis of the work is general scientific and special methods of scientific knowledge of facts and phenomena of legal reality. Thus, dialectical and idealistic methods served as the basis for revealing the role of AI in ensuring the efficiency and accessibility of justice. The terminological method made it possible to define the categories of the issues under study.

Special legal methods, such as formal-dogmatic and interpretation of legal norms, were used to examine international standards, norms of current domestic legislation, and practice of state authorities and courts. The statistical method helped to process empirical data and compare research results and statistics. The comparative legal method made it possible to highlight the positive experience of foreign countries in applying AI in judicial processes to improve its efficiency and speed.

Many scholars devoted their works to this issue, including Tsuvina, Varava, Cherpovytska, Zuryan, and Matviyev.[2] [3] [4] [5] [6] The article aims to clarify how to use AI

[2] T. A. Tsuvina, 'Online courts and online dispute resolution in the context of the international standard of access to justice: international experience' (2020) (149) Problems of Legality. p. 62-79.

[3] I. Varava, 'Innovations in the professional activity of lawyers: using the capabilities of artificial intelligence' (2020) 1(32) Information and Law. p. 47-54.

[4] I. Y. Cherpovytska, 'Modern foreign experience in the implementation of information and communication technologies as a means of optimizing communication between civil society and the judiciary' (2022) 56 Scientific Bulletin of the International Humanitarian University. p. 20-26. https://doi.org/10.32841/2307-1745.2022.56.5.

[5] V. Zuryan, 'Urgent problems and prospects for the development of electronic justice in Ukraine' (2020) (4) Bulletin of the Penitentiary Association of Ukraine. p. 173-181.

[6] R. I. Matviyev, 'The complexity of the integrity of judges in the context of the latest trends in legal reality' (2023) 13 Bulletin of LTEU. Legal Sciences. p. 24-28.

to improve the efficiency and speed of judicial processes and analyze examples of successful implementation of AI systems in the legal field. The article determines the advantages and disadvantages of AI used in justice and examines the issue of accessibility and justice in the context of AI in justice. This research is relevant since it offers an in-depth understanding and analysis of new technologies in the context of legal challenges. It is possible to resort to this research when developing effective strategies for implementing artificial intelligence in the legal field, which constitutes its practical implication.

Results

Humanity has been actively dealing with issues of artificial intelligence since the 1950s. The first definition of this concept was formed by John McCarthy in 1956 at a conference at Dartmouth University. AI is a set of sciences and methods capable of processing data to address complex computer tasks. From a theoretical point of view, AI imitates the work of the human brain with the help of a biological system of neural networks, which makes it possible to assist a person in solving numerous easy and difficult problems. However, the complete replacement of a person with AI is impossible now since it cannot imitate some emotional characteristics inherent in a human (for example, empathy). In addition, AI as an inorganic mechanism has many confirmed errors and malfunctions. The crucial condition for applying AI in the field of justice is the data availability and unimpeded access to it.

The issue of introducing artificial intelligence in justice remains debatable for every country in the world. The legislation does not allow replacing the judge with a software algorithm, but some legal practitioners discuss the appropriate involvement of artificial intelligence in this area. Thus, Article 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms enshrines the right to review cases by an independent and impartial court. However, Article 6 of this Convention does not explicitly prohibit the use of artificial intelligence nor specify that justice should be administered only by a human judge.[7]

The ethical prerequisite for AI use was the adoption of the European Ethical Charter on the use of Artificial Intelligence in judicial systems and their environment by the European Commission for the Efficiency of Justice of the Council of Europe in 2018.[8] The Charter provides principles that can guide politicians, legislators, and legal professionals as they face the rapid development of artificial intelligence

[7] Council of Europe, 'Convention on the Protection of Human Rights and Fundamental Freedoms' available at https://zakon.rada.gov.ua/laws/show/995_004#Text (last visited on September 15, 2023).

[8] Council of Europe, 'European ethical Charter on the use of Artificial Intelligence in judicial systems and their environment' https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c (last visited on October 27, 2023).

in national judicial processes. The Charter states that AI use in the field of justice can increase its efficiency and quality and must be implemented in a responsible manner that complies with the fundamental rights guaranteed, in particular, by the European Convention on Human Rights and the Council of Europe Convention on the Protection of Personal Data. The Charter defines the main principles that should be followed in the field of artificial intelligence and justice:

– the principle of respect for fundamental rights: ensuring the compatibility of the development and implementation of artificial intelligence tools and services with fundamental rights;

– the principle of non-discrimination: the special prevention of the development or strengthening of any discrimination between individuals or groups of individuals;

– the principle of quality and security: regarding the processing of judicial decisions and data, using certified sources and intangible data with models developed in an interdisciplinary manner and in a secure technological environment;

– the principle of transparency, impartiality, and fairness: make data processing methods accessible and understandable, allow external audit;

– user-controlled principle: excludes a prescriptive approach and ensures that users are informed participants and in control of their choices.

The use of AI tools and services in judicial proceedings is a problem that requires further theoretical development, considering the continuous IT development, as well as technological innovations in judicial systems caused by such qualitative changes. Judiciary adapts to new conditions as objectively new tasks appear, and, therefore, the need to solve them.[9]

In its Conclusion No. 14, the Advisory Council of European Judges (CEPEJ) defines IT as an instrument for improving the administration of justice. It is believed to facilitate access to justice, advance court proceedings, and speed up court activity. CEPEJ holds IT is central in providing information to judges, lawyers, and other stakeholders in the justice system, the public, and the media. At the same time, IT should meet the needs of judges and other system users, which, in any case, should not violate guarantees and procedural rights, the principle of impartiality in the consideration of a case.

Judges should be involved in all decisions regarding the use and development of IT in the judiciary. The CEPEJ warns it is necessary to account for the needs of those who cannot use IT tools. Judges should be empowered to insist on the personal presence of interested parties, the provision of printed documents, and oral hearings. Furthermore, IT cannot replace the judge's authority to examine and evaluate evidence.

[9] G. Said, K. Azamat, S. Ravshan, A. Bokhadir, 'Adapting Legal Systems to the Development of Artificial Intelligence: Solving the Global Problem of AI in Judicial Processes' (2023) 1(4) International Journal of Cyber Law. https://doi.org/10.59022/ijcl.49.

The CEPEJ encourages the use of IT to strengthen the role of the judiciary in upholding the rule of law in democratic states but cautions that IT should not interfere with the powers of the judge and undermine the guiding principles of the judicial process by Article 6 of the European Convention on Human Rights (ECHR). The CEPEJ recognizes that the role of AI in society is increasing. Moreover, the CEPEJ hopes for a positive effect of the widespread adoption of AI for societies in general and judicial systems in particular. Therefore, within the scope of its mandate, CEPEJ has officially proclaimed five fundamental principles, reflected in the Charter.

The Charter is designed for public and private entities empowered to create and implement AI tools and services involving judicial decision-making and data (machine learning or any methods derived from data science). It should also guide the activities of public authorities in the legislative regulation, development, control, or use of such tools and services. The Charter defines AI as a set of scientific methods, theories, and technologies for reproducing human cognitive abilities with the help of a machine.[10]

Modern developers are looking for machines capable of solving complex tasks that used to be solved by people. However, the term *artificial intelligence* is criticized by experts who distinguish between "strong" (capable of solving specialized and diverse problems completely autonomously) and "weak" or "moderate" AI (high performance in the field of learning). Some experts argue that "strong" AI will require significant advances in basic research, not just simple improvements in the efficiency of existing systems capable of modeling the world. The tools defined in the Charter were developed using machine learning methods, i.e., based on "weak" AI.

CEPEJ emphasizes that a state should encourage the use of AI but within the limits of responsibility. State regulation of this area needs to be guided by and consider the fundamental human rights proclaimed by the ECHR, the Convention for the Protection of Individuals about Automatic Processing of Personal Data, and the principles of the Charter.[11]

According to the developers, court decisions in civil, commercial, and administrative cases processed by AI will help increase the likelihood of predicting the applicable law and its content. As for criminal cases, it is essential to account for numerous caveats when using AI to prevent discrimination based on confidential data by the right to a fair trial. Regardless of where exactly AI is used (providing legal

[10] A. Olas, Looking beyond Covid-19 pandemic: does Artificial Intelligence have a role to play in preparing the justice system for the next global pandemic or similar hardship? The European perspective. Brill, 2023. 276 pages.

[11] Council of Europe, 'Convention for the protection of individuals with regard to automatic processing of personal data'. https://rm.coe.int/1680078b37 (last visited on October 4, 2023).

advice, developing or making court decisions, advising a direct user), the processing should also rely on an external and independent expert program evaluation, which is transparent, impartial, fair, and certified. The principles of effective use of AI in judicial proceedings proclaimed in the Charter are essential for the proper functioning of the system, and its purpose cannot be realized without them.

The first principle of the Charter is the principle of respect for fundamental rights. There must be a guarantee that AI tools and services comply with human rights and fundamental freedoms (primarily those proclaimed by the ECHR and the Convention for the Protection of Personal Data). The ECHR and the GDPR should guarantee that the processing of court decisions and data has clear objectives compatible with rights and freedoms. When using AI tools in cases of legal dispute, assistance in making a court decision, or providing guidance to the public, it is necessary to ensure that the guarantees of the right to access justice and the right to a fair trial (equality of rights and respect for the adversarial process) are observed or not violated. In addition, the principles of the rule of law and judicial independence in the decision-making process must be duly respected.[12]

Therefore, preference should be given to the following types of software development: either "ethical by design" (the program developers make ethical choices by inertia and thus do not leave a choice to the user) or "human rights-oriented". Consequently, rules prohibiting direct or indirect violations of fundamental rights protected by conventions are integrated at certain stages of program design and training.[13]

The second principle is the principle of non-discrimination, which implies the creation of efficient safeguards against the development or intensification of any discrimination between individuals or groups of individuals. AI can identify existing discrimination by aggregating systematized data about individuals or groups of individuals, so public and private decision-makers should ensure that AI tools do not reproduce or reinforce such discrimination and do not lead to deterministic analyses or use. Particular attention should be paid to both the development and deployment phases, especially when processing is directly or indirectly based on sensitive data, including race and ethnicity, socioeconomic status, political opinions, religious or philosophical beliefs, trade union membership, genetic or biometric data, and data related to health or sexual life and orientation. If such discrimination exists, authorized persons should take corrective measures to limit or neutralize

[12] S. M. Smokov, V. V. Horoshko, M. V. Korniienko, S.V. Medvedenko, 'Rule of Law as a Principle of Criminal Procedure (on materials of the European Court of Human Rights)' (2022) 14(3) Pakistan Journal of Criminology. p. 37-46.

[13] D. Mhlanga, 'The role of artificial intelligence and machine learning amid the COVID-19 pandemic: What lessons are we learning on 4IR and the sustainable development goals' (2022) 19(3) International Journal of Environmental Research and Public Health. p. 1879.

these risks. However, the use of machine learning and multidisciplinary scientific analysis should be encouraged to overcome it.

The third principle is the principle of quality and security, which implies respect for the processing of judgments and data and the need to use certified sources and intangible data with models developed in an interdisciplinary manner in a secure technological environment. The developers of machine learning models should work closely with experts in the relevant field of the justice system (judges, prosecutors, lawyers, etc.) and researchers in the fields of law and social sciences (e.g., economists, sociologists, and philosophers). Thus, the formation of a mixed project team in short cycles of creating functional models is one of the organizational methods that allows for an interdisciplinary approach. Existing ethical safeguards should be continuously disseminated among project teams and reinforced through feedback.

The judgment-based data in the software that implements the machine learning algorithm should come from certified sources and not be altered while the learning engine uses it. In addition, the created models and algorithms must also be stored and used in a secure environment to ensure system integrity.

The fourth principle is the principle of openness (transparency), impartiality, and honesty, which implies accessible and understandable ways of processing data and using external audits. The CEPEJ believes that it is crucial to strike a balance between intellectual property rights to certain processing methods and the need for transparency (access to the design process), impartiality (absence of bias), fairness, and intellectual integrity (priority of the interests of justice) when using tools that may have legal consequences or a significant impact on people's lives. It should be made clear that these measures apply to the design and operation of chains, as the selection process and the quality and organization of data directly affect the learning phase.

The first option includes full technical transparency (e.g., open-source code and documentation), which is sometimes limited by the protection of commercial information. The system can also provide additional explanations through communication to describe the procedure for obtaining results. This communication should cover the nature of the services provided, the tools developed, and the presentation and risks of errors. Independent bodies and experts should be empowered with certifying and verifying processing methods or providing preliminary advice. Public authorities should conduct certification, subject to regular review.[14]

[14] T. Sourdin, B. Li, D. M. McNamara, 'Court innovations and access to justice in times of crisis' (2020) 9(4) Health Policy and Technology. p. 447-453.

The fifth principle, the "user-controlled" principle, emphasizes the exclusion of a prescriptive approach and the existence of a guarantee of awareness of the user subject, who controls their choice (decision). The user's autonomy should be increased and not limited to AI tools and services. The user should be able to review court decisions and data used by him/her at any time and not continue to be bound to these decisions and data, taking into account the specific features of a particular court case.

Users should be informed in clear and understandable language about the binding or non-binding nature of the decision proposed by the AI tool concerning the various options available, as well as about their right to legal advice and the right to access the court. It is mandatory to inform users about their rights to object AI pre-processing of the case before or during the trial; they can demand that a court examine the case in the context of Article 6 of the ECHR. In other words, when implementing any AI-based information system, a computer literacy program should be developed for its users, and a discussion with the participation of justice system professionals should be proposed.

CEPEJ insists that the principles proclaimed by the Charter be applied throughout the judicial systems and their implementation be monitored and evaluated by public and private actors to improve practices continuously.

The USA has become the main AI user in the justice system, particularly in civil and criminal cases. Researchers from Stanford University have developed an algorithm that acts as a judge's assistant when choosing a preventive measure for a defendant. This program allows for a fair assessment of risks and the detention of a much smaller number of people while maintaining a balance of public safety. The product of the commercial company Northpointe is the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) software, which assesses the risk of reoffending by a person who is to be sentenced. The COMPAS program is based on the processing of data obtained by answering questionnaires by defendants. If defendants refuse to answer questionnaires, the program relies on information from their files. The data are divided into dynamic ones subject to change (drug addiction, professional status, or inclination to join a criminal group) and static ones that cannot change (gender, age, criminal status, and criminal history). As a rule, the judge passes a sentence based on the risk assessment of the program's findings.

However, it is worth noting that the use of the COMPAS program violates ethical standards, which is confirmed by the findings of research by the American non-governmental organization ProPublica. A striking example of such violations is the case of State v. Lomis, which was heard by the Wisconsin Supreme Court in 2016. According to the case file, Lomis was sentenced by the circuit court using

the COMPAS risk assessment, and the appellate court affirmed the specific issue of whether the use of the COMPAS risk assessment in sentencing violated the defendant's right to due process, either because the proprietary nature of COMPAS prevents defendants from challenging the scientific validity of the COMPAS score or because COMPAS scores take into account the sex of the individual. Lomis argued in his complaint that the court's consideration of the COMPAS risk assessment at sentencing violated the defendant's right to due process. This led to the court's erroneous use of its discretion to assume that the factual basis for the charges had been repeated (existing COMPAS risks). As a result, Lomis lost the case.[15]

Paul Zilli, an African American, was convicted of stealing a lawnmower and some tools in 2013. Paul's lawyer negotiated a plea deal with the prosecutor, under which Paul pleaded guilty and was sentenced to one year in prison and another year of administrative supervision. The COMPAS program assessed Paul as a high risk of committing further crimes, and it was after this that the judge changed his mind, canceling the plea agreement and sentencing Paul to two years in state prison and three years of administrative supervision.

The above examples emphasize that AI-based programs reveal the result of judicial analysis rather than its entire process. Thus, neither the defendant, the judge nor the public can see the decision-making process behind the sentencing prediction (although any sentence must be reasonable). It is unclear what criteria the developers of the COMPAS program used to determine the algorithm of work and establish risk assessments. Therefore, this issue is classified as an intellectual secret.

The uniqueness of modern data processing is that it does not try to reproduce the human model of cognition but creates contextual statistics based on data without any guarantee of false autocorrelations. Moreover, there is a real risk that the algorithm may provide discriminatory conclusions. An example is the COMPAS software (since 2017, the company has been called Equivalent). This program assesses the risk of reoffending by a person in respect of whom a judge is to pass a sentence. It is the most widely used program in the US criminal justice system.

COMPAS is based on data obtained from 137 questionnaires answered by the defendant, or in case of refusal, the information is taken from the defendant's file. The data are divided into dynamic data that are variable and can change – drug addiction, environment, professional status, and statistical data that cannot change and are more determinative for forming a conclusion – age, gender, criminal history, and offender status at the time of the first offense. During the survey, individuals are asked the following questions:

[15] I. Dankwa-Mullan, E. L. Scheufele, M. E. Matheny, Y. Quintana, W. W. Chapman, G. Jackson, B. R. South, 'A proposed framework on integrating health equity and racial justice into the artificial intelligence development lifecycle' (2021) 32(3) Journal of Health Care for the Poor and Underserved. p. 300-317.

1. How often did you get into fights when you were at school?
2. How many of your friends/acquaintances have ever been arrested?
3. How old were you when your parents divorced, if any?
4. Does a hungry person have the right to steal?

During the calculation, the defendants are divided into risk groups ranging from 1 to 10 (1 to 4 – low risk; 5-7 – medium risk; 8-10 – high risk). The judge then passes a sentence based on this risk assessment.[16]

The American non-governmental organization ProPublica revealed a violation of ethical standards by the algorithms used in the COMPAS program, namely racial bias. The algorithm was twice as likely to label African American defendants as repeat offenders, while white defendants were identified as low-risk. The assessment proved to be unreliable in predicting, as only 20% of African Americans out of the expected 40% reoffended.[17]

Two African Americans, Brisha Borden and Sade Jones, tried to steal a children's bike and scooter in 2014. Prior to this, Borden had committed minor offenses. Vernon Prather, a 41-year-old white man, was arrested for stealing tools worth $86.35 in 2015. Prater was a more experienced criminal; he had already been convicted of robbery and attempted robbery, for which he served five years in prison. The program showed that Brisha Borden was at high risk of reoffending even though she had no new charges for two years. Prater was assessed as low risk at the time and later received an eight-year sentence for stealing electrical appliances worth thousands of dollars.[18]

The story of Paul Zilli, an African American, demonstrates that judges change their minds after seeing AI reports. In 2013, a man from Wisconsin was convicted of stealing a lawnmower and some tools. His lawyer negotiated a deal with the prosecutor. Paul pleaded guilty, for which he was supposed to spend one year in prison and further administrative supervision. Northpointe assessed Zilli as a high risk for further crimes, and it was after this that Judge James Babler changed his decision, reversing the plea and sentencing Zilli to two years in state prison and three years of supervision.

There should be a solid ground to justify any decision. AI-based programs, such as SOMPAS, show results but do not disclose the entire analysis process. Therefore, neither the defendant, the public, nor even the judge can see what

[16] D. Golovin, Y. Nazymko, O. Koropatov, M. Korniienko, 'Electronic evidence in proving crimes of drugs and psychotropic substances turnover' (2022) 5(2) Access to Justice in Eastern Europe. p. 156-166. https://doi.org/10.33327/AJEE-18-5.2-n000217.

[17] R. Vinuesa, H. Azizpour, I. Leite, M. Balaam, V. Dignum, S. Domisch, A. Felländer, S.D. Langhans, M. Tegmark, F. Fuso Nerini, 'The role of artificial intelligence in achieving the Sustainable Development Goals' (2020) 11(1) Nature Communications. p. 1-10.

[18] O. Kovalova, M. Korniienko, O. Postol, 'Ensuring of child's dignity as a principle of modern education: administrative and legal aspects' (2019) 21(2) Asia Life Sciences Supplement. p. 341-359.

decision-making process this prediction is based on. This secrecy exists, on the one hand, because of the existing patent rights of the developers of these programs, which have a risk of plagiarism, and on the other hand, because of the Black Box problem, in which the patent holders are not able to fully understand the decision-making mechanisms. Northpointe refused to explain how the algorithm calculated the risk score, as this information is confidential. Unfortunately, in this whole story, there was no reasonable balance between ensuring the patent rights of developers and the fundamental rights of persons who were once defendants and whose information was processed by the COMPAS algorithm.

The US judicial systems willingly use the advantages of electronic systems. The first ideas to use digital technologies in solving legal problems emerged in the United States as early as the 2000s. Rocket Lawyer and Legal Zoom have developed and implemented legal tech that provide education services for mobile documents, smart contracts, and legal advice. Legal tech is used to provide many support services (appealing against decisions on administrative offenses issued using automated control). These electronic systems can estimate the positive or negative chance of a particular court case being resolved based on the data provided in an online questionnaire and, on this basis, offer a range of services to represent interests in court for a percentage of the amount received if the case is won.[19]

Another intellectual development has the main function of predicting the final decision of the US Supreme Court. The program can analyze the entire list of Supreme Court decisions since 1952 and their interpretations. The creators have developed an algorithm in which data on the resolved case is entered into the information base according to two parameters, which allows predicting 69.7% of the decisions of the highest judicial body of the United States, as well as accurately forecasting 70.9% of the results of the votes of the supreme judges in a given year.

Another system developed by American researchers is the DARE program, which recognizes false testimony in court. In order to have a chance to use the DARE program efficiently, AI was trained using video footage from 121 trials. The system tracks visual changes in facial expressions, voice, and speech. DARE's performance in recognizing deception was 92%. In this case, there is a clear interaction between information technology and psychology, which can often help solve a crime. However, these studies cannot consider all possible reactions of the human psyche. The above and similar systems should be used with a high degree of control. The main role of such programs should be to assist the user in making a particular decision and choosing the most effective strategy of action within a particular trial.

[19] R. M. Re, A. Solow-Niederman, 'Developing artificially intelligent justice' (2019) 22 Stanford Technology Law Review. p. 242-289.

AI can structure information. In complex court cases, it can be useful to recognize patterns in text documents and case files. For example, electronic discovery (eDiscovery) exists in the United States. eDiscovery allows identifying, collecting, and providing information stored on digital media. eDiscovery uses a learning method in AI technology to invent the best algorithm for finding relevant sections in a large amount of information. The parties to the case agree on the search terms and coding to be used. The judge determines the evidence. This process is much faster and more accurate than a human search. The courts of the United States and the United Kingdom recognize this methodology of document research.

China, a direct competitor in the technology arena, can compete with the United States for the title of leader in the use of technology. Since 2017, an online court has been operating there in the form of a mobile application of the main Chinese program WeChat. A video chat replaces a traditional courtroom, and an avatar controlled by AI instead of a judge. The first digital court was the Hangzhou court, and then the Chinese government created similar courts in Beijing and Guangzhou. In total, the courts have reviewed about 119,000 cases and issued decisions on 88,000 cases. The court is empowered to consider copyright disputes, online business disputes, and e-commerce violations.[20]

In European justice systems, the use of AI algorithms remains predominantly a private sector initiative, and the state does not properly perceive it. Moreover, certain issues of AI applications are subject to criminal prosecution. For example, France has criminalized the analysis of case law, which makes it possible to predict what decision a particular judge might make in a case. Such liability was adopted under pressure from the judiciary, arguing that court decisions are used to analyze the behavior of a particular judge, which violates their rights.

In the UK, in 2013, the Government presented a program to reform the criminal justice system called Swift and Sure Justice. Researchers have concluded that in the case of remote participation in a court hearing via teleconference, including cross-examination, victims of sexual crimes recall traumatic events better, as they avoid the psychological trauma caused by a personal meeting with the suspect.

The first “virtual court” was held in the Birmingham Magistrates’ Court. Currently, UK courts are actively modernizing their equipment and implementing special software. In addition, the UK uses a digital system in which AI can predict the decisions of the European Court of Human Rights (ECtHR). The principles of its operation are based on the analysis of 584 judgments issued by the Strasbourg Court on complaints of torture, humiliation of personal dignity of a person and

[20] C. Chen, Y. Hu, M. Karuppiah, P.M. Kumar, ‘Artificial intelligence on economic evaluation of energy efficiency and renewable energy technologies’ (2021) 47 Sustainable Energy Technologies and Assessments. p. 101-358.

citizen/subject, events related to the restriction of fundamental rights and freedoms, etc. Machine learning technologies allow for determining the outcome of court cases in 79% of cases.[21]

AI can be useful for different types of court cases in legal proceedings. Thus, the statistics of court cases in the Netherlands showed that out of 1.5 million cases per year, a large share is so-called routine cases – cases with a predictable outcome in which a decision is made based on the information provided. This is typical, to a greater extent, for family and labor cases. In such cases, the court considers the mechanism for resolving a legal conflict proposed by the parties to the conflict from the point of view of its legality and is similar to a notary. Such cases include divorce by mutual consent, establishment of parental custody, termination of employment, etc. Thus, a court decision in such cases is a document that is largely produced automatically, confirming that the agreement complies with the law. In more complex cases, where there is a dispute about the law, especially in criminal cases, the needs for IT in general, and AI, in particular, are different. Consequently, AI can play different roles in different types of cases (types of processes) in courts.

AI can consult and provide useful advice to people looking for solutions to their legal problems and lawyers. In this case, AI provides relevant information and answers questions to the user. The user is free to take the advice or not. This ability of AI becomes an opportunity for an individual to prevent a future legal dispute. AI support in the entire process of a court ruling or its part can eliminate monotonous actions. The first proven example of online dispute resolution is Solution Explorer used in the Civil Court (CRT) in British Columbia, Canada. Solution Explorer is a front-end of the CRT that uses Q&A to provide personalized legal information in plain language and free self-help tools to resolve disputes without the need to file a lawsuit. It applies a basic form of AI – an expert system that makes specialized legal knowledge widely available to the public.[22]

The Estonian Ministry of Justice has asked IT specialists to create a robot judge that will resolve disputes on small claims up to EUR 7,000. This robot judge is designed to reduce the burden on the state apparatus. The project is still under development but expected to start with consideration of cases over conflicts with contracts. Both parties are expected to upload all the necessary documents and other relevant information, and the program will make a decision that can later be appealed in court. The developer assures that the system will be adjusted after receiving feedback from lawyers and judges.

[21] A. Nguyen, H. N. Ngo, Y. Hong, B. Dang, B.P.T. Nguyen, 'Ethical principles for artificial intelligence in education' (2023) 28(4) Education and Information Technologies. p. 4221-4241.

[22] G. Currie, K. E. Hawk, 'Ethical and legal challenges of artificial intelligence in nuclear medicine' (2021) 51 Seminars in Nuclear Medicine. p. 120-125.

As for replacing judges with robots, it is impossible shortly. After all, many years will pass before AI meets the right to a fair trial, the standard outlined in Article 6 of the ECHR. For now, it can assist in searching and structuring information, advice, or suggestions for legal inquiries, provided it is constantly updated.[23]

In Ukraine, the implementation of AI in justice remains a problematic issue. The first step towards this is the launch of an electronic court, which has not found an effective implementation way yet. This electronic court can reduce the time for data processing and analysis of case law.

According to the Concept for the Development of Artificial Intelligence in Ukraine, approved by Order of the Cabinet of Ministers of Ukraine No. 1556-p,[24] artificial intelligence is an organized set of information technologies used to perform complex tasks by using a system of scientific research methods and algorithms for processing information received or independently created during work, as well as to create and use its knowledge bases, decision-making models, algorithms for working with information.

A wide range of scientific problems lies in the area of digitalization of the legal system in Ukraine. In the context of reforming domestic legislation, the digitalization of the codes on liability for public offenses (the Criminal Code, the Code of Administrative Offenses) is only part of the national digitalization program for the legal system. At the same time, the purpose of the digitalization of codes is to help law enforcement agencies (detectives, investigators, prosecutors, judges, defense attorneys, probation officers, prison and enforcement officers, etc.) make decisions when solving a particular problem using AI. A prerequisite for this is to build codes on a single methodological basis, which includes the following: a single structure (e.g., books, sections, subsections, articles, paragraphs, or subparagraphs), terminology, typification (classification) of offenses, and their legal consequences, unification of various registers, other materials, etc.[25] [26]

A prerequisite for the introduction of AI in Ukraine is the launch of the Unified Judicial Information and Telecommunication System (UJITS). The system envisages a paperless workflow owing to electronic digital signatures and document management. It also involves creating personal accounts for procedural actions and improving the

[23] F. Olan, E. O. Arakpogun, J. Suklan, F. Nakpodia, N. Damij, U. Jayawickrama, 'Artificial intelligence and knowledge sharing: Contributing factors to organizational performance' (2022) 145 Journal of Business Research. p. 605-615.

[24] Cabinet of Ministers of Ukraine, 'About the approval of the Concept of the development of artificial intelligence in Ukraine'. https://zakon.rada.gov.ua/laws/show/1556-2020-p#Text (last visited on October 4, 2023).

[25] T. A. Tsuvina, 'Online courts and online dispute resolution in the context of the international standard of access to justice: international experience' (2020) (149) Problems of Legality. p. 62-79.

[26] M. V. Korniienko, I. V. Petrunenko, I. V. Yena, K. O. Pankratova, K. A. Vozniakovska, 'Negative effects of corruption offenses for the country's economy' (2020) 11(5) International Journal of Management. p. 1072-1083. https://doi.org/10.34218/IJM.11.5.2020.098.

Unified State Register of Court Decisions by adding a system of hyperlinks to the legal positions of the Supreme Court. This will enable the algorithm to select the relevant Supreme Court decision for a particular case and construct a draft decision without human intervention. Today, the Electronic Court subsystem is operating in test mode, allowing you to file an exhaustive list of claims, track the progress of the case, submit procedural documents, pay court fees, and monitor the receipt of claims against you, all of which are done online.[27]

However, the complete implementation of UJITS will take several years. Only a few courts have implemented certain modules, and electronic lawsuits must be duplicated in hard copy. Due to several issues, the government has implemented an active policy of digital transformation. This will lead to rapid development in this area and result in more efficient and transparent work of Ukrainian courts. With the change of government in 2019, digitalization became one of the priorities of state policy, and the goal was to create a "state in a smartphone". Naturally, the newly created Ministry of Digital Transformation was supposed to become one of the locomotives of this trend in Ukraine. Among its tasks was a fairly new issue for Ukraine, but not for the world, to ensure AI development.

The Ministry of Digital Transformation has developed and published the Draft Order of the Cabinet of Ministers of Ukraine "On Approval of the Concept of Artificial Intelligence Development in Ukraine" for public discussion. This strategic document is intended to actualize the issue of artificial intelligence and its development as one of the drivers of Ukraine's social and economic development until 2030. The concept tries to build on and reflect the main principles of the Organization for Economic Cooperation and Development (OECD) Guidelines on Artificial Intelligence, which Ukraine joined in 2019.[28]

The main principles of the development and use of AI technologies include the following:

– AI should benefit people and the planet, contributing to inclusive growth, sustainable development, and prosperity;

– AI systems shall be developed and used only in compliance with the rule of law, and their use shall be ensured by appropriate guarantees, in particular, the possibility of unimpeded human intervention in the system's operation;

– ensuring transparency and responsible disclosure of information about AI systems;

[27] O. Yu. Drozd, L. V. Soroka, 'Digitization of courts: European experience' (2023) 1 Scientific notes of Taurida National V.I. Vernadsky University. p. 77-81.

[28] I. Varava, 'Innovations in the professional activity of lawyers: using the capabilities of artificial intelligence' (2020) 1(32) Information and Law. p. 47-54.

– organizations and individuals that develop, implement, or use AI systems are responsible for their proper functioning by the above principles.

The draft Concept defines the following core areas of state policy in the field of AI: education and human capital, science and innovation, economy and business, cybersecurity, defense, public administration, legal regulation and ethics, and justice. The drafters of the Concept also consider the trend toward electronic justice, whose implementation in Ukraine has been subject to numerous struggles in recent years. The Ministry of Digital Transformation envisages that one of the areas of use of artificial intelligence should be the issuance of court decisions in cases of minor complexity (by mutual agreement of the parties) based on the analysis of current legislation and court practice performed by artificial intelligence.[29]

Although such innovation may reduce the workload of Ukrainian courts, it is important to consider the potential threats. The judicial system's problems with delivering just decisions may lead to heterogeneity of practice. Additionally, there are issues with the timely filling of the Unified Register of Court Decisions and determining which cases will be classified as minor.

Discussion

The first positive aspect of using Artificial Intelligence (AI) in justice is the objectivity of the case with the exclusion of some human factors. Jerome Frank noted that justice is "what the judge ate for breakfast". In the article "Extraneous Factors in Court Decisions", the authors analyze court decisions and provide evidence that "the probability of a favorable decision for the defendant is greater at the very beginning of the day or after a break than later in the sequence of cases". Another positive aspect is the speed of case processing. In 2019, the Beijing Internet Court announced the launch of an online courtroom center that uses AI as a judge with a female image, voice, facial expressions, and movements.

The Beijing Internet Court notes that the use of this technical breakthrough will help judges concentrate on their work, while the AI judge will help with routine work. Other AI programs in China help to make court proceedings faster. For example, the mobile mini-court, the number of users of which reached more than 3 million in 2020, and courts across the country used this application to consider more than 2.14 million cases. Since Chinese courts are overwhelmed with millions

[29] I. Y. Cherpovytska, 'Modern foreign experience in the implementation of information and communication technologies as a means of optimizing communication between civil society and the judiciary' (2022) 56 Scientific Bulletin of the International Humanitarian University. p. 20-26. https://doi.org/10.32841/2307-1745.2022.56.5.

of cases, and domestic legal reforms have led to a sharp increase in the workload, it is quite beneficial to use AI in justice.[30]

Even though the AI system has several positive features that are already part of justice in several countries, there are threats in terms of violating fundamental human rights. An example of this problem is the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) program, which processes completed offender profiles and provides information on the risk of recidivism. The investigation published by ProPublica proved that several inalienable human rights were violated. The authors of the publication concluded that "the COMPAS system unevenly predicts recidivism between the sexes". However, the most dangerous consequence of using this program was the identification of signs of racial discrimination. The researchers compared the assessment statistics for African Americans and white people and proved that "African American defendants received a 77.3% higher violent recidivism score".

Another negative feature of AI integration is the lack of empathy in computer technology. A court should be independent and objective, but the human factor sometimes plays an important role in a fair judgment. The significance of a human judge is exemplified by Judge Frank Caprio's decision. The offender was a 96-year-old man who was speeding in a school zone while driving his 63-year-old son, who had cancer, to the hospital. After considering the case, the judge released the man from the penalty of a fine.[31]

Thus, on the one hand, AI enables countries to review cases faster and better and provides a more impartial decision-making environment. On the other hand, computer technology poses threats to human rights, for which society has fought so hard. Widening discrimination and violating the principle of innocence are already real negative consequences.

The issue of integrating AI into justice has not escaped Ukraine, which has embarked on the path of its development and standardization by European norms and requirements. One of the main tasks is to improve the judicial system, as this branch of power is discredited in the eyes of Ukrainian society. As for the disadvantages of introducing AI into Ukrainian justice, it is a threat to the development and improvement of national laws. When there is a problem that the relevant law cannot fully protect the victim, the higher courts begin to explain the provisions of the written rule, which in turn allows for judicial lawmaking and strengthening of national legislation. An example of the importance of judicial interpretation is the

[30] Y. Rydkoborod, A. Melash, 'The role of artificial intelligence in criminal proceedings' (2023) 5(35) Scientific Perspectives. p. 690-700.

[31] Zh. Udovenko, N. Rudenko, 'Advantages and disadvantages of the implementation of the artificial intelligence system in the justice system of Ukraine' (2023) 4(10) Current Issues in Modern Science. p. 252-262.

problem of application and prosecution under Article 126-1 of the Criminal Code of Ukraine on domestic violence.[32] The main reason for the ineffectiveness of this provision is the sign of systematicity. Judges of different instances tried to analyze the article from a practical perspective, but everyone had a different vision of the definition of systematic nature. Some decisions stated that it was "from two or more crimes", but the Supreme Court found that systematic violence is considered from the moment of violence for the third time.[33]

In this context, it is worth noting that the task of judges is not only to establish justice and protect the rights of victims but also to be the process that simultaneously writes and explains the law. AI, in turn, makes decisions based on existing practice, which means that machine learning algorithms can perpetuate existing discrimination or reproduce past mistakes.

The next problem is the uncertainty of AI's legal personality and its responsibility for its decisions. On the one hand, AI cannot be held criminally liable because it does not have such a component as guilt, and the responsibility for the actions of software agents rests with commercial corporations, manufacturers, or users. On the other hand, AI can already be considered a subject of criminal liability. AI, physically embodied in a robotics object, should be considered a subject of legal relations somewhere between legal entities and individuals; therefore, AI has every reason to bear responsibility under the Criminal Code of Ukraine.

At the same time, the benefits of using AI in the justice system are undeniable. The main achievement of AI applications is the unloading of courts and reduction of the workload for each representative of the Themis. The staff shortage is not a problem but a catastrophe. The staff shortage in the judicial system in Ukraine is more than two thousand judges, causing an increased workload and, in turn, a failure to consider a case within a reasonable time.[34]

Ukraine has every opportunity to develop computer technologies that can benefit the country. Today, some programs have a set of AI characteristics that help lawyers and judges before and during the trial. An example is Verdictum Ligazakon, which can analyze a procedural document and predict the potential resolution of a dispute based on the statement of claim and previous case law.

AI has no stereotypes that can influence people's decisions. This helps to provide more objective decisions that will not depend on personal beliefs and

[32] Verkhovna Rada of Ukraine, 'Criminal codex of Ukraine'. https://zakon.rada.gov.ua/laws/show/2341-14#Text (last visited on November 26, 2023).

[33] V. Zuryan, 'Urgent problems and prospects for the development of electronic justice in Ukraine' (2020) (4) Bulletin of the Penitentiary Association of Ukraine. p. 173-181.

[34] R. I. Matviyev, 'The complexity of the integrity of judges in the context of the latest trends in legal reality' (2023) 13 Bulletin of LTEU. Legal Sciences. p. 24-28.

stereotypes. AI helps to reduce the time and effort required to prepare cases and ensure access to justice. This allows for more time to be spent on the case.[35]

The result is an improvement in the level of judicial services provided to the public and increased trust in the work of the court. At the same time, the analysis of foreign experience provides a practical understanding of potential threats to the digitalization of the judiciary. AI may be seen as a neutral tool, but in reality, it may contain a certain level of hidden subjectivity. For example, AI algorithms may be dependent on prior information and data and may contain hidden discrimination.

AI may be limited in its ability to understand the context and reproduce human behavior in complex situations. This can lead to a lack of flexibility and insufficient ability to adapt to new situations. The risk of data leakage: The use of AI in criminal proceedings and justice requires a large amount of sensitive information. This can lead to the risk of data leakage and misuse. Lack of ethical standards: In the absence of ethical standards governing the use of AI in criminal proceedings and justice, ethical issues may arise, such as insufficient privacy protection and the possibility of using AI for control.

Violations of human rights, inhibition of the judicial lawmaking process, and uncertainty about the legal personality of AI hinder the process of rapid integration of AI into the judiciary. However, we believe that the gradual integration of AI into Ukrainian justice and its development as an auxiliary tool is an important task that will help restart the Ukrainian judiciary, bring it closer to European standards, and increase the level of respect for courts and representatives of the Themis.

Conclusions

Since the mid-1990s, there have been discussions about replacing judges with robots. Indeed, robots and computers are increasingly taking over the physical and mental labor of humans. Global practices have proven the usefulness of Information Technology (IT) for justice, especially when it comes to processing large amounts of information and making complex decisions, and there are certain achievements and failures in the use of AI in judicial systems and related industries in different countries. The experience of using innovative technologies in these areas in technologically advanced countries needs to be studied, and it may be useful in developing specific actions to reform the Ukrainian judicial system.

[35] O. Oliynychuk, R. Oliynychuk, A. Kolesnikov, 'Electronic justice as an element of the modern judicial system' (2022) (3) Actual Problems of Jurisprudence. p. 141-147.

The future of justice certainly lies in technology and the automation of judicial processes. AI has a huge potential to speed up the data processing process, relieve the work of courts, and make it more efficient. However, it is very important to adhere to fundamental principles when using AI.

For the global community, the issue of introducing artificial intelligence in justice is still controversial and is accompanied by different approaches, ranging from the active use of artificial intelligence in resolving various categories of disputes (copyright disputes, commercial disputes) to criminalizing the use of artificial intelligence algorithms to predict court decisions. The national legislation does not provide for the possibility of replacing a judge with an algorithm, but it is possible to discuss the partial involvement of AI in the judicial system.

AI systems are used in countries, such as the United States, China, and France. This system represents a so-called judge's companion or digital judge (systems that replace a judge in deciding a case). Thus, the use of AI technologies in the legal sphere and legal practice is an important factor in the development of the legal system, ensuring human and civil rights and freedoms. AI is an essential tool for legal reform, a new component of its implementation technology, and a means of increasing the efficiency of implementing qualitative legal changes in the current conditions of the information society. However, in Ukraine, the introduction of artificial intelligence in justice remains a problematic issue. The first important step towards this is the actual introduction of an electronic court, which has not yet found its effective way of implementation. National justice is being modernized. This process, at least for now, seems to be a long one, and theoretical research will be needed.

A função da inteligência artificial em garantir a eficiência e acessibilidade da justiça

Resumo: As tecnologias da informação estão mudando nosso mundo de forma extremamente rápida. A disponibilidade dessas tecnologias abre novas oportunidades, mas também apresenta desafios. Isso contribui para a relevância da aplicação da inteligência artificial (IA) no sistema de justiça. A e-justiça deve facilitar o desenvolvimento do mercado digital, o que é uma tarefa essencial do governo eletrônico. A indústria jurídica sempre foi conhecida por se basear na tradição e resistir à mudança. No entanto, os recentes avanços na tecnologia de IA têm o potencial de transformar o cenário jurídico, alterando a forma como escritórios de advocacia e departamentos jurídicos trabalham. O objetivo deste artigo é esclarecer como usar a IA para melhorar a eficiência e a celeridade dos processos judiciais, além de analisar exemplos de implementação bem-sucedida de sistemas de IA no campo jurídico. O artigo identifica as vantagens e desvantagens da IA utilizada na justiça e examina a questão da acessibilidade e da justiça no contexto da IA no sistema judicial. Esta pesquisa é relevante, pois oferece uma compreensão e análise aprofundadas das novas tecnologias no contexto dos desafios jurídicos. Pode-se recorrer a esta pesquisa para o desenvolvimento de estratégias eficazes para a implementação da inteligência artificial no campo jurídico, constituindo sua implicação prática.

Palavras-chave: Inteligência artificial. Justiça eletrônica. Tecnologias da informação. Judiciário. Prática internacional. Legislação nacional.

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