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Editorial

We are pleased to announce the second issue of 2025 of the International Journal of Law in a Changing World – IJLCW. As editors, we are proud to observe the journal's growing reputation worldwide, reflected in the rising number of submissions and citations. The journal currently holds a Google H-Index of 7 and is cited by leading publications in law and related fields. To celebrate its fourth year of publication, we present a diverse issue, both geographically and across a variety of topics.

This issue brings together a rich diversity of authors and perspectives from the United States, Poland, Egypt, Spain, Vietnam, Indonesia, and South Africa, reflecting the journal's commitment to a global and multidisciplinary dialogue on law. The topics span human rights, environmental protection, international trade, administrative law, legal theory, smart contracts, village-level governance, and professional ethics, demonstrating the breadth and depth of contemporary legal debates.

From Poland, Magdalena Łągiewska analyses dispute settlement mechanisms in China's Free Trade Zones, showing how these zones serve as laboratories for legal innovation despite the absence of a unified national framework for resolving Sino-foreign disputes.

Then, Mohammed Ibrahim Abdel Nabi and Yassin Abdalla Abdelkarim (Egypt) offer a doctrinal exploration of smart contracts under Egyptian civil law, clarifying their structure and operation while establishing a jurisprudential foundation to reconcile technological innovation with traditional contract theory. In the field of international economic law, Martín Jesús Urrea Salazar (Spain) evaluates the role of the WTO in a fragmented global trade landscape, arguing for a multidisciplinary understanding of how public and private international law interact to provide legal certainty for commercial actors.

Governance and administrative accountability are the focus of Vu Minh Chau (Vietnam), whose article links weaknesses in delegated legislation and oversight mechanisms to broader phenomena of crony capitalism and rising social inequality. Complementing this institutional analysis, Mario M. Masela and Tomy Michael (Indonesia) address the legal status of village regulations, identifying a troubling gap in Indonesia's judicial review system that leaves these local norms without a competent forum to test their legality, undermining constitutional guarantees of legal certainty.

Paul S. Masumbe, Bulelani Thukuse, and Usenathi Phindelo (South Africa) investigate misappropriation of client compensation funds in litigation involving the Road Accident Fund. Their study reveals systemic failures in regulatory enforcement and professional ethics, offering concrete recommendations to restore accountability and protect vulnerable claimants.

Together, these contributions showcase the journal's international reach and its dedication to encouraging informed, critical engagement with legal issues impacting societies worldwide. The journal continues to grow in importance, earning new scholar metrics and indexations. We sincerely thank all the readers, authors, and reviewers for their valuable support!

Editors-in-Chief
Elizaveta Gromova and Daniel Brantes Ferreira

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SETTLEMENT OF SINO-FOREIGN DISPUTES IN CHINA'S FREE TRADE ZONES

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China is making significant efforts to comply with international standards in dispute resolution. The country has set up the China International Commercial Courts (CICC) in Shenzhen and Xi'an, while the pilot Free Trade Zones (FTZs) are developing their own mechanisms for resolving international commercial disputes. This article examines recent developments and solutions implemented in various FTZs in China. The analysis concludes that China is employing legal transplantation and reviewing various solutions to resolve disputes within the FTZs. Therefore, the FTZs are facilitating the reform of dispute resolution in China. However, there is currently no uniform national-level legislation for Sino-foreign disputes handled in the FTZs. Instead, each FTZ adopts its own dispute resolution rules, including specialized arbitration institutions and 'one-stop-shop' platforms. To encourage more parties to resolve their Sino-foreign disputes in the FTZs, a unified approach and a set of regulations are required.

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1. INTRODUCTION

China is taking decisive steps to align its dispute resolution processes with international standards. In addition to the China International Commercial Courts (CICCs) in Shenzhen and Xi'an, the pilot Free Trade Zones (FTZs) are developing their own mechanisms for resolving international commercial disputes. However, each FTZ has its own approach to dispute resolution. For example, the Shanghai Pilot Free Trade Zone (SHFTZ) has pioneered innovative rules and systems for resolving Sino-foreign disputes. The FTZ Arbitration Rules have also been widely recognised as innovative solutions for arbitration reform. Secondly, the Guangdong Pilot Free Trade Zone (GFTZ) based its dispute resolution mechanism on the Shenzhen International Arbitration Institute, incorporating measures to ensure the independence of both the arbitration institution and the arbitral tribunal. Thirdly, the Chongqing Pilot Free Trade Zone (CFTZ) has set up the Chongqing One-Stop Diversified International Commercial Dispute Resolution Centre. This provides a "one-stop shop" combining court litigation with arbitration and mediation.

This article analyses recent developments and solutions adopted within various FTZs in China. It concludes that China uses legal transplantation and the review of multiple solutions to resolve disputes within the FTZs. For this reason, the FTZs are paving the way for reform of dispute resolution in China. However, there is currently no uniform national-level legislation for Sino-foreign disputes handled in the FTZs. Instead, each FTZ adopts its own dispute resolution rules, including specialised arbitration institutions and "one-stop-shop" platforms. To attract more parties to settle Sino-foreign disputes in the FTZs, a unified approach and regulations are needed.

2. ROLE AND SIGNIFICANCE OF PILOT FREE TRADE ZONES IN MAINLAND CHINA

A Free Trade Zone (FTZ) could be defined as a special economic and commercial zone for foreign goods. In fact, such foreign goods can not only be landed, transhipped, but also stored, processed and transformed within the FTZ. The 1970s are widely regarded as a milestone in the adoption of FTZs by developing countries. At the time, they were recognised as part of economic policies driven by the desire to attract more foreign investment and technology. Since the establishment of FTZs, there have been significant improvements in job creation, technology transfer, foreign investment, and trade facilitation. FTZs have played an important role in international trade networks throughout the continuous growth of world trade [12] (p. 323).

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China's FTZs were established in the wake of institutional change, with the aim of promoting institutional reform through local opening-up and the widespread application of experimental programmes. Accordingly, goods that conform to international practices can freely enter and leave the FTZs due to the absence of tariff and non-tariff barriers. In addition, the pilot FTZs also guarantee freedom of investment, information, capital and talent flows for national treatment. This means that there is no difference between national and non-national treatment within China's FTZs. It is relatively easy to implement the so-called "open economic system experiment" throughout the FTZs [4] (p. 59).

One could also note that the pilot FTZ differs from the common FTZ. Hence, "as a national strategy for intensifying reform and opening up, it is a comprehensive pilot zone under the open economic system from the reform of the economic system to that of the system of supervision and then the administrative system; it is also the institutional experimental zone for upgrading China's economy; its significance for building China's economic system can be comparable to that of the Shenzhen Special Economic Zone established in the first round of promoting reform through opening up" [4] (p. 59).

Overall, the pilot FTZs have certain objectives to achieve, including the establishment of an investment management system based on the so-called negative list, a trade supervision system focusing on trade facilitation, a financial innovation system for capital account convertibility together with the financial services industry, and an in-process and post-mortem supervision system aimed at transforming government functions [4] (p. 60).

The negative list management system refers to the special mode, which means that anything that is not prohibited by Chinese laws can be carried out. In fact, such a rule is in line with international standards. Therefore, it is possible through the reduction of non-tariff barriers along with more opportunities for enterprises in terms of fair competition and free choice. It is noteworthy that the number of items included in the negative list is constantly decreasing. For example, in 2011 the negative list contained 190 items, while in 2013 it will contain 122 items. In addition, this negative list is uniform and binding within four pilot FTZs, such as Shanghai, Guangdong, Tianjin and Fujian. According to the philosophy behind the negative list, the whole range of foreign investment fields that are not explicitly specified and included in the negative list falls within the scope of the notification system. This solution ensures the existence of the principle of equal treatment of domestic and foreign capital. In other words, such equal treatment exists as an alternative to the authorisation system [4] (p. 60).

Secondly, the pilot FTZs ensure the existence of a loose financial framework system along with the supervision mode. Therefore, it is relaxed for overseas. Meanwhile, the strict management is

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completed at home. The success of FTZ is based on institutional innovation, such as the free trade account system. Accordingly, the free trade account is open to both foreign and domestic capital. However, it should be noted that each fund entering or leaving the free trade account is closely monitored by the regulator. Therefore, any inflow or outflow of funds is also facilitated, and the risks are under the necessary control [4] (pp. 60-61).

Thirdly, the so-called in-process and post-mortem supervision system framework exists within the pilot FTZs based on six systems. The above-mentioned systems refer to the safety inspection system, the antitrust inspection system, the social credit system, the system for publishing company annual reports, the system for registering operational abnormalities, the information exchange system, the law enforcement system and the participation of social forces in market supervision [4] (p. 61).

Fourthly, the FTZs are based on the trade facilitation system. To illustrate, the SHFTZ is based on the new customs supervision mode. This means that goods first enter the zone and then receive the customs declaration. Interestingly, this solution makes it possible to reduce the time it takes to clear goods through customs. In fact, it can take two/three days. In addition to this reduction in time, logistics costs could also be reduced by an average of 10%. Such a solution was first adopted in the SHFTZ and applied from 18 September 2014 [4] (p. 61).

Fifthly, the establishment of the FTZ brings changes in terms of improving the legal system. To start with, the "Arbitration Rules of the China (Shanghai) Pilot Free Trade Zone" were issued on 8 April 2014. Subsequently, the Shanghai No. 2 Intermediate People's Court issued "Several Opinions on Judicial Review and Execution of Arbitration Cases governed by the Arbitration Rules of the China (Shanghai) Pilot Free Trade Zone'. These two legal acts are related to each other to ensure judicial protection [4] (p. 61).

Finally, the FTZ also accelerates institutional reform by facilitating the development of the surrounding areas and introducing the necessary coordination. It could even be said that FTZs function as enclaves that try to overcome existing barriers, mostly institutional. For example, the SHFTZ focuses on the development of the Yangtze River Economic Zone [4] (p. 62).

Interestingly, each FTZ is different from the others, which can confuse foreign investors. On the one hand, each FTZ has its own reform priorities, and on the other hand, there are many different areas within China's FTZs. This means that they not only have different focuses, but also different development orientations and specific policies and business environments. Given the Chinese approach to "legal

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transplants" (discussed below), each of the FTZs represents such a testing ground for China's comprehensive open economic reform. As such, Chinese FTZs do not resemble FTZs in other countries around the world. In fact, they fulfil different functions because, in addition to being FTZs, they are also Special Economic Zones (SEZs) that focus on systematic and institutional innovations. These innovations involve reforming state-market relations [5] (p. 21).

It is also worth noting that each FTZ benefits from different geographical advantages and functional orientations. As a result, FTZs have different industry clusters and target investment groups. Although FTZs are established on the basis of bonded areas together with high-tech and new-tech zones, there are many pitfalls in their development. In fact, such development is rather unbalanced, not only because of the different dates of their establishment, but also because of their geographical locations. In addition, FTZs aim to resolve and smooth the relationship between the government and the market. This can be achieved through the opening-up policy. Therefore, driven by the expansion of the reform experiment, "anything the law does not authorize is not done, while all duties and functions assigned by law are performed" [5] (p. 21).

The status and actual situation of each FTZ are different. The original four FTZs are currently in a "period of lassitude" of reform. This situation is a result of the institutional innovations that have been made. In fact, the original four FTZs, namely Shanghai, Guangdong, Tianjin and Fujian, have already liberalised both trade and investment. In order to achieve these goals, they took advantage of their geographical location and strategic positioning [5] (p. 22).

It should be noted that the strategy of differentiation that exists within the pilot FTZs is causing much confusion among foreign investors. To illustrate, the differences concern reform priorities and areas of focus, development orientations, specific policies and business environments. Such a policy is based on the testing ground for the establishment of a fully inclusive and open economic system in China. This means that China's FTZs differ significantly from those of other countries in terms of their historical missions and the multiple functions they are expected to perform. In fact, Chinese FTZs are also special economic zones, which means that they also focus on both systematic and institutional innovation. In practice, this means reforming the relationship between the state and the market. The various FTZs in China enjoy a variety of advantages, including not only geographical locations but also functional orientations. They also encompass many industry clusters and target investment groups. Overall, it could even be said that China's FTZs are centred on bonded areas and high-tech and new-tech zones [5] (p. 21).

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3. IMPROVEMENTS IN DISPUTE RESOLUTION THROUGH THE FTZ: A GENERAL OVERVIEW

The innovative solutions were introduced in the pilot FTZs following the SPC's "Opinions on Providing Judicial Safeguards for the Construction of Pilot FTZs". The above-mentioned Opinions are widely seen as a more open attitude towards arbitration itself and thus the application of the Chinese Arbitration Law (CAL) within China's FTZs [14] (pp. 59-60).

To illustrate, due to important breakthroughs, the Chinese legislature decided to redefine foreign-related factors. Previously, if the parties to a dispute had no foreign-related factors, they could not submit their dispute to arbitration abroad. According to the SPC's "Choice of Law for Foreign-Related Civil Relationships", "where a civil relationship falls under any of the following circumstances, the people's court may declare it to be a foreign-related civil relationship: 1. where one or both parties are foreign citizens, foreign legal persons or other organisations, or stateless persons; 2. where the habitual residence of one or both parties is outside the territory of the People's Republic of China (PRC); 3. where the object of the relationship is outside the territory of the People's Republic of China; 4. where the legal act that gives rise to the establishment, amendment or termination of the civil relationship takes place outside the territory of the People's Republic of China; or 5. other circumstances under which the civil relationship may be determined to be a foreign-related civil relationship" [14] (pp. 59-60). Article 1). This means that parties to foreign-invested enterprises (aka FIEs) in the PRC have been recognised as Chinese legal partners. In practice, this means that they cannot opt for foreign arbitration as there are no foreign-related factors in their identity ([14], p. 60).

Nevertheless, the first breakthrough came in November 2015 alongside the Siemens International Trade (Shanghai) Co., Ltd. V. Shanghai Golden Landmark Co., Ltd. case. Accordingly, the Shanghai First Intermediate People's Court introduced a new interpretation of "foreign-related factors". Accordingly, "foreign-related factors" can be found in two situations: first, where both the plaintiff and the defendant are wholly foreign-owned enterprises (WFOEs) registered in China's FTZs; and second, where the performance characteristics of the contract include some foreign-related factors [14] (p. 60). Interestingly, notwithstanding the fact that China is a civil law country, which means that case law is not binding, the broad interpretation of "foreign-related factors" introduced by the Shanghai court was noted by the SPC and thus reflected in its FTZ Opinions. Thus, pursuant to Article 9(1) of the FTZ Opinions, where both parties are WFOEs registered in the FTZ, any dispute arising from such cooperation is deemed to be a commercial dispute involving foreign-related factors. Under such an approach, there is no need to confirm whether the contract performance characteristics include the so-called "foreign-related factors". Although

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such a solution is innovative, it should be emphasised that it only applies to WFOEs. At the same time, it is not available to joint ventures or cooperative enterprises [14] (p. 61).

Second, although ad hoc arbitration cannot be applied under the CAL (Articles 16 and 18), there are different rules for FTZs. Article 9(3) of the FTZ Opinions provides that ad hoc arbitration can be conducted if certain conditions are met, such as "If two enterprises registered in the FTZ agree that relevant disputes shall be submitted to arbitration in a specific place in mainland China, according to specific arbitration rules or by specific personnel, the arbitration agreement may be deemed valid. If the people's court finds that the arbitration agreement is invalid, it shall request the higher court to review it. If the higher-level court agrees with the opinion of the lower-level court, the lower-level court shall report its opinion on the review to the Supreme People's Court on a level-by-level basis and make a decision after receiving the Supreme People's Court's reply" [14] (p. 62). In short, one could even say that the ad hoc arbitration agreement is valid if two parties are registered within the FTZs and the arbitration agreement meets the "three specific conditions", i.e. a specific place in mainland China, arbitration rules and arbitrators. While this solution may seem interesting, the People's Court still has discretion to determine the validity of an arbitration agreement. Given the binding provisions, "the arbitration agreement may be determined to be valid". The word "may" emphasises this possibility. In fact, in the case of an invalid ad hoc arbitration agreement, the prior notification mechanism applies. This means that the higher people's court is competent to review the case before making a final decision. Tao and Zhong emphasize that such a solution is aimed at ensuring consistency in the interpretation of the local people's courts on the validity of ad hoc arbitration agreements [14] (pp. 62-63).

Following the SPC Opinions, the Hengqin Free Trade Zone introduced the first "Ad Hoc Arbitration Rules", which took effect on 23 March 2017. It is widely regarded as a cornerstone in the development of ad hoc arbitration in mainland China. Although it is only a first step, it should be viewed positively. In fact, there are still many challenges and issues that need to be addressed, such as the correct understanding of the "three specific conditions". In addition, there is no consensus on whether these three conditions should be fulfilled simultaneously or not. The relationship between the CAL and the ad hoc regime remains unclear [14] (p. 63).

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4. SHANGHAI FREE TRADE ZONE AS A TRAILBLAZER IN RESOLVING SINO-FOREIGN DISPUTES

The Shanghai Pilot Free Trade Zone (SHFTZ) was established on September 29, 2013, as the first FTZ in mainland China. This decision was made in order to comply with international practices. According to its development programme, the SHFTZ would achieve its goals through the adoption of agile and efficient customs supervision measures. Therefore, it promotes both trade facilities and freedom. The latter refers, among others, to the liberalised border line, the recording system, and the supervision of the status classification of goods. Based on these facilities, it was possible to build the Shanghai International Trade Centre by attracting more foreign partners and investments [13] (pp. 323-324).

It is also worth noting that the SHFTZ was launched as a new round of reform in mainland China. The SHFTZ not only aims to create an international market-oriented environment, but also a law-based environment, and improve the rule of law within its jurisdiction. Interestingly, the SHFTZ should be recognised as a guide for other FTZs in China in terms of practices and experiences to be successful. This means that the other FTZs should replicate the solutions adopted in the SHFTZ. To illustrate, the Guangdong FTZ has even been responsible for following practices and rules that originated in Hong Kong. Such a trend was set in motion after the transplantation of Hong Kong law into Chinese domestic law in the 1980s [7] (pp. 341-342). One could even say that this approach reflects the so-called "legal transplants" that are very popular in China. "Legal transplants" refer to legal models that are transferred from an exporting legal system to a receiving jurisdiction. All in all, given the broad perspective, reception, transplants or borrowings can have two results. On the one hand, they can refer to the process. On the other hand, they can refer to the results of a legal reform project. In such a case, legal changes are based on the imitation of laws, some doctrines or even theories, among others [1] (p. 1).

Following the Chinese example, "legal transplants" were introduced in the name of modernisation. It should be emphasised, however, that any legal transplant also operates within a specific "local condition". This means that the unique political, social, economic and cultural background and context are involved. In practice, legal transplantation could be summarised as a process of trial and error. Historically, China benefited from such "legal transplants" in the course of the 20th century, which is widely known as a period of "revolutions" and radical changes in terms of Chinese ideology. As such, each process of legal transplantation of foreign laws, institutions and ideas was rather controversial in terms of clear direction [2] (p. 91).

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Overall, the SHFTZ is widely regarded as a milestone for doing business in China. Many foreign investors have chosen to develop their businesses within this special zone. However, it is worth noting that the SHFTZ is not only important for international partners but also for the Chinese government. Interestingly, the Chinese government is using the SHFTZ to achieve long-term goals, including better promotion of China in terms of service-oriented economy, internationalisation of the RMB, competitive tax rates, simplified cross-border capital flows, promotion of Shanghai as an international centre for trade, finance, shipping and logistics, expansion of FTZs across mainland China, etc [10] (p. 117).

5. ARBITRATION MECHANISMS AS A METHOD OF DISPUTE RESOLUTION WITHIN THE SHANGHAI FTZ

At the outset, it should be noted that arbitration is considered to be the preferred method of resolving commercial disputes. It offers many advantages over traditional litigation, such as neutrality, flexibility, efficiency, confidentiality, among others. Therefore, given these characteristics, arbitration is perfectly suited to the actual situation of disputes arising within the FTZs. In addition, there is a need to establish a fully pluralistic dispute resolution mechanism. Nevertheless, according to the current situation in China, there are still many restrictions on the direct application of international commercial arbitration mechanisms within the Chinese FTZs. It could even be said that the binding provisions of the Chinese Arbitration Law (CAL) are not in line with the existing economic development of the FTZ. Importantly, the commercial activities conducted in the FTZs are significantly different from other arbitration cases, so the FTZs also require their own arbitration mechanism for dispute resolution [14] (p. 610).

To illustrate, once the SHFTZ was established, it functioned without special laws and administrative regulations. At the outset, the SHFTZ was established on the basis of normative documents governing the "management system, investment opening, trade facilitation, financial services, tax administration, comprehensive supervision and rule of law environment". In addition, the State Council departments, together with the Shanghai Municipal Government and its General Office, have issued documents on the operation of the FTZ. Regarding the dispute resolution mechanism, the SHFTZ established the so-called Shanghai Pilot Free Trade Zone International Arbitration Centre (also known as the Shanghai Pilot Free Trade Zone Arbitration Court) on October 22, 2013, based on the Shanghai Pilot Free Trade Zone Arbitration Rules. It is worth noting that these rules are largely based on international arbitration rules. The SHFTZ Rules were promulgated on April 8, 2014, and entered into force on May 1, 2014.

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Following the adoption of the SHFTZ Arbitration Rules, the Shanghai No. 2 Intermediate People's Court, which is responsible for the review of arbitration cases by SHIAC, issued the "Opinions on Judicial Review and Enforcement of Arbitration Cases Applying to the China (Shanghai) Pilot Free Trade Zone Arbitration Rules". These Opinions are widely regarded as providing important judicial support for the implementation of the SHFTZ Arbitration Rules. It could even be said that the tripartite SHFTZ arbitration mechanism, including an arbitration institution itself operating within the SHFTZ, the arbitration rules and the opinions on judicial review, began to exist in the SHFTZ [17] (pp. 274-275).

The SHFTZ Rules contain some innovations compared to the CAL. According to these rules, if the parties have agreed to submit their disputes to the SHIAC and have handled their case, the said rules will apply to the parties, the material issues or the subject matter of the dispute, or "if the parties have agreed to submit their disputes to the FTZ Arbitration Court or have submitted their disputes to the SHIAC to be handled by the FTZ Arbitration Court, unless the parties have agreed otherwise" [17] (pp. 274-275).

By way of illustration, unlike the CIETAC Rules 2015 and the SHIAC Rules 2015, which refer to interim measures, the SHFTZ Arbitration Rules provide separately for interim measures and indicate that they may be used to protect property or evidence from being transferred or damaged: "a) property preservation measures; (b) evidence preservation measures; and (c) measures requiring a party to perform certain acts or prohibiting a party from performing certain acts; (d) pre-arbitration interim measures; (e) emergency arbitrator procedures; and (f) procedures for modification of interim measures" [17] (pp. 277). However, it should be stressed that the parties still rely on the support of the local people's courts when applying for interim measures. This also applies to the enforcement phase. In addition, the SHFTZ Arbitration Rules contain specific provisions on time limits. According to these rules, "if a party applies for a preservation order before or during the arbitral proceedings, such application shall be accepted immediately", and "in urgent cases, if the relevant requirements stipulated by law are met, a decision shall be made within 24 hours and then transferred for enforcement immediately" [17] (p. 278).

Another innovation, which is certainly worth highlighting, relates to emergency procedures. According to the SHFTZ Arbitration Rules, a party may decide to request interim relief from a provisional arbitrator. Such a possibility is available in the period between the acceptance of a case and the constitution of the arbitral tribunal. Thus, the SHFTZ Arbitration Rules provide that a provisional arbitrator may issue an urgent decision within 20 days of his appointment. Similarly, the arbitral tribunal could issue such a decision within the same period after receiving the request for interim measures. Overall, it could even be said that the SHFTZ Arbitration Rules provide for convenient time limits both for the appointment of the

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interim arbitrator and for the issuance of the decision. Therefore, the parties can obtain the said interim relief in a relatively short period of time [17] (p. 277).

Thirdly, the SHFTZ Arbitration Rules are relatively innovative with regard to the appointment of open-listed arbitrators. Indeed, there is a dual mechanism model, which means that the parties "may either appoint arbitrators from the panel of arbitrators or recommend persons from outside the panel of arbitrators as arbitrators". The parties "may also agree on the joint recommendation of a person from outside the arbitral tribunal as president/sole arbitrator" (Art. 27 SHFTZ). In addition, Article 9 of the Judicial Review of Arbitrators Appointed Outside the Arbitral Tribunal provides that "[i]f one or more of the parties recommends/jointly recommends arbitrators or the presiding (sole) arbitrator from outside the Arbitral Tribunal, it shall be recognised in the judicial review, if the appointment has been confirmed by the Chairman of the SHIAC, the appointed persons meet the qualification criteria set forth in Article 13 of the PRC Arbitration Law, and the appointment procedure is lawful under the SPFTZ Arbitration Rules and relevant provisions of Chinese laws" [17] (p. 278). These rules give the parties greater freedom to nominate and select arbitrators outside the panel.

Finally, the SHFTZ Arbitration Rules also contain some provisions regarding an award ex aequo et bono. These provide that "if the parties have so agreed in the arbitration agreement or have made a written request in the course of the arbitration proceedings, the arbitral tribunal may make an award ex aequo et bono, provided that such an award does not contravene mandatory provisions of law and public policy" (Article 56). In addition, under Article 13 of the Opinions, "where the arbitral tribunal makes an award ex aequo et bono, the procedure may be recognised in judicial review, provided that the procedure is jointly agreed by the parties in writing, does not violate any mandatory provisions of Chinese laws and the award made in the procedure is in accordance with the SHFTZ Arbitration Rules" [17] (pp. 278-279).

Overall, it could even be said that the solutions adopted in the SHFTZ reflect practices widely used in major international arbitration institutions worldwide. Notwithstanding these innovations at work in the SHFTZ, there are still some practical issues that need to be addressed. To illustrate, there is a potential conflict between the SHFTZ Arbitration Rules and the CAL. One example is the recognition of the implied arbitration agreement under the SHFTZ, which is not widely permitted under the CAL. Moreover, there are no supporting measures for the implementation of such introduced innovative solutions in civil proceedings. This situation applies, for example, to interim measures. According to the SHFTZ Arbitration Rules, the arbitral tribunal is competent to decide on interim measures, while the civil procedure grants such power to the local people's courts. In practice, such ambiguity leads to a situation where either the

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arbitral tribunal or the civil court can decide on the interim measures. As a result of this uncertainty, there are still many practical doubts as to whether such a decision could be enforced in the PRC [17] (p. 279).

Another interesting solution has recently been adopted within the SHFTZ. The State Council of the PRC issued the "Framework Plan for the New Lingang Area of the China (Shanghai) Pilot Free Trade Zone" (中国（上海）自由贸易试验区临港新片区总体方案) on August 6, 2019. According to Article 4 of the Framework Plan, it is allowed for reputable foreign arbitration and even dispute resolution institutions to register with the Shanghai Municipal Bureau of Justice and the so-called judicial administrative authority of the State Council. After fulfilling these requirements, they can set up a business in the New Lingang Area of the SHFTZ. Under this solution, such registered foreign institutions can handle civil and commercial disputes arising not only from international trade, but also from maritime affairs and investment. Interestingly, the above-mentioned institutions could also issue rules for the purpose of granting interim measures to both PRC and foreign parties. This solution aims to support the entire dispute resolution process, including the preservation of assets and evidence. Prior to the enactment of this Framework Plan, foreign arbitral institutions could decide to set up their representative offices since 2015. At present, the following representative offices exist within the SHFTZ: the Hong Kong International Arbitration Centre (HKIAC), the Court of Arbitration of the International Chamber of Commerce (ICC), the Singapore International Arbitration Centre (SIAC) and the Korean Commercial Arbitration Board (KCAB). While such a solution seems interesting, there are some uncertainties regarding the status of the awards. For example, the question arises as to whether an award would be domestic or non-domestic. Indeed, such a distinction has practical significance in terms of the setting aside and enforcement of awards [11].

According to the above plan, the SPC also issued the "Opinions on Providing Judicial Services and Safeguards for the Construction of the Lingang Special Zone of China (Shanghai) Pilot Free Trade Zone by People's" (关于人民法院为中国（上海）自由贸易试验区临港新片区建设提供司法服务和保障的意见) on December 27, 2019. Following these opinions of the SPC, the Shanghai High People's Court also issued the so-called "Implementation Opinions on Providing Judicial Services and Safeguards for the Construction of the Lingang Special Area of China (Shanghai) Pilot Free Trade Zone by Shanghai Courts" (上海法院服务保障中国（上海）自由贸易试验区临港新片区建设的实施意见). In fact, the two opinions pave the way for the development of a different approach to dispute resolution compared to other local people's courts in China. Thus, the Shanghai Courts will also provide a one-stop dispute resolution platform based on the cooperation of international commercial mediation and arbitration institutions. Thus, they could provide a complex service that includes not only mediation and arbitration, but also

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litigation. This solution is similar to the practice of the China International Commercial Court (CICC) [8]. It is noteworthy, however, that the other local courts have not yet experimented with such innovations thus far [3].

6. DISPUTE RESOLUTION MECHANISMS IN THE GUANGDONG AND CHONGQING FTZS

Another example is the second set of FTZs operating in China, the Guangdong Pilot Free Trade Zone (GFTZ). Interestingly, in this case, the GFTZ is linked to the Shenzhen International Arbitration Institute (SIAI). It is noteworthy that this institution has adopted a special management model, which is significant in terms of the independence of the arbitral institution and the arbitral tribunal itself. For example, the SIAI introduced the so-called Board of Directors, which is crucial in terms of changing the status quo of Chinese arbitration institutions [14] (p. 612).

The Municipal Committee approved the SIAI on July 20, 2021. This allowed the SIAI to establish the "Guangdong-Hong Kong-Macau Greater Bay Area (GBA) International Arbitration Centre". Indeed, the said Centre will provide better opportunities for exchanges and cooperation among arbitration and mediation institutions operating in the Guangdong-Hong Kong-Macau GBA [12]. (SCIA, 2021).

Finally, the SIAI has also broadened the scope of its jurisdiction. Therefore, it can also handle investment disputes involving a country and foreign investors. The newly amended Arbitration Rules ensure that the SIAI can also apply the UNCITRAL Arbitration Rules in handling this type of dispute. However, despite the efforts to attract more foreign parties, there are still many challenges, mainly related to the insufficient number of professional arbitrators and the lack of global reputation [16].

The Chongqing FTZ (CFTZ) took a different approach to dispute resolution. The Liangjiang New Area (Pilot Free Trade Zone) Court has established a special mechanism widely known as "one-stop international commercial dispute resolution". In fact, there is also a Chongqing One-Stop Diversified International Commercial Dispute Resolution Centre, which provides services based on the combination of litigation, arbitration and mediation. In practice, this mechanism benefits from diversity, efficiency and convenience. Therefore, it is considered a competitive component to improve the legal environment in the CFTZ [18].

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7. SHIFT TOWARDS UNIFORM LEGISLATION ON DISPUTE RESOLUTION IN FTZS

At present, there are many pitfalls regarding the dispute resolution mechanism within China's FTZs. Some FTZs have not even established arbitration institutions (e.g., Hubei Liaoning). Notwithstanding the increasing number of enterprises within the FTZs and thus the increasing number of commercial disputes, there is a need to establish professional arbitration institutions. This would ensure the relatively quick resolution of disputes. In order to achieve this goal and attract more foreign parties to settle their disputes in China's FTZs, it is necessary to unify the legislation on dispute resolution mechanisms [14] (p. 613).

Firstly, the Chinese legislature does not provide for a single set of rules governing arbitration in FTZs at the national level. Indeed, there are no similar solutions in the United States or Singapore. Therefore, the rule of "law first, zone later" does not apply in the case of the PRC. This means that there is no law applicable to the full range of Chinese pilot FTZs. In addition, the binding provisions of the Chinese Arbitration Law (CAL) are not fully in line with international standards and practices, particularly with respect to the ad hoc and emergency arbitration systems [14] (p. 613).

Secondly, the FTZs are based on the General Scheme, which could be defined as a regulatory document for the construction of each FTZ. This General Scheme includes the following issues: financial reform, tax regulation, transformation of government functions, and rule of law construction. One could say that there is nothing wrong with such content, but there are too many pitfalls regarding the level of formality and weak operability of this document. In view of the adoption of this system, the Ministry of Commerce, together with local governments, prepared the content of such a document, which was then approved by the State Council. However, there are discrepancies between the subject of the formulation and the subject of the approval. As a result, there are many controversies regarding the status of the General Scheme itself and some restrictions related to its application [14] (p. 613).

Thirdly, there is too much legislation at the national level, which is relatively difficult for foreign parties to follow. To illustrate, apart from the General Scheme, which is the basis for each FTZ, there are some normative documents, such as the Management Measures for Pilot Free Trade Zones and the Regulations for Pilot Free Trade Zones. The former are generally issued by the local governments for the purpose of day-to-day management, while the latter are issued by the local people's congresses. As a result, the legal norms for FTZs mostly refer to local legislation [14] (p. 613).

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Given the obstacles to Chinese dispute resolution mechanisms in FTZs, it is worth outlining possible solutions that could be adopted there. Firstly, it seems necessary to broaden the scope of admissibility of arbitration agreements, in particular with regard to "written form". Secondly, it seems necessary to adopt less strict requirements about the substantive elements of the arbitration clause/agreement itself. Such a relaxation should, for example, relate to the possibility of non-direct invalidity of an arbitration agreement. Under such a solution, in the case of a will to arbitrate and litigate, the method of dispute resolution would be based on the choice of the party who first initiated the proceedings (arbitration or litigation). Finally, if there is no clear choice of an arbitral institution to handle a dispute, the arbitration agreement should not be invalid in such a case. In fact, the number of arbitration institutions in China is increasing, and legislation cannot easily keep up with the constant changes. Therefore, one could refer to the recommendation to infer the appropriate arbitration institution from the content of the parties' dispute and the nature of the contract itself [14] (p. 614).

8. CONCLUSIONS

Although China uses legal transplants, including dispute resolution mechanisms, there are still many differences with international standards. The FTZs seem to pave the way for the introduction of new standards and the start of arbitration reform. However, the main problem is the lack of unified legislation for dispute resolution of Sino-foreign cases within the FTZs. In fact, there is no uniform legislation at the national level. As a result, each FTZ in China has its own rules and regulations on dispute resolution. Some of them have even decided to set up "one-stop-shop" platforms like the CICC (e.g., Chongqing FTZ). While all these solutions are innovative compared to the Chinese Arbitration Law (for example, in terms of interim measures, ad hoc arbitration or emergency arbitrators, etc.), there is still a need to unify these solutions to make them more comprehensive for foreign parties.

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SOLUCIÓN DE DISPUTAS SINOESTRATEGICAS EN LAS ZONAS DE FRANCO COMERCIO DE CHINA

RESUMEN

China está realizando importantes esfuerzos para cumplir con los estándares internacionales en materia de resolución de disputas. El país ha establecido los Tribunales Comerciales Internacionales de China (CCPI) en Shenzhen y Xi'an, mientras que las Zonas de Libre Comercio (ZLC) piloto están desarrollando sus propios mecanismos para la resolución de disputas comerciales internacionales. Este artículo examina los recientes avances y las soluciones implementadas en diversas ZLC de China. El análisis concluye que China está empleando la transposición legal y revisando diversas soluciones para resolver disputas dentro de las ZLC. Por lo tanto, las ZLC están facilitando la reforma de la resolución de disputas en China. Sin embargo, actualmente no existe una legislación nacional uniforme para las disputas sino-extranjeras que se gestionan en las ZLC. En su lugar, cada ZLC adopta sus propias normas de resolución de disputas, incluyendo instituciones de arbitraje especializadas y plataformas de "ventanilla única". Para alentar a más partes a resolver sus disputas sino-extranjeras en las ZLC, se requiere un enfoque y un conjunto de regulaciones unificados.

Palabras clave: China, resolución de disputas, zonas de libre comercio, arbitraje

中国自贸区中外纠纷解决机制

摘要

中国正大力推进争端解决机制与国际标准的接轨。中国已在深圳和西安设立了中国国际商事法院，同时，各自贸区也在构建各自的国际商事纠纷解决机制。本文考察了中国各自贸区近期在争端解决方面取得的进展和已实施的解决方案。分析表明，中国正在借鉴和借鉴自贸区内的各种纠纷解决方式。因此，自贸区正在推动中国争端解决机制的改革。然而，目前尚无统一的国家层面立法规范自贸区内中外纠纷的解决。各自贸区各自制定了不同的纠纷解决规则，包括设立专门的仲裁机构和“一站式”平台。为了鼓励更多当事方在自贸区内解决中外纠纷，亟需一套统一的规则和方法。

关键词：中国、争端解决、自由贸易区、仲裁

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SMART CONTRACTS UNDER THE EGYPTIAN CIVIL LAW: STRUCTURE AND TERMINATION

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ABSTRACT | 摘要 | RESUMEN

The prevalence of digital technologies in contemporary human interactions has elevated the role of digital means in contractual relations among society members, prompting renewed attention to smart contracts as automated, code-based legal instruments. This study examines the nature, structure, and operational mechanisms of smart contracts, comparing them to traditional contract theory under the Egyptian Civil Code (Law No. 131/1948). Smart contracts create binding obligations through software-based processes that rely on encryption, offering efficiency but also posing technical and doctrinal challenges. The paper investigates whether the Egyptian legal framework can adequately address issues such as consent, validity, termination, and dispute resolution in digital contracts. By analyzing smart-contract characteristics through the lens of Egyptian civil-law principles, the study seeks to clarify how existing doctrines may be adapted to accommodate emerging technologies. It ultimately proposes a jurisprudential foundation for integrating smart contracts into Egyptian law, ensuring legal certainty and coherence with established contractual norms.

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1. INTRODUCTION

Critical technological developments bear glaring impacts on legal fields. i.e., contractual aspects. Whenever a new technology appears on the horizon, it casts its shadow on transactions that have legal effects. International trade no longer follows traditional patterns of contract and transaction formation but has evolved, driven by successive technological developments, into electronic contracts. The latter are characterized by concluding via remote communication. Technological progress exceeded this stage to produce smart contracts, which enable the automatic formation and execution of contractual terms and conditions in the digital environment. The core pillar of this sphere is blockchain technologies. Smart contracts are a creative production of this newly emerging technology [6] (p. 477). The emergence of blockchain technology and smart contracts in the digital environment enhances trust and transparency in digital transactions while reducing reliance on intermediaries. Moreover, it helps reduce costs and increase operational efficiency.

This novel mechanism has recently emerged in the context of concluding traditional or electronic contracts. Smart contracts are the next generation of electronic contracts, as they are information programs that aim to implement the contract automatically without human intervention [6] (p. 482). An intermediary documents the transaction between the contractors on its platform using blockchain technology [12] (p. 7). Despite being advantageous, adopting blockchain technologies in contracts imposes several challenges due to contradictions with the existing legislative frameworks, which tend toward traditionalism. The contradiction creates legal and technical odds in practice, including the legislative vacuum of blockchain technology regarding contract theory. Moreover, questions arose about legal solidity, the contract's flexibility, its ability to be modified, and the dissolution of the contractual bond through termination.

The research aims to clarify how smart contracts work and identify areas that can benefit from their application, e.g., trade, law, and finance. It seeks to provide researchers and decision-makers with a deep understanding of the technical and legal challenges associated with adopting this technology from the perspective of Egyptian Civil Law by reviewing the contractual conceptions of smart contracts and blockchain technologies. Thus, it provides an appropriate legal and regulatory framework that supports the safe and efficient application of smart contracts.

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2. SMART CONTRACT FROM AN EGYPTIAN LEGAL PERSPECTIVE BACKGROUND

The concept of the smart contract has crystallized in contemporary legal thought through jurisprudential efforts that worked to understand its essence and adapt its technical content to the legal reference with a disciplined structure. Legislative efforts have combined with it through what the legislative authority has formulated in terms of legal texts that include an explanation of the concept of the smart contract within their midst.

2.1 Smart Contract Concept in Jurisprudence and Legislation

The Egyptian legislature defined the digital contract in Law No. 5/2022 on regulating and developing the use of financial technology in non-banking financial activities[1]. Under this law, a digital contract is a contract that includes the rights and obligations of the contracting parties electronically and can be recorded in a digital register. Accordingly, the digital contract may be a "smart contract" through a program that aims to implement, control, or document the provisions of the contract automatically.

However, the definition of a smart contract is not as simple as what the Egyptian legislator stated in the aforementioned law; as we will explain, the smart contract is not a contract in the traditional, conventional sense. For some, it is an information program that seeks to implement the contract in an automatic, self-executing manner without the intervention or mediation of others [6] (p. 482). For others, it is a computer program that works through blockchain technology and is implemented through the network. It is a program that plays an effective role in the automatic implementation of the conditions set in advance by the programmer [7] (p. 3). They are contracts that have been integrated with blockchain technology, granting them special technical characteristics consistent with the many advantages that this technology offers, including legal security and automatic execution of the contract after verifying the availability of the contract's elements. Their powerful technological advantages offer enhanced abilities to express the intents of the contracting parties and introduce their agreed-upon obligations and duties automatically.

Therefore, smart contracts are an advanced version of traditional contracts that are capable of executing and enforcing their terms automatically without human intervention when specific conditions are met [11] (p. 869). Accordingly, the smart contract is coded in a programming language by programmers, unlike traditional contracts that are written in a natural language, whether Arabic or English, by lawyers, legal experts, or the contracting parties themselves. This fact applies to the terms, conditions,

[1] Official Gazette No. (5) bis (d) dated 2/8/2022.

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and clauses of the contract. They are formulated as agreed upon by parties in the form of lines of symbols, codes, and programming and are stored on platforms operating with blockchain technology with a time stamp and are not subject to change or cancellation [7] (p. 4-5). When certain conditions are met according to the agreement, the required legal effect is produced, such as the transfer of ownership or payment of money. This reflects the smart contract's technical characteristics when integrated with platforms that operate with blockchain technology, which are security, transparency, stability, and non-amendability.

2.2 Egyptian Conventional Theory of Contract

Comparing the concept of the smart contract from the technological aspect with what is stipulated in the general theory of contracts reveals that the contract, according to the traditional theory, is every legal act issued by consent that is recognized by the law and is intended to create a legal status immediately upon its conclusion, such as sales, lease, and insurance contracts, or immediately upon the issuance of acceptance, such as an agency contract [17] (p. 458). In the judicial conception, the Egyptian Court of Cassation does not distinguish the smart contract concept from the conventional concept rooted in civil law and doctrine. The Court applies the conventional contract theory to each agreement intended to create a legal effect between parties[2].

Civil law jurisprudence emphasizes consent as the chief requirement of the contract concept [17] (p. 735). It should be explicitly stated in the agreement structure, and the acceptance should agree with the offer and be free from defects of will. The second requirement lies in the existence of the subject and its ability to be specified. The subject must be legitimate and not violate public order or morals [17] (p. 761-763). Last, the reason is the motive behind the contract and the commitment of the contracting parties. Whenever one of the pillars of the contract is missing, it becomes null and void [5] (p. 213-217). Therefore, if the contract contains elements of consent, subject matter, and cause, then it is valid, and the legal effects that the contracting parties intended will result from it[3]. The contract in its traditional form is written in one of the natural languages, whether Arabic or English, on paper or on electronic media.

To conclude, the smart contract is not a contract under the conventional conception of the general theory of contracts. At its core, it is a computer program or technological mechanism for the automatic implementation of the terms of the traditional contract, and it differs from the latter in terms of the language written in it and the absence of real oversight to ensure the availability and validity of its elements.

[2] Egyptian Court of Cassation - Appeal No.794 of 52 J.
[3] Egyptian Court of Cassation - Appeal No.12590 of 91 J.

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3. THE STRUCTURE AND CONCEPT OF BLOCKCHAIN TECHNOLOGY

The dominant factor operating in the environment of smart contracts is blockchain technology. Only platforms supported by blockchain technology can manage and conclude these contracts. Blockchain is an extensive database consisting of a series of blocks linked to each other via digital signatures, in which transactions are recorded between contracting parties using the electronic network, and information is sent between those blocks [1] (p. 2887-2889). A technology for storing and transmitting information transparently and securely without a central control body. It offers a protected, open-source database to document information, which safeguards against hacking. Moreover, this technology is tough and solid, and the document cannot be modified in any way. If the transaction is completed, it cannot be changed or reversed, and it does not require a third party. Blockchain operates through several platforms. Ethereum platforms are dominant in this aspect [16] (p. 96). They permit users to create the computer applications that they utilize to conclude the smart contract. Therefore, Ethereum's efficient capabilities enhance its use in digital contractual relations. In this section, the study reviews the debate over the impacts of blockchain's core features on contractual legal aspects under Egyptian Civil Law doctrine and jurisprudence.

3.1 Security

According to Mohamed Hassan (2023, p. 11), Smart contracts formed and executed on the blockchain are characterized by data protection, whether for parties or transaction data. This reflects blockchain's high security standards. However, this state of the art is not definite, as these digital platforms are vulnerable to several cyber threats, such as hacking or information technology outages. Furthermore, considerable concerns arise about the smart contract data confidentiality under conventional contract theories because utilizing novel technologies such as blockchain and smart contracts in concluding contracts triggers questions on the parties' confidentiality of identity, contradicting the obvious rules of the general theory of traditional contracts in Egyptian Civil Law [5] (p. 146-148). The chief requirement of the contract parties is the eligibility to perform legally. They should have the full capacity to execute legal acts. Determining this eligibility is straightforward for human users in traditional contracts, but not so straightforward for smart contracts, since smart contracts integrated into blockchain platforms rely on encryption. Without revealing the parties' true identities, it is difficult to verify that the party has fulfilled one of the contract's pillars, namely, capacity. This creates a technical odd that implies developing a solution to maintain the balance between the legal requirements for contract integrity and the effective use of technology to advance contractual relations.

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3.2 Non-amendability

Another technical odd concerns the flexibility of the smart contract, which might hinder the expansion of blockchain technology adoption in contractual relations. Ali Hassan (2022, pp. 764-769) argues that smart contracts are executed automatically according to the code or tokens once they are registered on a blockchain platform and cannot be modified. Therefore, the contract data becomes formidable to delete, modify, or change. This enhances the stability of the contractual relation reflected by the contract. However, errors in the contract structure cannot be remedied, which creates conflicts that threaten transaction stability [6] (p. 478). Being constant and non-amendable, the smart contract might not fulfill the requirements of Article 147 of the Egyptian Civil Law, which states that it must be "the law governing the parties' relation, and it may not be revoked or modified except by agreement of the two parties or for reasons determined by law." Consequently, the principle of the sovereignty of the will continues to dominate legal thought, emphasizing that neither party to a contract should revoke, terminate, or modify the agreement in any way that deviates from its terms unless mutual consent is obtained[4]. Thus, the smart contract's non-amendability creates an obstacle to the parties' common will to amend the contract's terms later, after it is concluded. Moreover, it contradicts the second paragraph of the aforementioned article that states "However, if exceptional general incidents occur that could not have been anticipated and their occurrence results in the implementation of the contractual obligation, even if it does not become impossible, becoming burdensome to the debtor in a way that threatens him with a huge loss, the judge may, according to the circumstances and after balancing the interests of both parties, reduce the burdensome obligation to a reasonable limit, and any agreement to the contrary shall be null and void." In light of this, it could be concluded that a chief effect of this feature is that smart contracts cannot be modified to keep pace with new developments and changes during the period of contract implementation, especially if implementation takes place over periods, as if it were a supply contract, for example, which restricts the authority of the judiciary to restore balance in contractual obligations.

3.3 Transparency

One notable feature of blockchain technology is its open-source nature, which grants everyone on the network access to information meant to be publicly available. At the same time, it enables the concealment of sensitive information, ensuring it is visible only to specific individuals. [12] (p. 37) This combination of openness and selective privacy makes blockchain a technology characterized by both transparency and confidentiality.

[4] Egyptian Court of Cassation Appeal No.14167 of 89 J.

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A potential conflict may arise in this context when considering the general theory of contracts, which allows parties to define the terms of their agreements so long as they do not violate public order. Contracts might contain sensitive information or trade secrets, posing a challenge when utilizing blockchain technology to execute smart contracts.

4. USING BLOCKCHAIN TO CONCLUDE CONTRACTS UNDER EGYPTIAN CIVIL LAW

4.1 Practical Mechanism

Once the concept of blockchain technology is clarified, one of its most significant applications is the execution of smart contracts. However, this is not always the case, as smart contracts can function independently of blockchain. Through blockchain technology, the process of creating and fully executing certain contracts can be carried out entirely without human involvement [16] (p. 96). Therefore, smart contracts within the blockchain pass through several stages.

The first stage involves converting the contract terms and conditions from natural language (human language) to a programming language, expressed as symbols and code necessary to operate and activate smart contracts [7] (p. 5).

The second stage includes copying the code (contract) onto the blockchain platform. The programmer uploads the contract to the platform using encryption techniques and inserts the smart contract into a blockchain block, which contains other transactions and is permanently added with an electronic timestamp. [5]To specify the date and time of the transaction so that anyone can track it [7] (p. 5).

The third stage is contract implementation. When the conditions set in advance are met, the contract automatically implements its terms and clauses, producing its legal effect between the parties. It no longer depends on the will of its two parties or a third party and does not require any additional approvals or procedures [7] (p. 6).

Finally, after execution, the smart contract remains stored within the blocks unless its structure and programming include a "self-destruct function" to end its legal and real existence.

[5] What is placed on an electronic document and takes the form of letters, numbers, symbols, signs, or other things that link that data to a specific time to prove the existence of that electronic document at that time - Ministry of Communications and Information Technology Resolution No.467 of 2024 amending the executive regulations of Law No. 15 of 2004 regulating electronic signatures and establishing the Information Technology Industry Development Agency. Published in the Egyptian Gazette - Issue 141 (continued) dated 7/2/2024.

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4.2 Challenges

Despite the benefits of technological developments, practice reveals flaws and shortcomings that pose technological and legal challenges, hindering the adoption of smart contracts in legal life.

4.2.1 Technological Challenges

Concluding contracts and converting them into symbols and codes by reformulating the traditional contract from the natural language in which it was written to the programming language - computer language - in the form of code, i.e., symbols and forms consisting of a set of instructions in the form of a condition and a result, meaning that if the condition is met, the effects result [12] (p. 32). The smart contract is written in one of two languages, one of which is called "Python" and the other is called "JavaScript". This requires knowledge of the basics of programming, as the two mentioned languages are programming languages. Because the programmer may not be a legal professional and lacks essential legal background, the contract code would be legally inefficient.

The contracting parties must trust the programmer tasked with translating the contract's terms and conditions into code. The possibility of technological illiteracy among the contracting parties underscores the significance of this trust [7] (p. 6-7); [11] (p. 872). Moreover, if the parties were completely aware of the technological aspects of the smart contract, they still might be challenged by severe cyber threats, either caused by poor technical designs, programming, construction, and structure of the smart contract or deficiences of the digital platform where the contract stored within that offers security vulnerabilities [16] (p. 97); [8] (p. 4).

4.2.2 Legal Challenges

During the implementation of the contract, especially contracts that require a period for their implementation, e.g., supply contracts, accidents, or other circumstances may occur that temporarily or permanently prevent the parties' complete fulfillment of their contractual obligations, either due to force majeure or unforeseen circumstances. Consequently, a judicial intervention is initiated to restore the contractual balance by amending the contract. However, the impossibility of amending rigid smart contracts due to their core blockchain's rigidity frustrates judicial efforts to restore this balance. This constitutes an obstacle against the effective application of the theories of force majeure and unforeseen circumstances [16] (p. 98); [9] (p. 189). Thus, certain jurists have suggested adopting multiple assumptions when setting the terms of the smart contract, thereby enabling any emergency circumstances that may arise to be addressed [6] (p. 497).

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In addition, when the parties have a dispute concerning the smart contract, which document should be presented to the court? Is it the contract in its traditional form or its coded form? If it is in the second case, what is the technical ability of the court to interpret it? Accordingly, the issue of understanding and interpreting the smart contract in its technological form in light of the contracting parties' will represents a legal challenge to activate smart contracts in contractual contexts because their programming structural technological complexity and ambiguity might prevent flexibility [7] (p. 8); [12] (p. 40). Therefore, the contracting parties should exert due care when programming the contract terms to demonstrate their true intention under the principle of freedom of expression of will.

Moreover, the physical implementation of the smart contract in the real world still lacks legal and jurisprudential theories [16] (pp. 102-103). A de facto legislative and jurisprudential vacuum dominates the legal scene regarding implementing smart contracts. This state-of-the-art makes smart contracts immune to oversight, facilitating the conclusion of terms that violate fundamental public order or general contract theory rules. In particular, core principles governing the implementation of traditional contracts prove inefficient in the technological context of smart contracts. The digital electronic theme of smart contracts jeopardizes the manifestation of moral principles, such as bona fide and the prevention of arbitrary clauses [12] (p. 43)

Given the confidentiality that blockchain platforms provide regarding the contracting parties' identities, they frustrate the determination of the parties' actual identities and verification of their ages and legal capacity [6] (p. 495). Consequently, the contract becomes a black box that contradicts the required clearance and transparency.

Thus, being non-specialists in the technological field, jurists should seek to develop legislation for blockchain technology and smart contracts. A technician's assistant is essential to ensure the effectiveness and applicability of the legislation. Legal technicians must participate in laying the foundation for legislation to encompass all aspects of technology.

5. TERMINATION OF THE SMART CONTRACT

5.1 General Rules

Upon their full implementation, contracts expire under the traditional theory in civil law. This consequence is not absolute, as several factors may override the ordinary termination of contracts. Rather,

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the contractual relationship terminates differently, and the parties return to their pre-contractual legal positions as a penalty for the termination resulting from their failure to fulfill their contractual obligations. Under Article 154/1 of the Egyptian Civil Law, the contract-binding force permits a party to terminate it once the other party fails to fulfill his contractual obligations, upon notifying the other party and providing compensation if there is a reason for it. Moreover, Article 158 permits the automatic termination of a contract without resorting to courts upon the failure to fulfill its obligations. Automatic termination still requires notification unless the contracting parties explicitly agree to an exception. Jurisprudence affirmed this principle[6]. The legislator intended to introduce a contractual penalty for violations of the parties' contractual obligations to preserve the legal conception of contractual liability. The penalty includes removing all obligations and duties arising from the contract by dissolving the contractual bond and treating it as if it had never existed. As a consequence, each party restores the original pre-contract status [17] (p. 212).

Therefore, jurisprudence reveals that contract termination in the civil law doctrine has one root: the failure of one of the contracting parties to fulfil contractual obligations. Then, the other contracting party can initiate judicial proceedings to terminate the contract and seek an appropriate remedy or adhere to the termination condition contained in the contract. Both approaches stipulate mutual contractual binding on the parties, since the termination rules aim to release the contracting party from their obligations as a result of the other contracting party's failure to fulfil their reciprocal obligations. Accordingly, the Egyptian Court of Cassation decided that the legislative exemption from the general rule of contract judicial termination, as provided in Article 158, sought to highlight the prominence of the parties' consensus over the contract's existence[7]. This ruling implies that the principle is the judicial termination, and the exception is that it is consensual and occurs by force of law once the violation occurs. The judiciary's role is to reveal the termination, not to establish it.

Terminating the contract triggers the principle of restoring the parties' original pre-contract status as a retroactive effect of contracts included in Article 160. Each contracting party recovers what they provided to the other while implementing the contract[8]. This means returning everything to its original state and treating the contract as void from its inception. The parties return to the state they were before concluding the contract. If this is impossible, compensation may be awarded. Then, that rescission

[6] The Egyptian Court of Cassation, Appeal No. 17714/81 J.
[7] The Egyptian Court of Cassation, Appeal No. 10494/85 J.
[8] The Egyptian Court of Cassation, Appeal No. 12058/87 J.

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includes the meaning of a penalty for the contracting party who fails to fulfil his obligation, which destroys the contract and dissolves the contractual relation [6] (p. 492).

In conclusion, the theory of contract termination in Egyptian Civil Law grants the parties the right to terminate the contract if one of the parties breaches contractual obligations. It returns them to the previous state before the contractual bond was formed upon termination.

5.2 Applicability to Smart Contracts: A Dilemma

In light of the above, the objective of contract termination rules is to provide legal protection for contractual relations within society due to their prominence in establishing an intact legal life. The chief consequence is to return the parties to their original status. This manifests the core of contract termination theory.

Smart contracts, being constructed on blockchain technology, ensure the automated implementation of their clauses according to specific technical mechanisms and procedures [12] (p. 9). Automatic execution prevents human intervention at any stage [12] (p. 33). The question revolves around the applicability of general contract termination rules in the pure technological environment of smart contracts, where the contracting parties exercise no actual control over the contract's execution.

To settle the dilemma, Ali Shah and Al-Saadi (2022, p. 114) suggest permitting the parties to exclude the retroactive effect rule, assuming that adopting a smart contract reflects their intention to avoid this rule, or that the contracting parties would enforce the retroactive effect manually outside the contract digital environment, i.e., the real world. This solution offers an alternative to the blind automated process of the smart contract implementation. In contrast, Al Dabousy (2024, p. 396) claims that technological constraints would prevent the application of this penalty to smart contracts. Moreover, it would contradict the bona fide principle in the implementation of the contract. Thus, he suggests applying this penalty electronically.

To conclude, the direct application of contract termination general rules of the Egyptian Civil Law to smart contracts is unimaginable, given the firm stability of smart contracts and the glaring inability to modify them after registering their core code on the platform. Therefore, resorting to an unconventional solution accords with logic in addressing this technical dilemma concerning the dissolution of the contractual relationship. The research introduces self-destruct as a mechanism to terminate a smart contract, addressing the legal vacuum in Egyptian Civil Law doctrine and jurisprudence.

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6. SELF-DESTRUCTION OF THE SMART CONTRACT: UNCONVENTIONAL SOLUTION

In the structure of smart contracts, automated tools are utilized to enhance their effectiveness and produce legal effects between the parties. Meanwhile, they administer the termination of the contract, ending its legal existence and automatically erasing contractual traces without the parties' intervention. The research introduces the selfdestruct function as an unconventional mechanism for automatically terminating a smart contract. It proves controversial because of its risks, making the smart contract like a building that explodes in a controlled internal explosion. Likewise, when the smart contract's self-destruct function is triggered, it ceases to exist. Selfdestruct is the "big red button" of smart contracts - the ultimate kill switch for the legal existence of the contract.

6.1 Demonstrating the Function

The concept of smart contract self-destruction emerged initially as a cyberattack targeting the cryptocurrency assets held by smart contracts in 2017, causing financial losses of approximately $152 million to the contracting parties [10] (p. 516). Consequently, self-destruct gained a negative reputation in the technical community, triggering serious concerns about its potential use in legal and commercial transactions. However, smart contract developers incorporated this technology into the smart contract's core blockchain. They sought to employ self-destruct to terminate smart contracts and end contractual relations.

Unlike Bitcoin's restricted architecture, smart contracts' core programming is the Ethereum blockchain. Ethereum offers smart contract developers ultimate and broad authority to create contracts, define the obligations of their parties, and determine the resulting legal positions and impacts of the contracting parties [8] (p. 4) because of its self-executing code. Upon activation, the smart contract operates automatically and permanently until termination.

The self-destruct function is provided for smart contracts built on the Ethereum blockchain to terminate the contract and end its effects. Nevertheless, Chen et al. (2021, p. 1) consider it a double-edged sword in the contracting process because the use of the self-destruct function enables contracting parties and stakeholders to remove smart contracts and transfer the crypto assets, which enables them to face emergencies such as cyberattacks. However, this function might complicate contracting processes because of crypto assets' vulnerabilities to cyber threats, which inflict damage to the contracting parties' legal positions.

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Despite the smart contract's non-amendability, self-destruct allows the parties to terminate an existing contract and replace it with another that satisfies the modifications they require [8] (p. 6). This possibility can be implemented throughout the smart contract's life cycle. In this case, it is limited to terminating and destroying the initial version of the contract. The parties then create a new version that responds to emerging requirements during the implementation of the original contract [8] (p. 16). This scenario is common in legal life due to the ongoing changes in human relations and needs. Flexibility that promotes the endurability of contractual relations among society members. This use of self-destruct proves smart contracts' ability to evolve continuously and eliminates their criticized rigidity [14] (p. 544). Moreover, this function enables the contracting parties to address force majeure and other unforeseen circumstances that arise during smart contract implementation and hinder the parties' fulfillment of contractual obligations.

The nature of the Ethereum blockchain enhances the privilege of self-destruct. It is not an information network in the technical sense but rather an access permission for blockchains that encrypt legal and financial transactions between the contracting parties [8] (p. 5). These permissions are subject to continuous verification of their codes embedded in the smart contract blockchains to ensure a high level of security and effectiveness of the smart contract. This technical protection promotes adopting smart contracts in legal life.

Security against the vagaries of technology is the main motivation for adopting the self-destruct function to terminate smart contracts. It enhances the protection of the crypto assets reflected in the contract. Nevertheless, Parisi and Budorin (2023, p. 84) emphasize that smart contracts should not include self-destruct clauses unless necessary. Instead, smart contracts could be provided with the ability of temporal suspension to enhance the protection. This facility entails that the contracting parties refrain from implementing their contractual obligations for a period upon fulfillment of a condition stipulated in the contract programming code [8] (p. 28). Furthermore, the contract activation could be conditioned on the parties' digital signatures to strike a balance between the contract's existence, as its termination is not yet certain, and enhancing its adaptive ability to changing circumstances concerning the contractual relation.

It is worth noting that the close nexus between the Ethereum structure and the blockchain that constitutes the smart contract has prompted the suggestion of limiting the adoption of the self-destruct technique to contracts involving Ethereum assets [8] (p. 27). The need for this function disappears in other smart contracts because Ethereum is the most effective and high-quality blockchain system used to transfer and store contract-encrypted assets owned by the parties [15] (p. 318), providing an appropriate environment for exchanging digital assets.

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To sum up, the self-destruct function is the sole mechanism for terminating smart contracts and extinguishing their legal existence and effects on the contracting parties. Being purely technical, selfdestruct can accomplish this function in the Ethereum environment due to its automation. Upon termination of the smart contract, the contract automatically returns the encrypted assets it contains to their original owners, restoring the parties' pre-contract status.

6.2 Applicability Under Egyptian Civil Law

Employing the smart contract self-destruct function to govern its termination manifests a leap in legal doctrine, as using a technical function to eliminate an existing legal establishment is a novel question featured by a legislative and jurisprudential vacuum. Under the general rules of contract termination in Egyptian Civil Law, a contract may be terminated if a party fails to perform a contractual obligation. The harmed party can seek termination judicially or consensually. While the former is achieved by a court ruling, the latter depends on a terminative clause included in the contract, introducing an automatic approach to terminate the contract under Article 158 of the Egyptian Civil Law.

As previously mentioned, the self-destruct function is an automatic mechanism to terminate smart contracts. Without the parties' or the courts' intervention, the failure to satisfy a contractual obligation activates the destruction code, which initiates the termination process. An entirely automatic process that ends the contract's legal existence and eradicates its effects. Thus, the automatic self-destruct feature complies with the termination approach set out in Article 158. Since this article does not require a specific physical form for the automatic consensual approach, the parties may draft a specific approach, even if unconventional in legal practice. The technological benefits of algorithms and coded contractual structures drive the parties to adopt technical methods to end the smart contract's legal existence. The self-destruct function integrates powerful artificial intelligence capabilities into the contractual relationship, making it tighter and clearer. Therefore, it is recommended to take advantage of Article 158's broad conception of contract consensual termination by integrating technological mechanisms into the contract, as there is no contradiction between adopting technology in contracts and the general contract theory rules in the Egyptian Civil Law. Moreover, technology enhances the achievement of the true aims of the contract theory.

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7. CONCLUSION

The research reviewed smart contracts through an Egyptian lens, offering a modern technological approach to contracts. Blockchain technology ensures security but presents challenges, particularly its incompatibility with traditional Egyptian legal frameworks, which complicates its integration into legal transactions. While smart contracts benefit from automatic execution, their non-amendability conflicts with legal principles such as force majeure or emergency circumstances. A legal framework must be adopted by developing ad hoc legislation to regulate aspects of smart contracts that take into account their technical nature. To settle the dilemma, the study integrates contractual blockchains into traditional contract theory under Egyptian Civil Law, offering an unconventional solution that draws on law and technology.

The smart contract self-destruct function is an innovative method that offers automated termination but raises legal and technological complexities. In this context, the research emphasizes coordination between legal and technical experts on contractual issues to avoid legal loopholes arising from technological illiteracy. Indeed, adopting consensual solutions such as self-destruct promotes handling emergency circumstances. Last, the study contributes to enhancing the Egyptian legal understanding of smart contracts and blockchains as a novel form of contract theory.

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CONTRATOS INTELIGENTES BAJO EL DERECHO CIVIL EGIPCIO: ESTRUCTURA Y TERMINACIÓN

RESUMEN

La prevalencia de las tecnologías digitales en las interacciones humanas contemporáneas ha elevado el papel de los medios digitales en las relaciones contractuales entre los miembros de la sociedad, impulsando una renovada atención a los contratos inteligentes como instrumentos legales automatizados basados en código. Este estudio examina la naturaleza, la estructura y los mecanismos operativos de los contratos inteligentes, comparándolos con la teoría contractual tradicional del Código Civil egipcio (Ley n.º 131/1948). Los contratos inteligentes crean obligaciones vinculantes mediante procesos basados en software que se basan en el cifrado, lo que ofrece eficiencia, pero también plantea desafíos técnicos y doctrinales. El documento investiga si el marco legal egipcio puede abordar adecuadamente cuestiones como el consentimiento, la validez, la rescisión y la resolución de disputas en los contratos digitales. Al analizar las características de los contratos inteligentes a través de los principios del derecho civil egipcio, el estudio busca aclarar cómo las doctrinas existentes pueden adaptarse para dar cabida a las tecnologías emergentes. En última instancia, propone una base jurisprudencial para la integración de los contratos inteligentes en el derecho egipcio, garantizando la seguridad jurídica y la coherencia con las normas contractuales establecidas.

Palabras clave: contrato inteligente, Derecho Civil egipcio, blockchain, medios contractuales digitales, contratos inteligentes autodestructivos (selfdestruct).

埃及民法下的智能合约：结构与终止

摘要

数字技术在当代人际互动中的普及提升了数字手段在社会成员间契约关系中的作用，促使人们重新关注智能合约这种自动化、基于代码的法律工具。本研究考察了智能合约的性质、结构和运行机制，并将其与埃及民法典（1948年第131号法律）下的传统合同理论进行比较。智能合约通过基于软件的加密流程产生具有约束力的义务，这在提高效率的同时，也带来了技术和法理上的挑战。本文探讨了埃及法律框架是否能够充分解决数字合约中的同意、有效性、终止和争议解决等问题。通过运用埃及民法原则分析智能合约的特征，本研究旨在阐明如何调整现有法律原则以适应新兴技术。最终，本研究提出了将智能合约纳入埃及法律的法理基础，以确保法律确定性并与既定的合同规范保持一致。

关键词：智能合约、埃及民法、区块链、数字合约手段、自毁式智能合约（selfdestruct）

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THE WTO AND THE CHALLENGES OF GLOBAL TRADE: RISKS AND OPPORTUNITIES IN THE CURRENT LANDSCAPE

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ABSTRACT | 摘要 | RESUMEN

No one can doubt today the close relationship between international trade and development. In this regard, the existence of a universal multilateral trading system—based on rules, open, non-discriminatory, and equitable—constitutes one of the objectives underpinning the Sustainable Development Goals adopted within the United Nations framework. From the perspective of commercial actors, the impact of the rules derived from the World Trade Organization on their commercial activities becomes essential. The pursuit of legal certainty is essential in business, particularly in international trade. In this regard, one can distinguish between a public-legal framework and a private dimension, the latter being "regulated" by the rules of Private International Law.

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1. INTRODUCTION

To begin with, it is necessary to contextualize the functioning of the multilateral trading system. Today, the close relationship between international trade and development is beyond dispute. While economists may debate the intensity of that relationship and the varying degrees of influence exerted by the different international organizations involved in development processes, there is a broad consensus on the fundamental role that trade plays in the economic and social development of States—and, by extension, of the individuals who comprise them. Within this context, the existence of a universal, rules-based, open, non-discriminatory, and equitable multilateral trading system stands as one of the core objectives of the Sustainable Development Goals adopted under the auspices of the United Nations.

However, the path toward the current multilateral system—even in its present state of crisis—has undergone several phases. International economic relations evolved through various classical models. Thus, the mercantilism of the 16th, 17th, and early 18th centuries gradually gave way to the free trade model. Free trade emerged as a reaction against the strong protectionist stance of States towards national industries and the imposition of import restrictions.

It can therefore be argued that the international community did not possess a truly multilateral instrument for progress and peace in the sphere of economic relations until the establishment of the General Agreement on Tariffs and Trade (GATT) in 1947. Indeed, the Industrial Revolution marked a shift from an agrarian, rural economy to one that was urbanized, industrialized, and mechanized. This transformation gave rise to the notion of economic liberalism and the emergence of free trade as a means of facilitating the exchange of goods through the elimination of tariff barriers. "Free markets" and "free trade" thus became essential components of economic development and the efficient allocation of resources. What has come to be known as the "first era of globalization," underpinned by the British Empire and the gold standard, fostered the liberalization of markets and the expansion of free trade.

Nevertheless, the economic rise of the United States beginning in the 1880s, based on a strongly protectionist model, sparked concern among British merchants, who began demanding that their government increase protection against foreign competition. This marked the resurgence of the debate over protectionism and a shift toward a model of international economic relations founded on bilateralism. Between 1880 and the end of the Second World War, a recurrent tension—a back and forth—between free trade and protectionism became evident. Efforts to forge a consensus within the League of Nations to halt what Francisco Comín termed the "disintegration of international trade" proved unsuccessful, largely due

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to the opposition of the United States, which caused the failure of the 1933 London International Economic Conference.

At that conference—convened in response to the crisis known as the "Great Depression"—France and the United Kingdom proposed establishing a fixed parity between their respective currencies. A stable relationship among the dollar, the pound sterling, and the franc was envisioned as a mechanism to support the recovery of global trade and the world economy. However, U.S. President Franklin Delano Roosevelt had already planned the imminent devaluation of the dollar as part of his interventionist economic program, the so-called New Deal. As a result, each state began implementing its own national strategies to combat the crisis.

Following the end of the Second World War, the war economy gave way to a new model of economic cooperation, which emerged as one of the principal forms of interaction among States. This transition was significantly accelerated by the Marshall Plan, which—beyond contributing to the reconstruction of the European economy through access to capital goods, energy resources, and raw materials—also encouraged economic liberalization across Europe, beginning with the liberalization of national markets.

Although economic cooperation and economic integration are often conflated and even used interchangeably, they represent distinctly different realities. In general terms, economic cooperation seeks to reduce barriers to trade, while integration involves their elimination. Cooperation may occur between countries with vastly different structures: distinct monetary, fiscal, and social security systems, as well as divergent views on business and enterprise. Integration, by contrast, requires the harmonization of the institutional framework governing the economy. According to some scholars, economic integration currently represents the most common form of economic relations among States. In any case, integration entails the establishment of international economic organizations. This path has been followed since the end of World War II, such that—according to data from the IMF and the World Bank—there are now more than 300 Regional Trade Agreements, approximately 200 international economic organizations or agencies, and between 20 and 30 integration-oriented international organizations endowed with common institutions and involving a transfer of sovereignty.

In the current model of international economic relations, both international organizations and States are responsible for regulating the exchange of goods and services at the international level, thereby defining the public legal framework in which international trade takes place. Economic operators must be aware of these rules in order to conduct their transactions effectively, for instance, regarding the potential

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existence of tariffs or quantitative quotas in the destination country. What they seek is legal certainty. And this legal certainty comprises a dual dimension: on the one hand, a private dimension, governed by the rules of private international law; and on the other, a public dimension, regulated by the norms of public international law.

It is within the design of this public framework that the World Trade Organization (hereinafter, WTO) plays a fundamental role by establishing rules aimed at regulating a multilateral system of global trade.

2. BACKGROUND: FROM GATT TO THE WTO

The need to create an International Trade Organization (ITO) was first discussed during the Bretton Woods Conference in 1944. The aim was to expand international trade relations not only as a means of promoting prosperity but also as a contributing factor to world peace. The recent armed conflicts and the economic consequences of trade restrictions during the 1930s highlighted the importance of initiating a process of international economic cooperation. However, divergent approaches between the British and American delegations hampered progress. While the U.S. administration supported a fundamentally liberal position, the British made trade liberalization conditional upon the achievement of full employment[1].

To accelerate the process, the U.S. government proposed convening an International Conference on Trade and Employment and requested that the United Nations Economic and Social Council take the lead in organizing it. Prior to this, a group of fifteen countries had already begun negotiations aimed at tariff reductions, and two preparatory meetings had been held to lay the foundations for the future International Organization. During those meetings, however, the U.S. position began to grow more hesitant. The final conference, attended by 56 countries, took place in Havana between November 1947 and March 1948. It produced a draft convention known as the "Havana Charter," which, in addition to proposing the creation of the International Trade Organization, included a global trade code.

[1] Millet, Montserrat, La regulación del comercio internacional: del GATT a la OMC, Colección Estudios Económicos, nº 24, 2001, Servicio de Estudios La Caixa, p. 28. Available at: https://www.caixabankresearch.com/ee-24-es

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The convention never entered into force because it was not ratified by the United States, and as a result, the ITO was never established[2]. The U.S. refusal to endorse the ITO was driven by both economic and political factors, including the opposition of various domestic interest groups to the liberal trade agenda of the Truman administration, as well as the increasingly hostile political environment of the Cold War[3].

In its place, international trade would be governed for nearly fifty years by an agreement originally intended as a provisional instrument: the General Agreement on Tariffs and Trade (hereinafter, GATT). This agreement, also promoted by the United States, sought to achieve multilateral tariff reductions[4].

There was no need, therefore, for an institutional structure, as the agreement was intended to remain in force only until the entry into force of the Havana Charter and the establishment of the future organization. The GATT was signed at the Palais des Nations in Geneva on October 30, 1947, by 23 countries[5], and entered into force on January 1, 1948.

Until January 1, 1995—the date on which the World Trade Organization (WTO) officially commenced operations—eight rounds of multilateral trade negotiations had taken place under the framework of GATT[6]. It was during the eighth round, the Uruguay Round (1986–1994), that the GATT Contracting Parties agreed to establish a new organization endowed with permanence and international legal personality. The evolving political and economic circumstances of the time, the phenomenon of globalization, and the consequent broadening of the substantive scope of states' trade policy rendered the "provisional" structure created in 1947 no longer suitable to meet the new needs of its members. Both the original 1947 GATT and the outcomes of the multilateral negotiation rounds were incorporated into the new organization, the WTO, as a kind of multilateral trade acquis. Thus, the GATT was a product of its origin and its provisional nature. It was conceived as a temporary framework with a mandate limited to tariff reduction.

[2] In 1950, the U.S. administration announced that it would not submit the “Havana Charter” to Congress for ratification. Consequently, the remaining signatory States (with the exception of Australia and Lebanon) did not proceed with their own ratifications.

[3] Palazuelos, Enrique and Alburquerque, Francisco (Coords.), Estructura económica capitalista internacional: el modelo de acumulación de posguerra, Ed. Akal, Madrid, 1990, p. 184.

[4] The authorization granted by the U.S. Congress in 1945 to negotiate reciprocal tariff reductions was valid for a maximum of three years, which was not deemed sufficient time to complete the negotiations and bring the proposed “multilateral trade system,” led by the ITO, into force.

[5] The original signatory countries were: the United States, the United Kingdom, France, Belgium, the Netherlands, Luxembourg, Canada, New Zealand, Australia, India, China, South Africa, Brazil, Cuba, Norway, Chile, Lebanon, Burma, Rhodesia, Syria, Ceylon, Pakistan, and Czechoslovakia.

[6] Geneva (1947), Annecy (1949), Torquay (1950–1951), Geneva (1956), Geneva (1960–1961 — Dillon Round), Geneva (1964–1967 — Kennedy Round), Tokyo (1973–1979 — Tokyo Round), Punta del Este (1986–1994 — Uruguay Round).

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Formally, the Marrakesh Agreement Establishing the WTO adopts the form of an international treaty, but it has a complex structure composed of the constitutive agreement and four major annexes. Among its various functions, the WTO administers five major multilateral agreements: Trade in Goods, Trade in Services, Trade-Related Aspects of Intellectual Property Rights (TRIPS), the Dispute Settlement Understanding (DSU), and the Trade Policy Review Mechanism (TPRM). The WTO's founding agreement itself consists of sixteen articles regulating the fundamental aspects of the organization's operation, including, inter alia, its functions (Article III), the institutional structure (Article IV), relations with other intergovernmental organizations and NGOs (Article V), the decision-making system (Article IX), and the procedure for the accession of new states and customs territories (Article XII).

To shift gears—borrowing a taurine metaphor—the Sustainable Development Goals (SDGs), adopted within the framework of the United Nations, recognized the fundamental role that a multilateral trading system must play in the economic development of states. This seems, at least to some extent, to "mitigate" the legitimacy deficit and place the system within a more functional perspective.

3. THE WTO: A FUNCTIONAL PERSPECTIVE

It has been asserted that the World Trade Organization (WTO) has come to play a fundamental role beyond merely regulating international trade relations, extending into the realm of global governance[7]. This is primarily due to the economic interdependence generated among States as a consequence of economic liberalization and the expansion of the trade sphere to more sensitive sectors for States, such as trade in services, agriculture, sanitary and phytosanitary measures, and intellectual property. However, beyond the potential legitimacy crisis facing the organization, the current situation—triggered by the "trade war" initiated by the United States and the consequent blockage of the Appellate Body by the latter—appears to jeopardize not only the reconstruction of a system already weakened by the economic confrontation between the U.S. and China over the past decade but also the very viability of the WTO itself.

Indeed, in 2018, U.S. President Donald Trump announced an increase in tariffs on steel and aluminum and, perceiving that the United States was being unfairly treated by the organization, halted the renewal of the Appellate Body of the Dispute Settlement Body (DSB). The DSB, and especially its

[7] See Sánchez Cordero Grossmann, Carla, "The Constitutionalization of the World Trade Organization: A Path to Legitimacy?", RJUAM, no. 20, 2009-II, p. 138, who argues that the purported benefits derived from membership in the WTO multilateral trade system "have been highly disparate and deeply asymmetrical."

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Appellate Body, whose decisions are binding, play an essential role in ensuring compliance with the WTO Agreements and trade rules.

The Appellate Body is composed of seven judges—experts in international trade—approved by consensus among the WTO's 166 members. By December 2019, only three members remained active, the minimum number required for the Body's functioning. On December 11 of that year, two of these members completed their maximum authorized eight-year terms, rendering the Body inoperative. This paralysis arose because the United States refused to endorse the appointment of new Appellate Body members during the thirty sessions dedicated by the WTO to this issue since November 2017, despite Mexico's leadership in nominating new judges. Nonetheless, U.S. skepticism toward the multilateral system predates the Trump administration, having originated during the George W. Bush administration (2001–2009) and continuing through Barack Obama's presidency (2009–2017). In this context, the European Union appeared to advocate for the creation of "Parallel Trade Courts," such as the Investment Court established under the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada.

Another noteworthy initiative, of a multilateral nature, was agreed upon in Davos (Switzerland) on January 24, 2020, between the European Union and ministers from sixteen WTO members (Australia, Brazil, Canada, China, Chile, Colombia, Costa Rica, Guatemala, South Korea, Mexico, New Zealand, Norway, Panama, Singapore, Switzerland, and Uruguay). This initiative launched an arbitration body conceived as a "temporary mechanism" and an alternative to the Appellate Body. It was an open alternative to the rest of the WTO members, based on Article 25 of the Understanding on Rules and Procedures Governing the Settlement of Disputes. This new mechanism was named the Multi-Party Interim Appeal Arbitration Arrangement (MPIA). However, the MPIA has been scarcely used: 1) In October 2022, Colombia initiated an arbitration proceeding against the EU concerning anti-dumping duties on frozen French fries originating from the Union, marking the mechanism's first official activation; and 2) In July 2022, the EU secured a favorable appellate arbitration award against Turkey in a case involving discriminatory practices in the pharmaceutical sector. Although the latter case was based on an ad hoc arbitration, MPIA procedures and rules were followed.

The current situation remains precarious, considering that the blockage persists alongside an ongoing tariff conflict. In the weeks preceding March 2025, President Trump announced a 25% increase in steel and aluminum tariffs effective that month, with an additional 25% increase for Canada and Mexico. In this context, the European Commission was reportedly considering challenging the tariff increase as unlawful before the WTO Dispute Settlement Body, notwithstanding the aforementioned dysfunctions. It

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is important to recall that only appellate rulings are binding. Similarly, in February 2025, China filed a complaint with the WTO arguing that U.S.-imposed tariffs are discriminatory and protectionist, thereby violating multilateral trade system rules.

In a similar vein, the EU is already preparing firm and proportionate countermeasures against the United States[8].It should be recalled that the United States' conduct constitutes an international wrongful act due to its breach of agreements adopted within the WTO framework, and thus of binding international law norms. Even Brazil, a major metal exporter that initially adopted a more "tolerant" stance—entertaining the possibility of not responding despite the global economic repercussions such countermeasures might provoke—has since opened negotiations with the U.S. administration, expressing its rejection of tariff increases and adopting domestic legislative measures in anticipation of possible counteractions.

Regarding the regulation of the multilateral trade system, it is first necessary to emphasize that WTO rules are addressed to States and International Organizations operating in international trade and are therefore rules of public international law. The ability of economic operators to invoke such rules in their private legal relations is extremely limited[9]. Traders cannot invoke WTO-derived regulations, such as those under GATT 1994 or the GATS in the services sector, before domestic courts when the applicable national law conflicts with those norms.

Nonetheless, this regulation impacts private commercial activity in two ways: a) it establishes a "harmonized" public legal framework for private commercial activities by removing trade barriers; and b) it may decisively influence the shaping of so-called police laws (laws of public policy).

Indeed, legal certainty for operators in their international commercial activities has a dual dimension. On the one hand, traders must be aware of potential tariffs or quantitative restrictions when planning their businesses and negotiating contracts. This is the public dimension, regulated by public law norms. On the other hand, there is a private dimension addressed by Private International Law. In a legally fragmented world with multiple judicial systems, it is necessary to ensure the continuity of cross-border private legal relations. That is to say, it is necessary to ensure that the transactions and contracts entered into by the parties do not "collapse" upon crossing state borders. In short, the validity of contracts must extend beyond the State in which they are signed and where the delivery of goods or the provision of

[8] On May 8, 2025, the press leaked a counterstrike of €95 billion in response to Donald Trump's tariffs.
[9] See Fernández Rozas, José Carlos, Arenas García, Rafael, and De Miguel Asensio, Pedro, *International Business Law*, IUSTEL, 2013, pp. 28–29.

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services, referring here to the most typical contracts in international trade, is to take place. It is precisely the need to guarantee legal relationships across space that lies at the origin of Private International Law and continues to constitute the essential element of the discipline. In this regard, the three classical pillars of Private International Law continue to provide answers to economic actors regarding: the courts with jurisdiction to resolve a potential dispute; the law to be applied by the authority responsible for adjudication; and the extraterritorial effectiveness of the decisions rendered by that authority.

If one accepts a limitation on States' international jurisdiction based on a criterion of reasonable proximity, one must also accept the extraterritorial effectiveness of judicial decisions from foreign courts[10]. Of course, there exist uniform substantive rules, both in international conventions (e.g., the 1980 Vienna Convention on the International Sale of Goods, or the Convention on the Contract for the International Carriage of Goods by Road—CMR) and in private regulations or soft law (such as INCOTERMS 2020 and the UNIDROIT Principles of International Commercial Contracts). Nevertheless, these substantive rules do not cover all sectors, may be dispositive, or ultimately rely on domestic law.

However, the rules adopted within the framework of the WTO may also affect so-called overriding mandatory provisions, as defined in Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I), thereby producing a new form of direct impact on the regulation of private-law relationships in international trade.

Indeed, an international contract is subject to a national law which, in the case of EU Member States, is determined pursuant to the aforementioned regulation. Yet, by definition, an international contract is connected to more than one State and may therefore generate negative consequences, which are commonly referred to as negative externalities. It is therefore undesirable for the contract to enjoy legislative immunity and remain entirely unaffected by the legal systems other than the lex contractus.

Specifically, Article 9 of the Rome I Regulation refers to the application of overriding mandatory provisions of the law of the forum, and to the possibility of giving effect to those of the country where the obligations arising out of the contract are to be or have been performed, insofar as those provisions render the performance of the contract unlawful. The provision does not refer to the mandatory substantive rules of the lex contractus, yet the majority of legal scholars in the field of Private International Law accept their potential application, insofar as they form part of the governing law of the contract.

[10] International judicial protection includes both declaratory protection and recognition enforcement. Therefore, the systems of international jurisdiction and recognition and enforcement of foreign judgments are “inextricably linked.” See Garcimartín Alférez, Francisco José, *Private International Law*, 4th edition, pp. 54–57.

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The influence of WTO law on overriding mandatory provisions can be seen both in a negative and a positive sense:

a) On the one hand, by precluding the application of overriding mandatory rules where they are incompatible with the core principles of the WTO;

b) On the other hand, by serving as a justification or legitimization for their imposition in international private relationships. It is not difficult to imagine, for example, States introducing de facto restrictions on international trade through the adoption of certain environmental regulations or standards that are contrary to the principle of non-discrimination or national treatment.

4. CONCLUSIONS

It is no longer possible to carry out a theoretical analysis of the legal framework governing international trade without referring to the distinction between the public and the private spheres—between the normative framework derived from public international law, particularly that developed by International Organizations, and the private or, if preferred, the "micro-framework" governing the legal relationships established between international trade operators. Indeed, traders themselves are, ultimately, the central actors in this field, and it is upon them that the consequences of the legal rules comprising international trade law are directly or indirectly imposed.

The ultimate aim of these rules is to provide sufficient legal certainty to encourage the formation of private-law relationships of an economic nature. Once again, it is not the legal status of the party that determines the nature of the legal relationship, contract, or transaction, but rather the capacity in which the party acts. Where a public entity, administration, or publicly owned corporation acts as a private party—devoid of sovereign prerogatives—the relationship is to be characterised as a private-law relationship within the sphere of international trade. However, this is by no means a novel conclusion; rather, it is one of the classical premises of Private International Law.

What is more innovative is the contemporary manner in which legal relationships of an economic nature within international trade are regulated—in other words, the modern approach to overcoming the longstanding challenges arising from the coexistence of multiple national legal systems and domestic courts within an increasingly global society, and, above all, the extreme difficulty in regulating such private relationships in a truly global manner.

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This is undoubtedly a defining feature of international trade law: the apparent failure of uniform law in the classical sense—that is, of normative instruments adopted by groups of States or within international organisations with the intention of being binding and universally applicable. Perhaps the most advanced manifestation of such efforts is the law emerging from economic integration processes. However, a more in-depth analysis would lead to the conclusion that, despite the existence of numerous ongoing economic integration initiatives, there has not yet been sufficient legal integration of cross-border private-law economic relationships.

This is not the place for a detailed discussion of this issue, but even a brief review of European Union legislation reveals this apparent failure. Various attempts to establish a European contract law have been unsuccessful, at least in achieving a binding and uniform legal framework.

A different matter—and one which has been noted—is the perspective of a global law based on the principle of party autonomy. This principle is increasingly viewed not only as a powerful tool for self-regulation but also as a means of norm generation, grounded in the knowledge and experience of the parties themselves. From this latter perspective, the conclusions we reach are far from pessimistic.

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LA OMC Y LOS RETOS DEL COMERCIO MUNDIAL: RIESGOS Y OPORTUNIDADES EN EL PANORAMA ACTUAL

RESUMEN

Hoy en día, nadie puede dudar de la estrecha relación entre el comercio internacional y el desarrollo. En este sentido, la existencia de un sistema multilateral de comercio universal —basado en normas, abierto, no discriminatorio y equitativo— constituye uno de los objetivos que sustentan los Objetivos de Desarrollo Sostenible adoptados en el marco de las Naciones Unidas. Desde la perspectiva de los actores comerciales, el impacto de las normas derivadas de la Organización Mundial del Comercio en sus actividades comerciales resulta esencial. La búsqueda de la seguridad jurídica es esencial en los negocios, en particular en el comercio internacional. En este sentido, se puede distinguir entre un marco jurídico público y una dimensión privada, esta última regulada por las normas del Derecho Internacional Privado.

Palabras clave: Comercio Internacional, Organización Mundial del Comercio, Sistema Multilateral de Comercio Universal, Acuerdo General sobre Aranceles Aduaneros y Comercio (GATT), Derecho Internacional Privado

世界贸易组织与全球贸易的挑战：当前形势下的风险与机遇

摘要

如今，国际贸易与发展之间的密切关系毋庸置疑。为此，建立一个基于规则、开放、非歧视和公平的普遍多边贸易体系，是联合国框架下通过的可持续发展目标的核心目标之一。从商业主体的角度来看，世界贸易组织规则对其商业活动的影响至关重要。追求法律确定性在商业活动中，尤其是在国际贸易中，至关重要。在这方面，我们可以区分公共法律框架和私人层面，后者受国际私法规则的“规制”。

关键词：国际贸易、世界贸易组织、普遍多边贸易体系、关税及贸易总协定（GATT）、国际私法。

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DELEGATED POWER, CAPTURED GOVERNANCE: HOW WEAKNESSES IN ADMINISTRATIVE ACCOUNTABILITY FUEL CRONY CAPITALISM AND SOCIAL INEQUALITY

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ABSTRACT | 摘要 | RESUMEN

The modern administrative state relies extensively on delegated legislation to address complex governance challenges, yet this reliance creates fundamental democratic accountability deficits. This paper argues that inadequate oversight mechanisms in delegated legislation processes create systematic vulnerabilities to crony capitalism and state capture, thereby exacerbating social inequality. Through theoretical synthesis and doctrinal analysis of administrative law principles, this research demonstrates how weak parliamentary scrutiny, limited judicial review, and insufficient public participation enable private interests to manipulate regulatory processes for personal advantage. The paper presents evidence showing that captured administrative decision-making systematically redirects public resources away from broad social welfare toward narrow elite interests, thereby reinforcing existing inequality structures. The research contributes a comprehensive framework linking administrative law design flaws to broader political economy pathologies and their social consequences, offering theoretical insights for administrative reform aimed at strengthening democratic governance and reducing inequality.

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1. INTRODUCTION

Contemporary democratic governance faces a fundamental paradox: the administrative mechanisms designed to enhance governmental efficiency and responsiveness increasingly undermine the democratic accountability they were intended to serve. Delegated legislation has become the predominant mode of law-making in modern democratic states, with executive agencies producing thousands of regulations annually that affect virtually every aspect of social and economic life [6]. While this delegation serves legitimate purposes of expertise and administrative efficiency, it simultaneously creates systematic vulnerabilities that enable private interests to capture regulatory processes for narrow advantage.

The central argument of this paper posits that deficiencies in democratic accountability and judicial review over delegated legislation create fertile conditions for crony capitalism and state capture, which function as primary drivers of social inequality in contemporary democracies. Unlike previous scholarship that treats these phenomena as separate pathologies, this research demonstrates their systematic interconnection through the institutional architecture of the administrative state itself. When delegated powers lack robust oversight mechanisms, they become vehicles for well-connected private interests to manipulate public policy for personal enrichment at the expense of broader social welfare.

This institutional vulnerability manifests through multiple pathways. Parliamentary oversight of delegated legislation remains inadequate due to resource constraints, technical complexity, and political incentives that favor concentrated interests over diffuse public benefits [13]. Judicial review provides only limited protection against subtle forms of capture, focusing primarily on procedural regularity rather than substantive capture or distributional consequences [26]. Public participation mechanisms, while formally available, are systematically exploited by well-resourced lobby groups who can afford the transaction costs of sustained engagement while excluding broader public interests [12].

The consequences extend far beyond administrative inefficiency to encompass fundamental questions of democratic legitimacy and social justice. Captured regulatory processes systematically favor policies that concentrate benefits among narrow elite networks while dispersing costs across broader populations, creating a form of "reverse redistribution" that exacerbates existing inequalities [28]. This pattern operates across multiple policy domains, from financial regulation that socializes risks while privatizing profits, to environmental regulations weakened by industry lobbying, to procurement processes that favor politically connected firms over competitive alternatives.

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This research contributes to existing scholarship by providing the first comprehensive theoretical framework linking administrative law design choices to broader patterns of inequality reproduction. While extensive literature examines regulatory capture, crony capitalism, and administrative accountability as separate phenomena, this paper demonstrates their systematic interconnection through the institutional vulnerabilities created by weakly supervised delegated legislation. The analysis reveals how seemingly technical questions of administrative procedure become sites of fundamental political contestation over the distribution of social resources and opportunities.

The paper proceeds through six main sections. Following this introduction, a comprehensive literature review synthesizes existing scholarship on delegated legislation, democratic accountability, regulatory capture, and social inequality to establish the theoretical foundation for the analysis. The methodology section outlines the theoretical synthesis approach and doctrinal analysis employed to examine these interconnections. The results section presents evidence for the systematic relationship between weak administrative oversight and inequality-generating capture. The discussion section analyzes the implications of these findings for democratic theory and administrative reform. The conclusion offers specific recommendations for strengthening accountability mechanisms to reduce vulnerability to capture and its inequality-generating effects.

2. LITERATURE REVIEW

2.1 Theoretical Foundations of Delegated Legislation

The scholarly literature on delegated legislation reveals fundamental tensions between administrative efficiency and democratic legitimacy that have persisted since the emergence of the modern administrative state. Classical administrative law theory conceptualized delegation through the "transmission belt" model, wherein agencies serve as neutral implementers of clear legislative directives [20]. This model assumed that explicit statutory guidance could adequately constrain administrative discretion while preserving democratic accountability through hierarchical control mechanisms.

However, empirical research consistently demonstrates that real-world delegation operates quite differently from this idealized model. Administrative agencies inevitably exercise substantial discretionary authority when interpreting and implementing broad statutory frameworks, effectively functioning as quasi-legislative bodies [21]. This reality reflects the practical impossibility of anticipating all implementation scenarios in advance and the need for expert judgment in technically complex policy domains. Yet it also creates what legal scholars term a "democratic deficit" wherein unelected officials make consequential policy choices without direct electoral accountability [8].

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The delegation doctrine in constitutional law attempts to address this tension through requirements that legislative delegations include "intelligible principles" to guide administrative discretion [15]. American courts have generally applied this standard with substantial deference to legislative judgments about appropriate delegation scope, striking down delegated authority only in extreme cases of standardless delegation [6]. However, critics argue that this deferential approach fails to address the more subtle forms of democratic accountability deficit that arise when agencies exercise broad discretionary authority under vague statutory guidance.

Recent scholarship has highlighted the particular vulnerability of delegated legislation to capture by organized interests who can afford the sustained engagement necessary to influence complex regulatory processes [18]. The technical nature of many regulatory issues creates information asymmetries that favor specialized industry participants over general public interests, while the volume and complexity of regulatory output overwhelm traditional oversight mechanisms [7]. These structural features make delegated legislation particularly susceptible to influence by concentrated interests seeking regulatory advantages.

2.2 Democratic Accountability Mechanisms and Their Limitations

Democratic accountability in administrative governance operates through multiple institutional mechanisms, each of which faces systematic limitations that create vulnerabilities to capture. Parliamentary oversight theoretically provides the primary democratic check on administrative action through various scrutiny mechanisms, including specialized committees, question periods, and legislative review procedures [23]. However, empirical research consistently reveals significant gaps between formal oversight authority and effective accountability in practice.

Parliamentary committees charged with reviewing delegated legislation face severe resource constraints that limit their capacity for meaningful scrutiny of voluminous regulatory output [33]. Technical complexity further compounds these limitations, as generalist parliamentarians often lack the specialized knowledge necessary to evaluate complex regulatory proposals effectively. Political incentives also work against vigorous oversight, particularly when the same party controls both executive and legislative branches, reducing incentives for aggressive scrutiny of administrative action [19].

Public participation mechanisms represent another theoretically important accountability channel, typically including notice-and-comment procedures, public hearings, and consultation requirements designed to ensure broad input into regulatory decision-making. However, research on administrative

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burdens reveals how these mechanisms can be systematically exploited by well-resourced interests while excluding broader public participation [12]. The transaction costs of sustained regulatory engagement favor organized groups with dedicated legal and lobbying resources over diffuse public interests that lack comparable organizational capacity.

Freedom of information and transparency requirements constitute a third category of accountability mechanisms, designed to ensure public access to information about administrative decision-making processes. While these requirements have expanded significantly in recent decades, their effectiveness remains limited by strategic disclosure practices that technically comply with legal requirements while obscuring substantive decision-making rationales [11]. Moreover, the sheer volume of information produced by modern administrative agencies can overwhelm the public's capacity to process and act upon disclosed information effectively.

2.3 Judicial Review as Administrative Control

Judicial review represents the most developed legal mechanism for controlling administrative action, with extensive doctrinal frameworks governing when and how courts will scrutinize agency decisions. Traditional grounds for judicial review include jurisdictional questions, procedural fairness requirements, substantive reasonableness standards, and constitutional compliance [3]. However, the effectiveness of judicial review as a check against capture faces several systematic limitations that reduce its utility as a primary accountability mechanism.

Judicial deference to administrative expertise represents perhaps the most significant limitation on review effectiveness. Courts typically apply deferential standards of review to agency interpretations of statutory authority and factual determinations within agency expertise, based on institutional competence arguments that agencies possess superior technical knowledge [5]. While this deference serves legitimate purposes of respecting agency expertise, it also limits judicial capacity to detect and remedy subtle forms of capture that operate through technically plausible but substantively biased decision-making.

Standing and reviewability doctrines create additional barriers to effective judicial oversight by limiting who can challenge agency actions and which decisions are subject to review. Traditional standing requirements favor parties with direct economic injuries over those asserting broader public interests, systematically excluding challenges based on diffuse harms like increased inequality or environmental degradation [9]. Reviewability limitations, including doctrines of agency discretion and political questions, further insulate many consequential administrative decisions from meaningful judicial scrutiny.

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The reactive nature of judicial review also limits its effectiveness as a control mechanism, as courts can only address agency actions after they have been implemented and only when proper parties bring challenges. This temporal lag allows captured agencies to implement favorable policies for extended periods before any judicial correction, during which significant private benefits may be extracted and policy precedents established. Moreover, the resource-intensive nature of judicial challenges favors well-funded interests that can afford sustained litigation over those lacking comparable legal resources.

2.4 Regulatory Capture Theory and Empirical Evidence

Regulatory capture theory provides the primary analytical framework for understanding how private interests gain systematic influence over administrative processes designed to serve broader public interests. Early capture theory, associated with scholars like George Stigler and Sam Peltzman, focused on industry capture of regulatory agencies through "revolving door" relationships and concentrated interest group influence [27]. This literature demonstrated how regulated industries could capture regulatory processes by exploiting their superior organization and resources relative to diffuse public interests.

Contemporary capture scholarship has expanded beyond simple industry capture to encompass more complex forms of influence, including "cultural capture," wherein regulatory officials internalize industry perspectives through professional socialization and "intellectual capture," wherein industry-favorable economic theories become dominant within regulatory agencies [4]. These subtler forms of capture can be more difficult to detect and remedy than crude forms of corruption or explicit quid pro quo arrangements.

Empirical research provides substantial evidence for capture phenomena across multiple regulatory domains. Financial sector studies document how regulatory agencies became dominated by industry perspectives during the deregulatory period, leading to the 2008 financial crisis, with regulators adopting industry-favorable interpretations of systemic risk and prudential oversight [34]. Environmental regulation research shows how industry influence systematically weakens environmental protections through technical rulemaking processes that favor industry cost considerations over environmental protection [26].

The telecommunications sector provides particularly clear evidence of capture dynamics, with detailed documentation of how major telecommunications companies gained systematic influence over Federal Communications Commission decision-making through revolving door relationships, technical information provision, and strategic litigation threats [30]. These studies reveal how capture operates

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through seemingly legitimate channels of expertise provision and regulatory engagement rather than obvious corruption.

2.5 Crony Capitalism and State Capture

Crony capitalism represents a systematic form of market distortion wherein business success depends primarily on political connections rather than competitive advantage in providing valuable goods and services. Unlike competitive capitalism, which theoretically rewards efficient resource allocation and innovation, crony capitalism creates wealth through preferential access to state resources and protection from competitive pressures [17]. This system undermines both market efficiency and democratic legitimacy by subordinating economic allocation decisions to political favoritism networks.

State capture represents the institutional mechanism through which crony capitalism operates, encompassing the systematic influence of private interests over state decision-making processes across legislative, executive, and judicial branches [13]. Unlike simple lobbying or interest group influence, state capture involves deeper structural relationships wherein state institutions become oriented toward serving narrow private interests rather than broader public purposes. This capture operates through multiple channels, including campaign finance, revolving door employment, technical information provision, and strategic litigation.

Academic research on crony capitalism emphasizes its systematic rather than episodic character, revealing how it becomes embedded in institutional structures rather than reflecting isolated instances of corruption [2]. Crony relationships typically involve ongoing exchanges of benefits between political officials and private interests, creating stable networks of mutual advantage that persist across electoral cycles and administrative changes. These networks develop their own internal logics and institutional protections that make them resistant to reform efforts.

The relationship between crony capitalism and inequality has received increasing scholarly attention as research documents how preferential access to state resources systematically concentrates wealth among politically connected elites while imposing costs on broader populations [28]. This dynamic operates through multiple mechanisms, including preferential tax treatment, regulatory exemptions, subsidized access to public resources, and protection from competitive pressures. The cumulative effect redistributes resources upward while creating barriers to social mobility for those lacking political connections.

2.6 Administrative Burdens and Inequality

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Recent scholarship on administrative burdens provides crucial insights into how seemingly neutral administrative processes can systematically reproduce and amplify social inequalities. Administrative burdens encompass the transaction costs that individuals face when accessing public services, including learning costs, compliance costs, and psychological costs associated with navigating complex bureaucratic procedures [12]. While these burdens ostensibly affect all citizens equally, empirical research demonstrates their systematically unequal impacts across different social groups.

The distributive effects of administrative burdens operate through multiple mechanisms that systematically disadvantage already marginalized populations. Higher-income individuals can more easily absorb the time and financial costs associated with complex administrative procedures, while lower-income individuals may be deterred from accessing benefits or services by these transaction costs [24]. Educational and linguistic barriers further amplify these effects, as complex administrative procedures often require skills and knowledge that are unequally distributed across populations.

Research on social policy implementation reveals how administrative complexity can function as a mechanism for rationing access to public benefits without explicit policy changes, effectively achieving distributive goals through procedural means rather than transparent political debate [22]. This "hidden redistribution" operates beneath public visibility while achieving systematic effects on resource allocation and opportunity distribution. The opacity of administrative complexity makes it difficult for affected populations to organize effective political resistance.

The intersection of administrative burdens with other forms of inequality creates compounding disadvantages for multiply marginalized groups. Research on immigration policy demonstrates how complex administrative procedures systematically exclude those with limited English proficiency, few financial resources, and limited legal knowledge, while providing advantages to those who can afford professional legal assistance [32]. Similar patterns operate across other policy domains, including healthcare, education, and social services.

3. RESEARCH METHODOLOGY

3.1 Theoretical Synthesis Approach

This research employs a theoretical synthesis methodology that integrates insights from administrative law, political economy, and inequality studies to develop a comprehensive analytical framework linking administrative accountability deficits to inequality reproduction. Theoretical synthesis

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differs from traditional literature review by actively constructing new theoretical relationships between previously disconnected scholarly domains rather than simply summarizing existing knowledge within established boundaries [14].

The synthesis process proceeded through several systematic stages. First, extensive literature mapping identified the core theoretical concepts and empirical findings within each relevant scholarly domain, including administrative law doctrine, regulatory capture theory, crony capitalism research, and inequality studies. Second, conceptual analysis examined the logical relationships between these different theoretical frameworks, identifying points of convergence, tension, and potential integration. Third, theoretical construction developed new analytical categories that could bridge insights across these domains.

The methodological approach draws upon established traditions in legal scholarship that emphasize doctrinal analysis combined with interdisciplinary theoretical integration. This approach recognizes that legal institutions both shape and are shaped by broader political and economic processes, requiring analytical frameworks that can bridge formal legal analysis with social scientific insights about institutional behavior and social outcomes [10].

3.2 Doctrinal Analysis Framework

The doctrinal analysis component examines administrative law principles across multiple jurisdictions to identify systematic patterns in how legal frameworks structure accountability relationships and create vulnerabilities to capture. This analysis focuses on formal legal rules governing delegation, oversight, and judicial review rather than attempting comprehensive empirical measurement of capture phenomena, which would require different methodological approaches.

The doctrinal analysis examines several key legal dimensions that structure accountability relationships in administrative governance. Delegation doctrines determine the scope of authority that can be transferred from legislatures to administrative agencies and the procedural requirements that govern such transfers. Oversight mechanisms establish formal channels through which democratic institutions can monitor and control administrative action. Judicial review doctrines define the scope and intensity of court supervision over administrative decision-making.

Comparative analysis across different legal systems reveals how variations in these formal institutional arrangements create different vulnerability profiles for capture and inequality-generating policies. While detailed comparative analysis exceeds the scope of this paper, the framework developed

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here provides a foundation for future research examining how different institutional designs affect capture susceptibility and inequality outcomes.

3.3 Case Study Integration

The analysis integrates illustrative examples and case studies to demonstrate how the theoretical framework applies to concrete instances of administrative decision-making and their social consequences. These examples serve to test and refine the theoretical arguments rather than providing comprehensive empirical proof, which would require different methodological approaches, including quantitative analysis of large datasets.

Case selection focused on instances where clear documentation exists of both administrative capture and measurable inequality effects, allowing examination of the causal pathways linking these phenomena. Examples span multiple policy domains, including financial regulation, environmental policy, telecommunications, and social policy, to demonstrate the generalizability of the theoretical framework across different substantive areas.

The case study analysis examines both successful instances of capture and cases where accountability mechanisms functioned more effectively, providing variation that helps illuminate the conditions under which different outcomes occur. This comparative approach strengthens the theoretical framework by identifying the specific institutional features that promote or inhibit capture and its inequality-generating effects.

4. RESULTS

4.1 Systematic Vulnerabilities in Delegated Legislation Processes

The analysis reveals several systematic vulnerabilities in delegated legislation processes that create predictable opportunities for capture by organized interests seeking regulatory advantages. These vulnerabilities operate through both formal institutional structures and informal practices that have developed around administrative rulemaking, creating multiple pathways through which private interests can gain disproportionate influence over public policy outcomes.

Information asymmetries represent perhaps the most fundamental vulnerability, as administrative agencies depend heavily on regulated industries for technical information necessary to develop complex

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regulations. While agencies possess formal information-gathering authority, practical constraints of time, budget, and expertise create systematic dependence on voluntary information provision by regulated entities [4]. This dependence creates opportunities for strategic information manipulation wherein regulated interests can shape regulatory outcomes by controlling the information available to decision-makers.

The analysis of consultation processes reveals how formally neutral participation mechanisms systematically advantage organized interests over diffuse public concerns. Industry participants typically possess dedicated regulatory affairs staff who can engage in sustained dialogue with agency officials throughout extended rulemaking processes, while public interest representation often depends on under-resourced advocacy organizations that cannot maintain comparable engagement levels [12]. This participation gap enables industry interests to dominate the substantive content of regulatory discussions.

Procedural complexity creates additional advantages for repeat players who develop expertise in navigating administrative processes while imposing transaction costs that deter sporadic participation by broader public interests. The Federal Register notice-and-comment process, for example, requires specialized knowledge of administrative procedure and regulatory drafting conventions that favor participants with legal and technical expertise over ordinary citizens attempting to express policy preferences [1]

4.2 Parliamentary Oversight Failures

Empirical examination of parliamentary oversight mechanisms reveals systematic failures to provide effective democratic accountability over delegated legislation, creating conditions that enable capture to operate without meaningful political correction. These failures operate through multiple channels, including resource constraints, institutional incentives, and procedural limitations that collectively undermine oversight effectiveness.

Resource analysis demonstrates that parliamentary committees charged with reviewing delegated legislation typically lack the staff, time, and technical expertise necessary for meaningful scrutiny of complex regulatory proposals. The House of Commons Delegated Powers and Regulatory Reform Committee, for example, reviews hundreds of statutory instruments annually with a small staff lacking specialized regulatory expertise [31]. This resource mismatch creates systematic capacity constraints that limit oversight to procedural compliance rather than substantive policy evaluation.

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Political incentive analysis reveals how partisan dynamics often undermine vigorous oversight, particularly when the same party controls both executive and legislative branches. Government MPs face electoral incentives to support their party's administrative agenda rather than conducting aggressive oversight that might embarrass their own government, while opposition MPs may lack access to information necessary for effective scrutiny [19]. These dynamics reduce oversight to symbolic rather than substantive accountability.

Procedural limitations further constrain oversight effectiveness by limiting parliamentary review to narrow procedural questions rather than broader policy merits. Most parliamentary review procedures focus on whether agencies have followed correct procedures and remained within statutory authority rather than examining whether regulatory outcomes serve broader public interests or distribute benefits and costs fairly across social groups [7].

4.3 Judicial Review Inadequacies

Analysis of judicial review doctrine and practice reveals systematic limitations that reduce court capacity to detect and remedy regulatory capture, particularly subtle forms that operate through technically competent but substantively biased decision-making. These limitations operate through doctrinal rules that prioritize administrative expertise and efficiency over democratic accountability and distributional fairness.

Deference doctrines represent the primary limitation on judicial oversight effectiveness, as courts typically defer to agency interpretations of statutory authority and factual determinations within agency expertise. While this deference serves legitimate purposes of institutional competence, it also limits judicial capacity to scrutinize substantive policy choices that may reflect captured decision-making [5]. Agencies can effectively immunize captured decisions from judicial review by embedding them within technically plausible analytical frameworks.

Standing and reviewability limitations create additional barriers by restricting who can challenge agency actions and which decisions are subject to review. Traditional injury-in-fact requirements favor plaintiffs with direct economic stakes over those asserting broader public interests, systematically excluding challenges based on diffuse harms like increased inequality or reduced social welfare [9]. This bias in access to judicial review reinforces the advantage that concentrated interests already enjoy in administrative processes.

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The reactive nature of judicial review further limits its effectiveness, as captured agencies can implement favorable policies for extended periods before judicial correction becomes possible. During these implementation periods, private interests can extract substantial benefits while imposing costs on broader populations, creating fait accompli situations that are difficult to reverse even when courts eventually intervene [23].

4.4 Pathways from Capture to Inequality

The research identifies several systematic pathways through which captured administrative decision-making translates into increased social inequality, operating through both direct resource transfers and indirect effects on market structure and opportunity distribution. These pathways reveal how seemingly technical administrative decisions can have profound distributional consequences that reproduce and amplify existing social hierarchies.

Direct resource transfer mechanisms operate through administrative decisions that explicitly redistribute resources from broad populations to narrow interest groups through preferential tax treatment, subsidies, regulatory exemptions, and favorable procurement decisions. Financial sector regulation provides clear examples, with captured agencies providing regulatory forbearance that socializes risks while privatizing profits, effectively transferring wealth from taxpayers to financial institutions [34]. Environmental regulation offers similar examples through exemptions and delayed implementation that impose public costs while providing private benefits to polluting industries.

Market structure effects operate through regulatory decisions that create or maintain barriers to competition, enabling incumbent firms to extract monopoly rents at consumer expense. Telecommunications regulation demonstrates this pattern through spectrum allocation decisions and interconnection rules that favor established carriers over potential competitors, resulting in higher prices and reduced innovation that particularly burden lower-income consumers who cannot afford premium services [25].

Opportunity structure effects operate through administrative decisions that shape access to education, employment, and social mobility pathways in ways that systematically advantage already privileged groups. Educational regulation provides examples through funding formulas and accountability measures that favor affluent districts over high-poverty schools, while licensing and credentialing requirements create barriers to employment that particularly affect those lacking social and economic capital to navigate complex regulatory compliance [12].

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The cumulative effects of these pathways create systematic patterns of "reverse redistribution" wherein administrative processes designed to serve broad public interests instead concentrate benefits among narrow elite networks while dispersing costs across broader populations. This pattern operates across multiple policy domains simultaneously, creating compounding disadvantages for already marginalized groups while reinforcing the political and economic advantages of connected elites.

5. DISCUSSION

5.1 Theoretical Implications for Administrative Law

The findings reveal fundamental tensions within administrative law doctrine that have important implications for legal theory and constitutional design. Traditional administrative law theory assumes that procedural regularity can adequately constrain administrative discretion while preserving both expertise and democratic accountability, yet the analysis demonstrates systematic failures in this approach when confronted with organized efforts to capture regulatory processes.

The central theoretical challenge involves reconciling administrative efficiency with democratic legitimacy under conditions where technical complexity creates systematic advantages for organized interests over diffuse public concerns. Current doctrinal frameworks attempt to address this challenge through procedural requirements and judicial oversight, but these mechanisms prove inadequate when capture operates through formally compliant but substantively biased decision-making processes.

This analysis suggests the need for new theoretical frameworks that explicitly incorporate distributional analysis into administrative law doctrine. Rather than treating administrative decisions as neutral technical exercises, legal doctrine should recognize their inherently political character and develop analytical tools for evaluating their distributional consequences. This might include requirements for explicit distributional impact assessment, heightened scrutiny for decisions that systematically favor concentrated interests, and expanded standing for challenges based on inequality-generating effects.

The findings also highlight the limitations of purely procedural approaches to democratic accountability in administrative governance. While procedural requirements serve important functions, they cannot substitute for substantive oversight mechanisms that examine whether administrative outcomes serve broader public interests rather than narrow private advantages. This suggests the need for hybrid approaches that combine procedural protections with substantive accountability mechanisms.

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5.2 Political Economy Insights

The analysis provides important insights into how institutional design affects political economy outcomes, particularly regarding the relationship between state capacity and inequality reproduction. While much political economy literature treats state institutions as exogenous constraints on private behavior, this research demonstrates how institutional design choices create systematic biases that favor particular social groups over others.

The findings suggest that conventional approaches to administrative reform that focus solely on efficiency and expertise may inadvertently exacerbate inequality by creating institutional structures that are more easily captured by organized interests. Reform efforts that emphasize deregulation, privatization, and reduced oversight may remove constraints on capture while failing to address underlying institutional vulnerabilities that enable inequality-generating outcomes.

This analysis points toward alternative reform approaches that explicitly incorporate distributional considerations into institutional design. Rather than assuming that efficient institutions will automatically serve broad public interests, reform efforts should examine how different institutional arrangements affect the distribution of political influence and economic opportunity across different social groups.

The research also reveals the dynamic relationship between economic inequality and political capture, wherein existing inequalities create political advantages that enable further inequality-generating policies. This suggests that addressing inequality requires simultaneous attention to both economic redistribution and institutional reform to reduce capture vulnerabilities.

5.3 Implications for Democratic Theory

The findings raise important questions for democratic theory regarding the compatibility of administrative governance with democratic legitimacy under conditions of high inequality and organized interest group activity. Traditional democratic theory assumes that electoral accountability provides adequate control over government action, yet administrative governance operates largely outside direct electoral control while making decisions with profound social consequences.

The analysis suggests that democratic accountability requires more than periodic elections when administrative agencies make consequential decisions on an ongoing basis. Effective democratic governance under modern conditions requires institutional mechanisms that can provide sustained

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oversight over complex administrative processes while ensuring that diverse social interests have meaningful opportunities to influence policy outcomes.

This research also highlights the importance of economic equality for democratic legitimacy, as high levels of inequality create systematic political advantages that undermine the theoretical equality of democratic citizenship. When wealthy interests can afford sustained political engagement while ordinary citizens face transaction costs that deter participation, formal democratic procedures may produce outcomes that serve narrow rather than broad interests.

The findings suggest the need for democratic innovations that can address these challenges through new forms of participation, oversight, and accountability that are adapted to the realities of modern administrative governance. This might include citizens' juries for complex policy issues, professional oversight bodies with explicit distributional mandates, and expanded resources for public interest representation in administrative processes.

5.4 Reform Implications

The analysis indicates several directions for institutional reform that could reduce vulnerability to capture while strengthening democratic accountability over administrative governance. These reforms operate at multiple levels, including constitutional design, statutory frameworks, administrative procedures, and civil society organizations.

Constitutional reform implications include potential amendments to delegation doctrines that would require more explicit distributional analysis in legislative delegations and expanded standing for constitutional challenges based on inequality-generating effects. While constitutional reform faces obvious political obstacles, the analysis suggests that current constitutional frameworks may be inadequate for addressing modern governance challenges.

Statutory reform possibilities include legislation requiring distributional impact assessment for significant regulatory actions, expanded resources for public interest representation in administrative processes, and strengthened oversight mechanisms with explicit mandates to examine inequality effects. The Administrative Procedure Act could be amended to require agencies to consider distributional consequences and provide enhanced participation opportunities for underrepresented groups.

Administrative procedure reforms could include proactive disclosure requirements that make regulatory processes more transparent, streamlined participation procedures that reduce transaction costs

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for public engagement, and professional standards for regulatory staff that emphasize public service over private advantage. Agencies could also develop internal review processes that explicitly examine distributional consequences of regulatory decisions.

Civil society reforms include expanded resources for public interest organizations, professional associations with public interest mandates, and educational institutions that can provide independent expertise to counterbalance industry influence. These reforms would require both public funding and private philanthropic support to create sustainable institutional capacity for representing broad public interests in administrative processes.

6. CONCLUSION

This research has demonstrated systematic connections between weaknesses in administrative accountability mechanisms and the reproduction of social inequality through captured governance processes. The analysis reveals how delegated legislation, while serving legitimate purposes of expertise and efficiency, creates institutional vulnerabilities that enable organized interests to manipulate public policy for private advantage at broader social expense.

The key findings indicate that current accountability mechanisms—parliamentary oversight, judicial review, and public participation—suffer from systematic limitations that reduce their effectiveness in preventing or correcting capture. These limitations operate through resource constraints, procedural complexity, deference doctrines, and participation barriers that collectively favor organized interests over diffuse public concerns.

The research identifies several pathways through which captured administrative decision-making translates into increased inequality, including direct resource transfers, market structure effects, and opportunity structure consequences that systematically advantage already privileged groups while imposing costs on broader populations. These effects operate across multiple policy domains simultaneously, creating cumulative disadvantages for marginalized groups while reinforcing elite political and economic advantages.

The theoretical contributions include a comprehensive framework linking administrative law design to inequality reproduction, demonstrating how seemingly technical procedural choices have profound distributional consequences. This framework reveals the inherently political character of administrative governance while providing analytical tools for evaluating institutional arrangements based on their distributional effects rather than purely efficiency criteria.

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The practical implications suggest several directions for institutional reform, including enhanced distributional analysis requirements, strengthened oversight mechanisms, expanded public participation opportunities, and increased resources for public interest representation. While these reforms face obvious political obstacles, the analysis indicates that addressing inequality requires simultaneous attention to both economic redistribution and institutional reform to reduce capture vulnerabilities.

Future research should examine these theoretical relationships through empirical analysis across different institutional contexts and policy domains. Comparative research examining how different accountability mechanisms affect capture susceptibility and inequality outcomes would provide valuable guidance for institutional design. Quantitative analysis measuring the distributional consequences of administrative decisions would strengthen the empirical foundation for the theoretical framework developed here.

The research also points toward normative questions about the appropriate balance between administrative efficiency and democratic accountability under conditions of high inequality and organized interest group activity. While this paper has focused primarily on descriptive and analytical questions, the findings raise important normative issues about how democratic societies should structure administrative governance to serve broad rather than narrow interests.

Ultimately, this research suggests that strengthening democracy under modern conditions requires more than periodic elections and formal procedural protections. It requires institutional innovations that can provide sustained oversight over complex administrative processes while ensuring meaningful opportunities for diverse social interests to influence policy outcomes. The administrative state need not be captured by narrow interests if democratic societies develop institutional capacity for broad-based accountability and participation.

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PODER DELEGADO, GOBERNANZA CAPTURADA: CÓMO LAS DEBILIDADES EN LA RENDICIÓN DE CUENTAS ADMINISTRATIVA IMPULSA EL CAPITALISMO DE AMIGOS Y LA DESIGUALDAD SOCIAL

RESUMEN

El Estado administrativo moderno depende en gran medida de la legislación delegada para abordar los complejos desafíos de gobernanza; sin embargo, esta dependencia genera déficits fundamentales de rendición de cuentas democrática. Este artículo argumenta que los mecanismos de supervisión inadecuados en los procesos de legislación delegada generan vulnerabilidades sistemáticas al capitalismo de amiguismos y a la captura del Estado, lo que posteriormente exacerba la desigualdad social. Mediante una síntesis teórica y un análisis doctrinal de los principios del derecho administrativo, esta investigación demuestra cómo el escrutinio parlamentario deficiente, la revisión judicial limitada y la participación pública insuficiente permiten que los intereses privados manipulen los procesos regulatorios para obtener beneficios personales. El artículo presenta evidencia que demuestra que la toma de decisiones administrativas capturadas redirige sistemáticamente los recursos públicos del bienestar social hacia intereses de élite, reforzando así las estructuras de desigualdad existentes. La investigación aporta un marco integral que vincula las fallas de diseño del derecho administrativo con patologías más amplias de la economía política y sus consecuencias sociales, ofreciendo perspectivas teóricas para la reforma administrativa destinada a fortalecer la gobernanza democrática y reducir la desigualdad.

Palabras clave: legislación delegada, Estado Administrativo, rendición de cuentas democrática, captura del Estado, capitalismo de compinches

权力下放，治理沦陷：行政问责机制的薄弱如何助长裙带资本主义和社会不平等

摘要

现代行政国家广泛依赖授权立法来应对复杂的治理挑战，然而这种依赖却造成了根本性的民主问责缺陷。本文认为，授权立法过程中监督机制的不足，使得国家容易受到裙带资本主义和权力攫取的影响，进而加剧社会不平等。通过对行政法原则的理论综合和教义分析，本文揭示了议会监督薄弱、司法审查有限以及公众参与不足如何使私人利益集团得以操纵监管程序以谋取私利。本文提供的证据表明，被权力攫取的行政决策系统性地将公共资源从广泛的社会福利转向狭隘的精英利益，从而强化了现有的不平等结构。该研究构建了一个综合框架，将行政法设计缺陷与更广泛的政治经济弊病及其社会后果联系起来，为旨在加强民主治理和减少不平等的行政改革提供了理论见解。。

关键词：授权立法、行政国家、民主问责制、国家权力被权力攫取、裙带资本主义

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LEGAL POSITION OF VILLAGE REGULATIONS MADE BY THE VILLAGE DELIBERATIVE BODY (BPD) IN THE HIERARCHY OF STATUTORY REGULATIONS

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Village regulations (Perdes) play a central role in linking national development policies with local needs, reflecting villagers' daily realities. Although crucial for governance, their legal status within Indonesia's legal hierarchy remains problematic. This study uses normative legal research to examine the regulatory gap surrounding the review of Perdes. While Perdes are subordinate to Regional Regulations, no institution—neither the Supreme Court nor the State Administrative Court (PTUN)—is clearly empowered to review their formal or material validity. As a result, Perdes occupy a legal grey zone lacking an authoritative oversight mechanism. This situation contradicts the constitutional principle of legal certainty under Article 28D(1) of the 1945 Constitution. The paper argues that the absence of a judicial review framework creates a legal vacuum that undermines accountability and the effectiveness of village-level governance and calls for reforms to properly integrate Perdes into Indonesia's system of statutory regulation.

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1. INTRODUCTION

Villages serve not only as administrative institutions; they are also places where daily community life takes place in a local way. Villages are where the most tangible development can be implemented. This is because villages serve as the meeting point between macro policies at the national level and micro realities on the ground. In this regard, the success of national development programs depends heavily on the ability of the central government, regional governments, and village officials to implement policies at the local level [8].

Furthermore, constitutional recognition of indigenous legal communities and their traditional rights, as stipulated in Article 18 paragraph (7) of the 1945 Constitution, demonstrates that the Indonesian state values the development of social and cultural diversity in many areas, including at the village level. With this recognition, villages as local government institutions gain sociological and historical legitimacy to play a significant role in the life of the nation. Furthermore, a special law, Law Number 6 of 2014 concerning Villages, enhances this foundation. This law significantly shifts the perspective on village management from being merely part of development to being part of active autonomy [16].

Villages are given greater authority in terms of regulation (local legislation), finance (Village Funds), and community development through the Village Law. First, in terms of government authority, the Village Law grants villages the independence to regulate and manage government affairs, development, community development, and community empowerment. Second, in terms of finance, the distribution of Village Funds, funded directly from the State Budget, is regulated. Therefore, villages are now actively involved in local development, not merely as objects of development [4].

The Village Consultative Body (BPD) is a fundamental pillar of democracy when villages are granted autonomy. It serves as a strategic partner to the Village Head in the regulatory process, conveying community aspirations and overseeing the implementation of village governance. The BPD's function is crucial in ensuring that village-level policy-making is participatory, transparent, and accountable. The BPD is a crucial part of contemporary village governance due to its legislative (discussing and agreeing on Draft Village Regulations with the Village Head), aspiration (accommodating and channeling community aspirations), and oversight (monitoring the Village Head's performance).

The existence of the Village Consultative Body (BPD) is a fundamental pillar of democracy within the framework of village autonomy. The BPD is a village "mini-parliament" with members elected from

the community. The BPD performs three primary duties, making it a strategic partner to the village head. As stipulated in Article 55 of the Village Law, the Village Consultative Body has the following functions:

1) Legislative Function (Discussing and Approving Village Regulations)

Article 55 letter a of the Village Law explicitly states that the BPD has the function of discussing and approving draft Village Regulations (Ranperdes) together with the Village Head. This demonstrates that the BPD is not merely a rubber stamp for the Village Head's policies, but rather plays an active and equal role in the regulation-making process at the village level. Approval from the BPD is an absolute requirement for a draft regulation to be ratified as a valid Village Regulation. This function ensures that every policy created reflects the aspirations and needs of the community, not just unilateral policies.

2) Aspiration Function (Accommodating and Channeling Community Aspirations)

According to Article 55, letter b of the Village Law, the BPD is responsible for receiving and disseminating community aspirations. This function serves as a communication channel between residents and the village government. The BPD must proactively listen to community complaints, hopes, and input before processing and officially submitting them to the Village Head and Village Government. It is crucial to do this work to ensure that policies made at the village level are truly based on community participation and real needs.

3) Supervisory Function (Overseeing the Performance of the Village Head)

As stipulated in Article 55, letter c of the Village Law, the BPD has an additional legislative function as a supervisor of the Village Head's performance. This function allows the BPD to oversee the implementation of Village Regulations, the Village Revenue and Expenditure Budget (APBDes), and established programs. The BPD uses this oversight to establish checks and balances, which are essential to ensure transparency, prevent abuse of power, and increase accountability in village governance.

Although Village Regulations play a crucial role, there are complex legal issues regarding their place within the legal system. This issue is paradoxical because, although Village Regulations are listed as a type of regulation in Article 8 paragraph (1) of Law Number 13 of 2022 concerning the Second Amendment to Law Number 12 of 2011 concerning the Formation of Legislation (hereinafter referred to as the P3 Law), the law does not explicitly place them below Regency/City Regional Regulations. This legal vacuum, or recht vacuum, raises doubts, as the principle of "lex superior derogat legi inferiori" (higher law overrides lower law) becomes unclear.

Ultimately, although vulnerable village regulations directly impact people's lives, their legitimacy is questionable and unequal, especially if their substance contradicts higher-level regulations. To ensure legal certainty and legal protection for every regulation made at the village level, this represents a legal gap that requires serious attention [14].

The consequences of this ambiguity are not only theoretical but have also had real implications in the field. Without a clear normative framework and adequate review mechanisms for the public to reject or challenge Village Regulations deemed detrimental, village officials and communities face significant legal vulnerabilities. Empirical findings across several locations indicate that Village Regulations (Perdes) are inconsistent with Regional Regulations (Perda) or higher-level regulations, resulting in losses for the community, regulatory chaos, and potential conflict [18]. For example, in cases of spatial planning and village levies that lack a strong legal basis and conflict with district/city regulations, the community suffers. At the same time, resolution efforts are time-consuming and costly, and cause social damage.

Given the complexity of the issues and the existing legal vacuum, an in-depth, highly relevant, and urgent research study is necessary. Theoretically, this research aims to examine the relationship between unique (sui generis) village regulations and the formal legal hierarchy system. It also examines the urgency of applying the principles of legisprudence to create rational, legitimate, and high-quality regulations.

This research should provide concrete solutions to unravel the legal tangle and restore the role of the Village Consultative Body (BPD). The BPD's role is expected to shift from being merely a supplementary organ to an equal strategic partner in formulating village legal products. To address this issue, an active role for local governments in more effective guidance and oversight of Village Regulations (Perdes) is needed. This will ensure that each Perdes has a strong legal framework and does not cause harm to the community. It is also a crucial step in restoring the BPD's role as a sovereign institution in driving village development. Based on the above background, the following research questions can be formulated: First, what is the legal standing of Village Regulations made by the Village Consultative Body (BPD) within the hierarchy of laws and regulations in Indonesia? Second, does the absence of a formal judicial review mechanism for Village Regulations impact legal uncertainty and harm to the community? The objectives of this study are as follows: First, to analyze and evaluate the legal standing of Village Regulations (Perdes) within the hierarchy of laws and regulations in Indonesia. Second, to examine the legal and social implications of the absence of a formal judicial review mechanism for Perdes, as well as its impact on legal certainty for village communities.

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2. RESEARCH METHOD

The research method used is normative legal research [21], using library materials or secondary sources collected. Legal research is also a process of determining legal rules, principles, and doctrines to address the legal issues at hand [9]. The basic materials used in this study came from library data. Everything related to data analysis is narrated holistically to achieve a comprehensive combination, and conclusions can be drawn in a balanced, structured manner using a deductive method.

One of the original results of this research is the 2021 study by Muhammad Iqbal Pajri from Muhammadiyah University of Palangkaraya entitled "Implementation of the Village Consultative Body (BPD) Function in Optimizing Development in Tuo Sumay Village, Sumay District, Tebo Regency." This research specifically discusses how the BPD in Sidodadi Village is implemented in accordance with Article 55 of Law No. 6 of 2014 concerning Villages: discussing and approving Village Plans. The BPD's functions consist of working with the village head, receiving and disseminating the village community's aspirations, and overseeing its performance. The BPD's functions consist of (a) discussing and approving draft village regulations with the village head (legislative function); (b) receiving and disseminating village community aspirations (aspiration function); and (c) supervising the implementation of village regulations and village head regulations.

Second, the BPD in Sidodadi Village, Masaran District, Sragen Regency faces challenges in implementing its functions in accordance with Law No. 6 of 2014. Internal challenges include obstacles arising within the BPD, such as the busyness of BPD members outside their activities and a lack of operational funds. External challenges originate from outside the BPD, such as the village government's work mechanisms that are not open to the BPD and a lack of operational funds.

Third, the Sidodadi Village Consultative Body (BPD) in Masaran District, Sragen Regency, has made various efforts to overcome obstacles hindering the implementation of its functions according to Law Number 6 of 2014: 1) Efforts to overcome internal obstacles by holding evening deliberations to reduce operational expenses; 2) Efforts to overcome external obstacles by holding coordination meetings between village officials to reduce village expenses.

Another research source is Sri Nurhayati, from Sebelas Maret University, in 2017, entitled "Supporting and Inhibiting Factors in the Role of the Tawengan Village Consultative Body in the Process of Establishing Village Regulations." The context of the content explains: 1. The Village Consultative Body functions to establish Village Regulations together with the Village Head, accommodate and channel

community aspirations, and conduct oversight. In addition to carrying out its function as a bridge between the Village Head and the village community, it can also act as an institution that acts as a representative institution for the community. The implementation of the duties and functions of the Village Consultative Body basically refers to the duties and functions of the institution that have been regulated in statutory regulations, namely carrying out legislative functions, accommodating and channeling community aspirations and supervisory functions.

The implementation of the legislative function of the Village Consultative Body has not been carried out effectively. However, in this case the Village Consultative Body in Tawengan Village also does not violate the regulation in this case Law Number 6 of 2014 concerning Villages and Government Regulation Number 111 of 2014 concerning Technical Guidelines for Village Regulations Article 7 paragraph (1) states that the Village Consultative Body can prepare and propose draft Village Regulations, paragraph (2) Draft Village Regulations as referred to in paragraph (1) except for the draft Village Regulation on the Village medium-term development plan, Draft Village Regulation on the Village Government work plan, draft Village Regulation on the Village APB and draft Village Regulation on the Accountability Report for the realization of the implementation of the Village APBDesa, because in reality the Tawengan Village Consultative Body has never submitted a Draft Village Regulation.

One of the supporting factors for the implementation of the Role of the Village Consultative Body in the process of Drafting and Determining Village Regulations is the community as the determinant of success in carrying out its functions, the implementation of the process of making Village Government regulations must involve the community as the subject of Village development and the cause of the ineffectiveness of the implementation of the duties and functions of this institution, especially the implementation of legislation, is due to the lack of understanding and skills and abilities of members of the Village Consultative Body in Drafting and Making a Village Regulation, in this case the Government has not implemented the rules made, in the Boyolali Regency Regional Regulation Number 10 of 2015 concerning Guidelines for the Preparation of Village Government Organizations and Work Procedures Article 19 paragraph (1) The Regional Government has the authority to guide and supervise the implementation of Village Government, Article 20 Guidance and supervision carried out by the Regional Government as referred to in Article 19 paragraph (1) includes: letter i reads organizing education and training for the Village Government, Village Consultative Body, Community Institutions, and traditional institutions.

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3. RESULTS AND DISCUSSION

The Position of the Village Consultative Body in the Constitutional System of the Republic of Indonesia

Constitutionally, the existence of the Village Consultative Body (BPD) embodies the principle of a self-governing community, as recognized in Article 18, paragraph (7), of the 1945 Constitution, which states that the state recognizes and respects customary law communities and their traditional rights. Therefore, the BPD has constitutional legitimacy to perform local legislative functions within the village government.

Given the Village Consultative Body's (BPD) role as a working partner of the Village Head, there is no doubt of an inseparable relationship between the two institutions. As a follow-up to Law Number 9 of 2015 concerning the Second Amendment to Law Number 23 of 2014 concerning Regional Government, the Government issued Government Regulation Number 47 of 2015 concerning Amendments to Government Regulation Number 43 of 2014 concerning Implementing Regulations of Law Number 6 of 2014 concerning Villages. The contents of this Government Regulation, among other things, regulate the implementation of the Village Government. Article 11 states that the Village Government consists of the Village Government and the Village Consultative Body (BPD) [1].

The Village Consultative Body, as regulated in the Government Regulation, is established under Article 29, which states, "The Village Consultative Body (BPD) serves as an element of the Village Government administration." Furthermore, Article 30 paragraph (1) states, "BPD members are representatives of the residents of the village concerned based on regional representation determined through deliberation and consensus." The duties of the Village Head are regulated in Article 14, paragraph (2), which states, "The Village Head has the task of administering government, development, and community affairs." The authority of the Village Head is regulated in paragraph (2) of Government Regulation Number 47 of 2015 concerning Amendments to Government Regulation Number 43 of 2014 concerning Implementing Regulations for Law Number 6 of 2014 concerning Villages."

The BPD carries out a legislative function at the village level, namely establishing Village Regulations together with the village head. This function essentially resembles the legislative function at the national level carried out by the DPR, albeit within a limited scope of authority. The existence of the BPD demonstrates the presence of a check-and-balance mechanism at the lowest level of government, as a means of implementing the principles of deliberative democracy in the village.

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From a constitutional law perspective, the BPD is a non-executive institution with representative and oversight functions. This is emphasized in Article 55 of the Village Law, which states that the BPD has three main functions: discussing and agreeing on draft village regulations with the village head, accommodating and channeling community aspirations, and overseeing the performance of the village government.

The BPD's position as a representative institution of the village community is not subordinate to the village head, but rather an equal partner working based on the principles of partnership, participation, and accountability. The horizontal relationship between the BPD and the village head strengthens the legal legitimacy of every public policy adopted at the village level. According to Lawrence Friedman's legal system theory, the effectiveness of legal institutions depends on the structure, substance, and culture of law. In the context of the BPD, all three must be in harmony: a clear institutional structure, legal substance in the form of legitimate authority, and a legal culture in the form of village community awareness to participate in decision-making [5]. The BPD's function is not only normative but also sociological. This means that the BPD serves as a means of social and political representation, enabling the community to voice its aspirations. Through this function, the BPD serves as a guardian of Pancasila values at the local level, particularly the fourth principle, which concerns democracy guided by the wisdom of deliberation/representation. The BPD's role as a representative of the village people is philosophically grounded in the concept of participatory democracy. In this system, political decisions are not solely derived from the will of the village elite but also from deliberations of all elements of society. This model is considered more in keeping with the social character of Indonesian society, which prioritizes collectivity and mutual cooperation.

Structurally, the Village Consultative Body (BPD) is not a regional government organ as stipulated in Law Number 23 of 2014 concerning Regional Government, but rather is part of the autonomous village government system. Therefore, the BPD is not subordinate to the district/city government hierarchy, but is an integral part of the village government, which enjoys autonomy under national law. In terms of authority, the BPD has the right to oversee the implementation of Village Regulations and the use of the Village Revenue and Expenditure Budget (APBDes). This authority is intended to maintain public accountability and prevent abuse of power at the village level. In practice, the BPD's oversight function often faces challenges due to limited human resource capacity.

From the perspective of the hierarchy of norms theory, the BPD obtains the authority to formulate regulations through delegation from higher-level regulations, namely the Village Law and District/City Regional Regulations. Therefore, legal products produced by the BPD must not conflict with higher-level

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legal norms, in line with the principle of lex superior derogat legi inferiori [10]. In state administration, the Village Consultative Body (BPD) serves as a counterbalance to the dominance of the village executive. This mechanism demonstrates the adaptation of the principle of checks and balances to village governance. Thus, the BPD is responsible for overseeing the implementation of village policies without exceeding the authority established by law. The concept of participation and representation upheld by the BPD aligns with the principles of good governance, particularly accountability, transparency, and public participation. The BPD is a crucial instrument for ensuring that village policies reflect the community's interests, not merely the administrative policies of the village head. Therefore, the BPD holds a crucial position in the Indonesian state system as a representative institution at the local level. Its function not only reflects village democracy but also strengthens the implementation of the rule of law (Rechtsstaat) at the smallest governmental level. The existence of the BPD is clear evidence that political and legal decentralization in Indonesia has reached the very roots of society.

The Village Consultative Body as a Local Legislative Institution in the Formation of Village Regulations

The Village Consultative Body (BPD) is a representative legislative body at the village level, playing a key role in formulating Village Regulations (Perdes). Based on Article 55 of Law Number 6 of 2014 concerning Villages, the BPD's function is to discuss and agree on draft village regulations with the village head. This function makes the BPD a local legal and political institution that exercises legislative authority at the micro-level, in accordance with the principles of decentralization and village autonomy.

From a constitutional law perspective, the BPD's role in formulating village regulations is the implementation of the principle of local self-government, namely the ability of village communities to regulate and manage their own affairs through democratic representative institutions. This principle reinforces the principles of recognition and subsidiarity as stipulated in Article 18B paragraph (2) of the 1945 Constitution.

The role of the Village Consultative Body (BPD) in the village-level legislative process is a miniature of the national legislative system. In this context, the BPD serves to balance the power of the village head so that it is not concentrated in one person's hands. The functional relationship between the BPD and the village head illustrates the principle of checks and balances as applicable in the national constitutional system.

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The BPD's authority in the formation of Village Regulations (Perdes) is rooted in Article 69 paragraph (1) letter b of the Village Law, which states that one of the village head's obligations is to implement village democracy through deliberation with the BPD. This means that the BPD functions not only as a formal approving body but also as a deliberative forum that determines the direction of village policy. Within the framework of the Stufenbau des Rechts theory developed by Hans Kelsen, Village Regulations are at a level of legal norms below Regency/City Regulations. Therefore, their formation process must adhere to the principles of legality and national legal hierarchy. The BPD's role as the institution that forms Village Regulations (Perdes) places it within the decentralized national legal system.

Meanwhile, Hans Nawiasky argued that in a legal system, every norm must be derived from and in accordance with a higher norm (die Stufenordnung der Rechtsnormen). In this context, the BPD's authority to establish Village Regulations derives its legitimacy from the Village Law, which in turn derives from the 1945 Constitution as the highest basic norm [11].

The formation of Village Regulations by the Village Consultative Body (BPD) has not only a normative dimension but also a sociological one. This is because the BPD is the institution closest to the village community, thus able to accommodate aspirations directly. Therefore, the process of forming Village Regulations should be a manifestation of active community participation in legal development at the local level. The concept of public participation in the formulation of Village Regulations is reinforced by Article 96 of Law No. 12 of 2011, in conjunction with Law No. 13 of 2022, which guarantees the community's right to provide input at every stage of the legislative process. Therefore, the BPD is obliged to involve community elements openly, both through village deliberations and consultative forums.

In practice, the BPD often faces implementation challenges due to limited human resources and a lack of technical understanding of legislation. This condition results in the quality of some Village Regulations not meeting formal and material standards. Therefore, the institutional capacity of the BPD needs to be strengthened through legislative drafting training at the village level. In terms of procedural matters, the process of establishing a Village Regulation (Perdes) by the Village Consultative Body (BPD) includes planning, discussion, joint approval, ratification by the village head, and promulgation in the village gazette. This structure adopts the regulatory cycle pattern as applied in national legislation. In addition to its legislative function, the BPD also carries out a representative function oriented towards public accountability. As a representative of the village community, the BPD must ensure that every regulation it establishes aligns with community interests and does not conflict with local values. From a legal and political perspective, the BPD's role in establishing a Village Regulation (Perdes) is a manifestation of legislative decentralization, namely the delegation of some authority to establish legal

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norms from the central government to regions and villages. This decentralization aims to strengthen the effectiveness of laws that are appropriate to the social conditions of local communities.

The quality of legislation produced by the Village Consultative Body (BPD) depends heavily on the institution's ability to conduct empirical studies on community needs. Without evidence-based studies, Village Regulations (Perdes) have the potential to be irrelevant or ineffectively implemented. Therefore, an Evidence-Based Policy approach is a crucial paradigm in the village legislative process. The principles of transparency and public accountability must also be the primary guideline for the BPD in formulating regulations. With public information transparency, the public can monitor every village legislative process, thereby preventing abuse of authority. Digitizing Village Regulation documents is a strategic step to achieve this goal. In an evaluative context, the effectiveness of regulations created by the BPD must be measured periodically. This evaluation aims to ensure that each regulation truly provides social benefits and does not conflict with higher-level legal norms. As a local legislative body, the BPD must balance formal legality with social legitimacy. This means that the regulations produced must not only comply with applicable law but also be accepted by the village community as just and beneficial. This balance reflects the integration of positive law and local social values. Thus, it can be emphasized that the BPD plays a role as a local legislative body that carries out a strategic function in the formation of Village Regulations. This role is not only technical-normative, but also political, sociological, and ideological, reflecting the implementation of substantive democracy at the grassroots level. By strengthening capacity, transparency, and participation, the BPD becomes a crucial instrument in building a national legal system that is adaptive, participatory, and socially just.

Deliberation and Public Participation Mechanisms in Legislation, Effectiveness, Evaluation, and Inter-Structural Relationships in Village Regulations.

The process of formulating village regulations should be based on the principle of deliberation as a mechanism of local political legitimacy that represents the collective will of village residents. Technical regulations on the organization of deliberations and the roles of relevant parties provide a normative foundation for community involvement, ensuring that village legal products are rooted in local aspirations.

Village deliberations, as regulated by the ministry's technical policies, are not merely procedural rituals but rather institutional tools for aggregating interests and fostering consensus among local actors, including the village head, the Village Consultative Body (BPD), and community groups. These tools serve to reduce information asymmetry during the drafting stage of village regulations. Effective public engagement requires a systematic consultation mechanism: socialization of drafts, open deliberation

forums, and simple impact assessments involving traditional leaders, youth, women, and marginalized groups. The implementation of village policy-making guidelines encourages these practices as part of accountable governance [20].

From a governance and village development perspective, public participation in the formation of village regulations contributes to the quality of resource allocation and the sustainability of village programs when residents feel represented in the formulation of norms, compliance and collaboration in implementing regulations increases, thus increasing the effectiveness of local policies. However, the reality on the ground shows variability in practice: the facilitation capacity of village governments and the BPD, as well as the existence of technical and cultural barriers, influence the extent to which deliberations are inclusive; international documents on optimizing Village Law emphasize the need to strengthen the capacity of facilitators and transparency mechanisms to close this gap [13].

A participation-oriented implementation model requires instruments for measuring participation and evaluating the process, such as meeting attendance lists, transparent minutes, and documentation of public consultations. Without documented evidence of the process, claims of participation risk becoming a normative formality lacking substantive content. Legally, ministerial technical regulations and guidelines for the formation of village regulations place deliberations as a mandatory procedure; this not only strengthens the legal legitimacy of the Village Regulation but also provides an evaluative basis for external and internal supervisors to assess process compliance.

The role of the Village Consultative Body (BPD) as a community representative in deliberations needs to be balanced with internal accountability mechanisms, such as returning deliberation results to constituents and following up on consultations. Without this two-way communication, the BPD's representative function is vulnerable to being substituted for genuine citizen participation. Gender bias and inclusion of vulnerable groups must be integrated into deliberation mechanisms: quorum arrangements, schedules that facilitate women's participation, and gender-sensitive methods for gathering aspirations help ensure that village regulations reflect the interests of the entire community. Local studies emphasize that simple procedural designs can enhance representation [6].

Strengthening the capacity of implementing parties (village government, BPD, external facilitators) through technical training, participatory facilitation modules, and access to draft regulation templates can improve the quality of deliberations. Academic repositories and local policy documents recommend adopting a continuous training approach. Administrative transparency in the publication of draft regulations, minutes of deliberations, and feedback mechanisms are prerequisites for legitimacy to

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prevent elite-centered regulation-making practices. Technical regulations governing publication and consultations provide opportunities for oversight by civil society and local media.

Deliberation mechanisms, designed institutionally and operationally to ensure public participation, are key to developing aspirational, effective, and sustainable village regulations. Practical recommendations include strengthening technical guidelines, process documentation, facilitator capacity, and inclusive instruments. All these components complement each other to realize democratic village governance.

The effectiveness of village regulations should be understood as the degree to which they achieve the expected normative and operational objectives of those regulations, namely, producing local policies that respond to community needs, guarantee legal certainty, and facilitate effective governance and village development. Effectiveness measurements should link the objectives of the regulations to output and outcome indicators [15].

Evaluation of village regulations is an important instrument for examining the extent to which regulations have been implemented as designed, whether their implementation has had the desired impact, and what factors hinder or promote their effectiveness; the evaluation approach should combine normative analysis (conformity with the legal hierarchy) and empirical analysis (field data). One aspect of assessing effectiveness is adherence to regulatory development procedures—whether the drafting process, deliberation, public consultation, and technical review have been carried out, as the quality of the process often determines the legitimacy and social compliance with the resulting normative product. This procedural evaluation also serves as an indicator of the accountability of village institutions.

From an outcomes perspective, evaluations need to test whether village regulations contribute to local development goals: for example, improving public services, managing local resources, alleviating poverty, or protecting vulnerable groups. This requires the design of indicators that are specific, measurable, and relevant to the substance of the regulations. The successful implementation of village regulations is often influenced by the capacity of village officials and the Village Consultative Body (BPD). Evaluations should identify gaps in technical, human, and organizational capacity to formulate targeted policy recommendations for institutional strengthening. Contextual factors such as budget availability (APBDes), administrative infrastructure, and local government support play a crucial role in the effectiveness of village regulations; a good evaluation should incorporate contextual analysis to prevent findings from generalizing actual failures related to resource constraints [4].

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The village regulation evaluation methodology should be multi-method, combining document studies (regulatory analysis), citizen perception surveys, in-depth stakeholder interviews, and participant observation to capture both the legal dimensions and the practical realities on the ground. A mixed-methods approach enhances the validity of the findings. Furthermore, process indicators (e.g., the number of deliberations, consultation documentation, and processing time) and outcome indicators (e.g., changes in service access, reduced conflict, and program implementation) should be distinguished within the evaluation framework, as expedited procedures do not necessarily translate into substantive outcomes.

Evaluations also need to assess the consistency of village regulations with higher-level regulations; clarifications or revocations by district/city governments can signal substantive inconsistencies that undermine the effectiveness of local regulations. Therefore, normative conformity analysis is a critical component of any legal evaluation. Community participation in the evaluation process strengthens accountability and the relevance of findings; engagement mechanisms, such as post-implementation feedback forums or social surveys, help capture residents' perceptions of compliance and perceived benefits, preventing the evaluation from being solely top-down. For institutional learning purposes, structured evaluations of village regulations should generate lessons learned that can be adopted by other villages; documenting best practices and failures helps accelerate the diffusion of effective regulatory innovations at the local level [3].

The use of integrated data (one-data) and village information systems can improve the quality of evaluations: the availability of accurate data facilitates the measurement of outcome indicators and enables evidence-based evaluations that quantitatively detect policy effects. Therefore, strengthening local data governance is an integral part of any evaluation strategy. From a methodological perspective, effectiveness evaluations should assess not only quantitative outcomes but also qualitative aspects such as social legitimacy and perceptions of fairness; regulations that are technically effective but perceived as unfair risk generating long-term social resistance.

Strengthening the capacity of local evaluators, both at the sub-district and district levels, is crucial to ensure the evaluation process is not always dependent on external parties. This capacity building includes indicator measurement techniques, field data collection, and the development of applicable policy recommendations. A good evaluation report should include operational recommendations, such as changes to technical provisions, rescheduling activities, additional resource allocation, and a clear follow-up plan, so that evaluation results translate into tangible improvements at the village level. To enhance the credibility of the evaluation, a mechanism for validating findings through data triangulation and

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stakeholder review is necessary. Recommendations are more easily implemented if they receive local political support and recognition from affected community groups.

The relationship between the Village Consultative Body (BPD), the Village Head, and the community is the pivot of local democracy, determining the quality of village lawmaking. These three actors form a normative cycle that begins with the initiation of ideas, the formulation of drafts, discussions in deliberative forums, and the establishment and enactment of village regulations. This relationship is functional rather than merely structural, as each actor's role touches on aspects of representation, executive power, and community participation [17].

Institutionally, the BPD performs a legislative function at the village level, specifically tasked with discussing and approving draft village regulations with the Village Head. This position positions the BPD as a mediator between the will of the community and the decisions of the village executive, thus ensuring that the quality of the relationship between these institutions determines whether the regulation-making process is participatory and accountable. Technical documentation for the formation of village legal products emphasizes the need for coordination between the BPD and the Village Head from the planning stage to promulgation. The Village Head, as the head of the village executive government, has the initiative and administrative responsibility to prepare draft regulations, conduct outreach, and implement established norms. The relationship between the village head and the BPD must be dialogic, not confrontational, so that the resulting regulations are not merely the product of centralized institutional decisions but also reflect local aspirations verified through representatives.

The community, in turn, plays two key roles: as a source of aspirations and as a monitor of implementation. Meaningful community participation requires access to information about the design, the opportunity to express opinions in deliberation forums, and a concrete feedback mechanism. Without such involvement, the social legitimacy of village regulations will be weakened even if bureaucratic procedures have been met.

The relationship between these actors is not conflict-free; normative tensions often arise between the executive (village head), who wants to implement policies quickly, and the deliberative function of the BPD, which demands in-depth deliberation. This conflict, if managed transparently through deliberation mechanisms and open documentation, can enrich the substance of regulations, but if thwarted by local hegemony, it risks creating arbitrary regulations. From a governance law perspective, the role of the BPD is not merely a symbol of representation, but rather a mechanism for democratic control over the authority of the Village Head; the BPD ideally channels the voices of vulnerable groups and corrects

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policy directions that ignore the public interest. Best practices demonstrate that an institutionally active BPD can increase transparency and reduce the practice of capture by local elites [19].

The operational mechanism of this relationship is manifested in a series of stages: planning (identifying issues and needs), preparation (drafting academic papers), discussion (BPD-Village Head deliberations and public forums), stipulation, and promulgation and dissemination. The regularity of this process requires documentation (minutes, attendance lists, draft revisions) that serves as procedural evidence and material for evaluating the quality of the regulation. The technical guidelines for developing village regulations recommend this format and stages as a minimum standard.

Quality public participation demands more than physical presence; it requires facilitation that enhances deliberative capacity, such as providing concise information on the regulation's impact, guided dialogue sessions, and alternative methods for gathering aspirations (surveys, group forums, local social media). When the community is facilitated in this way, the input that emerges tends to be constructive and can be incorporated into the draft regulation by the BPD and Village Head. Transparency is key to publishing draft regulations, notifying of deliberation schedules, and providing access to minutes, minimizing the opacity that allows regulations to be established without public oversight. A healthy relationship among the BPD, the Village Head, and the community is reflected in the practice of publishing information and providing a real feedback forum [2].

Legal legitimacy also depends on the alignment of village regulations with higher-level regulations; the Village Consultative Body (BPD) and Village Head are obligated to ensure that draft village regulations do not conflict with regional regulations, government regulations, or national laws. In practice, technical coordination with relevant agencies at the sub-district and district levels is crucial to prevent norm conflicts that could lead to the revocation of village regulations. Horizontal (between residents and the BPD) and vertical (between the village and district government) dynamics interact. When the BPD functions effectively as a representative, they serve as an extension of the community's voice in vertical forums, facilitating the harmonization of norms and conveying local needs to higher levels of government. Conversely, when the BPD is weak, harmonization becomes fragile, and villages risk producing isolated regulations.

The existence of local complaint or mediation mechanisms strengthens relationships between actors. When communities have channels to raise objections or provide input after regulations are enacted, the BPD and Village Head receive direct feedback that can be used for revisions or more responsive enforcement. Such mechanisms also reduce the potential for escalation of social conflict [7].

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The roles of gender and social inclusion cannot be overlooked in this relationship: the Village Consultative Body (BPD) and the Village Head must actively ensure the representation of women, youth, indigenous groups, and vulnerable groups in the regulation-making process. Inclusive participation not only increases social legitimacy but also enriches the substance of regulations, making them more responsive to the needs of all citizens.

The relationship between actors is also conditioned by local political culture and the village patronage system, with patron-client patterns tending to exhibit asymmetry, with the village head more dominant and the BPD less effective. Changing local political culture requires time and interventions that target civic education, transparency in village budgets, and the strengthening of internal control mechanisms. National legal instruments and technical guidelines (e.g., Ministerial Regulations, guidelines for the formation of village legal products) recommend collaborative practices between the BPD and the Village Head, including mandatory public consultation and process documentation. Compliance with these guidelines serves as a formal benchmark for a healthy relationship; however, actual implementation often requires technical assistance from local governments or civil society organizations [12].

From a fiscal accountability perspective, the BPD–Village Head–community relationship also plays a role in oversight of the Village Budget (APBDes): village regulations related to budget allocation, asset management, or local levy arrangements must be discussed through a deliberation mechanism involving the BPD and provide space for community participation so that village fiscal policies do not proceed unchecked. Participatory audit practices and the publication of the APBDes strengthen this oversight function. Strengthening healthy relationships requires institutional tools: standard operating procedures (SOPs) for establishing village regulations, a deliberation calendar, a simple academic paper template, and public communication channels. When such procedures are in place and adhered to, interactions among the BPD, Village Head, and community become more predictable, measurable, and easier to evaluate.

4. CONCLUSION

Based on the discussion, it can be concluded that the absence of a formal judicial review mechanism for Village Regulations (Perdes) creates a legal vacuum in Indonesia's legal review system. The Perdes' position, subordinate to Regional Regulations, but beyond the reach of the Supreme Court and the State Administrative Court (PTUN), leaves it without a competent legal forum to test its formal

and material validity. This situation contradicts the principle of legal certainty guaranteed by Article 28D, paragraph (1), of the 1945 Constitution of the Republic of Indonesia.

Usually, the hierarchy of laws and regulations, as stipulated in Article 8, paragraph (2), of Law Number 12 of 2011, in conjunction with Law Number 13 of 2022 concerning the Formation of Legislation, does not yet provide a formal judicial review mechanism for Perdes. Although Perdes are recognized as part of the national legal system, the absence of a judicial review mechanism leads to overlapping authority between local governments, sub-district heads, and the Village Consultative Body (BPD) in the clarification and revocation process.

From a social perspective, the absence of a formal judicial review mechanism for Village Regulations creates uncertainty and potential conflict in village communities, particularly when the regulations are deemed discriminatory, non-participatory, or violate the rights of village residents. This situation weakens the legitimacy of village law and reduces public trust in the local government system. Legally, this situation indicates the need to reformulate the legal policy to provide a formal judicial review mechanism for Village Regulations through authorized institutions, either by amending existing laws or by establishing a separate judicial review institution at the regional level. This is in line with the principles of recognition and subsidiarity that form the basis of village autonomy as stipulated in Article 18B paragraph (2) of the 1945 Constitution and Law Number 6 of 2014 concerning Villages. Thus, it is important to emphasize that strengthening the control and judicial review mechanisms for Village Regulations is a strategic step to ensure legal certainty, protect the rights of village communities, and strengthen democratic, transparent, and accountable village governance..

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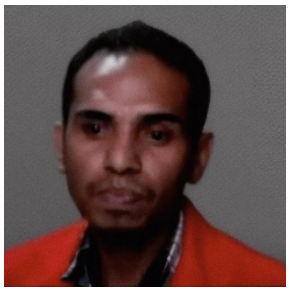

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POSICIÓN JURÍDICA DE LOS REGLAMENTOS DE ALDEA ELABORADOS POR EL ÓRGANO DELIBERADOR DE ALDEA (BPD) EN LA JERARQUÍA DE REGLAMENTOS ESTATUTARIOS

RESUMEN

Los reglamentos de aldea (Perdes) desempeñan un papel fundamental en la vinculación de las políticas nacionales de desarrollo con las necesidades locales, reflejando la realidad cotidiana de los aldeanos. Si bien son cruciales para la gobernanza, su estatus legal dentro de la jerarquía legal de Indonesia sigue siendo problemático. Este estudio utiliza la investigación jurídica normativa para examinar el vacío regulatorio en torno a la revisión de los Perdes. Si bien los Perdes están subordinados a los Reglamentos Regionales, ninguna institución —ni el Tribunal Supremo ni el Tribunal Administrativo Estatal (PTUN)— está claramente facultada para revisar su validez formal o material. En consecuencia, los Perdes ocupan una zona gris legal, carente de un mecanismo de supervisión autorizado. Esta situación contradice el principio constitucional de seguridad jurídica consagrado en el Artículo 28D(1) de la Constitución de 1945. El documento argumenta que la ausencia de un marco de revisión judicial crea un vacío legal que socava la rendición de cuentas y la eficacia de la gobernanza a nivel de aldea y exige reformas para integrar adecuadamente a Perdes en el sistema de regulación legal de Indonesia..

Palabras clave: situación jurídica, regulaciones de aldea, órgano deliberativo de aldea, regulaciones regionales

村级议事机构（BPD）制定的村规在法律体系中的法律地位

摘要

村规（Perdes）在连接国家发展政策与地方需求方面发挥着核心作用，反映了村民的日常生活。尽管村规对治理至关重要，但其在印尼法律体系中的法律地位仍然存在问题。本研究运用规范性法律研究方法，探讨了村规审查方面的监管空白。虽然村规隶属于地方规章，但没有任何机构—无论是最高法院还是国家行政法院（PTUN）—被明确授权审查村规的形式或实质有效性。因此，村规处于法律灰色地带，缺乏权威的监督机制。这种情况与1945年宪法第28D(1)条规定的法律确定性原则相悖。本文认为，司法审查框架的缺失造成了法律真空，削弱了村级治理的问责制和有效性，并呼吁进行改革，将村级议会（Perdes）妥善纳入印尼的法律法规体系。

关键词：法律地位，村级规章，村级议事机构，地区规章

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ASSESSING PERSONAL INJURY LAWYERS ALLEGED MISAPPROPRIATION OF CLIENT COMPENSATION FUNDS IN SOUTH AFRICA: TAKING THE BRIEFS OUT OF THE BRIEFCASE

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ABSTRACT | 摘要 | RESUMEN

The Road Accident Fund (RAF) was created to provide social protection and compensation for victims of motor-vehicle accidents. Yet, its functioning has increasingly been compromised by unethical conduct from some legal practitioners. This paper examines the extent to which the RAF fulfills its mandate and the ways in which certain lawyers have misappropriated or withheld client compensation funds, violating fiduciary duties and constitutional rights. Through doctrinal research, it analyzes the legal framework governing RAF litigation, including the Road Accident Fund Act, the Legal Practice Act, Legal Practice Council Rules, and relevant constitutional provisions. Key case law is reviewed to illustrate judicial responses to professional misconduct. The findings indicate significant weaknesses in regulatory enforcement and oversight. The study concludes by proposing reforms to strengthen accountability, enhance claimant protection, and restore confidence in the legal profession's role in RAF matters.

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1. INTRODUCTION

The Road Accident Fund (RAF) was created by the Road Accident Fund Act as a statutory insurance scheme aimed at compensating victims of motor vehicle accidents for bodily injury or loss of support, regardless of fault[1]. The scheme reflects South Africa's constitutional commitment to socio-economic justice by ensuring that accident victims are not left destitute because of another's negligence[2].

However, over time, reports of misconduct by certain legal practitioners have cast a shadow over the RAF's intended role[3]. Instead of protecting vulnerable claimants, some attorneys have unlawfully retained or misappropriated settlement funds meant to restore victims' financial stability[4]. This conduct amounts to a breach of the fiduciary duty lawyers owe to their clients and undermines public confidence in the legal system[5]. Remember, a lawyer cannot take a case against a past client if there's a real chance that they might use that client's secrets against them [41].

The fiduciary nature of the attorney-client relationship is deeply entrenched in South African common law and reinforced by statutory duties under the Legal Practice Act and the Legal Practice Council's (LPC) Code of Conduct[6]. Yet, despite these regulatory safeguards, misconduct involving RAF claims has persisted [27]. The Special Investigating Unit (SIU) has uncovered large-scale fraud involving over 100 law firms, some of which received duplicate payments amounting to hundreds of millions of rands from the RAF[7] [36].

Misappropriation of funds often occurs through the abuse of attorneys' trust accounts, which are regulated under sections 86-91 of the Legal Practice Act to protect client money[8]. The courts have repeatedly condemned such conduct. In Motswai v Road Accident Fund [20], the Supreme Court of Appeal described an attorney's misrepresentation and mishandling of a claim as "legally untenable and ethically unconscionable." The court held that fraud was found against the attorney without a proper hearing in open court and without the facts. Judgment was delivered after an informal discussion between

[1] Road Accident Fund Act 56 of 1996
[2] Neethling, J., Potgieter, JM., & Visser, PJ. (2020).
[3] Van Zyl, CH., and Visser, J. (2016).
[4] Code of Conduct for Legal Practitioners; Coetzee., SA. (2019).
[5] The described conduct constitutes a breach of a lawyer's fiduciary duty, which is a serious violation that undermines public trust in the legal system. This duty requires lawyers to act in the best interests of their clients, and maintain confidentiality. Zhou, J. (2024)
[6] The Legal Practice Act 28 of 2014, specifically sections 25 and 86, and the Legal Practice Council's Code of Conduct for Legal Practitioners (2019), govern the conduct and practice of legal professionals in South Africa.
[7] The Special Investigating Unit (SIU) conducted preliminary investigations into the Road Accident Fund (RAF) and discovered over R340 million in duplicate payments to law firms, including Sheriffs
[8] Legal Practice Act 28 of 2014 sections 86-91.

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the judge and legal representatives in chambers, irregular and unfair, second judgment failing to correct prejudicial findings against attorneys[9].

Similarly, in South African Legal Practice Council v Dube, [34] the court struck an attorney from the roll for misappropriating RAF client funds and practising without a Fidelity Fund certificate[10].

The constitutional dimension of this problem is significant. Section 10 of the Constitution of the Republic of South Africa, 1996 guarantees everyone the right to dignity, while section 34 ensures the right of access to courts both of which are compromised when claimants are deprived of their lawful compensation[11]. Greenbaum (2020) argued that protecting these rights requires strong regulatory enforcement and a proactive approach to attorney misconduct, particularly in high-risk areas such as RAF litigation. Academic commentary[12] further highlights that inadequate enforcement mechanisms within the LPC contribute to the persistence of misconduct [42].

The matter South African Legal Practice Council v Marais [35] concerns an application to permanently remove the respondent's name from the roll of legal practitioners, specifically attorneys. The respondent is already serving a suspension imposed by this court on 25 February 2021. The application faces opposition on two main grounds: first, that the process has not been procedurally fair; and second, that there is no substantive justification for either the existing suspension or the proposed striking-off. Between January 2019 and June 2025, the LPC received over 53,000 complaints, including almost 10,000 relating to RAF matters, yet only a small fraction resulted in findings of guilt [16].

This raises critical questions about whether the regulatory framework is meeting its constitutional and professional mandates. From a jurisprudential standpoint, misappropriation of client funds also undermines the foundational principle that attorneys are officers of the court and have a duty to uphold the administration of justice [38]. In addition to statutory reform, the literature points to the importance of robust internal controls within law firms, regular audits of trust accounts, and enhanced disciplinary transparency to deter misconduct [11]. The RAF itself has called for closer cooperation with the LPC and the SIU to expedite investigations and prosecutions against corrupt practitioners[13] [42].

[9] Motswai v Road Accident Fund [2014] ZASCA 104, para 31
[10] South African Legal Practice Council v Dube [2025] ZAGPPHC 365, para 42-45
[11] Constitution of the Republic of South Africa, 1996 sections 10 & 34
[12] Academic commentary suggests that the Legal Practice Council's (LPC) inadequate enforcement of its rules and regulations contributes to the persistence of misconduct related to the Road Accident Fund (RAF).
[13] The Road Accident Fund (RAF) is seeking closer collaboration with the Legal Practice Council (LPC) and the Special Investigating Unit (SIU) to speed up investigations and legal actions against corrupt legal practitioners involved in RAF claims.

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This paper, therefore, examines the legal, constitutional, and regulatory dimensions of RAF-related attorney misconduct, using a doctrinal research approach to analyse legislation, case law, and scholarly perspectives. It argues that unless oversight bodies adopt more rigorous preventive measures, misconduct will continue to jeopardise the RAF's constitutional mandate and the rights of accident victims. Part I of the study deals with the effectiveness of the Road Accident Fund in fulfilling its mandate within South Africa's legal system. Part II focuses on legal practitioners and ethical breaches in South Africa. Part III deals with the adequacy of Legal Frameworks and Regulatory Bodies in Safeguarding Constitutional Rights in RAF Matters.

2. THE EFFECTIVENESS OF THE ROAD ACCIDENT FUND IN FULFILLING ITS MANDATE WITHIN SOUTH AFRICA'S LEGAL SYSTEM

2.1 Objectives and Constitutional Foundation

The RAF's mandate is inseparable from South Africa's constitutional commitment to socio-economic rights. Section 27 of the Constitution recognises the right to social security [6], while section 10 recognises the right to dignity, and section 34 guarantees the right to access to courts, which in this matter reinforces the need for effective remedies for those injured in accidents. The RAF exists to ensure that victims are not left destitute due to another person's negligence [3]. The transformative constitutional vision, therefore, frames the RAF not simply as an insurance mechanism but as an instrument of social justice [8]. Its objectives are threefold: (i) to compensate victims of road accidents for bodily injury or loss of support, (ii) to promote equitable access to remedies, and (iii) to relieve claimants from the burdens of complex and costly litigation [3].

2.2 Operational Mechanisms and Challenges Facing the RAF

The RAF is financed primarily through a fuel levy imposed under the Customs and Excise Act[14], which ensures a steady revenue stream. Claimants may lodge claims directly or through legal practitioners, and compensation typically covers medical expenses, loss of earnings, and general damages for pain and suffering [3]. Attorneys and medico-legal experts play an important role in lodging claims, assessing damages, and negotiating settlements [1].

[14] Act 91 of 1964

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However, in practice, delays, inefficiencies, and reliance on legal representatives for RAF claims often create new barriers [19]. For many claimants, lawyers become the sole gateway to accessing their RAF compensation, increasing their vulnerability to exploitation.

Despite its constitutional and statutory foundations, the RAF has been plagued by systemic challenges [23]. Backlogs in processing claims frequently result in delays of several years, undermining the Fund's social justice mandate. The RAF Annual Report (2023/24) highlights a financial deficit running into billions, further complicating its ability to settle claims promptly [40]. Fraudulent practices, including the submission of inflated medico-legal reports and duplicate claims, have drained the Fund's resources [42]. The Special Investigating Unit (SIU) uncovered more than R340 million in duplicate payments made to legal practitioners and sheriffs, underscoring the scale of corruption.

These challenges have eroded public confidence in the RAF, with many claimants perceiving the Fund as an obstacle rather than a source of relief.

The RAF does not operate in isolation; its success depends on institutional collaboration with oversight bodies such as the Legal Practice Council (LPC), Parliament, and the SIU. The LPC plays a vital role in regulating lawyers who handle RAF claims, yet it has often been criticised for weak enforcement. The SIU has been mandated to investigate unlawful practices and recover funds siphoned off through fraud, while Parliament's Standing Committee on Public Accounts (SCOPA) monitors the RAF's financial and governance performance [43]. However, the fragmentation of accountability mechanisms has allowed misconduct to flourish. Without effective coordination and transparency, RAF claimants continue to bear the brunt of systemic failures [21].

The RAF Amendment Bill of 2023 introduces significant reforms to the Road Accident Fund's mandate and compensation model. One of the key changes involves a reduction in the scope of coverage. Instead of compensating claimants for their full damages, the Bill proposes a shift toward structured benefits, which would be paid out in the form of annuities rather than once-off lump sum payments [29].

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3. LEGAL PRACTITIONERS AND ETHICAL BREACHES IN SOUTH AFRICA

3.1 The Fiduciary Duty of Attorneys

According to Yifat Naftali Ben Zion on the underlying conceptions of fiduciary law, the heart of attorney-client relations lies in the fiduciary duty, which obliges lawyers to act with loyalty, integrity, and in the best interests of their clients [22]. This duty is entrenched in South African common law and reinforced by the Legal Practice Act and the LPC's Code of Conduct [12]. Attorneys are required to maintain trust accounts for client monies and to hold valid Fidelity Fund certificates as a safeguard against misappropriation[15].

The fiduciary duty includes safeguarding confidentiality, avoiding conflicts of interest, and ensuring transparent handling of settlements. Breaches of this duty not only harm individual clients but also undermine the legal profession's legitimacy [31].

3.2 Common Forms of Misconduct in RAF Cases and Judicial Condemnation of Ethical Breaches

RAF-related misconduct typically manifests in several recurring forms. First, misappropriation of client funds, where attorneys unlawfully retain settlement monies, is the most widespread. Second, lawyers often engage in overcharging, particularly by inflating medico-legal fees. Third, collusion between some practitioners and RAF officials has led to fraudulent claims and duplicate payments [42]. These practices divert funds away from deserving claimants, many of whom rely on RAF compensation for medical care and basic subsistence.

South African courts have consistently denounced misconduct in RAF litigation. In Motswai v RAF, the Supreme Court of Appeal condemned an attorney's misrepresentation as ethically unconscionable [20]. In Legal Practice Council v Dube, the court struck an attorney from the roll for misappropriation and for practising without a Fidelity Fund certificate [34]. Similarly, in Legal Practice Council v Marais, the High Court considered striking-off proceedings against a practitioner already under suspension [35].

The above cases illustrate the judiciary's recognition that RAF-related misconduct is not a trivial matter but a serious breach of constitutional and professional duties.

[15] Legal Practice Act 28 of 2014, sections 86-91

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3.3 The Role of the Legal Practice Council (LPC)

The legal profession has long been viewed as a noble calling, with legal practitioners traditionally respected by the public. In Vassen v Law Society of the Cape of Good Hope, the court highlighted that being an attorney is an honourable profession that requires its members to uphold absolute honesty, trustworthiness, and integrity [4]. Accordingly, practitioners have a duty to act truthfully towards their clients, the courts, their peers, and the public at large.

Section 2 of the Legal Practice Act describes the purpose of the LPA [12]. The purpose of the LPA is to transform and regulate the legal profession to reflect South Africa's diversity while ensuring accountability and independence. Section 5 of the LPA empowers the Legal Practice Council to uphold professional and ethical standards while protecting the public from unethical conduct.

However, between 2019 and 2025, it received over 53,000 complaints, of which nearly 10,000 concerned RAF matters, yet only a small fraction resulted in findings of guilt [42]. This gap raises serious concerns about the LPC's enforcement capacity.

Scholars like Shaka Yesufu (2025) argue that the LPC's disciplinary processes are opaque, under-resourced, and overly lenient, allowing corrupt practitioners to continue operating. In his study, Shaka provided that the Road Accident Fund (RAF) was turned into a cash cow by unscrupulous lawyers who inflated bills, falsified accounts, and stole funds meant for vulnerable victims. He explained that many lawyers enriched themselves overnight through these illicit dealings while the Legal Practice Council failed to protect victims or stop the exploitation. Shaka argued that such individuals were not genuine legal practitioners but fraudsters who entered the profession for personal gain. To curb this misconduct, he called for mandatory prison terms for convicted lawyers to be increased from 10 years to 30 years as a deterrent [40]. Parliament's SCOPA has also criticised the LPC for failing to exercise robust oversight, particularly in high-risk areas such as RAF litigation.

3.4 Systemic Implications of Misconduct

Attorney misconduct in RAF matters has ripple effects that extend beyond individual clients. First, it erodes public trust in the legal profession, undermining the perception of lawyers as officers of the court. Second, it compromises constitutional rights by depriving victims of their compensation, thereby

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threatening their right to dignity and access to justice[16]. Third, it exacerbates the RAF's financial instability, as fraudulent or inflated claims drain resources that should be directed to genuine victims [26].

From a jurisprudential standpoint, misconduct compromises the administration of justice itself, weakening the rule of law and South Africa's broader commitment to constitutional democracy.

4. ADEQUACY OF LEGAL FRAMEWORKS AND REGULATORY BODIES IN SAFEGUARDING CONSTITUTIONAL RIGHTS IN RAF MATTERS DISCUSSION

The regulation of legal practitioners in South Africa, particularly those involved in Road Accident Fund (RAF) matters, reveals significant gaps that undermine both the integrity of the legal system and the protection of vulnerable claimants [2]. The misconduct of lawyers who misappropriate compensation funds exposes a troubling tension between professional regulation and constitutional guarantees of access to justice [9], [33]. While the Legal Practice Act establishes a framework for regulating attorneys and advocates, its enforcement mechanisms remain insufficiently robust to deter or effectively address unethical conduct [12].

The Road Accident Fund Act was designed as a social security measure to compensate accident victims and their dependents. Still, it has become increasingly associated with delays, mismanagement, and exploitation by unscrupulous practitioners [28]. Section 17(1) of the Act provides that the Fund must compensate claimants for loss or damage arising from bodily injury or death caused by negligent driving [65].

However, lawyers' failure to pass on these funds to their clients effectively nullifies the constitutional promise of access to justice and undermines the dignity of victims [10]. Section 10 of the Constitution of the Republic of South Africa, 1996, explicitly guarantees everyone the right to inherent dignity, while section 34 ensures the right to access courts and resolve disputes fairly [6]. The withholding of RAF settlements violates both these rights, leaving claimants without the compensation intended to restore their dignity and support their livelihoods.

Judicial decisions underscore the seriousness of such misconduct. In the matter of Law Society of the Northern Provinces v Mabaso, the Supreme Court of Appeal (SCA) addressed the serious misconduct of an attorney who had misappropriated client funds, including money received from a Road Accident

[16] Constitution of the Republic of South Africa, 1996, sections 10 & 34

Fund claim. The respondent, Mr Christopher Mabaso, was accused of failing to keep client funds properly in his trust account, neglecting to account for monies received, and delaying payments to clients, thereby breaching his fiduciary duties. The Gauteng Division of the High Court had initially suspended him for a year rather than striking him off the roll, prompting the Law Society to appeal the decision [14].

Judge Mpati P, delivering judgment for the SCA, reaffirmed the well-established three-stage enquiry when considering whether an attorney should be removed from practice: first, determining whether the misconduct is proven; second, assessing whether the attorney remains a fit and proper person to practise; and third, deciding whether suspension or striking off is the appropriate sanction[17].

4.1 The LPC's Oversight Role in RAF-Related Complaints

The Legal Practice Council (LPC), in a briefing before Parliament's Standing Committee on Public Accounts, reported that instances of attorney misconduct in Road Accident Fund (RAF) matters remain statistically low, with fewer than one percent of practitioners found guilty of wrongdoing. Between 2019 and June 2025, the LPC received more than 53,000 complaints against attorneys, of which 9,671 were related specifically to RAF claims [42]. Out of this number, only 280 practitioners were ultimately found guilty of professional misconduct, and a mere 78 of those cases involved the misappropriation of RAF funds.

The LPC noted that the sharp rise in complaints over this period could be attributed largely to the RAF's operational challenges, particularly its chronic delays in paying out claims and the moratorium on writs of execution. These difficulties often fuelled client frustration and misunderstandings, which in turn escalated into formal complaints against their legal representatives. The grievances most frequently raised included poor communication by attorneys, excessive or unlawful charges of fees, and the mishandling of contingency fee agreements.

4.2 Criminal Prosecution against Legal Practitioners who commit fraud

When a legal practitioner misappropriates client funds, the aggrieved party is not confined to complaining to the Legal Practice Council (LPC). Such a complainant, often a former client, is also entitled to lay criminal charges with the South African Police Service (SAPS) against the practitioner concerned [24]. Importantly, the lodging of a criminal complaint does not have to await the outcome of disciplinary

[17] See *Law Society of the Northern Provinces case paragraph 2. See also Summerley v Law Society, Northern Provinces [2006] ZASCA 59; 2006 (5) SA 613 (SCA) paragraph 2.*

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proceedings before the LPC. In fact, the LPC itself, acting in its regulatory capacity, may lay charges if it reasonably believes that a criminal offence has been committed by a practitioner.

The Legal Practitioners Fidelity Fund (LPFF) plays a pivotal role in safeguarding public confidence in the legal profession. Section 55 of the Legal Practice Act provides that the LPFF is liable to reimburse persons who have suffered financial loss owing to the theft of trust money or property by practitioners or their employees[18]. However, this protection does not mean that dishonest practitioners escape liability. Section 80 of the Act expressly subrogates the LPFF, once it has compensated a claimant, into all the rights and legal remedies that the claimant would have had against the defaulting practitioner[19].

In effect, the LPFF "steps into the shoes" of the victim and can pursue civil recovery or other legal remedies. In addition to this, claimants retain the right to lay criminal charges and to institute civil proceedings in their own name to recover stolen trust funds [24]. Furthermore, the LPFF has proactive enforcement powers: section 63(1)(i) empowers it to institute private prosecutions where the National Prosecuting Authority (NPA) declines to prosecute practitioners accused of theft or misappropriation of trust property[20]. This illustrates that the LPFF is not merely a compensatory mechanism for victims but also an enforcement body that actively supports the prosecution of errant practitioners, thereby reinforcing accountability within the profession.

4.3 Removal of Legal Practitioners from the Roll

The Legal Practice Council (LPC) serves as the central regulatory authority overseeing all legal practitioners in South Africa, including both attorneys and advocates, as well as candidate legal practitioners. In exercising its mandate under section 6 of the Legal Practice Act, the LPC is empowered to establish norms and standards that ensure the integrity and accountability of the profession. To give practical effect to this responsibility, the Council has adopted a comprehensive Code of Conduct applicable to all practitioners, candidate practitioners, and juristic entities engaged in legal practice[21]. This Code is supplemented by the Rules promulgated in terms of sections 95(1), 95(3), and 109(2) of the Act.

Collectively, these instruments set out the ethical and professional obligations expected of practitioners. Where an attorney or advocate fails to comply with the provisions of the Act, the Code, or the Rules, the LPC may initiate disciplinary proceedings before its designated committee, which could

[18] Legal Practice Act 28 of 2014, section 55
[19] Legal Practice Act 28 of 2014, section 80
[20] Legal Practice Act 28 of 2014, section 63(1)(i)
[21] Legal Practice Act 28 of 2014, section 6

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ultimately result in the removal of the practitioner's name from the roll. Section 40 of the Legal Practice Act gives the LPC's disciplinary committee the authority to recommend serious sanctions where a practitioner is found guilty of misconduct[22]. Among the options available, the committee may advise that the Council seek an order from the High Court to strike the practitioner's name from the roll, suspend them from practice, or prohibit them from handling trust monies.

This procedure reflects the principle that removal from the roll is not a matter the LPC can finalise independently, but rather one that falls within the supervisory jurisdiction of the courts. In terms of section 31(1)(a), read together with sections 44(1) and (2) of the Act, the High Court retains the ultimate authority to determine whether a practitioner is no longer "fit and proper" to continue practising law, and it is the Court that may order a striking off, suspension, or other appropriate relief[23]. This ensures judicial oversight over the most serious professional sanctions, safeguarding both the integrity of the legal profession and the rights of practitioners.

Rule 54.14.9 of the Legal Practice Council (LPC) rules places a strict obligation on firms to ensure that no trust creditor's account ever reflects a debit balance [17]. In addition, rule 54.14.14 stipulates that any withdrawal from a firm's trust banking account may only be made in favour of a trust creditor or, alternatively, transferred to the firm's business account for funds that are legitimately due [18]. The combined effect of these provisions is to safeguard the integrity of clients' monies by creating a closed system of accountability.

Where a legal practitioner disregards these rules and withdraws funds in contravention of the provisions, it almost inevitably results in a deficiency in the trust account. Such conduct not only undermines professional standards but also amounts to a serious breach of fiduciary duty, and in many cases may constitute the criminal offence of theft of trust funds.

Theft of trust funds by legal practitioners represents one of the gravest breaches of professional duty and carries severe consequences for those found guilty. South African courts have consistently affirmed that an attorney who dishonestly misappropriates client funds cannot be regarded as a fit and proper person to remain in practice, and that the appropriate sanction in such cases is removal from the roll of attorneys.

[22] Legal Practice Act 28 of 2014, section 40
[23] Legal Practice Act, section 90 (1)

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In Law Society of the Free State v Le Roux and Others, the court emphasised that dishonesty of this nature warrants the "ultimate sanction" of strike-off, given the betrayal of public trust and the damage caused to the profession's integrity [13]. Similarly, in South African Legal Practice Council v Bobotyana, the respondent misappropriated over R2 million in trust monies. The Eastern Cape Division found that his conduct was deliberate, persistent, and fundamentally inconsistent with the faithful discharge of an attorney's duties [32]. The court stressed that once dishonesty is proven, a lesser sanction is rarely appropriate, and accordingly, the respondent's name was struck from the roll.

In Legal Practice Council (KwaZulu-Natal Provincial Office) v Naicker and Another, the court dealt with an attorney who had misappropriated R1 million deposited into his trust account for the purchase of immovable property. The respondent made several unauthorised withdrawals from the account and proceeded with the transfer and registration of the property despite lacking the necessary funds. Although he later repaid the money, the court emphasised that repayment does not erase the initial wrongdoing, as the knowing misuse of trust money amounts to theft [15]. Importantly, the court distinguished this case from more severe instances of dishonesty, finding that while the respondent's conduct demonstrated a serious breach of professional standards, it did not establish that his character was irredeemably flawed. Consequently, rather than ordering his removal from the roll, the court imposed a suspension from practice for two years. This decision highlights the court's nuanced approach in balancing the gravity of misconduct against the practitioner's overall fitness to continue in the profession.

5. CONCLUSIONS

The Road Accident Fund was created to protect and compensate victims of motor vehicle accidents, upholding South Africa's commitment to social justice. Unfortunately, the unethical conduct of some legal practitioners, particularly the misappropriation of client funds, has significantly undermined this purpose and eroded public confidence in the legal system.

Courts have repeatedly emphasised that attorneys must act with integrity and uphold their fiduciary duties, yet gaps in enforcement under the Legal Practice Act and the LPC's Code of Conduct have allowed misconduct to continue. This not only affects individual claimants but also threatens constitutional rights, including the right to dignity and access to justice.

The following should be considered: effective collaboration between the RAF, LPC, and SIU is critical for detecting, investigating, and deterring fraudulent activity.

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Measures such as regular audits of trust accounts, improved transparency, and robust accountability mechanisms are essential to rebuild public trust. Without these interventions, the RAF's ability to fulfil its constitutional mandate and protect vulnerable accident victims remains at risk.

Strengthened legal and institutional safeguards are therefore crucial to ensure justice, uphold professional ethics, and restore confidence in the Road Accident Fund system.

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EVALUACIÓN DE LA ALEGACIÓN DE APROPIACIÓN INDEBIDA DE FONDOS DE COMPENSACIÓN DE CLIENTES POR ABOGADOS DE LESIONES PERSONALES EN SUDÁFRICA: RETIRANDO LOS ARCHIVOS DEL MALETÍN

RESUMEN

El Fondo de Accidentes de Tránsito (RAF) se creó para brindar protección social e indemnización a las víctimas de accidentes automovilísticos. Sin embargo, su funcionamiento se ha visto cada vez más comprometido por la conducta poco ética de algunos profesionales del derecho. Este documento examina hasta qué punto el RAF cumple con su mandato y las formas en que ciertos abogados han malversado o retenido fondos de compensación de clientes, violando deberes fiduciarios y derechos constitucionales. A través de una investigación doctrinal, se analiza el marco legal que rige los litigios del RAF, incluyendo la Ley del Fondo de Accidentes de Tránsito, la Ley de Práctica Legal, el Reglamento del Consejo de Práctica Legal y las disposiciones constitucionales pertinentes. Se revisa la jurisprudencia clave para ilustrar las respuestas judiciales a la mala conducta profesional. Los hallazgos indican deficiencias significativas en la aplicación y supervisión regulatoria. El estudio concluye proponiendo reformas para fortalecer la rendición de cuentas, mejorar la protección de los demandantes y restablecer la confianza en el papel de la abogacía en asuntos relacionados con el RAF.

Palabras clave: Fondo de Accidentes de Tránsito, mala praxis de los profesionales del derecho, acceso a la justicia, cumplimiento normativo

评估南非人身伤害律师涉嫌挪用客户赔偿金的行为：揭开法律的神秘面纱

摘要

道路交通事故基金（RAF）的设立旨在为机动车事故受害者提供社会保障和赔偿。然而，一些法律从业人员的不道德行为日益损害了该基金的运作。本文探讨了道路交通事故基金履行其职责的程度，以及某些律师挪用或扣留客户赔偿金、违反信托义务和宪法权利的方式。通过法理学研究，本文分析了道路交通事故基金诉讼的法律框架，包括《道路交通事故基金法》、《法律执业法》、《法律执业委员会规则》和相关宪法条款。本文还回顾了关键案例，以说明司法机关对职业不当行为的回应。研究结果表明，监管执法和监督方面存在重大缺陷。该研究最后提出改革建议，旨在加强问责制、提升索赔人保护，并恢复公众对法律界在道路交通事故基金（RAF）事务中所扮演角色的信心。

关键词：道路交通事故基金、法律从业人员不当行为、司法救济、监管执法

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