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BRICS LAW JOURNAL (BRICS LJ)

An independent, professional peer-reviewed academic legal journal.

Aims and Scope

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

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

Notes for Contributors

Manuscripts must be the result of original research, not published elsewhere. Articles should be prepared and submitted in English. The BRICS LJ doesn't accept translations of original articles prepared not in English. The BRICS LJ welcomes qualified scholars, but also accepts serious works of Ph.D. students and practicing lawyers.

Manuscripts should be submitted electronically via the website *www.bricslawjournal.com*. Articles will be subjected to a process of peer review. Contributors will be notified of the results of the initial review process within a period of two months.

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BRICS DEVELOPMENT STRATEGY – PRIORITY AREAS OF COOPERATION FOR GAINING A FOOTHOLD IN A MULTIPOLAR WORLD ORDER

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The international world order has been changing rapidly since the turn of the twenty-first century. BRICS, as an economic association, that unites five countries, each of which is the leading state in its own region, is faced with a variety of modern-day challenges. The article examines the most important issues for BRICS, as well as the outcomes and potential future directions for deepening cooperation among the BRICS member states and in more extended formats. The main purpose of the article is to identify major trends and factors that influence the formation of the BRICS agenda and the future direction of development. Other important tasks that could be mentioned are determining the reasons for the intensification of political cooperation, obstacles and opportunities for BRICS institutionalization as an international organization and potential expansion. To become a stable international institution, BRICS needs to devise an effective strategy of development that includes key areas such as the economy, investment cooperation, digitalization, security, ecology, and the environment. The creation and strengthening of external relations of BRICS with leading developing countries and international organizations, as well as cooperation on the basis of equality, complementarity, and mutual benefit in the economic, scientific, and technical fields, taking into account the significant resource base of BRICS countries, the largest labor resources, capacious domestic markets, goals of economic modernization and high technologies, as well as food and energy safety will provide BRICS with the opportunity to form an effective development strategy to gain a foothold in the multipolar world order.

Keywords: BRICS; development; strategy; multipolar; world order; economy; policy; expansion; institutionalization; digitalization; security; health; environment.

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Introduction

The international world order is rapidly changing at the beginning of the twenty-first century. Various modern tendencies affect the entire system of international relations, resulting in the multipolar world. The Covid-19 pandemic has shown that when a global crisis occurs, liberal economic attitudes are not always consistent. Even if the economy suffers, states prefer to close borders and protect their citizens. As a result, we may assume that the phenomenon of globalization, which became so popular at the end of the twentieth century, will be replaced by the processes of regionalization.[1] As a result, entities such as the European Union (EU), the Eurasian Economic Union (EAEU), the Association of Southeast Asian Nations (ASEAN), the Shanghai Cooperation Organisation (SCO) and BRICS may play an important role in forming a post-coronavirus world order.

BRICS is an example of the so-called transcontinental dimension, in which the interaction between four continents – Asia, Africa, Europe and South America – in two hemispheres is demonstrated. It is the economic association that unites

[1] Доклад «Евразийская экономическая интеграция – 2020» (25 августа 2020 г.) / Евразийский банк развития [Eurasian Development Bank, Eurasian Economic Integration – 2025, Report, 25 August 2020] (Sep. 21, 2021), available at https://eabr.org/analytics/integration-research/cii-reports/doklad-evraziyskaya-ekonomicheskaya-integratsiya-2020/.

five countries, each of which is the leading state in its region.[2] The main value of this arrangement lies in the formation of a modern multipolar world, as the BRICS countries unite to respond to modern-day challenges.

The acronym BRICS is formed by the first letters of the English-language names of the five countries mentioned: Brazil, Russia, India, China and South Africa. Their territory covers 29.6 percent of the world's land surface, and they account for 42.6 percent of the world's population.[3] Although the term "BRICS" was coined by chance, it has important implications. During a visit to India in 1998, the Prime Minister of Russia, E. Primakov, stated that there are many problems in the world that are dependent on relations between India, China and Russia. He actively promoted the formation of a "Russia-India-China" allied coalition (RIC). In fact, this was the prototype for the idea of creating a group of BRICS countries. In 2001, Jim O'Neill first coined the term "BRIC," predicting that by 2050, Brazil, Russia, India and China will be among the world's six largest economies (along with the United States and Japan). As a result, the emergence of the concept of "BRICS" on the one hand means the rapid development of five countries in terms of economic indicators; on the other hand, the changing international community, with its various opportunities and challenges, contributes to their unification.

Later, new reports and studies from various companies and organizations appeared, adding to the popularity of BRIC. Initially, the BRIC concept became popular in the business and investment world as a result of the "hype" organized by investment bankers and participants in international financial markets. However, with the strengthening of economic and trade ties and the gradual formation of the identity of the association, the base of cooperation of the BRIC countries has expanded significantly, including non-institutionalized formats of cooperation on political issues. On Russia's initiative, the first meeting of foreign ministers in the BRIC format was held in September 2006, within the framework of the United Nations (U.N.) General Assembly, and in June 2009, the first summit of the BRIC leaders was held in Yekaterinburg.

Despite the fact that the BRIC association, which became BRICS in November 2010 at the G20 summit in Seoul, when South Africa formally applied to join the BRIC cooperation mechanism, was initially created primarily on an economic basis, political issues have been increasingly included on the agenda of the annual BRICS summits since the second declaration. The creation of the association was partly influenced by the global financial and economic crisis of 2008–2009. However, in today's rapidly changing world, it would be quite difficult to limit oneself solely to economics. Such an important component of the BRICS activities, as ensuring the economic security of

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[2] A review of the economies of the BRICS countries provides more accurate and expanded characteristics. *See* Роль БРИКС в мировой экономике // TV BRICS. 6 мая 2019 г. [The Role of BRICS in the Global Economy, TV BRICS, 6 May 2019] (Sep. 21, 2021), available at https://tvbrics.com/news/rol-briks-v-mirovoy-ekonomike/.

[3] 国家统计局发布时间, 第一章 金砖国家概况及经济社会指标比较 (2017) [National Bureau of Statistics of China, BRICS Joint Statistical Publication (2017)] (Nov. 8, 2020), available at http://www.stats.gov.cn/ztjc/ztsj/jzgjlhtjsc/jz2017/201709/t20170901_1530127.html.

the participating countries, was also closely related to the political dimension, which was subsequently expressed in the creation of certain institutions.

1. Political Dimension of BRICS Cooperation

The dominant circumstance in the characteristics of BRICS is the format of cooperation to achieve the economic goals and objectives of partners, which is why the documents of BRICS summits concentratedly consolidate this direction in the content of cooperation, which requires legal support. At the same time, economic ties, covering a wide variety of areas, are constantly expanding the boundaries of cooperation, which is sometimes focused on achieving very ambitious goals. One of the common tasks for the BRICS countries, in particular, is forecasting and implementing changes in the functioning of the global economic system, a key component of which is the reform of the structure and management of the Bretton Woods system of financial institutions.

As previously stated, the main efforts of the BRICS countries are related to economic cooperation and development, but member-states are attempting to broaden the scope of cooperation. Today, their most important achievement is the strengthening of interaction and mutual understanding, which allows this group of countries to defend and advance their interests in the face of a fierce battle in the international arena. The socio-economic and political models of BRICS are not just centers of power or economic influence, but distinct historical projects, the strength of which is not measured by comparison in real time, but by the ability to respond to the challenges of time in the long term.

Based on the specifics of building multilateral ties within the alliance, the manifestation of the political will of the leaders of the BRICS countries is necessary to ensure effective cooperation in a number of strategic areas, such as the fuel and energy complex and the defense industry. This would enable the countries of the RIC triangle, on the one hand, and Brazil and the Republic of South Africa, on the other, to overcome the objective logistical difficulties that inevitably arise in trade relations.

In addition, the formation and development of BRICS is taking place in the context of an acute ideological struggle with Western projects of a similar nature. As a result, the question of the appeal of BRICS as an association to other countries, as well as the creation of a positive image of BRICS for the rest of the international community, is becoming extremely important. This task is implemented in various ways, ranging from the work of the media to shape public opinion to meetings in the "outreach" format. This format, in which Brazil, Russia, India, China and South Africa invite states from their respective regions to work cooperatively, presupposes the consolidation of efforts to attract representatives of target countries in the context of the political process.

Of course, the inclusion of political issues on the agenda of the group is a gradual process, and the commitment of BRICS countries to the principles of international law and the fight against terrorism is expressed already in the first documents of the association. However, chronologically, it is possible to distinguish 2013–2014

as a specific turning point: it was during this period that both the corresponding rhetoric and the activities of BRICS in the political direction were activated. In 2013, as the Syrian crisis worsened, discussions of security issues and military-political cooperation within the BRICS framework were not ruled out. The Ukrainian crisis also became one of the topics for discussion at various meetings of officials of the BRICS countries. As a result, foreign policy events had a significant impact on the inclusion of the political component in the discourse of BRICS interactions.

The constant and continuous increase in the number of aspects related to the political "track" of BRICS makes it possible to single out a number of main lines of interaction that have emerged. Cooperation in these areas was actively pursued, and there is a strong likelihood that it will continue to expand in the future.

Resolving acute local political crises (while not necessarily directly affecting the interests of the BRICS member states) is one of the top priorities mentioned in both, the annual declarations following summit meetings and the working documents of individual platforms, within the framework of which certain issues of cooperation are discussed.

Information security, in particular, the fight against cybercrime, is being discussed more and more actively within BRICS recently, thanks to the efforts of Russia, India and the People's Republic of China. Information security issues have taken a prominent place on the agenda of the 2016 summit in India: the Goa Declaration speaks of the need to counter terrorist use of the Internet for their own purposes.[4] The countries have also agreed to exchange experiences and achievements in the field of information and communication technology, with the meeting at the level of the relevant ministries serving as the vehicle for this exchange.

Other challenges to this order include terrorism and drug trafficking. In 2016, Russia called for the creation of a working group within the BRICS framework to discuss counter-terrorism issues. In 2015, the BRICS Working Group was established to coordinate efforts to prevent drug trafficking. It is not surprising that the fight against terrorism has become one of the leitmotifs of the Goa Declaration: in particular, while it is linked to other challenges (drug trafficking, cybercrime). Among new, but more and increasingly actively articulated problems is the need to prevent an arms race in outer space. The ambitions of the majority of countries participating in the space exploration group are already backed up by real actions, which necessitates the development of clear "rules of the game." The solution to these problems is also on the political plane.

It is also worth noting the heterogeneity of the formats in which the BRICS members develop a joint position on political cooperation. On the one hand, summit meetings of heads of state have become annual since 2009, in modern conditions accompanied by the adoption of program documents (Declarations, Action Plans). On the other hand, separate structures are created for discussions on various specific

[4] BRICS Goa Declaration, Goa, India, 16 October 2016 (Sep. 21, 2021), available at http://brics.utoronto.ca/docs/161016-goa.html.

issues: working groups and even separate forums (Parliamentary, Civil, Youth). It is worth noting that some of the BRICS formats initially created ad hoc, eventually became the standard. For instance, the meetings of the national security advisers of the BRICS states, the first of which was held in Russia in a quadripartite format in 2009, eventually became an annual event.

As can be seen, the formats of BRICS cooperation have expanded significantly and intensively in recent years. The political positions of the BRICS countries are being consolidated on the sidelines of the G20 summits, as well as within U.N. institutions. The proposed format of the dialogue between BRICS and the G7 could become an opportunity for an exchange of views on global politics, but this is hindered by internal differences that exist in both groups on political issues.

Indeed, in terms of the importance of the problems of political cooperation for individual BRICS members, a certain gap can be observed. Russia is known for its focus on political issues which is most characteristic of Russia. To a lesser extent, this phenomenon is characteristic of China; only a few initiatives in the political sphere have emerged from Brazil and South Africa. India appears to be the most detached from political upheavals: experts from this country have repeatedly emphasized the economic nature of the association. However, this did not prevent the inclusion of a number of political decisions in the final document of the 2016 summit.[5]

Nonetheless, apart from other problems, two aspects are currently gaining special significance for BRICS: the debate over the need for institutionalization; and a debate over the prospects for expansion. These two points appear to require further consideration.

2. Institutionalization of BRICS

The problem of BRICS institutionalization remains quite relevant in the light of recent events. The lack of a founding agreement, statutory document and formalized structure in BRICS does not allow either political scientists or officials to fully speak of BRICS as an organization. At the same time, the perspective of the evolution of the BRICS association into an international organization is assessed by Russian and foreign publicists in a rather contradictory way, ranging from skepticism of some Western authors[6] to optimistic statements that the process of institutionalization has already been launched thanks to the New Development Bank.[7]

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[5] BRICS Goa Action Plan, Goa, India, 16 October 2016 (Sep. 21, 2021), available at http://brics.utoronto.ca/docs/161016-goa-action-plan.html.

[6] Jyrki Käkönen, *BRICS as a New Constellation in International Relations?*, IAMCR 2013 Conference, Dublin, 25–29 June 2013 (Sep. 21, 2021), available at https://research.tuni.fi/uploads/2020/03/50196994-brics-as-a-new-constellation-in-international-relations51.pdf.

[7] Ravni Thakur, *Institutionalizing BRICS: The New Development Bank and its Implications*, Delhi Policy Group (August 2014) (Sep. 21, 2021), available at https://indianstrategicknowledgeonline.com/web/1070_Institutionalising_BRICS_The_New_Development_Bank_and_its_Implications.pdf.

Of course, BRICS could not exist as an international forum without some level of formalization. Over the years of cooperation, a procedure has been developed for holding annual summits, at which decisions that are vital for the further development of BRICS and are reflected in the final documents are adopted. In addition, the presence in each BRICS country of the posts of Sherpas and Sous-Sherpas responsible for this area of foreign policy can also be considered as one of the signs of the institutionalization of the BRICS. Regular meetings at the level of the heads of ministries and departments of the BRICS countries should also be taken into account, as this will aid in the implementation of institutionalization. In this regard, the establishment of economic institutions in 2014, particularly the New Development Bank and the Pool of Conditional Foreign Exchange Reserves cannot be ignored. This step is critical for the institutionalization of the association, regardless of whether it is deepened in the future.

However, this level of institutionalization clearly does not cover all the "tracks" of cooperation within the association. The need for joint development and protection in the international arena of common interests, including political ones, could become one of the prerequisites for continuing the launched process. The emergence of organizationally formalized institutions under the auspices of BRICS could enable the five member countries to more effectively consolidate their efforts of, including in the political sphere. Institutionalization would allow the group to be formalized through a synthesis of bilateral and multilateral ties, namely the RIC triangle, on the one hand, and representatives of the South, previously, included in the trilateral format of the IBSA (India, Brazil and South Africa), on the other. Moreover, the legal consolidation of BRICS as an organization would help to legitimize the decisions taken at the summits, making these norms peremptory from the standpoint of international law. One of these solutions appears to be the codification of the principles of BRICS functioning, which have already been reflected more than once in the joint statements of the leaders of the countries, on the basis of the principle of expediency. On the other hand, such a situation would inevitably lead to excessive bureaucracy, as seen in the examples of both universal international organizations (such as the U.N.) and associations of an integration type (in particular, the European Union). It is clear that the necessary consensus on the issue of institutionalization has yet to be reached either in academia or among those who make foreign policy decisions. In any case, the issue remains open for further discussion in expert and government circles.

Concerning the legal dimension, it should be noted that despite the growing denials of international law, as well as its principles, the widespread approach of domestic legal science regarding the legal principles of mutual cooperation of the BRICS countries is to place them within the framework of the principles of international law. At the same time, it is necessary to single out the political and legal significance, role and place of BRICS cooperation principles in the system of international law, as well as their relationship with the basic principles of the U.N. Charter.

A separate issue, one which to a large extent determines the adequacy of the results in solving many problems and formulating a number of key qualifications, is the question of the legal nature of the unification of the five countries. Using various formulas such as "group," "alliance," "partnership," "association" and so on is perceived primarily as evidence of their lack of formal legal and organizational characteristics in comparison to the 'traditional' international organizations in the current international legal order. In theoretical terms, the situation is complicated by the fact that it is directly related to the issue of the possibilities of independent action of the association of states in international relations: the determination of international legal consequences is essential not only for the participants of such associations themselves, but also for their so-called external contour, as well as for the interstate system as a whole. Indeed, at this current stage, BRICS lacks clear legal outlines and statements about prospects of a different nature are very cautious. On this matter, one author has commented,

> Since BRICS as an association does not have a clearly expressed legal foundation, its transformation as it develops into a full-fledged powerful international political institution is too early to predict.[8]

However, as work in this direction continues, taking into account other successful steps within BRICS, we can expect perceptible changes in this sphere in the near future.

3. BRICS Expansion

The political component can also be attributed to the dilemma of further expansion of BRICS at the expense of external players. This problem is interconnected with the issue of institutionalization raised above: an increase in the number of BRICS members could lead to a change in the status of the association. The only BRIC expansion in history took place in 2010 when South Africa joined the group.

The universal nature of the principles underlying BRICS activities is appealing to other participants in the international process. The expansion of BRICS could become not only another informational reason for attention to the group, but also an opportunity to increase the true weight of the association in the global arena. At the same time, potential newcomers should not only meet certain economic criteria, but also share the political values enshrined, in particular, in the Fortaleza Declaration.[9]

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[8] Sideek Seyad, *A Critical Overview of the Objectives and Future Direction of the BRICS and its New Development Bank*, 31(9) J. Int'l Bank. L. & Regul. 495 (2016).

[9] Jaya Josie et al., *BRICS Evolution Vision: Institutionalization, Enlargement and Outreach Technologies* in *VII BRICS Academic Forum* 404 (Georgy Toloraya ed., 2015).

When discussing the grounds for possible expansion, it should be noted that BRICS has a successful outreach format, which was launched at the 2013 summit in Durban, South Africa. In fact, within this dimension, the host country invites partners in the region (often entire organizations) to cooperate. At the same time, it is not surprising that in 2013 attention was focused on the African Union, in 2014 on integration in Latin America (UNASUR), in 2015 there was contact with the SCO and the EAEU, and in 2016 on the Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC). However, the presence of such a regional component raises the question of how to determine the order of priority of joining BRICS if it is impossible to carry out the expansion of BRICS in all affected regions. Naturally, this issue is still speculative, but potential disagreements among the BRICS members on this issue should be considered and, if possible, neutralized during the negotiation process.

In terms of the circle of potential members, there are abbreviations in the literature that unite possible newcomers (or competitors, depending on the emphasis placed): for example, MINT (Mexico, Indonesia, Nigeria, Turkey). One of the leading Russian experts on BRICS issues, Professor G. Toloraya, believes that the expansion of the BRICS membership at the expense of representatives from the Islamic world, such as Indonesia, could be expedient in the future.[10] As a result, a civilizational approach can become the basis for a possible expansion. Despite the indicated advantages of the possible expansion of BRICS, at the moment this issue remains only on the plane of expert discussions.

To summarize, as noted by Chinese observer Peng Lu, it is the peculiarities of political identity characteristic of the populations of all five countries that have led to a closer rapprochement between the BRICS states both at the highest level and at the level of contacts between people.[11] This proves once again the assertion that BRICS is much more than a purely economic project. For several years of the format's existence, the first steps towards the path of institutionalization have already been taken: the frequency and sequence of summits have been determined, following which policy documents are adopted; and the first institutions under the auspices of BRICS have begun to operate. There was also the first expansion of the group at the expense of South Africa, although there is now a moratorium on the entry of new members, and the prospects of admitting other states in the near future remain questionable.

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[10] *Толорая Г.* Зачем России БРИКС? // Россия в глобальной политике. 19 февраля 2015 г. [Georgy Toloraya, *Why Does Russia Need BRICS?*, Russia in Global Affairs, 19 February 2015], 1 Russia in Global Affairs (2015) (Sep. 21, 2021), available at http://www.globalaffairs.ru/number/Zachem-Rossii-BRIKS-17309.

[11] Peng Lü, *"It's the Economy, Stupid"? A Comparative Analysis of Confidence in Political Institutions Among the "BRICS" Countries*, paper prepared for the Asia Barometer Workshop (2011) (Sep. 21, 2021), available at https://ricas.ioc.u- tokyo.ac.jp/aasplatform/achivements/pdf/2011_ab_lu.pdf.

4. Role of the Academic Community

Currently, the academic society works on all of the abovementioned issues, as well as others. The fact that BRICS is, in many ways, a product of the efforts of the academic community also speaks of the special responsibility of specialists who develop recommendations for the further development of the association.

Moreover, the BRICS expert track appeared before the association itself. Even before the first summit in Yekaterinburg, a consultation mechanism was launched with the participation of academics from Brazil, Russia, India and China. Scientists and practitioners from four BRIC countries met for the first time in person in December 2008, at the Ararat Park Hyatt hotel in Moscow, at the initiative of the "Unity for Russia" and "Russkiy Mir" foundations. Prior to that, they had become increasingly accustomed to seeing each other either in a bilateral format or at Western venues. They began talks about the common interests of the world's largest "emerging" economies. Doubts were raised about the ability of such different countries, representing different civilizations; to not only unite, but also to find a common language. Subsequently, on the eve of the first BRICS summit, a meeting was held in Yekaterinburg. These meetings marked the beginning of the annual Academic Forum, which the chair country hosts on the eve of the BRICS leaders' summit, with the expectation of receiving independent assessments and recommendations from scientists. The final documents of the forums on all aspects of multilateral interaction helped in enriching the discussions at the highest level, as well as developing and expanding the BRICS agenda far beyond the originally designated framework of economic cooperation. In a number of areas, experts have been pioneers, drawing attention to emerging issues. The overwhelming majority of the initiatives of the expert community were supported at the highest level and helped in transforming the association into a significant mechanism of global governance with an extensive agenda, capable of formatting the fabric of international relations. By the third summit, the association had grown strong enough that a decision was made at the highest level to institutionalize the expert track by creating a network of research centers in five countries. In Russia, the BRICS National Research Committee (NRC) became the national coordinator in pursuance of the action plan approved by the President of the Russian Federation on 24 May 2011 to implement the agreements reached at the BRICS summit in the Chinese city of Sanya. The committee, as it was established, is designed to contribute to the formation of a single information field in the field of domestic BRICS research. It also promotes the Russian position and expert assessments in the international arena, and the coordination of the activities of leading research organizations and experts in the BRICS region. It consists of a diverse group of experts, who have coined the term "brixologists" to describe themselves. Their primary mission was to organize and conduct research on the role and place of BRICS countries and other "rising" powers in global politics and economics. In 2013, before the summit in South Africa,

in Durban, the heads of the national coordination centers signed the Declaration on the Establishment of the Council of Expert Centers (CEC) BRICS[12] or the BRICS Think Tank Council (in the English version) (BTTC). Its main goal is the exchange of ideas between leading experts, representatives of the scientific community and research centers from five countries, as well as the development of a shared ideology and strategic vision of the prospects for the strengthening of the cooperation between the BRICS countries. Today, the official members of the BRICS CEC are organizations that are called upon to promote five-sided cooperation along the so-called "second track" of BRICS: the Institute for Applied Economic Research in Brazil; the National Committee for BRICS Research in Russia; the Observer Research Foundation in India; the China Council for the BRICS Think Tank Cooperation in China; and the South African BRICS Think Tank in South Africa. Scientists and specialists hold conferences and consultations in both multilateral and bilateral formats on a regular basis. The annual BRICS Academic Forum, to which national coordinators invite representatives of relevant ministries and departments, as well as leading experts from five countries, is at the top of the pyramid. As a rule, the Academic Forum is held under the auspices of the foreign ministry of the host country, and its agenda is formed taking into account the themes of the upcoming BRICS summit.

Meanwhile, the Council of Expert Centers has developed its own system of work. It is based on the "Long-term vision of BRICS." They are referred to as the five main "pillars" of interaction:

- Promotion of economic growth and development;
- Peace and security;
- Social equality, sustainable development and improving the quality of life;
- Political and Economic Management;
- Achieve global progress through knowledge sharing and innovation.

Each of the BRICS member states is responsible for research in that direction. Thus, China is responsible for the first direction of research, Russia, for the second, South Africa for the third, India for the fourth, and Brazil for the fifth. Another "invention" of this type of work is the BRICS Civil Forum, which has become one of the supporting events of the "second track." In addition, the members of the Council of Expert Centers have launched a number of new projects. During Russia's presidency in 2020, Russia will continue the course towards strengthening the practical interaction of the five countries. The XII BRICS Academic Forum held in October 2020 in Moscow brought together about 200 international experts in person and online. As a result, concrete recommendations from experts and civil communities to were prepared for the leaders of the five countries and steps towards closer coordination of research on specialized problems were taken, mainly in three pillars: politics and global governance; economic

[12] Declaration on the Establishment of the BRICS Think Tank Council, Durban, South Africa (2013) (Sep. 21, 2021), available at http://www.nkibrics.ru/system/asset_docs/data/54cf/71f1/6272/690a/8b0c/0000/original/Declaration_on_...Think_Tanks_Council.pdf?1422881265.

growth and cooperation, finance and sustainable development; humanitarian cooperation and people-to-people contacts.[13] In recent years, it has also become important to ensure closer interaction between the national coordinators of the "second track" and the Sherpas/Sous-Sherpas of the BRICS countries, namely, the official and expert tracks of BRICS, in order for the leaders of the five countries to make a more productive use of the recommendations of the expert community. A methodology is being developed for ongoing monitoring of BRICS activities and the implementation of the agreements reached at the summits, which will allow for the identification of "problematic" areas of cooperation and the proposal of steps to achieve consensus on the ongoing formation of the BRICS agenda.

An extremely important argument in favor of the emergence of BRICS was that all of the countries of the association are among the developing powers, are the spokesmen for the economic interests of developing countries and are highly likely to become leading economic powers in the future, given their high rates of economic growth, large population, territory, and aggregate strength.

In recognition of certain shared characteristics, which are specifically presented further in the article, the BRICS countries are gradually forming a mechanism of cooperation to achieve common interests and implement joint action plans based on their complementarity and similarity. Moreover, an even greater potential for economic cooperation between the five countries can be unlocked due to their competitive advantages in terms of resource availability and industrial structure. BRICS countries are the largest generators of intercontinental economic growth among middle-income developing countries. They possess the largest population in the world, especially India and China, and have experienced rapid economic growth over the last two to three decades, only recently giving way to a slight decline. Russia is called the "world gas station" because of its oil and natural gas reserves. Russia can also be proud of its advanced basic science and thriving aerospace and military-industrial complexes. India has been dubbed the "world office" for its leadership in the computer industry and software development, despite the fact that Indian manufactured products are relatively uncompetitive. Brazil is perceived to be dominated by its advanced agriculture and clean technologies. Due to its wealth of mineral resources, Brazil is also referred to as the "global resource base." South Africa has gained recognition as a gateway to Africa and a springboard for the development of the African continent as a whole, owing to its enormous resources and advanced mining technologies. The BRICS countries are closely linked by a common identity and set of interests. On the one hand, the BRICS countries differ from the developed countries represented in the G7; on the other hand, they differ from ordinary developing countries in terms of scale, speed and potential for development, as well as international ambitions. The

[13] Recommendations of the 12th BRICS Academic Forum to the Leaders: BRICS New Vision for a Better World (2020) (Sep. 21, 2021), available at https://eng.brics-russia2020.ru/images/106/14/1061402.pdf.

BRICS members, as emerging markets and G20 members, share common interests in optimizing the industrial structure, reforming the governance system of the global economy, elevating their status in the international system and participating in global governance. In a world economic system dominated by Western countries, the BRICS countries are more vulnerable to the consequences of the global financial crisis and pressure from protectionism in world trade. Therefore, they need to speak with one voice and work together to provide a more favorable international environment for their own transformation and development.

By supporting development and multilateralism, the BRICS countries work together for a fairer, more equitable, just, democratic and representative global political and economic order. When developing the agenda for their summits, the BRICS countries should start with international and regional issues of mutual interest, guided by common goals and aspirations. The BRICS agenda aims to maintain equality and solidarity, openness and inclusiveness, build an open global economy, and deepen cooperation with emerging markets and developing countries. The agenda indicates the direction for BRICS countries to work together to achieve mutually beneficial results and common development goals, as well as to constantly expand the practical cooperation of BRICS, which can benefit the entire world. Under the influence of these internal factors, various summit agendas and joint action plans in accordance with the development goals of BRICS countries have been formulated over the years of the association's work.

The formation of the BRICS agenda is based on the general level of development of the countries that make up this alliance, but it is also dependent on the international situation. The cooperation of the BRICS countries must be viewed in the general context of the global development and evolution of the international system. We are in the midst of a tremendous period of growth, transformation, and adaptation. The world today is becoming increasingly multipolar, the economy is global, cultural diversity is increasing, and society is being digitized. The Law of the Jungle, in which the strong prey on the weak and zero-sum games are no longer acceptable, has been replaced by the universal aspiration of all peoples to live in peace, development, and cooperation based on the win-win model. Against this backdrop, many emerging markets and developing countries are rising, playing an increasingly important role in international processes.

The sudden global financial crisis of 2008 brought the global economy to a halt, and it has yet to fully recover. The coronavirus crisis became the new global trial in 2020, the outcome of which we still cannot predict. Faced with an external shock, the five BRICS countries leveraged their strengths and overlapping interests to create a BRICS-led cooperation mechanism covering a wide range of topics and different levels of engagement. Previously, a number of large cooperation projects had been launched. In particular, the New Development Bank and the BRICS Contingent Reserve Pool have become a source of financing for infrastructure and sustainable

development projects in the BRICS countries, contributing to more efficient global economic management and the emergence of an international financial cushion. Over the past decade, according to the National Bureau of Statistics of China, the total GDP of the BRICS countries has grown by 179 percent, trade by 94 percent, and the urban population by 28 percent.[14] All of this has greatly contributed to the stabilization of the global economy and its return to a growth trajectory, as well as brought tangible benefits for more than three billion people. However, the Covid-19 pandemic will definitely affect these indexes negatively.

It is obvious that the development of the BRICS agenda has always closely followed the changes in the international political and economic structure. Today's BRICS agenda has been largely focused again on economic issues, with a focus on what actions can be taken to overcome the crisis-driven slow economic growth. Following the 2011 Sanya summit, the scope of topics discussed within BRICS has gradually expanded from economic and political priorities to humanitarian and social issues. The BRICS countries began to hold various additional events, such as city forums, meetings of ministers of health, events aimed at developing cooperation in the fields of culture, sports, science and technology. As a result, the situation in the international political and economic system, as well as social trends, are external factors influencing the BRICS agenda.

5. Levels of Interaction

Over the past decade, BRICS has established an effective framework for cooperation. This framework, which is centered on a summit of leaders, covers a wide range of topics in a comprehensive and "layered" manner. The Annual Leaders Summit is an event of the highest level and of key importance for the cooperation mechanism, which sets the political and strategic direction for all cooperation within BRICS. At the second level of interaction, there are high-level meetings: national security advisers, governors of central banks and ministers of foreign affairs, trade, industry, labor and employment, education, science and technology, agriculture, environment, health, ministers for emergencies, migration issues and so on. These high-level meetings have become an important tool for implementing decisions taken by the BRICS leaders, and the significance of their contribution to the development of cooperation between the BRICS countries is noted in the declarations of each summit. For example, the declaration of the BRICS summit in Johannesburg states,

> We are satisfied with the results of ministerial conferences in various areas and look forward to the results of future meetings in 2018.[15]

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[14] BRICS Joint Statistical Publication, *supra* note 3.

[15] BRICS Johannesburg Declaration, Johannesburg, South Africa (2018) (Sep. 21, 2021), available at https://www.gov.za/speeches/10th-brics-summit-johannesburg-declaration-27-jul-2018-0000.

In addition, it has become a common practice for high-ranking officials of the BRICS countries to meet at major multilateral diplomatic events such as the U.N. General Assembly and G20 summits. Such meetings are the most important tool for developing pragmatic cooperation. At the third level of interaction, there are meetings of senior officials and working groups of the BRICS countries that provide technical support to cooperation, such as forums of state enterprises, forums on anti-corruption, science and technology, trade and economic issues, agriculture, justice, counter terrorism and drug trafficking, as well as urbanization. Furthermore, intellectual support for cooperation between the BRICS countries can be obtained from the BRICS Business Council, BRICS Council of Expert Centers, BRICS Expert Centers Forum, BRICS Business Forum, BRICS Financial Forum and other formats of cooperation. At the fourth level of interaction, there is direct contacts between the citizens of the BRICS countries through platforms such as the Forum of Young Scientists of BRICS Countries, the Conference of Small and Medium Enterprises of BRICS Countries, the BRICS Conference on Tourism, the BRICS Cities Friendship Forum, the BRICS Film Festival, and the BRICS Under-17 Football Championship, reflecting the importance of cultural exchanges and the associated opportunities for developing cooperation. The purpose of such interactions is to expand the scope of people-to-people exchanges between the BRICS countries, thereby creating favorable conditions for long-term cooperation and broadening the scope of the BRICS agenda.

6. Scope of the BRICS Agenda

The four levels of the BRICS cooperation mechanism listed in the last section have distinct purposes, corresponding to the four main categories of the BRICS agenda, which are included in a single cooperation framework and serve as an important source for analyzing the activities of the association.

The BRICS scope has expanded significantly over the last several years. The pattern of cooperation formed within the BRICS is driven by three main themes: economics, politics and security, humanitarian exchanges. In comparison to the themes reflected in the declarations of the previous summits, the content and scope of the cooperation agenda of the BRICS countries continue to be enriched and grow.

Without a doubt, the main priority of the BRICS cooperation mechanism remains economic and financial cooperation, with the most notable results achieved in this area. The BRICS countries take a unified stance of major economic reforms, including: changes to the system of global reserve currencies; reforming the management system of international financial institutions; the need to replenish the resources of multilateral development banks; creating new financial "airbags"; implementing an effective supervision system that takes into account the positions of all participating economies and overcoming financial imbalances. The BRICS countries have made outstanding achievements in the field of financial and economic cooperation. First,

the BRICS countries continue to deepen their economic cooperation. Second, the creation of appropriate mechanisms marked the beginning of a new stage of financial cooperation among the BRICS countries. Third, the advancement of the BRICS countries in the reform of international financial institutions has resulted in an increase in the representation of emerging market and developing countries. In addition, the BRICS alliance offers effective solutions to many global issues, such as combating money laundering, anti-corruption cooperation, climate change, food security and energy, which helps to enhance the role of BRICS in global governance.

Political and security issues play an important role in the BRICS agenda. Concerning major international and regional issues, such as the situation in Iraq and Afghanistan, the crisis in Syria, the Iranian nuclear issue, the crisis in Ukraine, the conflict in Yemen and the denuclearization of the Korean Peninsula, the BRICS countries uphold the positions of emerging market and developing countries and call the parties involved to comply with the requirements of the U.N. Charter, international law and the basic principles of international relations, and strive to resolve conflicts through political and diplomatic methods. The BRICS countries are implementing joint counter-terrorism activities and are working to complete negotiations on the conclusion of a Comprehensive Convention on International Terrorism within the framework of the U.N. General Assembly. The emergence of BRICS has renewed discussions over peacekeeping and donor activities. On the one hand, BRICS countries adhere to the paradigm of the liberal world and its often neo-liberal attitudes, which allows them to advocate for the protection of sovereignty and non-interference in internal affairs, as well as to protect their trade and promote other interests. On the other hand, the increased active involvement of the BRICS countries in the peace and security agenda, as well as the deployment of their own donor and peacekeeping programs poses a challenge to the Euro-Atlantic structures dealing with peace and security and international development. In addition, a common understanding was reached between BRICS countries on issues such as the exploration and use of outer space, the fight against piracy and cybercrime. The BRICS countries also resolved to strengthen practical cooperation and information exchange in the areas of renewable energy production, peaceful uses of nuclear energy, climate change and food security.

The mission of BRICS is to broaden the scope of mutually enriching and mutually beneficial cooperation among the members of the association and to form a positive agenda on a wide range of issues. The cooperation of the BRICS countries on social and humanitarian issues is growing; channels of communication and humanitarian exchanges are constantly expanding in areas such as familiarization with each other's customs, cooperation of small and medium-sized enterprises, cooperation on gender equality, youth policy, education, culture, health care and strengthening friendship between cities.

To summarize, BRICS has gradually evolved from a "dialogue forum" focusing on global economic governance issues to a "comprehensive coordination mechanism"

dealing with political and economic governance issues, as well as general principles and practices of international cooperation.

7. Place in the System of International Relations

The influence of BRICS as one of the relatively new forces in the world arena is constantly growing. As the experience of BRICS shows, the institutions of multilateral diplomacy have become an integral part of the modern system of international relations, and they are able to serve as instruments for solving various international problems that are beyond the strength of bilateral interstate relations.

BRICS as an alliance is characterized by the presence of open, dynamic, and diverse mechanisms. In practice, the BRICS countries have a two-way and multilateral dialogue system. This mechanism enables the BRICS countries to reach consensus on key global issues, and to create a flexible atmosphere in which no particular foreign policy behavior is imposed on one member of the bloc by another member. This culture and type of interaction will clearly have a greater impact on the relationship between the member states than traditional geopolitical and geo-economic ties. At the same time, this BRICS culture contributes today, and will undoubtedly continue to contribute in the future, to the formation of a new culture of modern international relations.

In general, BRICS could be viewed as a reflection of new methods of implementing multilateral diplomacy. This is a significant achievement for the official direction of the BRICS countries' policy. However, in today's realities, as BRICS tries to develop its own structure, strengthen its members, and organize their work from within in order to obtain all of the necessary mechanisms for its development, the existing cooperation between officials should only be strengthened. All the more so, it is clear that rivalry with other blocs and countries will be difficult and that competition in the economy leads to constant confrontation in politics. This is one of the main reasons why BRICS should not only focus on the economy but also include a wide range of issues in their work. Of course, the BRICS countries take this into account, but in order to gain more effective results, it should be accelerated.

As previously mentioned, all of the BRICS countries are experiencing economic growth. On the one hand, in terms of economic power, these countries are comparable to developed countries, owing to rapid economic growth and their significant role in the regional economy. On the other hand, the rapid economic development of the BRICS countries is of concern to Western countries. In the existing world political system, the BRICS countries are perceived as a new force in international relations, and they are sometimes referred to as "new" players, emphasizing that they are perceived as "aliens" in the existing international system. Recognizing their many objective similarities and common concerns, it appears that the BRICS countries have banded together to assert their role in the global system and defend their core interests in the globalizing community.

8. What Determines BRICS Success?

By 2020, the total GDP of the BRICS countries amounted to twenty-five percent of the global ($21 trillion), and the share of international trade amounted to almost twenty percent ($6.7 trillion). The mutual exports of the five BRICS countries grew by forty-five percent from 2015 to 2019. These figures confirm the strengthening of the positions of BRICS countries in the world economy. The activities of the association are already delivering tangible benefits to the citizens of its member states. Furthermore, the BRICS countries have successfully established the operational activities of the New Development Bank. For instance, in Russia, nine projects worth $2.8 billion have already been approved. Moreover, the BRICS Energy Research Platform has been launched, which will allow for the ongoing promotion of joint investment projects in the energy sector. Currently, the Partnership for a New Industrial Revolution is also being created, which will allow for a formation of a mechanism for cooperation in the field of digitalization of industry and the training of highly qualified personnel. Among the other significant steps that could be mentioned are Russia's intentions to create its own cryptocurrency for use within the BRICS countries; in addition to the unified payment system and internal cryptocurrency, a special alliance for the development of artificial intelligence could be formed within the BRICS. Moreover, Russia is developing a digital platform for data exchange between scientists in BRICS. It will be used to select new research projects and create transnational teams of scientists. The solution will allow for the open exchange of scientific knowledge and data among teams of scientists. Cooperation between the BRICS countries in the field of collective information security including in the use of information and communication technologies receives special attention. The establishment of a unified cyber police is designed to aid in the organization of countering urgent cyber threats such as information terrorism and extremism, as well as information war operations and large-scale hacker attacks.

The impressive results gained by BRICS are determined, first and foremost, by similarities between the BRICS countries and their intentions for collaborative work. A significant number of them are listed below:

• A similar position of the five countries in the existing structure of international relations

Each of the five BRICS member states are developing countries with growing economies that have a shared influence in the regional configuration of development. These five countries can be regarded as "the third world in the first world" and "the first world in the third world" based on their level of development. Nevertheless, their development has thus far been mainly manifested only in the economic sphere. In terms of total power, the BRICS countries ranked significantly lower than the developed countries. For instance, neither of the BRICS countries is a member of the G7. BRICS cannot dictate the conditions for development to the international

community. In fact, the BRICS countries, by and large pursue a protectionist policy in order to ensure their national interests and act as a united front in relations with Western countries. In terms of aggregate power, the Third World countries cannot be compared to the BRICS countries. However, there is a significant difference in terms of development levels between the BRICS countries and developed countries.

• A common desire for multipolarity, a variety of forms of modern international order and a desire to increase its significance in international affairs

As a country's aggregate power increases, it seeks to protect its national interests and strives for such a status in the world arena that corresponds to its power. It is important to note that the national interests of states have a hierarchical structure: first, there are the interests of the survival of the state (the interests of national security) which are the fundamental interests of the country, followed by the interests of development (economic interests) and finally – the interests of state authority, as well as the ability to control one country over another. This formulation of the hierarchical nature of national interests has proven to be relevant in the BRICS countries. In the current world economic structure, as embodied in the international organizations of developed countries, developing countries do not have a sufficient number of quotas and votes. In other words, they are not a significant force for influencing decision-making in the global economy. Naturally, the current unjust order is unfavorable for the new growing economies. As a result, in terms of external political and economic relations, the BRICS countries are oriented towards multipolarity in world politics and reducing the dominant role of the West in international affairs in order to strengthen its role in the global political and economic process. This is the primary goal of the joint diplomatic efforts of the BRICS countries, which are sometimes referred to as "BRICS-specific diplomacy."

• A similar approach to resolving confrontational issues

In the settlement of international conflict, the BRICS countries are unequivocally committed to using only diplomatic and negotiation methods and they are categorically opposed to violent interference in the internal affairs of any country.

• A similar foreign policy orientation aimed at democratizing international relations and opposing hegemony and an unjust world order

As previously stated, due to their rapid rise, new growing economies will undoubtedly compete for a place in the international community that is proportionate to their economic strength. It appears that in the modern international structure these requirements the demands of growing economies are met with great difficulty. In this regard, phrases such as "democratization of international relations" and "against hegemonism" are frequently used as the foreign policy slogans of the BRICS countries. Overall, the priority for BRICS is the development of full-fledged relations with the West, since the BRICS countries are not yet in a position to resist the West or to cooperate with Western countries on an equal footing. As a result, the BRICS countries are at a similar stage of development, share similar goals and

have proposed a non-Western development model known as the "BRICS-specific development path."

• BRICS countries are regional centers; they play an important role in the regional governance of the world

The BRICS countries are the locomotives of regional development, representing developing countries from different continents. Brazil has been a pioneer of economic development in Latin America, whereas Russia, located in Eastern Europe and North Asia, is at the core of Eurasian integration. There is every reason to believe that the BRICS countries, being the centers of development in different regions of the world, will be able to play a significant role in regional governance. The trans-regional BRICS bloc has the potential to become a "collective pole" in a multipolar international structure, as well as a "collective great power" among the great powers of the world.

• In the BRICS countries, the system of political governance is centralized

The industrial revolution in modern and recent times has led to industrialization on a global scale. If the BRICS countries are to achieve economic recovery in a relatively short period of time, they will need a centralized model of political governance in order to use all necessary resources precisely for the development of priority sectors or those areas that can bring substantial economic benefit. In this regard, the centralized political model of governance in the BRICS countries differs significantly from the decentralized power relations in Western countries.

• Similarity of the stages of development of BRICS countries

The BRICS countries are currently at a similar stage of development, transitioning from the group of middle-income countries to the group of high-income countries.[16] The urgent task for most of the BRICS countries, which are middle-income countries, is to avoid the "middle-income trap," which is characterized by stratification into rich and poor, uneven income distribution, corruption, exacerbation of social contradictions, and so on. A transitional stage in development is distinguished by problems and new challenges that require intellectual efforts to find a reasonable solution. If the necessary measures are not taken, economic and social development may stagnate or even regress. The "middle income trap" phenomenon refers to the fact that some countries and regions remain for an extended period of time at a low average income level. Some countries and regions advanced quickly from the low-middle-income status, but failed to establish a firm foothold in the group of high-middle-income countries. The BRICS countries can use their collective experiences and practices to help each other to improve their positions in this regard.

• Similar desire to institutionalize and improve the organizational level of the BRICS countries

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[16] БРИКС // Tadviser. 17 декабря 2020 г. [BRICS, Tadviser, 17 December 2020] (Sep. 21, 2021), available at https://www.tadviser.ru/index.php/%D0%A1%D1%82%D0%B0%D1%82%D1%8C%D1%8F:%D0%91%D0%A0%D0%98%D0%9A_(%D0%91%D0%A0%D0%98%D0%9A%D0%A1).

BRICS cooperation in the field of institutionalization has already yielded significant results. Nevertheless, as previously mentioned, the BRICS mechanisms are still in their initial stages of institutionalization with no secretariat or other relevant bodies in place to ensure their functioning as a full-fledged international organization. However, under the current conditions, multi-level contacts and cooperation within BRICS are constantly deepening. Throughout this process, all the BRICS countries pay attention not only to strengthening cooperation but also to expanding external relations with other international organizations.

• BRICS countries have one more distinct feature – complementarity of energy

As the world's most dynamic economies, the energy consumption of the BRICS countries is understandably high. While, India, China and South Africa are energy importers, Brazil and Russia are energy exporters. In this regard, the existing transregional complementarity between the importers and exporters of BRICS in the energy sector is reflected in improved energy security, the development of new types of energy, the development of energy technologies and an increased role in global energy governance. The existing energy complementarity contributes to the cooperation of BRICS countries, both bilaterally and multilaterally. The goal of close cooperation in the energy field is to create a sustainable discussion and coordination mechanism on energy issues within BRICS. Specific steps have already been taken in this regard.

9. Priority Areas of BRICS Cooperation in the New Development Strategy

One of the most pressing issues for BRICS today is determining the next step in its development. Without a doubt, economic cooperation remains the most important area for strengthening ties. Thus, the adoption of the new BRICS Economic Partnership Strategy is of central importance. It is also important to pay special attention to the activities of the BRICS New Development Bank, which has been in operation since 2016.

The fundamental elements of the BRICS Development Strategy are digitalization trends, expanding economic opportunities for countries, sustainable growth of individual industries within the framework of the seventeen United Nations Sustainable Development Goals. At some point in the changing landscape, there were attempts to rethink the relevance of these areas. When it comes to the Sustainable Development Goals, despite the fact that they are all interconnected, one of the most important is becoming the goal of social development as a result of the corona crisis. It is necessary for the BRICS member states to coordinate national policies in order to face the global problems, such as the epidemics that have affected the entire world or changed the patterns and directions of development.

The digital transformation area is becoming another priority, owing to the fact that the consumption system has changed dramatically, and that a significant portion

of trade has moved to electronic form. BRICS needs to agree on comprehensive measures and rules for digital services as part of its framework. Agriculture, food production, biotechnology and public medicine are all examples of areas where the innovative agenda should be implemented. In addition, the development of innovations in the industrial economy, particularly in the production and consumption of energy, is necessary not only because it reflects the interests of the growing economies of the BRICS countries, but also because the rest of the world cannot repeat the Western path – the planet will not withstand the anthropogenic load.[17] The answer to this problem is closely related to the issue of environmental protection. This topic will be discussed further below.

However, the pandemic did not cause any fundamentally new challenges for the BRICS countries. The coronavirus crisis, as well as another serious issue, the U.S.-China trade war largely served to actualize the existing ones.

In the third decade of the twenty-first century, BRICS needs to position itself as a full-fledged instrument of global governance, and one of the priorities of its development should be to establish a permanent institutionalized dialogue with third countries, primarily in the BRICS plus format. Among other priorities, should be strengthening cooperation in the security sphere. BRICS has already accomplished a lot in this area, as well as in terms of coordinating positions and "speaking the same language." When we compare the ability of BRICS to negotiate with the ability of the G20 or G7, BRICS clearly wins. The current trends in global development make cooperation on security issues even more relevant. For instance, the United States confrontational policy towards China and Russia will continue for a long time, which complicates cooperation on security issues at the global level and increases the risks of bloc polarization. The United Nations Security Council is in a state of inaction. The G20 has become hostage to the conflict between the United States and China. Traditional Western-centric institutions of global governance are losing their effectiveness as selfishness and mercantilism become more prevalent in politics. Globally, the management deficit is growing. In this regard, BRICS, by the very fact of its existence, has a stabilizing effect on international relations. The organization includes both, countries that the United States has declared as its main rivals, and countries that the United States considers to be key partners, such as India. On this basis, BRICS reduces the risk of global polarization. At the same time, it should not turn into an anti-American club; rather it should have a unifying effect on international relations. Accordingly, it is in the interest of BRICS to reduce the governance deficit at the global level, independently propose rules for interaction on security issues and promote them at the global level. BRICS should complement, not replace, global governance by proposing rules and regimes that may be necessary,

[17] *Яшкова Т.А.* БРИКС: место и роль в изменяющемся мире // КиберЛенинка [T.A. Iashkova, *BRICS: Place and Role in a Changing World*, Cyberleninka] (Sep. 21, 2021), available at https://cyberleninka.ru/article/n/briks-mesto-i-rol-v-izmenyayuschemsya-mire/viewer.

but impossible to implement in other, more traditional institutions. BRICS should be openly positioned not only as a forum of dialogue between the five countries about issues of mutual interest, but also as an institution of global governance ready and capable of taking on this role.

On the other hand, the threat of war is objectively increasing around the world, with the escalation of an unintentional non-nuclear clash in the "gray zone" of the cyber sphere type. The arms control system is in desperate need of a major upgrade. Furthermore, it is a completely unconventional area for BRICS, but non-nuclear weapons are now the primary concern of strategic stability. As a result, it would be especially beneficial for BRICS to accept and promote the global rules of responsible behavior in military aspects, information and communication technologies. The focus of BRICS work should be not on tougher arms control regimes, but on the rules of conduct in the non-nuclear sphere and strengthening confidence-building measures. Moreover, there is a rise in transnational security challenges. Threats such as international terrorism are used for great power competitions. The pandemic and environmental issues are being used as a form of information warfare against geopolitical rivals. All these dangers are a threat to the BRICS countries. Because BRICS as an organization is a non-military alliance, it is much better suited to combating transnational threats. However, due to its nature of economic cooperation, an effective fight against such threats only within the BRICS bloc is impossible. It is important to recognize that exclusivity leads to marginalization. As a result, the main priority for BRICS should be the development of the "BRICS plus" and "outreach" formats. Partner countries could include non-Western G20 members who are not BRICS members, for example, Turkey and Saudi Arabia, but not only them; the list of countries depends on the specific issues on which BRICS should strengthen interaction.

In light of the coronavirus pandemic and other widespread diseases, biological safety has become an additional pressing issue for cooperation in BRICS. Unfortunately, the countries' interaction on these issues is insufficient within the BRICS framework. However, it is necessary to consider the assistance that the countries can provide to their partners in the organization. In addition to discussing the creation of a five-way Vaccine Center, it is necessary to cooperate on the development of testing systems. It is also advisable to think about creating under the auspices of BRICS or the G20 an international bank for the advancement of research in the field of epidemiology. In addition, within the BRICS format, it is necessary to develop principles and rules of international cooperation in preventing epidemics, to interact on the supply of drugs and testing means, to develop principles for the price regulation of drugs and medical devices, as well as customs regulation rules, because there are problems with other diseases such as HIV and AIDS in Africa, tuberculosis and others, including endemic diseases in India and China, cardiovascular diseases in Russia, mental health issues in Brazil and so on. Because the number of problems that need to be addressed is enormous, BRICS has a large field to work on in the healthcare sector, including a more expanded format.

The next important area for cooperation within the BRICS format is ecology. Environmental issues are deeply embedded in the economic specialization of the BRICS countries and closely linked to economic growth models. Thus, here we have several fundamental issues:

- BRICS could use a conceptual framework for the basis of a "green economy";
- Bio economics is a promising area, but investments in this area are minimal;
- BRICS has a monopoly in the field of bio economy.

Taking into account the aforementioned, the main mission of BRICS should be the development of economic growth models that pay special attention to environmental constraints. The primary source of environmental problems is growing consumption, so it must be limited, and BRICS needs to raise this issue for global discussion. Because Western countries are the primary consumers and the BRICS countries are the primary producers, the scale of environmental problems in the latter is greater. Consumption patterns need to be adjusted globally. The Sustainable Development Goals should be revised, making them systemic, and priorities should be changed. When it comes to proposals for BRICS in this sphere, we can focus on the following:

- Solving environmental problems using elements of a progressive tax;
- Coordinated work on the development of international standards for "green financing" (in the BRICS countries it is the cheapest way to reduce emissions);
- Joint efforts to create new models of economic development that take into account economic constraints.

In general, we can state that the BRICS countries can contribute to the search for solutions for a number of world problems. They all support the establishment of a multipolar world order, based on the norms of international law, the principles of democracy and ensuring human rights, rejection of the practice of "humanitarian intervention," and take a collective approach to solving global problems and resolving regional conflicts. To become a stable international institution in the formation of a multipolar world system, BRICS has to focus on issues such as international trade, economic and investment cooperation, reforming the obsolete monetary and financial architecture and establishing a more democratic and equitable international financial and economic order, instilling modern methods of network diplomacy, strengthening cooperation in security area, including the field of information security, counter cyber-terrorism and cyber-crime, both within the BRICS format and within the framework of global and regional organizations, as well as making joint efforts within the U.N. and other institutions to coordinate the fight against drug trafficking. BRICS must also give attention to the creation and strengthening of their external relations with leading developing countries and international organizations, and foster cooperation on the basis of equality, complementarity and mutual benefit in the economic, scientific, and technical fields, taking into account the significant resource base their countries have. Their enormous labor resources, capacious domestic markets, economic modernization and high technology goals, and food

and energy safety measures, will give BRICS the opportunity to form an effective development strategy to gain a foothold in the multipolar world order.

The advancement of the development of BRICS in the future can be carried out only on the basis of the collective efforts of all the BRICS countries. The reasons for this are as follows: China is rich in economic resources, but it has little experience of international cooperation; Russia has a fairly large military potential and natural resources, but it does not have sufficient economic power; India has a democratic political system, but it lacks the aggregate power corresponding to large developed democracies; and Brazil and South Africa, despite being leaders in their respective regions cannot bear the burden of full international responsibility. Thus, there is every reason to hope that with the strengthening of all BRICS countries, a truly highly institutionalized trans-regional international organization will gradually emerge in the international community over time.

Conclusion

Despite the difficulties that the BRICS countries have faced, it is generally accepted that the potential and competitive advantages of the BRICS countries in terms of available resources, market size and labor force have been preserved, and the long-term prospects remain promising. The BRICS countries are urged to follow developing historical trends, seize new opportunities for development, work together to address existing challenges and play a constructive role in establishing a new type of international relations and a "community of the common destiny of mankind."

The current world political situation and the state of inter-economic cooperation between the peoples of different countries are among the important external factors that continually influence changes in the BRICS agenda. Additionally, changes in the global agenda under the U.N. Charter and the G20 are also important factors shaping the scope of BRICS interaction. The level of development of interaction within BRICS is characterized by the maturity of the agenda and the established mechanism of cooperation, as well as the expansion of the list of substantive topics for cooperation.

In the foreseeable future, the economic component will remain the priority in BRICS development. However, measures aimed at strengthening multilateralism and advancing the reform of global governance will take a prominent place on the BRICS agenda. In addition, the BRICS countries should recognize that cultural cooperation is the primary driving force behind the fourth industrial revolution, and it offers significant opportunities for economic development.

Due to modern challenges (such as the Covid-19 pandemic), BRICS should pay special attention to the healthcare system, as well as continue to expand the scope of humanitarian exchanges and cooperation and make full use of opportunities for interaction in multilateral cooperation. The updated Strategy until 2025 already

includes the following areas of cooperation among the BRICS countries: sustainable trade, investments without barriers and sanctions, the development of the digital economy in the interests of people, as well as sustainable growth and balanced development in the fields of climate, energy, spatial development, human capital and food security. The focus of the future BRICS agenda, along with topics that will arise based on the internal development priorities of BRICS, may include issues such as expanding the membership of the association, linking cooperation within BRICS with the implementation of the 2030 Agenda and the digital economy as a key element of the BRICS development agenda.

Looking back at the history of BRICS cooperation over the last decade, it should be noted that the countries participating in the alliance demonstrated their sincerity to develop interactions with BRICS partners, allowing for the formation of various cooperation mechanisms. The active participation of the BRICS countries in international cooperation has become an important experience for all developing countries around the world and has made a significant contribution to the development of North-South cooperation.

Over the next decade, BRICS should focus on extending cooperation among developing countries, actively participating in global governance, expanding and deepening pragmatic cooperation, as well as cooperation among the BRICS countries on sustainable development issues and broadening the list of partner-countries and organizations, all of which would allow BRICS to gain a foothold in a multipolar world order as a successful, fully-fledged international alliance.

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POSSIBLE LEGAL COOPERATION FOR A BRICS PERSPECTIVE ON INTERNATIONAL AND TRANSNATIONAL ECONOMIC LAW

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This research paper seeks to identify and analyze the regulations that rule the economic life of the BRICS countries in the fields of foreign investment's law, competition law and global administrative law, and further to identify points of convergence and divergence among them in order to indicate the possibilities of legal cooperation to facilitate economic exchanges and investments flow among them. We believe that the possible bottlenecks in trade and investment can be overcome mostly by exchange of experiences, to mitigate the lack of knowledge on national laws and regulations, and by the creation of cooperative mechanisms that facilitate the economic flow among them.

Keywords: foreign investment law; competition law; global administrative law; cooperation; international law.

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Introduction

As BRICS has become a political grouping, some questions have arisen over the cultural similarities among these countries, besides their condition of the most representative developing economies. The questioning carries out a misleading assumption whereby BRICS could be a form of traditional regional integration – the reason why it would require solid cultural ties – since it was the sort of alignment known as the only alternative to multilateralization. But such assumption is also misplaced by virtue of proclaiming that the group would not last because their similarity would be "solely" their condition of the most representative developing economies, as if such common feature could be underestimated.

In fact, if we take a deeper look at developing countries' social and economic demands, as well as at their contradictions, we ascertain that the "developing" economic condition represents a powerful political likeness: it places the country within the world. Such condition creates a circle of external relations' possibilities and risks to a developing economy. It compels the country to vindicate higher participation into global governance, to reduce economic underdevelopment by means of aiming to attract foreign investments, to take part of technological revolutions in course; at the same vein that the country shall make its best efforts to safeguard its sovereignty and independence, to conserve its natural resources and to assure that its populations will access satisfactory portion of such resources, in a sustainable manner.

In the case of the BRICS, all of its members attribute particular relevance to the economic activities which evokes some sort of state measures – since direct exploitation until regulating and supervising, – as it is the case of energy, transportation, communication and so on. Moreover, all BRICS countries are strongly concerned about international investments flows, both as receivers and providers.

If the core of the shared aims of developing countries is economic, enhancing legal cooperation through economic laws and governance is strongly recommended as it rules the economic exchanges and investments in and between countries. In this sense, we seek to identify and analyze the regulations of the BRICS countries in these matters, and further to identify points of convergence and divergence among them in order to indicate the possibilities of legal cooperation to facilitate economic exchanges and the flow of investments. We believe that possible bottlenecks in trade and investments can be overcome by exchanging experiences to mitigate a lack of mutual knowledge and by cooperation in three segments: foreign investment's law, competition law and global administrative law. Therefore, these are the guiding axes of this research, which will be addressed in the following sections.

1. Foreign Investments' Law Within and Among BRICS

Brazilian foreign investments' ruling has a constitutional framework. Its insertion into globalization, in 1990, has been made by reforming the Constitution, in order to

avoid discriminatory treatment upon foreign investments, by abrogating the provision that authorized special favored treatment directed to small companies owned by national capital, and hence evading national capital criteria.[1] The most important Brazilian law over foreign investments is the Law No. 4.131/1962, modified by the Law No. 4.390/1964, which is supplemented by a series of other instruments.[2]

Concerning its foreign policy, Brazil has assayed to take part in Bilateral Investments Treaties (BITs) proliferation in 1990, but changes occurred into political scene has made the country to refuse ratifying the treaties assigned, under suspicious held by Argentinian crisis.[3] Notwithstanding, Brazil is currently accepting to conclude Agreements on The Promotion and Reciprocal Protection of Investments. Internal legal measures are also taken, as the express possibility of public administration to take part in arbitration proceeding, which includes proceedings with a foreign investor,[4] as well as recently the legislation permitted the amount of a compensation due to expropriation to be defined in arbitration proceeding.[5]

The 1990s are also meaningfully for Russian investments' law. In 1991, Russia has approved its internal law ruling foreign investments. Some scholars consider it as the first instrument needed to be modernized. Lately, it was replaced by the modern Federal Law on Foreign Investments – Law No. 160-FZ. There is also an important legal instrument – Law No. 225-FZ – governing shared production, the use of subsoil and investments activities[6]. Furthermore, Russia, in the same decade, has concluded several BITs, which has been intensified under President Putin's mandate. Its foreign policy directed to investments comprises the resource to such treaties, many of them contending an arbitration clause.[7]

Previously to 1990, India has had a protectionist legislation over foreign investments. Foreign social participation into national companies was limited to a percentual

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1 Eros Roberto Grau, *A Ordem Econômica na Constituição de 1988* 269–273 (3rd ed. 1997).

2 Thiago Pedroso Andrade & José Augusto, *Direito Fontoura Costa. Desenvolvimento e o Investimento Estrangeiro Direto: Crítica ao Padrão de Indenização por Danos Perpetrados Pelo Estado Conforme o Direito Brasileiro* in *Direito e Desenvolvimento: um Diálogo entre os BRICS* 406 (Mario G. Schapiro & David M. Trubek eds., 2012).

3 *See* José Augusto Fontoura Costa, *Brasil e Arbitragem Internacional de Investimentos: Realidades e Possibilidades*, 1(3) Revista Jurídica Luso Brasileira 875 (2015) (15 Sep. 2021) also available at http://www.cidp.pt/publicacoes/revistas/rjlb/2015/3/2015_03_0875_0911.pdf.

4 Marco Antônio Ribeiro Tura & Emílio Mendonça Dias Silva, *Arbitragem de Investimentos Estrangeiros* in *Arbitragem e Administração Pública: Temas Polêmicos* 145 (Joaquim Paiva Muniz et al. eds., 2018).

5 Emílio Mendonça Dias Silva, *Foreign Investments Protection and Arbitration Within BRICS* in *International Legal Aspects of BRICS* 289 (Paulo Borba Casella et al. eds., 2019).

6 *See* Mark A. Stoleson, *Investment at an Impasse: Russia's Production-Sharing Agreement Law and the Continuing Barriers to Petroleum Investment in Russia*, 7(2) Duke J. Comp. & Int'l L. 671 (1997).

7 Elliot Glusker, *Arbitration Hurdles Facing Foreign Investors in Russia: Analysis of Present Issues and Implications*, 10(3) Pepp. Disp. Resol. L.J. 614 (2010).

e it depended on the approval of the Reserve Bank of India. Its participation could be increased by 40% in case of technology transference. After Gulf Crisis, India has launched its New Industrial Policies and Other Reforms, aiming to attract foreign investments by altering its legislation over the issue.[8] Such new policy has resorted to the conclusion of a series of BIT's. Those treaties are held as the reason for great increase of foreign investments flows.[9]

In the history of Chinese relation with foreign investments, the reforms made in 1970 is the reference to its market openness. In 1968, the Law on Foreign-Owned Enterprises came into force. It was regulated by the Catalogue for the Industrial Guidance of Foreign Investments, establishing areas in which foreign participation are encouraged, permitted, restricted and forbidden, depending on the degree of national interest and sensibility. However, considering that there were constant measures to defraud such system,[10] China has approved its recent Foreign Investments Law, which came into force in January 2020.

China has a well-established foreign investments' policy founded on BITs conclusions. Interestingly, the country has been concluding BITs with "south-to-south" feature, which is not so aggressive to local potentiality because the ruling relation is governed by local legislation and the treaty is only applied in case of local admission upon the investments, despite its economic power. Besides that, China is the only BRICS country that ratified Washington Convention on the Settlement of Investments Disputes, 1968 – ICSID Convention. BITs promoted by the country generally contain arbitral clauses to ICSID to solve investments controversies.[11]

Investments law in South Africa has been born after *apartheid* regime. The first addressing has been extremely related to foreign policy and the conclusion of BITs since UK was endeavoring to protected British national's properties. Many BITs have been ratified with European countries. However, their provisions were too severe to local interests and collided to South African Constitution. After being charged in lots of arbitration proceedings, South Africa has terminated its first generation of BIT's, comprising the treaties among European countries. In addition, the country has decided to govern investments relations through national legislation, in a way that it has enacted its *Protection Investments Act*, in 2015.[12] This *Act* contains provisions

8 *See* Tracy S. Work, *India Satisfies its Jones for Arbitration: New Arbitration Law in India*, 10(1) Transnat'l Law. 217 (1997).

9 *See* Niti Bhasin & Rinku Manocha, *Do Bilateral Investment Treaties Promote FDI Inflows? Evidence from India*, 41(4) Vikalpa 275 (2016).

10 Meichen Liu, *The New Chinese Foreign Investment Law and its Implication on Foreign Investor*, 38(2) Nw. J. Int'l L. & Bus. 288 (2018).

11 Catherine Elkemann & Oliver C. Ruppel, *Chinese Foreign Direct Investment into Africa in the Context of BRICS and Sino-African Bilateral Investment Treaties*, 13(4) Rich. J. Global L. & Bus. 593 (2015).

12 Dreyer Swart, *Legal Protection of Foreign Investment in South Africa*, Master Thesis, University of Pretoria (2016), at 15–43.

protecting foreign investments but conciliating to public interest. In the other hand, it furnishes detailed descriptions of the ambit of application, to avoid that the protection can be extended with no control.

Despite being a matter of importance for all BRICS countries, there is not a joint and uniform vision construed by the group on foreign investments. Before BRICS alignment, India and Brazil have made a joint announcement in the World Trade Organization (WTO) opposing to the idea that trade-related measures should be considered as harmful to competition.[13] Those measures imply requirements to the foreign investor, aiming to improve local potentiality, like the duty to use local inputs or to promote technological transference. For both countries, those measures could favor industrialization and, therefore, improve competition.

Investments have also appeared as a strategic issue for BRICS countries, in the document named "The Strategy for BRICS Economic Partnership,"[14] which was prepared and presented in the Ufa Summit, in 9 July, 2015.

2. Competition Law Within and Among BRICS

Competition law is an important field to all BRICS countries. BRICS countries' legislation over competition are, in some cases, referred as the firsts in the world: in case of Russia competition law exists since the enactment of the "Code of Criminal Remedies," by Emperor Nicholas I, in 1845[15]; or India, which counts to a modern competition legislation since 1969. Most of BRICS countries counts to administrative bodies, holding preventive and repressive duties in order to avoid monopolies and cartels: in case of Brazil, the Administrative Council for Economic Defense (CADE); in Russia the activity is exercised by the Federal Antimonopoly Services (FAS); in India by the Competition Commission of India (CCI); and the Competition Commission, in South Africa. China, in this sense, has a particular difference, inasmuch as the duties to avoid economic domination are exercised in a diffuse manner, counting to diversified authorities to lead with the matter, being the most prominent the Ministry of Commerce of the People's Republic of China (MOFCOM).

Moreover, all BRICS countries has an economic framework traditionally connected to State-Owned Companies (SOE's), which made their legal flexibilizations to vindicate competition efficient laws. Meaningful, competitive cooperation among BRICS

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[13] World Trade Organization, Council for Trade in Goods, Committee on Trade-Related Investments Measures, Communication from Brazil and India, G/TRIMS/W/25, 9 October 2002 (15 Sep. 2021) available at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=37165,80441,62798,46188,7585,107275,42800,32046,24943,47836&CurrentCatalogueIdIndex=5&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True.

[14] The Strategy for BRICS Economic Partnership (15 Sep. 2021) available at http://infobrics.org/files/pdf/43.pdf.

[15] About the FAS Russia, FAS (15 Sep. 2021) available at http://en.fas.gov.ru/about/what-we-do/.

countries is more advanced than foreign investments. Russia has demonstrated to be greatly interested in the matter, since FAS has promoted the first BRICS conference on the matter, held on 1 September 2009, in Kazan. Since then, BRICS countries have, in each two years, new edition of the conference.

Competition is, therefore, an area that BRICS is effectively promoting cooperation. It is fruitful to keep strengthening BRICS ties relating to the matter, because avoiding the abuse of economic power is important for the democratization of international relations.

3. Improving BRICS Participation in Global Administrative Law

Another important discussion for BRICS could be the advance of the postulates of a global administrative law. They derive from the transformation of domestic administrative laws by the necessary adaptation to globalization. As a general phenomenon, the provider state, which was built by the conception of welfare state, is being replaced by a manager state. Public activities take place by means of public and private partnerships and, as sensible to public policies, these activities are object of state regulation. From that, regulation and supervision of this cluster of economic activities are realized by regulatory agencies with transnational behavior, claiming more attention from international law to those matters.[16]

A good example of the expansion of global administrative law is the Government Procurement Agreement (GPA) in the ambit of WTO. It is aimed to submit local government procurement to its *desiderata* of non-discrimination and open market. Within BRICS, Hong Kong and Chinese Taipei are members of the agreement and, recently, Brazil and Russian Federation are in process of acceding.

Public procurement is also extreme important to infrastructure. It is also a tool for reversion of economic underdevelopment. It is a matter relevant to foreign investments and to the condition of developing economy. Therefore, it would be fruitful if BRICS had a view and a joint strategy on the matter, beginning from the establishment of group studies to understand the meanings of a possible "global administrative law."

Closing Remarks

The BRICS grouping has a strong economic and financial motivation in its political coordination and cooperation. However, this convergence needs to be strengthened to be able to optimize trade and investment flows between them. For this reason, the need to intensify cooperation between them within the scope of the regulatory

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[16] Benedict Kingsbury et al., *A Emergência de um Direito Administrativo Global* in *Ensaios sobre o Direito Administrativo Global e Sua Aplicação no Brasil* 11 (Michelle Ratton Sanchez Badin (org.), 2016).

matter on economic relations has been raised. In this concern, it is possible to verify the existence of standards that can be used for better understanding, converging points that turn into cooperation mechanisms, and divergent points that can reach a consensus that benefits all the BRICS countries. Thus, this study sought to identify these points in each of them and advocate the need to increase legal cooperation and exchange of experiences, showing that there is an extraordinary potential for increasing economic relations through the regulation on investments, trade and governance that strengthen the grouping as a whole, above all in the economic and financial sphere.

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COPYRIGHT AND PATENT PROTECTION OF CLOUD STORAGE SOFTWARE IN THE BRICS MEMBER STATES

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In the BRICS Member States, serious attention is paid to Information Technology development in terms of both technology and law. These countries are at the forefront in the development of the digital economy and digital innovations. Cloud storage software is an important element in this sector and is intensively applied in civil law transactions. The processes of approval, storage and sorting of documents are being automated on the basis of the relevant computer programs. This helps companies and government agencies to systemize their operations. At present, the most pressing issues are those related to copyright and copyright holders of computer programs since software code may be copied, even illegally or unconscientiously, and used as the basis for another software product. Cloud storage software is copyright-protected, but, depending on the scope of its use, additional patent protection may be required. Given the rapid development of the IT sector, a software product may be one of the components in an invention subject to patenting. The article focuses on the relationship between copyright and patent protection of software and offers a comparison of the approaches taken by the BRICS countries. Approaches taken by Germany as a European Union Member State and the United States of America are shown in the all-out comparison. The article also analyzes the views of academics on the relationship between copyright and patent protection of software.

Keywords: copyright; intellectual property; BRICS; Russia; China; India; Brazil; South Africa.

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Introduction

The transitional nature of the current state of affairs in all spheres of public life, in their both domestic and international aspects, has been noted with concern by social scientists. There are numerous reasons for such concern, but perhaps the most important is a perception of the existing regulators of public processes and laws lagging behind the rapid development of the economy, engineering and technology.

As noted in a recent article by Iu. Tikhomirov, E. Cherepanova and A. Tsomartova, new trends and changes in the development of laws, such as the interrelation and interdependence of international and national laws, as well as changes in the principles of economic development, justify the need for the identification of the limits to the impact of the law on a person and a citizen, as well as the limits to self-regulation in various spheres of social relationships.[1]

The sixth technological stage, often defined as "post-technological," raises a difficult question which legal experts have to answer, namely the question of how to and should one arrange for the new economic relationships that are beyond the customary legal formulas and frameworks and that may emerge, for example, in cybersphere or other spheres where business entities communicate. Furthermore, does all this necessitate the development of brand new and innovative mechanisms of legal regulation or the application of traditional legal frameworks accessible under existing laws, at least during the transitional period?

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[1] *Тихомиров Ю.А., Черепанова Е.В., Цомартова Ф.В.* Правовые векторы реальных процессов – новый подход в теории // Государство и право. 2021. № 1. С. 9 [Iu.A. Tikhomirov et al., *Legal Vectors of Real Processes – A New Approach in Theory*, 1 State and Law 7, 9 (2021)].

According to M. Zaloilo, the goal of creating a digital economy, which has been proclaimed in Russia and many foreign countries, leads to the digitalization of law, allowing for the establishment of new regulators, such as quasi-legal ones, as well as the transformation of law into another social regulator.[2] Is that true? We will attempt to answer this question by investigating the capacity of traditional legal institutions and frameworks to regulate one of the most remote spheres of economy and technology, namely the sphere of cyberspace and, in particular, the cloud storage databases that make up the complex software[3] and hardware combinations.

In our opinion, the analysis of ways and methods of protecting such intangible assets as cloud storage software that are unusual from the viewpoint of the existing legal frameworks requires a comparison of different approaches to this issue taken in the countries with the most developed regulatory methodologies, as well as an examination of international legal acts and practices applicable in the IT field.

This article is dedicated to the review of the basic means of legal protection afforded to computer programs that enable the formation and operation of cloud storage databases in the BRICS member states, as well as a comparison of these protections to those currently in place and being developed in the legal systems of Germany and the United States. According to T. Khabrieva, interaction within BRICS establishes specific objectives for legal science and opens up new prospects for mutually beneficial cooperation between Russia and other countries.[4] A review of the approaches taken in the BRICS countries allows for an understanding of the national regulations on computer programs, particularly, in terms of their protection as intellectual property items.[5] Given the rapid technological development of the BRICS countries and the sophistication of computer programs, the sharing of experience in regulation and adoption of the instruments of legal protection is undoubtedly of interest.

The BRICS member states work closely together in the legal regulation of intellectual property, as well as in the development of science and information

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[2] *Залоило М.В.* Законность и целесообразность в обществе постмодерна: пересмотр сложившейся классической модели // Журнал российского права. 2020. № 6. С. 27 [Maxim V. Zaloilo, *Legality and Expediency in a Postmodern Society: A Revision of the Existing Classical Model*, 6 Journal of Russian Law 22, 27 (2020)].

[3] For the purposes of this article, the terms "application software" and "computer program" have the same meaning.

[4] Киберпространство БРИКС: правовое измерение: монография [*Cyberspace BRICS: Legal Dimension: Monograph*] 21 (Dan Ruiping & Talia Khabrieva eds., 2017).

[5] *Ахмадова М.А.* Обеспечение охраны прав на интеллектуальную собственность, созданную при осуществлении совместной деятельности в рамках двусторонних соглашений России о научно-техническом сотрудничестве со странами БРИКС // Международное право и международные организации. 2019. № 3. С. 39 [Mariam A. Akhmadova, *Ensuring the Protection of Intellectual Property Rights Created in the Implementation of Joint Activities within the Framework of Bilateral Agreements of Russia on Scientific and Technical Cooperation with the BRICS Countries*, 3 International Law and International Organizations 38, 39 (2019)].

technologies. The use of cloud storage software is frequently trans-national in nature and it is also a factor of technological advancement. At present, Russia is a party to the following bilateral agreements:

• Agreement between the Government of the Russian Federation and the Government of the Republic of India on Scientific and Technological Cooperation dated 30 June 1994. In 2002, the parties signed the Intergovernmental Protocol on the Protection of Intellectual Property Rights which formed the legal basis for the development of innovative technologies.

• Agreement between the Government of the Russian Federation and the Government of the People's Republic of China on Scientific and Technological Cooperation dated 18 December 1992. In 1999, the parties signed the Intergovernmental Protocol on the Principles of Protection and Allocation of Intellectual Property Rights.

• Agreement between the Government of the Russian Federation and the Government of the Federative Republic of Brazil on Scientific and Technological Cooperation dated 21 November 1997.

• Agreement between the Government of the Russian Federation and the Government of the Republic of South Africa on Scientific and Technological Cooperation dated 14 October 2014. This Agreement includes an attachment titled "Intellectual Property and Confidential Information."

It is worth noting that, with the exception of the one between the Governments of Russia and Brazil, intellectual property is subdivided into the former and the created. The term "former" intellectual property refers to the property created before the start of the cooperation in the sphere of research, whereas "created" intellectual property refers to the product of such cooperation.

Such subdivision is not common for the national laws of the BRICS member states. The Civil Code of the Russian Federation does not define the former property, but some of its provisions govern the created one. For example, the Law No. 9.610 on Copyright and Related Rights of the Federative Republic of Brazil, enacted on 19 February 1998 does not contain any provisions regarding former intellectual property. On the other hand, the Copyright Act of India dated 4 June 1957 includes the provisions that regulate the creation of intellectual property. This law mentions previously created audio recordings that may be changed at the time when the original author is specified. The former intellectual property is not mentioned in the laws that govern the authors' rights in China and South Africa. In general, the regulation in these countries is aimed at the created intellectual property, namely, the final result.

These agreements help the member states in concretizing issues related to the allocation and protection of intellectual property, which is especially important for the computer programs that may be used via the Internet. Considering that intellectual property is of a territorial nature, that is, it is protected in the territory of the state where such protection is requested and, under the laws of this state, the effect of such multilateral agreements, such as the Berne Convention for the Protection of Literary

and Artistic Works of 1886, the Paris Convention for the Protection of Industrial Property of 1883, the Universal Copyright Convention of 1971 (South Africa is not a party to this Convention) among others, as well as specialized bilateral agreements, expands the opportunities of the author/copyright holders to protect their rights. The bilateral agreements focus on matters related to the protection of intellectual property, coordination, and definition of the parties' contributions to the elaboration of applications, thus enabling the countries to enhance their R&D efforts, bridge the gap in IT development, as well as avoid legal uncertainty and enhance further cooperation.[6]

Cloud data storage is a type of online data bank model that stores the data on servers provided to the clients.[7] A cloud storage database is both an intangible asset (software with specific functions of data storage, as well as the execution of user commands related to data sorting and formatting) and a complex tangible asset(hardware that makes up a data processing center) (DPC). This technology is used by legal entities for the organization of workflows, as well as by individuals for their personal needs. Cloud storage technology is now being integrated into the operations of government agencies.

No cloud data storage project can be implemented in a DPC without the use of special equipment. Such a database can be applied in practice for the users, for instance, large legal entities that would use it for their work with major data arrays. Users may be able to access additional functions through cloud data storage. Cloud data storage is typically provided by legal entities (on rare occasions, by individual entrepreneurs) that are registered or recognized as such under the laws of the country in which they are engaged in entrepreneurial activities in the field of digital services. Such companies are large and have a complex structure because they have not only an administrative center, but also a R&D division that is responsible for the development and improvement of software.

Computer programs are a subset of intellectual property. They are classified as "literary works for copyright protection purposes"[8] in the laws, but are not regarded as such in global practices. However, the development of software is considered a creative endeavor. In order to ensure, copyright protection an international copyright protection agreement in the form of the World Intellectual Property Organization (WIPO) Copyright Treaty was adopted in 1996. Computer programs are protected as literary works under Article 4 of this Treaty, as defined in Article 2 of the Berne Convention. Such protections apply to computer programs, regardless of the mode or form in which they are expressed. A key distinctive feature of a computer program as opposed to a literary work is the possibility of state registration.

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6 *Regulating New Technologies in Uncertain Times* 150 (Leonie Reins ed., 2019).

7 Cesare Bartolini et al., *Property and the Cloud*, 34(2) Comput. L. Secur. Rev. 358, 361 (2018).

8 *Близнец И.А., Леонтьев К.Б.* Авторское право и смежные права: учебник [Ivan A. Bliznets & Konstantin B. Leontiev, *Copyright and Related Rights: Textbook*] 138 (Ivan A. Bliznets ed., 2018).

1. Legal Framework for Regulating Cloud Storage Software in Russia

Article 1261 of the Civil Code of the Russian Federation protects the copyright of a computer program, including its source code and object code. When running a program, audiovisual reflections of that program are displayed on the monitor screen, as are its name and preparatory materials (preparatory materials are compared to drafts of literary works and include additional information about that program, such as a user manual).[9] The name of the program may also be protected by its copyright holder through registration, and its audiovisual depiction on the monitor screen is also subject to legal protection.[10] Computer programs function with the goal of achieving a specific result. There is a wide range of functions for cloud data storage facilities, ranging from data sorting to editing and distribution of data.

When a computer program is being developed, the very act of creating it acknowledges the exclusive right to it. However, one cannot say that the program registration is merely a formality because it serves as the material cause for its protection in the event of a dispute. Copyright holders may use the "©" symbol in order to inform others of their copyright to a work. Computer programs that contain state secrets are not subject to state registration. Under Article 1262 of the Civil Code of the Russian Federation, computer programs are registered by submitting applications with the federal executive authority in charge of intellectual property which is in Moscow (Rospatent). If the application is approved, this authority would then issue the certificate of official registration to the applicant and publish the information about this registration in its official gazette.

The exclusive right to a computer program is held by its authors, their heirs or other persons who have received such right under the relevant law or contract. Authors of computer programs in Russia, India, China and other BRICS countries, as well as in Germany and the United States, have the right to distribute them, create derivatives based on them and demonstrate them in public (this right is somewhat different from the right to demonstrate a literary or artistic work, but such a program has an audiovisual image which may be displayed on a monitor screen). The copyright holders' rights to computer programs are absolute. It means that they are permitted to use such programs personally or allow others to use them.

It is necessary to draw attention to the fact that software applications are being constantly changed and improved. This is also relevant to cloud data storage. This

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[9] Гражданский кодекс Российской Федерации (часть четвертая) от 18 декабря 2006 г. № 230-ФЗ // СПС «КонсультантПлюс» [Civil Code of the Russian Federation (Part Four) of 18 December 2006 No. 230-FZ, SPS "ConsultantPlus"] (Mar. 1, 2021), available at https://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=LAW&n=357900&dst=1000000001%2C0#09427936808940447.

[10] *Гаврилов Э.П.* Право интеллектуальной собственности. Авторское право и смежные права. XXI век [Eduard P. Gavrilov, *Intellectual Property Rights. Copyright and Related Rights. The 21st Century*] 876 (2016).

technology is used in a variety of fields for the storage and processing of information, including banking and healthcare, as well as in the streamlining of the activities of legal entities in any field, the organization of document workflows in government agencies and so on.[11] Specific users may have requirements related to the operation of a cloud data storage application, which may necessitate changes to it. A cloud data storage application is typically provided to a user under the terms of the relevant licensing agreement.

It is important to distinguish between the modification and adaptation of computer programs. Modification denotes a change to the program, namely making material changes to it. According to subparagraph 9 of paragraph 2 of Article 1270 of the Civil Code of the Russian Federation (CCRF), the modification of a computer program means any change therein, except for adaptation, which is an amendment made exclusively for the purpose of running the computer program on a specific hardware of a user. An adaptation of cloud storage software would not necessitate the development of a new program. Thus, the main difference between a copyright-protected computer program and a literary work is that when an author's novel is published, no changes can be made in it because any change would be regarded as copyright infringement, whereas changes must be made in a computer program for the purpose of its proper operation, as well as keeping pace with scientific and technological progress.

According to paragraph 4 of Article 1260 of the CCRF, the authors of modified programs have the exclusive right to the derivative works as the independent objects of copyright, irrespective of the protection of the rights of the authors of the original cloud storage programs. It is advisable to focus on the well-known contradiction in the application of copyright to computer programs, because Article 1266 of the CCRF grants the right to the integrity of a work and Article 1270 of the same allows for the modification of computer programs with the modifiers required to indicate the name of the author of the initial program. At the same time, the CCRF does not include any specific criteria for the modification or for the institution in charge of the relevant expert examination and the comparison between the original and modified programs required to ensure that the new program is treated as a truly new subject of copyright.

The case law does not provide a clear answer as to whether a reworked or modified computer program should be treated as a new separate copyright item.[12] Russian courts that deal with copyright issues adjudicate the disputes in which various criteria are applied to define the novelty of a modified program. In order

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[11] Marcelo Corrales et al., *New Technology, Big Data and the Law* 341 (2017).

[12] *Ахмедов Г.А.* Проблемы регулирования модификации программного обеспечения // Журнал Суда по интеллектуальным правам. 2020. № 2(28). С. 24 [Gadzhimurad A. Akhmedov, *Software Modification Regulation Problems*, 2(28) Journal of the Intellectual Property Rights Court 20, 24 (2020)].

to assess the changes made in such a program, an expert examination is typically required. It is important to consider the goal of the changes made in the program, which includes answering the following questions: what was the specific reason for the changes; is the program creative by its very nature; were the changes intended to change the functionality of the program? Additionally, the significance of the changes made to the program is also taken into account and special attention is paid to the changes made in the program's source code, as well as to the number of the processed and added fragments within this code. Attempts have been made to assess the changes in the program in terms of their percentage in the source code. However, this factor is not always recognized by the courts that hear cases involving intellectual property rights. There are examples when the changes in the source code have exceeded eighty-eight percent, but the courts failed to acknowledge the fact that a derivative program was created.[13] Decisions to the contrary can also be found in case law when it was proven that no source code copying had occurred, but the court admitted a violation of the copyright of the holders of the source program.[14] When determining an infringement of the rights of the holders of the source program, the courts consider the process of creating the new program, as well as the reasons for its creation. B. Gerasin, a Russian legal expert, notes that "the degree of significance cannot be determined as a percentage" and also emphasizes the importance of taking the "scope of designing and coding works" into account.[15]

In the context of the development of the digital economy, the criteria for determining material changes and modifications in software applications will be developed very soon in the Russian Federation and other BRICS member states. In the case of cloud storage software, modifications are feasible when the functionality of such software is being upgraded in order to meet the data protection requirements, as well as the needs of specific users. But, such upgrades must occur in parallel with the improvement of the data centers that are capable of ensuring the continued operation of software.

Legal entities typically hold the copyright for cloud storage software. In general, their license agreements for the use of such software include a prohibition on users

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[13] Постановление Суда по интеллектуальным правам от 21 ноября 2016 г. № С01-328/2016 // СПС «КонсультантПлюс» [Resolution of the Court for Intellectual Property Rights of 21 November 2016 No. S01-328/2016, SPS "ConsultantPlus"] (Apr. 28, 2021), available at http://www.consultant.ru/cons/cgi/online.cgi?req=doc&ts=144174774045930983694055 23&cacheid=21E7EF2EAB6B32EEF020D8034D3D326E&mode=splus&base=SIP&n=26250&rnd=0.2826176515801282#n7l3cukt1c.

[14] Определение Верховного Суда Российской Федерации от 2 октября 2017 г. № 305-ЭС17-13190 [Decision of the Supreme Court of the Russian Federation of 2 October 2017 No. 305-ES17-13190/2016, SPS "ConsultantPlus"] (Apr. 28, 2021), available at http://www.consultant.ru/cons/cgi/online.cgi?req=doc&ts=144174774045930983694055 23&cacheid=4F579E62953C8CFE16CDE943E0B68706&mode=splus&base=ARB&n=514502&rnd=0.2826176515801282#19u3azp3uuj.

[15] *Герасин Б.В.* IT-споры в России: сегодняшние реалии // Судья. 2017. № 7. С. 33 [Boris V. Gerasin, *IT Disputes in Russia: Today's Realities*, 7 Judge 31, 33 (2017)].

making any changes to it. Information technology companies do not transfer their exclusive rights to software to the users, which is a wise solution in terms of copyright protection. On one hand, such restrictions hinder the development of new software. On the other hand, an initial author/copyright holder may have expended significant effort and expense in developing a sophisticated computer storage program, but granting permission for its modification by another person de facto minimizes the difficulty of the process of its creation.

The exclusive right to a work in Russia is valid until the end of the author's life and seventy years after the author's death.

Article 1301 of the RFCC establishes financial liability for copyright infringement. In addition, criminal penalties apply in cases of serious violations of copyright and related rights, such as misappropriation of authorship and illegal use of the items of copyright or related rights. This criminal liability may entail fines and/or imprisonment for up to six years.

Because the cloud storage software can only be efficiently operated on specialized hardware installed in the data center, a modification by another entity, namely, one that lacks the requisite technological infrastructure, would be of little importance to a cloud storage provider. Meanwhile, obtaining a patent for a data center that incorporates the cloud storage function would be the most effective way to protect intellectual property.

A software and hardware package may be patented in Russia as an invention. This is possible because only the computer program along with the data processing center which contributes to the cloud storage would be of interest to the copyright holder. At the same time, such a software and hardware package must be designed at the relevant level of invention and must also be characterized as having a certain amount of originality, novelty and industrial applicability that would confirm the uniqueness of the system and the functions of the data processing center. According to G. Ivliev, changes were introduced to the patentability assessment procedure in 2020, with the following amendments to the Civil Code of the Russian Federation: institutions accredited by Rospatent (RF Federal Service for Intellectual Property) may conduct expert examinations and provisional assessments of the patentability of inventions and utility models.[16] If a data processing center equipped with the relevant computer program is declared to be an invention, experts from accredited research institutions and universities may be engaged and consulted, thus allowing them to determine whether or not the data processing center with cloud storage should be patented.

Data center patents are valid for twenty years under Article 1363 of the RFCC. Additional patents for the invention may be obtained in Russia, allowing for the improvement and upgrading of data centers.

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[16] *Ивлиев Г.П.* Модернизация гражданского законодательства в сфере интеллектуальной собственности // Журнал российского права. 2021. Т. 25. № 1. С. 27–28 [Gregory P. Ivliev, *Modernization of Civil Legislation in the Field of Intellectual Property*, 25(1) Journal of Russian Law 23, 27–28 (2021)].

Discussions are underway in Russia about the most efficient method of legal protection of computer programs, namely patent or copyright-based. Advocates of the patent-based protection believe that the patents contribute to investments in research work. A large number of patent applications support this viewpoint. The criteria for obtaining a patent, such as novelty and level of invention, are better suited to a software and hardware package designed for cloud storage. S. Sereda believes that patent-based protection is "more natural" for computer programs and that the features of technical systems and the mode of their development are taken into account by the system of patent protection of intellectual property rights in a fairly comprehensive manner.[17] F. Saveliev is also in support of patent-based protection of rights of top computer programs because it allows for the protection of non-literary components of these programs[18], such as the physical appearance of the program when it is displayed on a monitor screen.

On the other hand, patent-based protection has its own drawbacks. IT companies are actively trying to have their software solutions patented and a large number of patents are being issued for generalized algorithms. This could stifle innovation. Because this type of protection was initially conceived for the purpose of protecting new solutions in technology and inventions, determining the novelty, non-obviousness and usefulness of a software and hardware package may be difficult. A patent obtained by one company may have far-reaching implications, limiting the ability of other companies to design new computer programs.

2. Peculiarities of Information Technology Legal Protection in Brazil

The Federative Republic of Brazil has a high level of information technology development and intellectual property legislation. Brazil's legal system is influenced by Romano-Germanic law. Cloud data storage is governed by Law No. 9.610 on Copyright and Related Rights of 1998 (hereafter referred to as the "Brazilian Copyright Law"). Under Article 7 of this law, computer programs are intellectual works and copyright-protected items governed by the special provisions of this law.[19] Under the Brazilian Copyright Law, only an individual may be the author, but this factor does not deprive the legal entities of their right to protection. Software in Brazil is also governed by specialized laws such as Law No. 9.609 of 1998 on the Protection of Intellectual Property

[17] *Середа С.А.* Правовой подход к программному обеспечению: требуются изменения // Патенты и лицензии. 2004. № 1. С. 45 [Serge A. Sereda, *Legal Approach to Software: Changes Needed*, 1 Patents and Licenses 44, 45 (2004)].

[18] *Савельев А.И.* Лицензирование программного обеспечения в России: законодательство и практика [Alexander I. Saveliev, *Software Licensing in Russia: Legislation and Practice*] 69 (2012).

[19] Law No. 9.610 of 19 February 1998 on Copyright and Related Rights (Mar. 1, 2021), available at https://www.wipo.int/edocs/lexdocs/laws/en/br/br002en.pdf.

of Software, its Commercialization in the Country and Other Provisions (hereafter referred to as the "Brazilian Software Law"). This law was elaborated in accordance with Article 10 of the Agreement on Trade-Related Aspects of Intellectual Property Rights in order to avoid conflicts in bilateral relations. Decree No. 2.556 on the Brazilian Software Law was adopted in order to elaborate the Brazilian Software Law in detail.

Computer programs are treated as literary works in Brazil and they are afforded the necessary protection. Under point 1 of Article 2 of the Brazilian Software Law, the author has the right to claim the authorship of computer programs and oppose any unauthorized changes or modifications to them.[20]

The registration of copyright for a work is optional and is carried out by a government agency legally appointed by the ministry in charge of the state policy in the fields of science and technology. According to S. Lahorgue Nunes, a Brazilian legal expert, software protection is not dependent on registration, but it is nevertheless important to have the source and object codes of a computer program registered in order to facilitate the confirmation of the copyright to software. S. Lahorgue Nunes further points out that when software is embedded in a technical device, the device may be patent-protected as an invention, while the software itself may be protected under the copyright regime.[21]

Under Article 9 of the Brazilian Software Law, the use of a software program, including cloud storage software, is the object of a licensing agreement. F. Barros Oquendo, a Brazilian legal scholar, draws attention to the inconsistency of this law: Article 10 declares as null and void any clauses that restrict the production, distribution or commercialization of software. At the same time, Article 2 of the same law grants the exclusive right to authorize or prohibit commercial leasing to the owners of software copyrights. The author points out that software copies may be sold, licensed or transferred in any other way without violating copyright laws.[22] As a result, in some cases, an author or copyright holder may limit the scope of any potential modification to cloud storage software.

The laws provide for the ability to transfer computer program technology in accordance with the terms of the applicable licensing agreement. In this case, under Article 11 of the Brazilian Software Law, such an agreement must be registered with the National Institute of Industrial Property (INPI).[23] In order to accomplish this, the

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[20] Law No. 9.609 of 19 February 1998 on the Protection of Intellectual Property of Software, its Commercialization in the Country, and Other Provisions (Mar. 1, 2021), available at https://www.wipo.int/edocs/lexdocs/laws/en/br/br001en.pdf.

[21] *Security Rights in Intellectual Property* 150–151 (Eva-Maria Kieninger ed., 2020).

[22] *Liability for Antitrust Law Infringements & Protection of IP Rights in Distribution* 409 (Pranvera Këllezi et al. eds., 2019).

[23] *Еременко В.И.* О правовой охране интеллектуальной собственности в Бразилии // Изобретательство. 2013. Т. 13. № 3. С. 1–12 [Vladimir I. Eremenko, *On the Legal Protection of Intellectual Property in Brazil*, 13(3) Invention Activities 1 (2013)].

provider of the technology must deliver to its recipient the complete documentation, including the commented source-code, functional specifications and any other technical data required for the technology to be absorbed.

The principle of social function of a contract, as affirmed in Article 421 of the Civil Law of Brazil, is applicable in this country. This principle streamlines the legal relationships pertaining to intellectual property. It aims to reduce contradictions in situations where the profits of the author or copyright holder involved in the creation of an intellectual property item are lower than the profits of the party that has obtained the right to dispose of this item.

The Brazilian Software Law stipulates the civil and criminal penalties for violations. A violation of the rights of the author of a software program is punishable by a six-month to two-year imprisonment or fine under Article 12 of this Law. If the violation consists of the full or partial reproduction, by any means, of a software program for commercial purposes, the perpetrator faces a penalty of one to four-year prison sentence and fine. According to Article 41 of the Brazilian Software Law, the economic rights of authors are protected for seventy years from the time of their death.

In Brazil, the issues concerning the obtaining of patents for inventions are resolved in accordance with Law No. 9.279 of 1996, which governs the rights and obligations pertaining to industrial property (hereafter referred to as the "Law No. 9.279"). Under Article 10 of the Law No. 9.279, computer programs are not considered inventions or utility models.[24] A data center may be patented if it meets the novelty criteria, has the required levels of invention and has industrial applicability, namely, the ability to be used in any sphere, though this may be difficult. The international novelty is taken into account in Brazil, just as in many other countries. As a result, applications that have become available and widely known in other countries cannot be patented in this country. In this case, just as in other countries, the data center must be a unique technical complex that facilitates the operation of the cloud storage software and ensures its stability and functionality based on its computing capacities.

If the data center is patented, the applicant or patent holder may obtain an additional certificate of invention by paying the special fee specified in Article 76 of the Law No. 9.279. The applicant receives this certificate in order to protect a potential improvement or development of the invention, even if it lacks inventive activity, as long as it shares the same inventive concept. As a result, when a patent is obtained for the data center that incorporates the cloud storage software, the holder of this patent, upon receipt of the relevant certificate, may subsequently engage in the improvement of the center's hardware and software, allowing such a holder to rise to prominence in the country's IT sector. In Brazil, the patent for a data center as an invention is usually issued for a period of twenty years and cannot be issued for less than ten years under Article 40 of the Law No. 9.279.

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[24] Law No. 9.279 of 14 May 1996 (Mar. 1, 2021), available at https://www.wipo.int/edocs/lexdocs/laws/en/br/br003en.pdf.

Therefore, a distinctive feature of the IT sector in the Federative Republic of Brazil is its high level of protection of cloud data storage software due to the ability to limit the scope of third party modifications of the computer program and the complex that would incorporate the patented data center and the software.

3. Indian Cloud Storage Software Copyright and Patent Protection System

India and China are the leaders among BRICS member states in the areas of IT development, training of IT specialists and drafting of IT-related laws. The Indian Copyright Act of 1957 is an integrated document that covers not only the rights of authors, but also matters of international private law and the activities of the Copyright Office. The Copyright Rules of 2013 are an important by-law in the sphere of copyright protection. In terms of the regulations that govern the relationships that pertain to computer programs, the Indian Information Technology Act of 2000 should be noted as the Act that formalized the regulatory base for new information technologies, as well as their legal definitions that are not included in the Indian Copyright Act. Noteworthy is the fact that the Indian Information Technology Act contains no definition of cloud data storage.

The Indian Copyright Act of 1957 considers computer programs to be literary works. Under this law, a computer program is a set of instructions articulated in words, codes, layouts or other forms, including those that are machine-readable, that can be used to achieve a specific objective with the help of a computer. Article 2 of this Act states that a work is considered Indian, namely, governed by Indian laws, if any of the following conditions are met: 1) its author is a citizen of India; 2) the first publication or demonstration of the work (computer program) took place in India; 3) the work (computer program) has not been published but its author was a citizen of India at the time of its creation.[25]

The author may register his copyright to a computer program in India by filing the relevant application with the Registrar of Copyrights. Article 18 of the Indian Copyright Act allows for the assignment of copyright in whole or in part. It is common practice in India to use licensing agreements to provide computer programs to their users. The Copyright Office monitors the parties' compliance with their obligations under such agreements and in instances when the licensing of computer programs is mandatory, the Registrar of the Copyright Office may demand that the user remit his allocations under the licensing agreement to a public account in India. This account has been designated by the Board of Appeals, (the agency established under the Trademark Act of 1999 and acting in conjunction with the Copyright Office) in order to enable the author/copyright holder to receive remuneration under the agreement.

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[25] The Copyright Act, 1957 (14 of 1957) (Feb. 24, 2021), available at https://copyright.gov.in/documents/copyrightrules1957.pdf.

Article 30 of the Indian Copyright Act of 1957 allows for the modification or adaptation of literary works for technical purposes without infringing on the rights of the authors of the works in question, namely, computer programs. As established by Article 57 of the same, the author of a work has the right to claim authorship of the work and to restrain or claim damages in respect of any distortion, mutilation, modification or other act in relation to the said work even after the assignment of the copyright. In the case of a computer program, failure to display an adaptation is not deemed an infringement of the rights. It is worth noting that Article 32 of the Indian Copyright Act allows for the granting of a license to produce and publish a translation of a literary work after a certain period of time has passed since the first publication of such work. It appears that the same can be said of computer programs. Under Article 22 of the Indian Copyright Act, a copyright subsists in any work published during the author's lifetime and for sixty years after the author's death.

Severe punishment is stipulated in India for the use of an infringing computer program. Under Article 63B of the Indian Copyright Act, a person liable for such actions is punishable by imprisonment for a term that cannot be less than seven days but which may be as long as three years. Under Article 52 of this law, the storing of any computer program when it is not in use does not constitute an infringement of copyright.

The Patents Act of India was based on the provisions of the United Kingdom Patents Act of 1949. The current version of this Act applies the international novelty, inventive step and industrial applicability criteria to inventions. The initial version of this Act did not include the international novelty criterion; instead, only the local novelty was applied. In addition, the Patents Rules of 2003 are also in effect in India.

The Patents Act of India of 1970 contains a detailed list of items that are not patentable. For example, computer programs and algorithms are not patented inventions under paragraph "k" of Article 3 of this law.[26] T.G. Agita, an Indian legal expert, believes that protection by patent in India requires greater originality than protection by copyright; and that originality for such copyright-based protection means that a work has been created by the author individually.[27]

4. Cloud Storage Software as an Object of Copyright and Patent Law in China

In China, as in India, the government is primarily concerned with the development of the country's IT sector. The copyright for computer programs is governed by the Copyright Law of the People's Republic of China (PRC) dated 1990 (last version

[26] The Patents Act, 1970 (Mar. 1, 2021), available at https://www.ipindia.gov.in/writereaddata/Portal/IPOAct/1_31_1_patent-act-1970-11march2015.pdf.

[27] *Copyright Law in the Digital World: Challenges and Opportunities* 22 (Manoj Kumar Sinha & Vandana Mahalwar eds., 2017).

adopted in 2010). Such programs may be created by legal entities. Under Article 3 of this law, computer software is considered to be a "work."[28] The author's rights become effective at the time of the creation of a computer program, and the copyright registration makes it possible to determine the exact date and time at which the program was initiated in the event of a legal dispute. The registration process is voluntary and is handled by the Copyright Protection Center of China. According to J. Wang, a legal expert, copyright protection is based on the principle of culpability, which refers to the intentional harm inflicted by an infringer on an author or copyright holder. Liability for copyright infringement is severe and it entails a significant financial penalty.[29] Moreover, Mr. Wang believes that the terms of licensing agreements should be scrutinized more closely.

In China, copyright of an individual to a computer program is protected during the individual's lifetime and fifty years after the individual's death. When a copyright is held by a legal entity or an organization, the term of its protection shall be fifty years after the first publication of the respective work (Art. 21 of the Patent Law of the People's Republic of China).

Under Article 16 of the Regulation for Computer Software Protection of the People's Republic of China, a cloud storage software user may make necessary alterations to the software in order to implement it in an actual environment of computer application or to improve its functions or performance, provided that such user does not, unless otherwise agreed in the contract, offer the altered software to any third party without permission from the relevant copyright owner.[30]

Under Article 23 of the Regulation for Computer Software Protection of the People's Republic of China, civil liability is stipulated in respect of anyone who commits an infringement of the rights of the author or holder of copyright by publishing, registering or altering a piece of software without the permission of its author/holder.

Under Article 24 of the same, when a copyright infringement jeopardizes the public interest, the copyright administration department may impose a fine, confiscate the material, tools and equipment primarily used to produce infringing copies; and investigate criminal liability where the law is violated. This document contains a contradiction, in that, according to Article 29 thereof, the development of a piece of software that is similar to a pre-existing one due to a limitation of

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[28] Copyright Law of the People's Republic of China, promulgated by the Standing Committee of the National Congress on 26 February 2010 and entered into force on 1 April 2010 (Feb. 2, 2021), available at https://www.wipo.int/edocs/lexdocs/laws/en/cn/cn031en.pdf.

[29] Jia Wang, *Conceptualizing Copyright Exceptions in China and South Africa: A Developing View from the Developing Countries* 179 (2018).

[30] Regulations on Computers Software Protection, Decree of the State Council of the People's Republic of China No. 339, effective as of 1 January 2002 (Feb. 24, 2021), available at https://www.wipo.int/edocs/lexdocs/laws/en/cn/cn002en.pdf.

alternative forms of expression does not constitute an infringement of the copyright in the pre-existing one.

The Patent Law of the People's Republic of China dated 1984 does not preclude the obtaining of patents for computer programs (*see* Art. 25), but such an item of intellectual property is essentially protected by the Chinese copyright laws.[31] In 2018, the Standing Committee of the Chinese National People's Congress made a significant contribution to the development of the legal framework of the patenting process: a special examination is now stipulated for sophisticated inventions and software, implying that a higher level of technical knowledge may be required for the examination of the relevant patent applications. Appeals against the decisions of the first instance courts are considered by the Supreme People's Court of China,[32] thus stressing the importance of this sphere of activity. Patents for data centers, as well as inventions incorporating cloud storage software are issued for twenty years with the payment of an annual fee (Arts. 45 and 46 of the Patent Law of the People's Republic of China). This law does not stipulate the issuance of an additional patent for data center improvement.

Patent protection of software is not widely available in China and algorithms for cloud storage programs are typically not protected by patents, with software registration serving as the primary means of protection.

It is worth noting that the special PRC Regulations for the Protection of Computer Software have been in effect in China since 2001. It governs the development, use and distribution of software. The term "computer software" refers to a computer program that includes the necessary documentation. When an individual or a legal entity provides computer programs to a foreign counterparty, the provisions of the PRC Regulations on Administration of Import and Export of Technique from 2001 must be followed.

5. Special Aspects of Cloud Storage Software Regulation in the Republic of South Africa

In the Republic of South Africa, the IT sector is rapidly developing and the regulations that govern it are improving. This country joined BRIC in 2011, resulting in a change in the name of this organization which is now called BRICS. The RSA is one of the most developed African countries in terms of law, industry and the economy. It is one of the regional leaders in the production of energy resources and its energy sector is closely linked to intellectual property regulation and development. At present, the Republic seeks to develop the digital economy and make use of cloud data storage facilities.

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[31] Patent Law of the People's Republic of China, adopted at the Fourth Session of the Standing Committee of the Sixth National People's Congress on 12 March 1984 (Feb. 28, 2021), available at https://www.wipo.int/edocs/lexdocs/laws/en/cn/cn006en.pdf.

[32] Giovanni Pisacane & Daniele Zibetti, *Intellectual Property in China* 13 (2020).

As noted by S. Karjiker, a South African legal scholar, intellectual property is protected in the country under the relevant general laws. Copyright, trademarks, industrial designs, patents and crop breeders' rights are based on legislative acts, whereas unfair competition is governed by general laws (including information disclosure). S. Karjiker points out that while intellectual property regulation is not mentioned in the RSA Constitution, it is a component of property in general.[33]

The perception of the key examples of the island-based legal tradition influenced the creation of laws that govern the protection of intellectual property. In South Africa, the basic law in this sphere is the Copyright Act No. 98 of 1978. This Act is substantiated by Copyright Instruction No. 6265 of 1978. Computer programs in the RSA are works eligible for copyright protection (Art. 2 of the Copyright Act), but they are not included in the list of literary works. Meanwhile, tables or compilations can be stored in a computer program. A computer program is a set of instructions that is fixed or stored in any manner and that, when used directly or indirectly in a computer, directs its operation to produce a result (Art. 1 of the RSA Copyright Act).[34]

Copyright on a computer program is valid for fifty years, from the time it is made available to the public or when it is first published.

Article 11B of the RSA Copyright Act allows for the adaptation of a computer program. According to the law, an adapted computer program may include: (i) a version of the program in a programming language, code or notation different from that of the program; or (ii) a fixation of the program in or on a medium other than the medium of fixation of the program. Under Article 20 of the RSA Copyright Act, an author may provide the cloud storage software to a third party for use and may object to any modification thereof, provided that such author does not prevent or object to modifications that are absolutely necessary on technical grounds or for the purpose of commercial exploitation of the program.

The patent-related laws of the RSA were heavily influenced by the United Kingdom Patents Act of 1977. These laws have evolved over time, with the most recent version being the RSA Patents Act No. 57 of 1978, which is currently in effect. The Patent Instruction of 1978 as well as the Patent Expertise Instruction of 2003 applies along with this law.

Under Article 25 of the RSA Patents Act, a computer program, like a literary work, does not qualify as an invention. In South Africa [35] as in other countries, a data center can be patented as an invention. However, such a data center must meet the patentability criteria, which include novelty and inventive step (it is also necessary for

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[33] *Security Rights in Intellectual Property*, *supra* note 21, at 605–606.

[34] Copyright Act 98 of 1978 (Mar. 3, 2021), available at https://www.gov.za/documents/copyright-act-16-apr-2015-0942#.

[35] Patents Act 57 of 1978 (Mar. 3, 2021), available at https://www.gov.za/documents/patents-act-9-apr-2015-0827.

an invention to meet the requirements of Article 25 of the Law). The RSA Patents Act differs from the Acts analyzed above in that its patentability criteria do not include industrial applicability. The international novelty criterion is applied in the RSA in the same way as it is in other countries. The term of effect for a patent in South Africa is twenty years from the date of filing of the relevant application, provided that the established annual fees are paid (Art. 26 of the RSA Patents Act). It is worth noting that the provisions regarding the additional patents for improvements or alterations are also applicable in the RSA. Such additional patents are issued for the same period of time as the basic patents.

6. German and United States Approaches to Cloud Storage Software Regulation Compared with BRICS Countries

For comparison purposes, we will analyze the approaches of Germany, a EU Member State, and the United States in the field of legal regulation of computer program use in areas where they differ from the legal systems of the BRIC countries. The German legal system shares features with the Russian legal system, while the Anglo-Saxon legal system is distinct in its own right. Significant attention is paid to the development of the IT sector in terms of both technology and law. This sector has been rigorously regulated and there are numerous judicial precedents relating to it.

In Germany, copyright to computer programs is protected by the Copyright and Related Rights Act of 1965 and the Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs. Section 2 of the German Act states that computer programs are copyright-protected just as works in the same way that literary, scientific and artistic works are.[36] Under Section 69a of the same Act, protects not only ready-ma programs but also their drafts are subject to copyright protection, and they are protected if they represent individual works.

Under point 3 of Section 69a of the Copyright and Related Rights Act of the Federal Republic of Germany, computer programs shall be protected if they represent individual works in the sense that they are the result of the author's own intellectual creation. No other criteria, particularly qualitative or aesthetic criteria, shall be used to determine its eligibility for protection. The use of the program's source code requires consent of the copyright holder. The Copyright and Related Rights Act contains a list of cases (§ 69e) in which the authorization of the copyright holder is not required, such as when changes are required to install the program.[37] Under

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[36] Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz) 09.09.1965 (geändert 26.11.2020) (Jan. 21, 2021), available at https://www.gesetze-im-internet.de/urhg/BJNR012730965.html.

[37] *Antitrust Analysis of Online Sales Platforms & Copyright Limitations and Exceptions* 602 (Bruce Kilpatrick et al. eds., 2018).

Section 64 of this law, the copyright expires seventy years after the author's death. The Copyright Office is in charge of registering computer programs which is entirely voluntary. Similar provisions are included in Directive 2009/24/EC.

In Germany, financial liability is stipulated for cases of infringement of the rights of copyright holders for cloud storage software.[38] The Copyright and Related Rights Act gives special consideration to the potential harm that may be caused to the copyright holders. In addition, a court may issue in cases of infringement of copyright holders' rights (Sec. 64 of the Copyright and Related Rights Act of the Federal Republic of Germany). Criminal liability is applied to an infringer in cases of damage to public interest. Matters related to the exhaustion of copyright to software are widely discussed in German academic literature as the distribution and use of software via the Internet reduces the copyright holders' ability to exercise control over the use and infringement of copyright.

In Germany, a computer program is patent-protected when it is considered an invention, which includes software and hardware components. As in many other countries, patents in Germany are granted for any inventions, that are new, involve an innovative step and are capable of industrial application, as stipulated by Section 1 of the German Patent Act of 1936 (the most recent version of which was adopted in 2017).[39] Under Section 20 of this law, a patent is valid for a period of twenty years from the date of filing the application for it. In accordance with Section 1 of the same, a computer program is not considered an invention subject to patenting. As a result, a patent can only be obtained for a software and hardware package incorporating not only the relevant computer program, but also the novel technological tools required for data processing. Such provisions are also applicable at the EU level. The German Patent and Trademark Office plays an important role in the regulation of copyright and intellectual property. It accepts patent applications and registers the transactions that serve as the basis for the transfers of registered rights under licensing agreements.

In the United States, where computer programs appeared earlier than in many other countries, the copyright is regulated at the federal level. The main legal Acts in this sphere are the United States Copyright Act of 1976 and the United States Digital Millennium Copyright Act of 1998. Computer programs as the aggregates of data and commands required for the operation of computing devices must meet the following criteria: they must be represented in material form (electronic form is allowed depending on the digitization); they must be original or creative nature and they must serve a useful purpose.

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[38] *Compatibility of Transactional Resolutions of Antitrust Proceedings with Due Process and Fundamental Rights & Online Exhaustion of IP Rights* 679 (Bruce Kilpatrick et al. eds., 2016).

[39] Patentgesetz (Deutschlands) 05.05.1936 (geändert 08.10.2017) (Jan. 21, 2021), available at https://www.gesetze-im-internet.de/patg/BJNR201170936.html.

Article 117 of the U.S. Copyright Act allows for an adaptation of a computer program when it is created as an essential step in the utilization of the computer program in conjunction with a machine.[40] Adaptations may be sold or otherwise transferred to third parties only with the authorization of the copyright owner. Article 106A of this law enshrines the right to authorship and integrity, which means that an author has the right to claim authorship of a computer program and to prevent the use of their name as the author of the work in the event of a distortion, mutilation, or other modification of the work that would be detrimental to his/her honor or reputation.[41]

Copyright in the United States protects not only the source code of a computer program, but also its structure,[42] the sequence of its creation and the way in which it is organized. In such situations, all of these categories must be original. Various tests are used to determine the originality, such as the abstraction-filtration-comparison test (proposed in the course of the examination of *Computer Associates International, Inc. v. Altai, Inc*., 1992[43]).

The United States Copyright Act stipulates the protection of source and object codes, as well as preparatory and audiovisual materials. The algorithm of a program is subject to special protection because it can serve as the basis for various modifications of that program. The algorithm is protected within the framework of patent law. Moreover, only the algorithms that cannot be implemented by human effort and thus require interaction with a machine are subject to such protection.

Legal entities in the U.S. may act as the authors of computer programs. Despite the fact that registration is not mandatory but recommended, it may serve as the pre-condition for filing a lawsuit in federal court. According to paragraph 410 of Title 17 of the United States Code (U.S.C.), the registration of a computer program places its author in a privileged position in comparison to other people.[44] In order to establish the fact of copyright infringement by the claimant the respondent would first challenge the claimant's certificate of authorship, namely, the legitimacy of the registration of his copyright to the program. Copyright registration is carried out by the Library of the U.S. Congress. Under Article 302 of the U.S. Copyright Act, the

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40 U.S. Copyright Act of 1976, 17. U.S.C. §§ 101 et seq.

41 *Новоселова Л.А., Рузакова О.А.* Значение и функции регистрации авторских прав в Российской Федерации и за рубежом // Вестник Пермского университета. Юридические науки. 2017. № 37. С. 341 [Liudmila A. Novoselova & Olga A. Ruzakova, *The Value and Functions of Copyright Registration in the Russian Federation and Abroad*, 37 Perm University Herald. Juridical Sciences 334, 341 (2017)].

42 *Чурилов А.Ю.* Проблема охраны программ для ЭВМ // Вестник Саратовской юридической академии. 2020. № 1. С. 97 [Alexey Iu. Churilov, *The Problem of Protection of Computer Programs*, 1 Bulletin of the Saratov Law Academy 94, 97 (2020)].

43 *Computer Associates International, Inc. v. Altai, Inc*., 982 F.2d 693 (2^{d} Cir. 1992).

44 U.S. Code Title 35. Patents (Mar. 3, 2021), available at https://www.wipo.int/edocs/lexdocs/laws/en/us/us176en.pdf.

author's copyright in a work lasts for the duration of the author's life and seventy years after the author's death.

Under Article 101 of the United States Code Title 35 – Patents, whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent for the invention or discovery in question. As a result, the law allows patent protection for both cloud storage software and data centers. Under Article 154 of the United States Code Title 35 – Patents, the term of a patent is twenty years from the date the application for such patent was filed. There is no concept of an additional patent in the United States.

A notable example in United States case law is *Alice v. CLS Bank* of 2014 in which a computer program that consists of an abstract idea is ineligible for patent protection.[45] The court decision on this case had a major impact on the software development and patenting in the United States. According to scholar Y. Li, more than 400 patent applications were invalidated by mid-2018 in the U.S. It is difficult to determine whether this court decision had a positive or negative effect. On one hand, it led to a decrease in the number of 'bad' patents and to the introduction of new approaches in the sphere of software development. On the other hand, the legal experts noticed an uncertainty in the software patenting process.[46] A two-stage test is used in the U.S. for software patenting purposes (the test was developed on the basis of the *Mayo Collaborative Services v. Prometheus Laboratories* case from 2012).[47] The initial question was whether or not the patent formula repeated a law of nature or an abstract idea; if so, the question was whether or not something greater was added to the formula to transform this "law of nature" or "abstract idea" into an acceptable subject of patent.

Conclusion

From the viewpoint of copyright, a computer program is a special item because its creative element can be seen not in the formula of the source code, but rather in the ideas, functions and operations of the program that manifest themselves during the course of its use and are not copyright-protected. The program's source code, algorithms and formulas do not always meet the originality criterion, but this does not diminish the need for legal protection.

Holders of cloud storage databases are fully protected by copyrights or patents. Copyright protection is provided to computer programs in all of the countries mentioned above. In contrast, patent-based protection is only possible when cloud

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45 *Alice Corp. v. CLS Bank International*, 573 U.S. 208 (2014).

46 Yahong Li, *The Current Dilemma and Future of Software Patenting*, 50(9) IIC Int. Rev. Intellect. Prop. Compet. L. 823, 824–25 (2019).

47 *Mayo Collaborative Services v. Prometheus Laboratories, Inc*., 566 U.S. 66 (2012).

storage is regarded as a function of the relevant software and hardware package, in which case copyright holders would be required to show the truly innovative technological complexes.

There were discussions in the 1970s and 1980s about how to protect software, and whether to use patents, copyright, or sui generis protection as a means of doing so. The World Intellectual Property Organization (WIPO) expressed the opinion that software should be copyright-protected and that the software/hardware package may be patented. In general, this viewpoint was considered by WIPO member states as acceptable.[48]

All of the BRICS member states do not allow for patenting computer programs in their laws. Obtaining a patent for a computer program in the BRICS countries, as well as in Russia, United States, and Germany, is not an easy task because one must justify the originality of software and hardware.

As seen in Brazil, most of the BRICS member states (Russia, India, South Africa) allow for the acquisition of additional patents for data centers as inventions or certificates. Despite the fact that the structure of an additional patent is outdated in terms of the global development of patent laws, its inclusion in these laws is an important factor for the improvement of the IT sector because new technological solutions are being developed on an ongoing basis, a process that is inherent to the sector's development.

Patents are valid for twenty years in all the BRICS countries under consideration, as well as in other countries, such as the United States and Germany. Such a period seems to be quite long for a sector such as IT, where innovations appear almost every year. From this viewpoint, the copyright protection of cloud storage software appears preferable. Despite the fact that obtaining patents itself is a protracted and complicated process.

The obtaining of a patent for a data center is more justifiable because the data center can be both an invention and a complex technological structure. However, the twenty year term of effect for this innovation is too long. Perhaps, for software and hardware innovations, the term of effect of a patent could be reduced to seven years. This would allow for the patenting of such innovations, as well as providing them with a high level of security, without impeding the IT development in the member states.

Obtaining a patent for cloud storage software, as permitted in the United States, is a time-consuming task. In some of the BRICS Member States, the availability of software patenting may retard the processes of development and use of innovative technologies. As a result, this may have an adverse effect on national economies.

In all of the countries under review an author has the right to register his computer program, and registration provides him with guarantees in the event of

[48] Copyright Protection of Computer Software, WIPO (Apr. 25, 2021), available at https://www.wipo.int/copyright/en/activities/software.html.

a dispute, since the copyright for it would be defined and the dates of its creation and registration would be fixed.

It is noteworthy that there is some convergence of approaches in India and Germany in terms of registration of licensing agreements, but such registration is not feasible in relation to massive transactions when the users accept the terms of licenses. However, the registration of licensing agreements may be an efficient tool for copyright protection. It is significant that India applies one of the toughest measures of liability for the use of non-licensed software. According to, A. Marsoof and I. Gupta, Indian legal experts, India's approaches towards copyright regulation are unique. This is evident from the strict liability for violations of the law, as well as the caution advised to subjects of legal relationships at the time of their establishment.[49] Some BRICS countries, as well as the United States and Germany, have enacted legislation establishing criminal liability for copyright infringement. However, such measures are not widespread and are typically used only when the public interests are jeopardized.

The adaptation and modification of cloud storage software is well streamlined in the BRICS member states. The adaptation is allowed in all of the countries under review and is limited only to the technical changes that must be made to the software in order for the users to be able to work on it. In the case of the modification, the situation is different. Authors and copyright holders have the right to declare their right to the software and prohibit any changes to its structure, especially if the changes will have a negative impact on his or her good name and reputation. As a result, changes can only be made with the consent from the author/copyright holder. Typically, a contract for cloud storage of data specifies that the user is prohibited from altering the informational structure of the program or making any changes in its source code. All intellectual property rights in such a program are granted to the provider of the cloud storage facility.

It is important to establish the criteria for defining the originality and novelty of a computer program in the BRICS member states because such criteria may differ in judicial practices, as well as in the legal and technical books. These criteria would help in determining the level of modification, namely, to find out whether the program is a real innovation or a minor variation of the existing program. The exchange of experience between the BRICS countries may be effective and would contribute to the development of laws and technologies in each of them.

The foregoing analysis of the means of protecting cloud data storage programs strongly indicates that, regardless of the specific features of such programs, their legal protection may be rendered quite efficiently on the basis of the traditional copyright and patent frameworks. It is noteworthy that the emphasis in the laws and legal practices of Russia and the world's leading countries is not on the invention of new

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[49] Althaf Marsoof & Indranath Gupta, *Shielding Internet Intermediaries from Copyright Liability – A Comparative Discourse on Safe Harbours in Singapore and India*, 22(3-4) J. World Intellect. Prop. 234, 262 (2019).

methods of regulation that would be in line with the current state of the technological sphere, but rather on the expansion of the items of individual (including intellectual) property that are subject to legal protection. According to, S. Alexeev, the key factor is the recognition of these relationships as full-fledged property items.[50] This recognition would raise the level of protection for owners and copyright holders of the cloud data storage applications in the environment of accelerated modernization of the economy on its way to the stage of post-industrial development.

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[50] *Алексеев С.С.* Право собственности. Проблемы теории [Sergey S. Alekseev, *Property Rights: Problems of Theory*] (2007).

RESEARCH INTO THE STATUS OF SPECIAL ADMINISTRATIVE REGIONS IN CHINA

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This article analyzes the legal status of special administrative regions in China. This type of territorial unit occupies a special place and has a specific legal status, which is especially noticeable in relations with the central authorities. The authors focus on the historical prerequisites for the formation of such a legal status and analyze the current situation. A special feature of this study is the research methodology, since a comprehensive analysis requires the use of a mixed research method. The conclusions reached by the authors can be used to formulate a new form of government.

Keywords: special administrative regions; government; China; executive power; legislative power; judiciary.

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Table of Contents

Introduction

Located in the southeast corner of the People's Republic of China,[1] Hong Kong was a sparsely populated fishing village under the Qing Dynasty, when it was ceded to the British Government in 1843 because of the First Opium War.[2] After the Second Opium War,[3] under 99-year lease agreement, the adjoining territories were added. Except for the Japanese occupation during World War II, it remained under British control until 1997 when it was returned to the People's Republic of China within a "One Country Two Systems" framework ("国两制" in Chinese). Since then, it maintains a higher degree of autonomy in accordance with the Basic Law of Hong Kong Special Administrative Region (HKSAR).[4]

Being a unitary country itself, China has a total of 34 provincial-level administrative regions, including 23 provinces, 5 autonomous regions, 4 municipalities, and 2 special administrative regions. However, the "One Country Two Systems" framework makes Hong Kong and Macau the only two capitalist regions, that results in a different type of central-local relationship. On the one hand, the effectiveness of this policy can be proved by more than 20 years of stable governance. On the other, recent social unrest and disturbances reveal growing problems. According to Mee Kam Ng, HKSAR continues to be a non-democratic, administrative city administrated by an "executive-led" government. Globalization led to introducing new changes in a mode of governance, economic and political restructuring. This can be seen in a shift in policy-making and implementation from top-down government-led modes towards networks of cross-sectoral partnerships, which are characterized by shared power. The developing countries go through a three-stage process: a period of state-led growth with a strong state and a weak civil society, followed by a *transitional period*

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1 Constitution of the People's Republic of China (Sep. 2, 2021), available at http://www.npc.gov.cn/englishnpc/constitution2019/201911/1f65146fb6104dd3a2793875d19b5b29.shtml.

2 Michael Faure & Ton Hartlief, *Economic Analysis* in *The Impact of Social Security Law on Tort Law* 222 (Ulrich Magnus ed., 2003).

3 *Id*. at 253–255.

4 Gerard A. Postiglione, *Education and Social Change in China: Inequality in a Market Economy* 97 (2006).

when the civil society becomes more powerful and comes into conflict with the state. Finally, in the third period two outcomes are possible: paralyzed development caused by state domination or excessively strong civil society; or sustainable development that results from a stable balance of power between the state and civil society.

With different opinions and discussions on this topic being taken into consideration, this paper aims to give a comprehensive study of this innovative type of governance and introduce the main content of this policy, its historical background, peculiar features, current power types and situation in HKSAR. Policy advantages and challenges will be analyzed on the basis of mixed methodology. The final part of the article discusses lessons drawn from the application of the model and its necessity.

1. Research Methods

The research is based on a combination of methods: analysis and synthesis, historical and legal methods, Mix Methods Research. The use of general scientific methods of analysis and synthesis allow to identify individual elements of the state complex structure, i.e. a combination of unitary state features and federal characteristics. Besides, the analysis method is used to identify and describe such concepts as factors affecting the content of the state structure and their effects. With the help of the historical and legal method, an extensive retrospective analysis of foreign practice in the field of legal regulation of the state structure will be carried out within the study framework. It will allow to identify the historical necessity and its predetermination, describe the prerequisites for current trends in this area, outline the dynamics of the evolution of the institute and its main directions. The application of these methods has a specific character because the scientific issues under consideration are interdisciplinary.

Mix Methods Research is a set of quantitative and qualitative methods of data collection, which allows to combine formalized statistical methods and techniques of qualitative interpretive analysis to form a semantic field that characterizes the object under study. The most complete definition of the strategy of mixing methods is given by J.W. Creswell:

> In the strategies of mixing methods, the researcher collects and analyzes both qualitative and quantitative data based on the research question; one mixes (integrates or combines) them in parallel or sequentially, while giving greater importance to one of them or both; uses these procedures in one study or in multiple phases of the research program; considers these procedures within the framework of the chosen philosophical or theoretical approach; develops a unique research design with several methods.[5]

[5] John W. Creswell & Vicki L. Plano Clark, *Designing and Conducting Mixed Methods Research* 95–108 (2nd ed. 2011).

The use of a mixed research method will allow us to develop scenarios for emulating positive Chinese experience.

2. Research Results

The People's Republic of China (PRC) is a socialist state in which, according to Article 2 of the Constitution of the People's Republic of China, all power in the Republic belongs to the people. The leadership of the Communist Party of China[6] acts as a certain feature of socialism with Chinese characteristics. No organization or group can violate this system.

There are two levels of government in the People's Republic of China: central and municipal. The first level is the National People's Congress (NPC), which is the highest state authority of the People's Republic of China and is formed through democratic elections, the second is 23 provinces, 5 autonomous regions, 4 municipalities that are directly subordinate to the central government, 2 special administrative regions. It is worth noting that it is the NPC that approves the formation of provinces, autonomous regions and municipalities, and also decides on the creation of special administrative regions. Further, in accordance with Article 30 of the Constitution of the People's Republic of China, provinces and autonomous regions are divided into autonomous prefectures (districts), counties, autonomous counties and cities. Counties and autonomous counties, in turn, include townships, national towns and cities. Municipalities and other large cities are divided into districts and counties, autonomous prefectures (districts) – into counties, autonomous counties and cities. All autonomous regions, autonomous prefectures and autonomous counties act as autonomous national regions.

An important fact is the fact enshrined in Article 134 of the Constitution of China, which establishes that citizens of all nationalities have the right to use their native oral and written language in court hearings. Thus, the people's courts and the People's Procuracy bodies must provide translation to any party to the court hearing, if she is not familiar with the language used in these proceedings.

Speaking about the principle of separation of powers between central and municipal authorities, it should be clarified that it is based on providing a "full scope for thoughts and creativity" of local authorities, ensuring a decent standard of living for people under the unified leadership of the central authorities. In addition, the center controls the legislative power of local assemblies of people's representatives. Nevertheless, in accordance with Article 100 of the Constitution of the People's Republic of China, the above-mentioned provincial and municipal bodies and their standing committees may adopt local resolutions (directives) that should not

[6] Michael Firth et al., *Friend or Foe? The Role of State and Mutual Fund Ownership in the Split Share Structure Reform in China*, 45(3) J. Fin. Quant. Anal. 685 (2010).

contradict the Constitution, National People's Congress laws, as well as administrative rules and instructions approved by the State Council of the People's Republic of China. Further, local public authorities must report the adopted directives to the Standing Committee of the National People's Congress for registration. Moreover, the People's Congress of a city divided into districts and its Standing Committee may adopt resolutions that should not contradict the Constitution, laws, administrative regulations and local directives of the province or autonomous prefecture (district) and must be submitted for approval by the Standing Committee of the People's Assembly of the Province or Autonomous District. It is worth noting that the Standing Committee of the National People's Congress has a right to cancel local resolutions and decisions of the authorities of provinces, autonomous regions and municipalities directly subordinate to the central government if these normative legal acts (NPA) contradict the Constitution, laws, or administrative rules or instructions. In addition to adopting and issuing resolutions, Local Assemblies of People's Representatives consider and adopt plans for the economic and cultural development of their territories, development of public services. Local assemblies of people's representatives at the county level and above should consider and adopt socio-economic development plans and budgets of their administrative districts, check and approve reports on their implementation. It is noteworthy that these authorities, acting at their own level, elect and have the authority to recall governors, vice-governors, mayors, their deputies, heads and their deputies of counties, districts, towns, etc.

The State Council of the People's Republic of China as the highest executive power of the Republic creates an audit body to monitor the income and expenses of all departments and local governments accountable to it at different levels, income and expenses of all financial and monetary organizations, all enterprises and institutions in the country.

In accordance with Article 105 of the Constitution of the People's Republic of China, Local People's Governments of various levels are the executive bodies of local government organizations, as well as local government organizations of the appropriate level under the unified leadership of the State Council of the People's Republic of China and are subordinate to it. Local people's governments are engaged in administrative work in the field of economy, education, culture, health, physical culture, urban and rural development, finance, public security. They adopt decrees and resolutions, appoint or remove officials, conduct their training, evaluate their work, and eventually encourage or punish them. The urban and rural population creates committees at the place of residence, which are mass organizations of self-government. Such committees create committees on public safety, health and other issues in order to manage civil affairs and public services in their districts, regulate civil disputes, and maintain public order. In addition, city and village committees serve as a kind of conductors of public opinions and demands of the population, making proposals to the people's government.

Regional autonomy is practiced in areas where representatives of national minorities live in strong, concentrated communities. In these areas, self-government bodies are being created to exercise the power of autonomy and to enforce laws and state policy. It is noteworthy that national autonomous regions have the power to manage their finances. Thus, in accordance with Article 117 of the Constitution of the People's Republic of China, the income received by them within the framework of the state financial system is managed and used by the self-government bodies of these districts at their own discretion. In addition, the self-governing bodies of the national autonomous regions independently organize the management of the district economic development, guided by state plans. In addition, the state is obliged to consider their interests while building enterprises and developing natural resources in these areas. Among other things, autonomous regions, if necessary, have the right to organize local public security forces to maintain public order. In general, the self-governing bodies of national autonomies independently manage education, science, culture, health care in their districts, protect cultural heritage and hold events aimed at the dynamic development of their cultures.

Particular focus of the paper is on the internal structure and procedure for the formation of authorities of Special Administrative Regions (SAR), in particular Hong Kong and Macau. According to Article 31 of the Constitution of the People's Republic of China, the State may, if necessary, create special administrative regions. The system created in a special administrative region must be prescribed by a law adopted by the National People's Congress.

The concept of SAR was included in the Constitution of 1982 with a hope for the return of Taiwan, Hong Kong and Macau under the sovereignty of Beijing. In July 1997, Hong Kong was handed over to the outgoing British colonial administration, and in December 1999, Macau was returned to Portugal. The administration of these two special administrative regions is covered by Beijing's "One Country, Two Systems" concept, which guarantees that within 50 years they will be able to maintain their former economic and political systems. Thus, Hong Kong will be able to maintain its capitalist economic system under the leadership of a chief representative (appointed by Beijing) and partially elected legislature.

Special administrative regions (as municipal units) have the highest degree of autonomy in China. Despite the relative autonomy that the Central People's Government grants to special administrative regions, the National People's Congress can still write laws for special administrative regions unilaterally and secretly. These laws are not published until they are adopted.

In accordance with the principle of "One Country, Two Systems," the two special administrative regions continue to have their own governments, multiparty legislatures, legal systems, police, monetary systems, separate customs territories, immigration policy, national sports teams, official languages, postal systems, academic and educational systems, as well as significant competence in foreign relations other than or independent of the PRC.

Each of the two special administrative regions – Hong Kong and Macau – has a codified constitution, which is called the Basic Law. The law grants the regions a high degree of autonomy, a separate political system and a capitalist economy in accordance with the principle of "one country, two systems" proposed by Deng Xiaoping.

Currently, Hong Kong and Macau are responsible for all matters except diplomatic relations and national defense. Consequently, the National People's Congress authorizes the SAR to exercise a high degree of autonomy and use executive, legislative and independent judicial power, and each has its own courts of last resort.

Special administrative regions have the right to conclude a wide range of agreements with other countries and territories: mutual visa cancellation, mutual legal assistance, air transportation, extradition (a form of international cooperation between States in combating crimes, consisting in the arrest and transfer by one State to another of persons suspected or accused of committing a crime (for trial), or persons already convicted by the judicial authorities of another State), double taxation processing and others, without the participation of the Chinese government.

However, in some diplomatic negotiations involving special administrative regions, the relevant SAR may send officials to the Chinese delegation (for example, when the former Director of the Hong Kong Department of Health, Margaret Chan, became Director General of the World Health Organization (WHO), she worked as a delegate from the People's Republic of China to WHO).

The Hong Kong Government has established Hong Kong Economic and Trade Offices (HKETOS) that are Hong Kong's trade representative offices outside the Territory. There are 12 offices outside the Greater China region and eight in the Greater China region (one in Taiwan, four offices and three liaison groups in mainland China.

Both SARs have garrisons of the People's Liberation Army (the regular armed forces of the People's Republic of China (PRC) and the ruling political Party of the People's Republic of China, the Communist Party of China (CPC). The Chinese authorities have stated that the PLA will not be allowed to interfere in the local affairs of Hong Kong and Macau. The PLA does not participate in the management of the SAR, but the latter can ask for their civil-military participation during emergencies, such as natural disasters, since defense is the responsibility of the PRC government.

3. Immigration and Citizenship

The authorities of Hong Kong and Macau independently issue passports to their permanent residents who are also citizens of China (PRC). Permanent residents of SAR who are not Chinese citizens (including stateless persons) are not eligible for SAR passports. Persons who are not Chinese citizens must obtain passports from foreign[7]

[7] Percy R. Luney, Jr., *Traditions and Foreign Influences: Systems of Law in China an*, 52(2) L. Contemp. Probl. 129 (1989).

diplomatic missions representing their countries of citizenship. For stateless persons, each SAR can issue its own identity cards, for example, an identity document, instead of national passport for some persons. Chinese citizens who are not permanent residents of the two SARs are also not eligible for SAR passports.

There is no article in the Constitution of the People's Republic of China establishing the State or official language. That is, legally, no language in the country is the state language, it has definite political grounds. In fact, Chinese is a main means of communication throughout the country. It is used for television and radio broadcasting; it is the language of many educational institutions. This gives reason to believe that Chinese is the de facto state language of the People's Republic of China and the official language of the country's administrative structures. The Constitution uses the definition of "commonly used," but not official. The legislator does not want to use the phrase "state language" because of its obvious national content and seeks to formalize the status of the Chinese language as much as possible so that it is not perceived as a factor of cultural dominance of the Han ethnic group over other peoples of the country. It is closely related to the objectives of China's national policy: according to Article 4 of the Constitution of the People's Republic of China all peoples have the right to use and develop their native language, both written and oral, and to preserve or improve their folk customs and traditions.

According to Article 9 of the Basic Law of Macau, Portuguese can also be used as an official language (together with Chinese) by its executive, legislative and judicial bodies. According to Article 9 of the Basic Law of Hong Kong English can also be used as the official language (together with Chinese) in all Hong Kong authorities. According to Article 19 of the Constitution of China, the State ensures the dissemination of the generally accepted Chinese language throughout the territory.

Articles 2 and 3 of the Law of the People's Republic of China "On the Commonly Used Language and Writing" repeat the content of the norms on the status of the language, according to Article 19 of the Constitution of the People's Republic of China but expand it somewhat. The NPA adds that "the State promotes the spread of unified writing, which means modern simplified hieroglyphs, the list of which is approved by the State Council of the People's Republic of China." Article 4 of this law obliges local authorities to take measures to spread Putonghua in the regions (Article 4 illustrates an interference of the authorities in the development of languages of ethnic minorities and the oppression of local dialects). Article 16 establishes a scope of possible usage of local dialects. They can be used by: employees of public services to perform their duties; television and radio broadcasting, if such a measure is approved by the Minister of Television and Radio Broadcasting or the regional Department for Television and Radio Broadcasting; in the works of theatrical and cinema art; in book publishing, education and scientific research, if necessary.

According to Article 12 of the Law of the People's Republic of China "On Education," Chinese language and writing are basic for schools and other educational institutions.

Schools and other educational institutions that teach mainly representatives of small nations can teach in the language of a particular nationality or languages of a particular region.

Hong Kong: status features

Hong Kong is directly subordinate to the Central People's Government (Art. 12). The Central People's Government is responsible for foreign affairs related to Hong Kong, but authorizes the SAR to conduct foreign affairs in accordance with this Law (Art. 13). The Central People's Government appoints the President of the Government and the chief officials of Hong Kong in accordance with Chapter 4 of this Law (Art. 15).

Laws passed in Hong Kong should be sent to the Standing Committee of the National People's Congress. If the Standing Committee finds that the submitted law does not comply with this Law, or affects the powers of the central authorities, it returns the law back, but has no right to correct it. Any returned law must be immediately annulled (Art. 18)

According to Article 19, Hong Kong is endowed with an independent judiciary, including the right to a final judicial decision. The Hong Kong courts have jurisdiction over all cases in the Region. Hong Kong courts do not have jurisdiction over cases related to foreign security and foreign affairs issues. The courts of the Region should receive a certificate from the President of the Government for each case when the court faces issues of external security and foreign affairs when making its decision. The specified certificate is mandatory for vessels. Before issuing such a certificate, the President of the Government must receive a corresponding document from the Central Government.

According to Article 24, residents of special administrative regions include permanent residents and non-permanent residents.

Permanent residents of the Hong Kong SAR are:

1. Chinese citizens born in Hong Kong before or after the formation of the SAR.

2. Chinese citizens who have been continuously residing in Hong Kong for 7 years before or after the establishment of the SAR.

3. Chinese citizens born outside Hong Kong, but who are relatives of the citizens specified in the first two paragraphs.

4. Non-Chinese citizens who have entered Hong Kong on the basis of relevant documents, have been continuously residing in Hong Kong for at least 7 years and consider Hong Kong a place of permanent residence before or after the establishment of the SAR.

5. Persons under the age of 21 who were born in Hong Kong to persons listed in Category 4 before or after the creation of the SAR.

6. Persons who before the creation of the SAR had a right of permanent residence in Hong Kong only.

The above-mentioned residents must have permanent identity cards, which indicate their right to permanent residence. Non-permanent residents of the SAR are persons who have Hong Kong identity cards, but do not have the right to permanent residence.

Permanent residents – the right to vote and the right to participate in elections (Art. 26). Non-permanent and permanent residents are equal before the law (Art. 25).

According to Article 43, the Chief Executive of the Hong Kong SAR is the President of the Hong Kong Government and a representative of the Region. In accordance with this Law the President of the Government is responsible to the Central People's Government.

According to Article 44, the President of the Government is a Chinese citizen, at least 40 years old, a permanent resident of the Region, without a right to stay in any foreign country, with a permanent residence in Hong Kong for at least 20 years (for 5 years, no more than 2 terms). According to Article 45, the President of the Government must be appointed by the Central People's Government after local elections and consultations. According to Article 47, the President of the Government, upon taking office, must declare all his income to the Chief Judge of the Court of Final Appeal of the Hong Kong SAR. This declaration must be made in writing.

4. Formation of Executive Power in Hong Kong

According to Article 54, the Executive Council of the Hong Kong SAR should be a body to assist the President in governing. According to Article 55, the members of the Executive Council must be appointed by the President of the Government from the main officials, members of the Legislative Council and representatives of the society, i.e. the decision on their appointment or removal can be made by the President of the Government. The term of office should not be longer than the term of the President who appointed them. The members of the executive council must be Chinese citizens, permanent residents of the Region, and not have the right of residence in any foreign country.

According to Article 59, the Government of the Hong Kong SAR should consist of executive authoritative representatives of the Region. According to Article 60, the Administration Department, Finance Department, various bureaus, offices and commissions should be established in the Hong Kong SAR Government. According to Article 63, the Department of Legality ensures the work of the courts, excluding any interference in their activities. According to Article 64, the Government must comply with the laws and be accountable to the Legislative Council of the Region. It must comply with the laws passed by the Council, it must regularly inform the Council, respond to requests from Council members, and receive the approval of the Council for Tax and Public Expenditures.

5. Formation of Legislative Power in Hong Kong

According to Article 66, the Legislative Council should be the law-making body in the Region. According to Article 67, the Legislative Council should be formed of Chinese citizens, permanent residents of the Region, without the right to reside in

another country. However, permanent residents of the region, non-Chinese citizens, or those who have a right of residence in another country can also be elected to the Legislative Council, provided that their number does not exceed 20% of the total composition of the Council.

According to Article 68, the Legislative Council must be elected. The method for forming the council should be determined on the basis of the Region actual situation, according to the principle of gradual and normal development based on universal suffrage (a special method for the formation of the Legislative Council and the procedures for voting and nominating candidates is set out in Annex 2 of this Law).

According to Article 71, the Chairman of the Legislative Council must be elected from among the members of the Council – a Chinese citizen, a permanent resident of the Region, at least 40 years old, without the right of residence in another country, who has lived in the Region for at least 20 years continuously.

According to Article 80, the courts of the SAR exercise judicial power in the Region. According to Article 81, the following courts are approved in Hong Kong: the Court of Final Appeal, the Supreme Court, District Courts, Magistrates' Courts and other special courts. The Supreme Court includes the Court of Appeal and the Court of First Instance. The legal practice previously applied in Hong Kong remains, except for the consequences associated with the establishment of the Hong Kong Court of Final Appeal.

6. Advantages and Necessity of Establishing the Status of a Special Administrative Region

The practice proved to be very effective in maintaining Hong Kong and Macao for more than 20 years of long-term stability and prosperity. The reason lies in the fact that the "One Country, Two Systems" framework can reach a consensus in seeking common ground while preserving differences. Recognizing the development of capitalism under the premise of one country is a key to political stability, economic prosperity and common good. It protects the fundamental interests of the PRC as well as its people, the unity of national sovereignty by legally stating that the People's Republic of China under the leadership of the Communist Party of China implements a socialist system dominated by public ownership in the mainland, and a capitalist system of private ownership in the two SARs of Hong Kong and Macau. Hong Kong successfully resisted the impact of the Asian financial crisis, the SARS epidemic and the international financial crisis. It has a status as an international financial, shipping, and trading center, and is continuously ranked by many international institutions as the world's freest and most competitive economy.

From the political perspective, this framework refers to a peaceful way to protect national sovereignty and territorial integrity. The "One Country, Two Systems" strategy created a precedent for the peaceful settlement of international disputes. In case

of China, it guarantees its territorial integrity and sovereignty, reduces grounds for social unrest before and after the return of Hong Kong and Macao, and facilitates a smooth transition after the return.

Within this framework, the Basic Law protects a right of two different social systems to develop together under unified national sovereignty. It avoids chaos and turmoil due to different ideologies.

From the economic perspective, the framework contributes to national development in general. Since the return of Hong Kong and Macau, the central government supported the development of SARs by signing the "Closer Economic Partnership Arrangement," supporting Hong Kong and Macau in responding to the Asian and international financial crises, and supported Hong Kong in maintaining its status as an international financial, shipping, and trade center. Statistics proved that with the strong support, the two SARs continued to develop steadily and prosperously. In 2018, Hong Kong's GDP was 285 million HK dollars, an increase of 108% over 1997. The growth rate of major economic indicators over the same period was among the highest among developed economies. At present, with the construction of the Guangdong-Hong Kong-Macao Greater Bay Area, the two SARs will be more closely linked with the development of the mainland.

In terms of culture, this framework allows two SARs to acquire characteristics of both Chinese and Western civilizations, and at the same time maintain a different political system from the mainland. Thus, it is necessary for the two cities to benefit from the cultural and systematic advantages of both types in order to establish their own model of development within the framework "One Country, Two Systems."

7. Problems Revealed in the Process of Development

The above-analyzed material shows that the "One Country, Two Systems" framework has been successfully applied in Hong Kong during the past 20 years. At the same time new challenges appear. The recent series of violent attacks in Hong Kong that undermined its economic development and social stability revealed its shortcomings after more than 20 years of operation.

"One Country, Two Systems" implies a country with two systems, but there is no complete governance power. According to Foucault, the power applies itself to immediate everyday life which categorizes the individuals, identifies their individuality and identity, imposes a law of truth on them which they must obey, and which others have to recognize in them. It is a form of power which makes individuals subjects.[8] But Hong Kong still sticks to a traditional way of governing, it is different in many aspects (identity, institutionalization, legislation) from the central government power; from this perspective it is separated from it.

[8] Michel Foucault, *The Subject and Power*, 8(4) Crit. Inq. 777 (1982).

To be precise, the framework operates without full governance of SARs, which means that unified administration of the region by the central government is lacking in Hong Kong and Macau. Consequently, it is impossible to achieve complete control over judicial, education, public security systems, over media and publication, as well as government officials. The exercise of power comprises

> a total structure of actions brought to bear upon possible actions; it incites, it induces, it seduces, it makes easier or more difficult; in the extreme it constrains or forbids absolutely.[9]

Among all these, violence must have been its primitive form, its permanent secret and its last resource, according to Foucault. The effective governing is unattainable because of the lack of the above-mentioned mechanisms.

In other words, the hegemony, with economic and political leadership, as well as cultural, moral and ideological dominance hinders effective development of the Hong Kong SAR. In Hong Kong it results in a controversial attitude to the national ideology and identity under the leadership of CPC. It is more common among young people who are closely connected to the western culture due to globalization.

Conclusion

To conclude, the framework of "One Country, Two Systems" can considerably protect the fundamental interests of the society on order to achieve peace and compromise. The use of this power model ensured a long period of political and economic stability and successful development in many directions. However, the current contradictions prove the need to introduce changes and keep a clear-cut balance between national and regional views on Hong Kong long-term development.

Any system has its limitations and validity period and must be adjusted to the changing external environment. Now, after 20 years of the "One Country, Two Systems" model implementation, its disadvantages are becoming more evident. This model needs transformation to avoid contradictions and unrest.

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[9] Michel Foucault, *The Subject and Power*, 8(4) Crit. Inq. 777 (1982).

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VIOLENCE AGAINST WOMEN IN RUSSIA AND BRAZIL: INTERNATIONAL AND DOMESTIC RESPONSES

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The problem of domestic violence and violence against women, despite being an age-old phenomenon, came to the fore of public debate relatively late. It entered the agenda of intergovernmental organizations in the 1990s, but became the subject of international litigation only in the 2000s and 2010s. While this belated response of the international community can be associated with the inadequate conceptualization of the problem and insufficient data, it also has to do with the ongoing public/private dichotomy that became especially pronounced in the recent years when various conservative groups increasingly question the necessity of specific laws and policies aimed at eliminating this kind of crime. In this article, I briefly trace the developments concerning women's rights, and, particularly, domestic violence and violence against women in international law. Then, based on the analysis of international and regional court decisions, I try to see how and whether these decisions contributed to the domestic developments in the field of combatting this phenomenon in Russia and Brazil. It is also important to examine how COVID-19 pandemic impacted the narratives of violence and how the international community should respond to the challenge of protecting the most vulnerable members of the society in the conditions of health emergency.

Keywords: domestic violence; violence against women; Brazil; Russia; CEDAW; Inter-American Commission of Human Rights; European Court of Human Rights.

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Introduction

Violence committed against women and girls is an age-old phenomenon. Women are more likely to be subjected to violence on the part of their husbands or intimate partners than outsides.[1] There are several concepts used by researchers and law-makers to indicate abuse that might occur in a variety of contexts and relationships ranging from dating and cohabitation to an officially registered marriage, such as "intimate partner violence," "family violence," "domestic violence," "violence against women," "gender-based violence."[2] Rhona K.M. Smith emphasizes that,

> Domestic violence is prevalent in all parts of the world, and is sometimes part of the ingrained culture. Latin America, Asia and the Pacific all produce evidence of cultures which condone (even passively) some domestic violence. One of the most significant problems with violence against women is the lack of public (official) awareness. Many women do not report domestic violence to the authorities and, even if they do, frequently they will not press charges.[3]

Biased attitudes of the law-enforcement officials, lack of training how to deal with such offenses, unfriendly and intrusive interrogation practices lead to the situation when domestic violence remains an invisible crime. In addition, frequently states do not have special statistics on such offenses (or such statistics is not easily accessible)

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1 Ola W. Barnett et al., *Family Violence Across the Lifespan: An Introduction* 3 (3rd ed. 2010).

2 It must be remarked that the Istanbul Convention, adopted by the Council of Europe in 2011, uses such terms as "violence against women and domestic violence." The latter term is meant to include not only women, but other vulnerable groups like children and the elderly. *See* the analysis of the Istanbul Convention in Sara De Vido, *The Ratification of the Council of Europe Istanbul Convention by the EU: A Step Forward in the Protection of Women from Violence in the European System*, 9(2) Eur. J. Leg. Stud. 69 (2017).

3 Rhona K.M. Smith, *Texts and Materials on International Human Rights* 543 (3rd ed. 2013).

making it difficult to trace the dynamics of this phenomenon, and complicates an overall picture of such crimes on the global level.

Although the problem is old, the interest to it is unwaning, not only among the media, but also in academic circles and among policy-makers and practitioners. This can be explained by several decisions that came out recently in international and regional courts, but also by the pandemic 2020, which brought to light such problems as victims' vulnerability in the conditions of self-isolation, the lack of appropriate services and the impossibility to physically separate the victims and the abusers.

Drawing on the feminist concept of intersectionality,[4] I would like to address two interrelated questions: how (and whether) international and regional human rights institutions understand the complex nature of violence experienced by women, as well as trace the impact of these decisions domestically on the examples of Brazil and Russia. I chose these two countries since they have been frequently brought about in literature as examples of an "anti-gender turn" currently unfolding globally.[5] Finally, I would like to examine the omissions in the field of combatting domestic violence and violence against women that became apparent in 2020, in the conditions of the COVID-19 health crisis.

1. History: Domestic Violence as a Human Rights Violation in International Law

On the international level, the question of violence against women started to emerge on the agenda of international organizations relatively late, compared to discrimination, the initial frame used to discuss women's rights. Two mainstream human rights treaties, part of the International Bill of Rights, ICCPR (International Covenant on Civil and Political Rights) and ICESCR (International Covenant on Economic, Social and Cultural Rights) used the language of non-discrimination and equality, listing such grounds as "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[6]

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[4] The concept "intersectionality" was introduced in late 1980s by an American activist and a law professor, Kimberlé Crenshaw, to emphasize how oppression operates across multiple layers of an individual's identity. *See, e.g.*, Kimberlé Crenshaw: What Is Intersectionality?, YouTube, 22 June 2018 (Feb. 10, 2021), available at https://www.youtube.com/watch/ViDtnfQ9FHc.

[5] Kristina Stoeckl & Kseniya Medvedeva, *Double Bind at the UN: Western Actors, Russia, and the Traditionalist Agenda*, 7(3) Glob. Const. 383 (2018); Back to the Past: Brazil's Backlash of Reproductive Justice in its Domestic and Foreign Policy, Center for Feminist Foreign Policy, 9 March 2020 (Feb. 10, 2021), available at https://centreforfeministforeignpolicy.org/journal/2020/3/9/back-to-the-past-brazils-backlash-of-reproductive-justice-in-its-domestic-and-foreign-policy; Elaine R. Brandão & Cristiane da Silva Cabral, *Sexual and Reproductive Rights Under Attack: The Advance of Political and Moral Conservatism in Brazil*, 27(2) Sex. Reprod. Health Matters 76 (2019).

[6] International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, Art. 26 (Feb. 10, 2021), available at https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx; International Covenant on Economic, Social and Cultural Rights, adopted and opened

The CEDAW Convention (Convention on the Elimination of Discrimination Against Women, 1979), in Article 1 also used the language of discrimination:

> For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

The CEDAW Committee issued several recommendations, however, that offered a more nuanced approach to discrimination and violence. According to Recommendation No. 25 related to temporary special measures,

> certain groups of women, in addition to suffering discrimination directed against them as women, may also suffer from multiple forms of discrimination, based on additional grounds as race, ethnic or religious identity, disability, age, class, caste or other factors.[7] [para. 12]

Recommendation No. 19 refers to gender-based violence and calls it "a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men." Importantly, the Recommendation mentions that, "gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence."[8] This conceptualization of violence and discrimination is important, since it has long been recognized by feminist scholars that "individuals can experience discrimination on the basis of multiple and intersecting identities."[9] Discrimination never occurs alongside one particular trait only (gender, in this case): it is inexorably linked to questions of ethnic and racial belonging, social class, disability, and other aspects of identity.

The language of violence against women started to be explicitly used in international documents only in the 1990s. Controversy surrounding the question of

for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, Art. 2(2) (Feb. 10, 2021), available at https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx.

[7] General recommendation No. 25: Article 4, paragraph 1, of the Convention (temporary special measures), 30th Session (2004) (Feb. 10, 2021), available at https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_3733_E.pdf.

[8] General recommendation No. 19: Violence against women, 11th Session (1992) (Feb. 10, 2021), available at https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_3731_E.pdf.

[9] Meghan Campbell, *CEDAW and Women's Intersecting Identities: A Pioneering New Approach to Intersectional Discrimination*, 11(2) Revista Direito GV 479, 480 (2015).

violence mostly had to do with the dichotomy between public and private spheres of individuals' lives, when it was presumed that states were not supposed to intervene into the private domain. This was especially true in the classical understanding of public law in Western European countries and the United States where private matters were exempt from legal scrutiny.[10] This public/private dichotomy was criticized and questioned to stress that states were under an obligation to protect individuals from abuse in the private sphere. Namely, states should prevent, investigate and punish the occurrence of such acts.[11] It was in 1993 that Declaration on the Elimination of Violence Against Women (Vienna Declaration) was adopted by the General Assembly (Res. 48/104, 20 December 1993). Article 1 of the Declaration defined "violence against women" in the following way:

> Any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

The Declaration mentioned "physical, sexual and psychological violence" that occurs in the family, within the general community, in educational institutions and elsewhere (Art. 2). States should take measures to eliminate violence against women, as well as "condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination" (Art. 4). In 1999, United Nations General Assembly declared November 25 an International Day for the Elimination of Violence Against Women. This day was chosen in the memory of women tortured and murdered by the Trujillo dictatorship in the Dominican Republic.[12]

Radhika Coomaraswamy, Special Rapporteur on Violence Against Women, presented her report in 1996, where she stressed that,

> the role of State inaction in the perpetuation of the violence combined with the gender-specific nature of domestic violence require that domestic violence be classified and treated as a human rights concern rather than merely as a domestic criminal justice concern.

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[10] Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61(1) Ohio State L.J. 1 (2000) (Feb. 10, 2021), also available at https://kb.osu.edu/bitstream/handle/1811/70397/OSLJ_V61N1_0001.pdf?sequence=1.

[11] Catherine Moore, *Women and Domestic Violence: The Public/Private Dichotomy in International Law*, 7(4) Int'l J. Hum. Rts. 93 (2010).

[12] U.N. General Assembly, International Day for the Elimination of Violence Against Women, A/RES/54/134, 7 February 2000 (Feb. 10, 2021), available at https://undocs.org/en/A/RES/54/134.

She also suggested the ways states could improve their domestic violence-related legislation, as well as take other measures necessary to address this problem.[13]

The Vienna World Conference of 1993 that led to the adoption of the Declaration, gave an impetus to the movement aimed at strengthening the CEDAW mechanism, which, by that time, was criticized for its ineffectiveness and even referred to as a "second-class instrument."[14] As a result, Optional Protocol to the Convention that envisaged the right of an individual petition was proposed at the Beijing World Conference on Women in 1995. The Protocol was adopted in 1999 (it entered into force in 2000). It gave the individuals the right to submit an individual communication in the conditions when the state party breached certain provisions of the Convention. The mechanism works in a similar way as other U.N. mechanisms: upon exhaustion of domestic remedies, an individual submits his/her application to the CEDAW Committee, which evaluates this submission and issues a decision on the merits and makes specific and general recommendations to the state. The Committee's views and recommendations are not legally binding, though the states are expected to give "due consideration" to them. It is also possible for the Committee to "designate one or more of its members to conduct an inquiry and to report urgently to the Committee. Where warranted and with the consent of the State Party, the inquiry may include a visit to its territory."[15] According to Article 5 of the Optional Protocol, the Committee may adopt interim measures to prevent "irreparable damage" to a victim. An important point as well is that the Committee may adopt follow-up procedures in respect of communications, in accordance with Article 7(5). As of October 2020, there were 36 pending cases under the Optional Protocol.[16] Even if, formally speaking, this mechanism is not a very strong one, views have been expressed that it can be

> seen to provide women with a bridge to the longed-for human rights centre, the alternative to which is for women to be consigned to a peripheral existence marked by exclusion and persistent inequality.[17]

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[13] U.N. Economic and Social Council, Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 1995/85, E/CN.4/1996/53, 5 February 1996 (Feb. 10, 2021), available at https://undocs.org/E/CN.4/1996/53.

[14] Loveday Hodson, *Women's Rights and the Periphery: CEDAW's Optional Protocol*, 25(2) Eur. J. Int'l L. 561, 562 (2014).

[15] U.N. General Assembly, Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, A/RES/54/4, 15 October 1999, Art. 8(2) (Feb. 10, 2021), available at https://www.ohchr.org/en/professionalinterest/pages/opcedaw.aspx.

[16] Status of pending cases under the Optional Protocol to CEDAW, as of 27 October 2020, U.N. Human Rights Office (Feb. 10, 2021), available at https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/cedawindex.aspx.

[17] Hodson 2014, at 565.

The Committee also examines state-parties' periodic reports

> on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect.[18]

However, the first merits opinion of the CEDAW Committee related to domestic violence and violence against women came out more than ten years after the 1993 Vienna Declaration. The first case was *Ms. A.T. v. Hungary* (2005), when the Applicant complained that she was not able to obtain protection on the part of the state from her abusive ex-partner. Neither was she able to receive support from a women's refuge, since none of them offered essential support for her handicapped child.[19] She also stressed that Hungarian law did not envisage the possibility of a restraining or protection order to keep the perpetrator away from her and her children. The Committee found a violation of Article 2(a), (b) and (e) (the obligation to adopt legislative and other measures to eliminate discrimination against women) and Article 5(a) (the need to adopt special measures necessary to eliminate prejudices) in conjunction with Article 16 (the need to adopt special measures to eliminate discrimination in family relations) of the CEDAW Convention. Other early cases that involved domestic violence and violence against women were brought against Austria,[20] and touched upon the problem of insufficient implementation of domestic violence laws, as well as other structural problems. The Committee took a rather broad approach to the phenomenon of violence and recommended the states to take measures not only in these specific situations, but also in general, for instance, to adopt necessary laws, provide safe shelters to the victims, and educate state officials how to address such offenses.

2. Russian and Brazilian Submissions to the CEDAW Committee: States' Obligations and Women's Rights

Brazil is a party to major international and regional human rights conventions, including the CEDAW Convention, which it signed in 1981 and ratified in 1984.

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[18] Convention on the Elimination of All Forms of Discrimination Against Women, adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, entry into force 3 September 1981, Art. 18(1) (Feb. 10, 2021), available at https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx.

[19] Communication No. 2/2003, *Ms. A.T. v. Hungary*, CEDAW/C/36/D/2/2003, 26 January 2005 (Feb. 10, 2021), available at https://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/CEDAW%20Decision%20on%20AT%20vs%20Hungary%20English.pdf.

[20] Communication No. 5/2005, CEDAW/C/39/D/5/2005, 6 August 2007; Communication No. 6/2005, CEDAW/C/39/D/6/2005, 1 October 2007 (Feb. 10, 2021), available at https://www.ohchr.org/en/hrbodies/cedaw/pages/jurisprudence.aspx.

Optional Protocol to the Convention was signed in 2001 and ratified in 2002. Brazil is also a party to the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (1995).

So far, there has been only one case examined by the CEDAW Committee against Brazil.[21] *Da Silva Pimentel Teixeira v. Brazil* (2011) dealt with the victim's access to healthcare.[22] The Applicant was a mother of a poor Afrodescendant woman, Alyne da Silva Pimentel Teixeira, who could not get proper medical treatment during childbirth, and died of health complications. The victim's mother alleged that there was a violation of her daughter's right to life and health under Articles 2 and 12 of the CEDAW Convention. While the question of violence was not raised in this case, it still showed the complexity of women's experiences, especially women "belonging to vulnerable and disadvantaged groups," and that

> the duty to eliminate discrimination in access to health care includes the responsibility to take into account the manner in which societal factors, which can vary among women, determine health status. [para. 3.2]

Understanding women's rights as a broader term that encompasses social and economic rights is especially important in the Latin American context due the historical specificity of the feminist struggle in the region. As Katherine M. Marino remarks,

> Feminismo americano demanded not only women's individual rights under the law – for the vote and for civil rights but also economic and social rights.[23]

In this particular case it was established that Brazil discriminated against the victim on the ground of "her status as a woman of African descent and her socioeconomic background" (para. 7.7).

Russia signed the CEDAW Convention in 1980 and ratified it in 1981. Optional Protocol to the Convention was signed in 2001, and ratified in 2004. Since 2004, there have been nine submissions registered by the Committee against Russia.[24] Two submissions were declared inadmissible, violations were found in four of them.[25] CEDAW examined

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21 Table of pending cases, U.N. Human Rights Office (Feb. 10, 2021), available at https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/cedawindex.aspx.

22 Communication No. 17/2008, CEDAW/11/C/49/D/17/2008, 27 September 2011 (Feb. 10, 2021), available at https://www.ohchr.org/Documents/HRBodies/CEDAW/Jurisprudence/CEDAW-C-49-D-17-2008_en.pdf.

23 Katherine M. Marino, *Feminism for the Americas: The Making of the International Human Rights Movement* 4 (2019).

24 Statistical Survey on individual complaints, information as of 28 January 2020, U.N. Human Rights Office (Feb. 10, 2021), available at https://www.ohchr.org/Documents/HRBodies/CEDAW/StatisticalSurvey.xls.

25 *S.T. v. Russia*, CEDAW/C/72/D/65/2014; *O.G. v. Russia*, CEDAW/C/68/D/91/2015; *X. and Y. v. Russia*, CEDAW/C/73/D/100/2016; *O.N. and D.P. v. Russia*, CEDAW/C/75/D/119/2017.

domestic violence in relation to Russia in the communication brought by S.T., a woman from Chechnya who complained of repeated physical and psychological abuse on the part of her ex-husband who even hit her with an axe, causing severe health injuries.[26] It was emphasized in the submission that the victim was financially dependent on the abuser and could not afford to live separately (para. 2.4). It was also mentioned that she could not afford the necessary medical treatment to cure her injuries (para. 2.23), and her claims for compensation were dismissed by the court (para. 3.6). Neither could she go to a women's shelter because in her village there were none. She was blamed by the villagers for "provoking her husband," and her family members were stigmatized, even though they had also been subjected to abuse. Her husband, however, received a mild punishment because it was decided that he acted out of "temporary insanity" (para. 2.17). He was largely portrayed as a victim in the eyes of the court and the villagers. The Applicant claimed a violation of Article 2(c) and (d), read in conjunction with Article 1, and Article 5(a) of the CEDAW Convention since she was not able to get effective protection from the government. The case also involved difficult questions of religion and culture, and showed how different layers of identity (ethnic, social, gender) could intersect and become the basis of oppression.

The Committee in its recommendations stressed the state's obligation to properly investigate cases of gender-based violence, to provide victims with assistance and revise its legislation to bring it in conformity with international standards and the CEDAW Convention. Multiple systemic problems came to light as a result of these submissions, such as the lack of psychological rehabilitation for the victims, the lack of training for the police officers, and so on.

3. Regional Human Rights Protection Mechanisms and Domestic Violence

Regional human rights protection mechanisms have been instrumental in examining the problem of violence against women. The American Convention on Human Rights (1969) contains the right of an individual and group petition in cases of human rights violations (it was ratified by Brazil in 1992). The Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (Convention of Belém do Pará) was passed in 1994 by the General Assembly of the Organization of American States (ratified by Brazil in 1995).

Violence against women has frequently become the subject of human rights litigation in the Latin American context. It covered such questions as rape, torture and sexual violence in armed conflicts,[27] violence against indigenous women,[28] the

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[26] Communication No. 65/2014, CEDAW/C/72/D/65/2014, 8 April 2019 (Feb. 10, 2021), available at https://undocs.org/en/CEDAW/C/72/D/65/2014.

[27] *Caso Masacre Plan de Sánchez v. Guatemala*, Reparaciones, 19 November 2004, Serie C No. 116 (Feb. 10, 2021), available at https://www.corteidh.or.cr/docs/casos/articulos/seriec_116_esp.pdf.

[28] *Caso Fernández Ortega y otros v. México*, Excepción Preliminar, Fondo, Reparaciones y Costas, 30 August 2010, Serie C No. 215 (Feb. 10, 2021), available at https://www.corteidh.or.cr/CF/jurisprudencia2/ficha_tecnica.cfm?nId_Ficha=338.

states' duty to prevent, investigate and sanction violence against women,[29] forced sterilization of women in hospitals.[30] These developments, in part, are attributed to the activities of women's rights groups in the region, as well as to the activism of lawyers and female judges on the bench.[31]

In the Inter-American system of human rights protection (that includes the Commission and the Court) the question of domestic violence and violence against women was examined in the famous *Maria da Penha* case brought against Brazil in 2001.[32] The Commission relied on the American Declaration of the Rights and Duties of Man and the Convention of Belém Do Pará to establish whether Brazil was responsible for breaching these treaties (the latter treaty was applied for the first time in this case). The Applicant, Maria da Pehna Maia Fernandes, complained that her husband tried to murder her several times (which left her paraplegic since 1983 at the age of thirty-eight, and caused other serious bodily harm), and state authorities did nothing to protect her and punish her husband, even though she brought repeated complaints against him. He was arrested only in October 2002, nineteen years after the crime had been committed and the statute of limitations had almost expired. In 2007 he was released on probation.[33] Given that the victim and the perpetrator were both middle-class educated people, this case demonstrated that domestic violence could not be attributed to certain individuals with anti-social behavior or a lack of education, but could happen in any social class, regardless of the educational, material or other factors.

The Commission established that,

> The failure to prosecute and convict the perpetrator under these circumstances is an indication that the State condones the violence suffered by Maria da Penha, and this failure by the Brazilian courts to take action is exacerbating the direct consequences of the aggression by her ex-husband. [para. 55]

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29 *Caso Gelman v. Uruguay*, Fondo y Reparaciones, 24 February 2011, Serie C No. 221 (Feb. 10, 2021), available at https://www.corteidh.or.cr/docs/casos/articulos/seriec_221_esp1.pdf.

30 *Caso I.V. v. Bolivia*, Excepciones Preliminares, Fondo, Reparaciones y Costas, 30 November 2016, Serie C No. 329 (Feb. 10, 2021), available at https://www.corteidh.or.cr/docs/casos/articulos/seriec_329_esp.pdf.

31 Mariana Prandini Assis, *Violence Against Women as a Translocal Category in the Jurisprudence of the Inter-American Court of Human Rights*, 8(2) Revista Direito e Práxis 1507 (2017) (Feb. 10, 2021), also available at https://www.scielo.br/scielo.php?script=sci_abstract&pid=S2179-89662017000201507&lng=en&nrm=iso.

32 *Maria da Penha Maia Fernandes v. Brazil*, Case 12.051, Report No. 54/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 704 (2000) (Feb. 10, 2021), available at http://www.cidh.org/annualrep/2000eng/ChapterIII/Merits/Brazil12.051.htm.

33 Ana P. Martins Amaral & Ellen C. Rocha Amorim, *A Lei 11.340/2006 – Lei Maria da Penha – como fruto dos compromissos internacionais assumidos pelo Brasil e de sua condenação perante a Comissão Interamericana de Direitos Humanos*, 29(2) Revista Justiça do Direito 179, 186 (2015).

The Commission went on to stress that this situation was not an isolated occurrence, but

> a general pattern of negligence and lack of effective action by the State in prosecuting and convicting aggressors … this case involves not only failure to fulfill the obligation with respect to prosecute and convict, but also the obligation to prevent these degrading practices. That general and discriminatory judicial ineffectiveness also creates a climate that is conducive to domestic violence, since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts. [para. 56]

The Commission found a violation of Articles 8 and 25 of the American Convention (right to a fair trial and judicial protection). The Commission also established that the Applicant was denied equal protection guaranteed by Article 24 of the American Convention. Articles II and XVIII of the American Declaration, Article 1.1 of the American Convention, and Article 7 of the Convention of Belém do Pará (a state's obligation to undertake policies to prevent, punish, and eradicate violence against women) were also breached by Brazil (para. 60.1).

Brazil's law enforcement and judicial systems came under intense scrutiny in this case. Even if violence against women was a widespread phenomenon, victims' complaints were not fully investigated and perpetrators were not prosecuted. Relying on various reports by NGOs and other organizations, the Commission stated that,

> 70% of the criminal complaints pertaining to domestic violence are put on hold without any conclusion being reached. Only 2% of the criminal complaints for domestic violence against women lead to conviction of the aggressor. [para. 49]

On the European continent, there have been several treaties that address the question of domestic violence and violence against women.[34] In the European Court of Human Rights (ECtHR) jurisprudence, the issue of domestic violence has been examined by the Court under various European Convention's provisions, including Article 2 (right to life), Article 3 (prohibition of torture and inhuman or degrading treatment), Article 6 (right to a fair trial), Article 8 (right to private and family life), Article 14 (prohibition of discrimination) and involved such complex issues as alleged risk of being subjected to domestic violence in case of deportation, insufficient investigation of domestic violence offenses, alleged failure by the state

[34] Libor Klimek, *Domestic Violence in European Legal Documents*, 6(0) CBU Int'l Conf. Proc. 647 (2018) (Feb. 10, 2021), also available at https://ojs.journals.cz/index.php/CBUIC/article/view/1227/1769.

institutions to provide women with adequate protection against perpetrators, states' obligation to protect physical and psychological integrity of individuals, confidentiality of correspondence, cyberbullying, etc.[35] It is firmly established in the Court's jurisprudence that states must exercise due diligence when trying to fulfill their obligations to combat domestic violence.[36]

The first case against Russia that involved domestic violence came out in July 2019 and immediately became the subject of unprecedented media scrutiny. The ECtHR decision coincided with ongoing public debates over the necessity to introduce a special bill to combat domestic violence, and showed how polarized the Russian society was on this matter. The Applicant, Valeria Volodina, a young woman from Ulyanovsk, frequently brought complaints against her partner since he constantly physically and verbally assaulted her, which led to a medically-induced abortion due to a possibility of a miscarriage. He also caused damage to her property, took her identity documents, posted her private photos on the Internet without her consent, put a tracking device in her bag and traced her movements, resorted to stalking and death threats. The state authorities, however, remained largely dismissive of her complaints and criminal charges were never properly pursued (they were either dropped or not brought at all). Fearing for her life, she had to change her name and flee her town.[37]

The Court pointed to the positive obligations of the states under Article 3, namely,

> the obligation to establish and apply in practice an adequate legal framework affording protection against ill-treatment by private individuals; the obligation to take the reasonable measures that might have been expected in order to avert a real and immediate risk of ill-treatment of which the authorities knew or ought to have known, and the obligation to conduct an effective investigation when an arguable claim of ill-treatment has been raised. [para. 77]

The fact that the authorities did not pursue criminal investigation against the offender despite continuous complaints against him, and did not introduce any measures to protect the victim, led the Court to believe that there was a violation of Article 3 for the failure to investigate the ill-treatment of the Applicant (para. 101). It is important that the ECtHR continuously denied that domestic violence could be regarded as a "private matter" (para. 105).

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35 ECtHR, Factsheet: Domestic Violence (July 2021) (Feb. 10, 2021), available at https://www.echr.coe.int/Documents/FS_Domestic_violence_ENG.pdf.

36 Lee Hasselbacher, *State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, and International Legal Minimums of Protection*, 8(2) Nw. J. Int'l Hum. Rts. 190 (2010) (Feb. 10, 2021), also available at http://scholarlycommons.law.northwestern.edu/njihr/vol8/iss2/3.

37 *Volodina v. Russia*, Application No. 41261/17, 9 July 2019.

The Court also found that domestic violence in Russia disproportionately affected women and found a violation of Article 3 and Article 14 (taken in conjunction with Article 3). According to police data for the period 2015–2017,

> women made up between 67% to 74% of all adult victims of registered crimes "committed within the family or household." The offence of battery, which is the most common form for prosecution of minor violence, appears to have targeted exclusively women and children, as the total number of those two categories of victims was equal to, or larger than, the total number of registered incidents. [para. 119]

Polshina v. Russia[38] (16 June 2020) was the second case when the ECtHR examined domestic violence and found a violation of Article 3 in conjunction with Article 14 of the Convention because of police's failure to investigate complaints and the state's failure to provide legal protections for the victims of domestic violence. Svetlana Polshina from St. Petersburg complained of systematic physical and verbal assaults on the part of her husband, including death threats, as well as preventing her from having social contacts and even from seeing her son. The assaults were going on for more than two years, the perpetrator, however, was not punished. The injuries of the victim were deemed not serious enough to become the basis of prosecution. The Court noted that,

> The continued failure to adopt legislation to combat domestic violence and the absence of any form of restraining orders clearly demonstrate that the Russian authorities were reluctant to acknowledge the seriousness and extent of the problem of domestic violence in Russia and its discriminatory effect on women. [para. 46]

The next submission, *Tunikova, Petrakova, Gershman and Gracheva v. Russia* was communicated on 28 June 2019. The most notoriously famous case was that of Margarita Gracheva, whose hands were chopped off by her husband. As a result of this brutal attack, she had to undergo very complex surgeries, including the one that enabled her to have a bionic right hand.[39] When asked to respond to this submission, the Justice Ministry representatives were quoted as saying that,

> As for the alleged violation of Article 14, the Government emphasize that yet the phenomenon of domestic violence is regrettably widespread

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[38] *Polshina v. Russia*, Application No. 65557/14, 16 June 2020.

[39] Lucy Ash, *Russian Domestic Violence: Women Fight Back*, BBC News, 21 November 2019 (Feb. 10, 2021), available at https://www.bbc.com/news/election-2019-50493758.

> all around the world and do exist in Russia as well as in any other county, the scope of the problem of violence within family and household as well as the gravity and extend of its discriminatory effect on women in Russia is sufficiently exaggerated.[40]

This response caused much discontent among the victims' relatives who blamed the government for downplaying the seriousness of the problem.[41] At the time of writing, the decision has not been made yet, but it is almost certain that the ECtHR will come to very similar conclusions as in its previous judgments.

4. Domestic Responses to Violence Against Women in Russia and Brazil

Decisions of international and regional human rights bodies received wide resonance domestically, in both Brazil and Russia. As Paula Spieler remarks, before 2001, there was little interest in the topic of domestic violence in the Brazilian society, even if certain measures had already been introduced, i.e. opening of shelters,[42] special police stations ("*delegacias de mulheres*," set up in 1985), as well as Supreme Court condemnation of "honor defense" in cases of wife-killing.[43] There was no special law on domestic violence, and such pervasive problems as "honor killings" came to the attention of the media only in high-profile cases. And even if high-profile cases resulted in actual conviction, the perpetrators usually received very short sentences.[44] However, after the Commission's report on *Maria da Penha* case, new initiatives started to emerge, accompanied by extensive media coverage, NGO activism and public discussions. Several conferences and seminars were held in Brazil to dwell

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[40] Russia's Justice Ministry says journalists distorted its argument that domestic violence claims in Russia are exaggerated. Fine, here's the full quote, Meduza, 19 November 2019 (Feb. 10, 2021), https://meduza.io/en/feature/2019/11/19/russia-s-justice-ministry-says-journalists-distorted-its-argument-that-domestic-violence-claims-in-russia-are-exaggerated-fine-here-s-the-full-quote.

[41] Calls to probe Russian official over stance on domestic abuse, France 24, 21 November 2019 (Feb. 10, 2021), available at https://www.france24.com/en/20191122-calls-to-probe-russian-official-over-stance-on-domestic-abuse.

[42] As of 2014, there were 74 "safe houses" operating in Brazil. *See* Table IV.4. Latin America and the Caribbean: shelters and safe houses for women victims of violence in Economic Commission for Latin America and the Caribbean, Annual Report 2013–2014. Confronting violence against women in Latin America and the Caribbean (2014), at 60 (Feb. 10, 2021), available at https://www.cepal.org/en/publications/gender-equality-observatory-latin-america-and-caribbean-annual-report-2013-2014.

[43] Paula Spieler, *The Maria da Penha Case and the Inter-American Commission on Human Rights: Contributions to the Debate on Domestic Violence Against Women in Brazil*, 18(1) Indiana J. Glob. Leg. Stud. 121 (2011).

[44] Jodie G. Roure, *Domestic Violence in Brazil: Examining Obstacles and Approaches to Promote Legislative Reform*, 41(1) Colum. Hum. Rts. L. Rev. 67, 73–74 (2009) (Feb. 10, 2021), also available at https://www.corteidh.or.cr/tablas/r23765.pdf.

on the possible governmental responses to the problem, and the year 2004 was declared the "Year of the Woman." In 2005, "the National Campaign on Violence Against Women: Tolerance Zero" was initiated.[45]

Several amendments were made to the country's civil and criminal codes, which sought to promote equality between women and men in marriage in matters of property, and to remove certain moralistic categories such as an "honest woman" or a "virgin woman." Significant sums of money were allocated to develop programs within National Pact to Combat Violence Against Women (*Pacto Nacional pelo Enfrentamento à Violência contra a Mulher*).[46]

More importantly, however, in 2006 Brazil introduced the so-called Maria da Penha Law (Law No. 1134/2006), which incorporated a gender perspective into the federal criminal law. The legislative act envisaged the establishment of special courts and stricter sentences for perpetrators, as well as other instruments in cities of more than 60,000 inhabitants (for example, police stations and shelters for women). According to the National Council of Justice in Brazil, as of 2011, the results were positive: there were more than 331,000 prosecutions and 110,000 final judgments, and nearly two million calls to the Service Center for Women.[47] In 2018 the law was amended to include the obligation imposed on the perpetrator to reimburse the Unified Health System for any expenses incurred with victims of domestic violence. According to Bill No. 5001/16, the aggressor might also face an obligation to attend rehabilitation and re-education programs.[48]

Law No. 13.104/2015 ("*Lei do Feminicídio*") was an amendment to the country's criminal code passed in 2015 in order to classify feminicide (i.e. gender-related killing) as a circumstance equivalent to murder.[49]

Researchers also emphasized that Brazil became more active internationally promoting women's rights approach in its foreign policy. Thus, in March 2017, Brazil

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[45] *See* also Table IV.3. Latin America and the Caribbean: campaigns against violence against women in Economic Commission for Latin America and the Caribbean, Annual Report 2013–2014, *supra* note 42, at 59, 60.

[46] Spieler 2011, at 136–137. For more details, *see* Secretaria de Políticas para as Mulheres da Presidência da República, Pacto Nacional pelo Enfrentamento à Violência contra as Mulheres (2011) (Feb. 10, 2021), available at https://www12.senado.leg.br/institucional/omv/entenda-a-violencia/pdfs/pacto-nacional-pelo-enfrentamento-a-violencia-contra-as-mulheres.

[47] Maria da Penha Law: A Name that Changed Society, U.N. Women, 30 August 2011, available at https://www.unwomen.org/en/news/stories/2011/8/maria-da-penha-law-a-name-that-changed-society.

[48] CEPAL, Comprehensive National-Level Review Report on the Implementation of the Beijing Declaration and Platform for Action – Brazil (May 2019) (Feb. 10, 2021), available at https://www.cepal.org/sites/default/files/informe_beijing25_brasil.pdf.

[49] Sebastián Essayag, *From Commitment to Action: Policies to End Violence Against Women in Latin America and the Caribbean: Regional Analysis Document*, U.N. Development Programme & U.N. Women (2017) (Feb. 10, 2021), available at https://reliefweb.int/sites/reliefweb.int/files/resources/UNDP-RBLAC-ReportVCMEnglish.pdf.

launched its National Action Plan on Women, Peace, and Security the country's commitment to the agenda laid out in the series of resolutions beginning with the U.N. Security Council Resolution 1325 (2000).[50]

Despite these initiatives, however, as the Inter-American Commission on Human Rights reported in 2019, four women were killed each day in Brazil and the state was not doing enough to prevent and prosecute femicide, even if the necessary law was in place.[51] Human Rights Watch, in particular, pointed to the fact that,

> As of 2018, only 8 percent of municipalities had established police stations specializing in violence against women and only about 2 percent operated women's shelters, both requirements of the law.[52]

Brazil's President Jair Bolsonaro is criticized for cutting the funds for women's rights programs and for his openly anti-gender stance.[53] Even if the implementation of the above-mentioned initiatives has been rather uneven and produced mixed results,[54] still, with the adoption of the special law, "the spread of human rights norms appears to have been significant."[55]

In Russia, the idea to adopt a special law to combat domestic violence emerged already in the 1990s. However,

> over the past 10 years, this bill has been submitted to the State Duma for consideration more than 40 times, but has never passed the first of the three required readings.[56]

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50 Mónica Salomón, *Exploring Brazilian Foreign Policy Towards Women: Dimensions, Outcomes, Actors and Influences*, 63(1) Revista Brasileira de Política Internacional 1 (2020) (Feb. 11, 2021), also available at https://www.scielo.br/scielo.php?script=sci_arttext&pid=S0034-73292020000100204.

51 Brazil: four women killed every day in 2019, human rights body says, The Guardian, 4 February 2019 (Feb. 11, 2021), available at https://www.theguardian.com/world/2019/feb/04/brazil-women-killed-2019-rate-alarming-iachr.

52 Submission to the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) on Brazil, 79th CEDAW Pre-Session, Human Rights Watch, 21 October 2020 (Feb. 11, 2021), available at https://www.hrw.org/news/2020/10/21/submission-committee-elimination-all-forms-discrimination-against-women-cedaw-0#_ftn1.

53 *Id*. *See* also Katy Watson, *'Feminism is sexist': The women backing Brazil's Bolsonaro*, BBC News, 23 October 2018 (Feb. 11, 2021), available at https://www.bbc.com/news/world-latin-america-45944164.

54 Essayag, *supra* note 49, at 73–78.

55 Marina Wilbraham, *The Maria da Penha Law and the Media: Understanding the Adoption of Human Rights Norms on Domestic Violence in Brazil*, BA Thesis, Columbia University (2019) (Feb. 11, 2021), available at https://academiccommons.columbia.edu/doi/10.7916/d8-5dxm-s088.

56 Olimpiada Usanova, *Russia's "Traditional Values" and Domestic Violence*, Kennan Cable No. 53 (June 2020) (Feb. 12, 2021), available at http://wilsoncenter.org/publication/kennan-cable-no-53-russias-traditional-values-and-domestic-violence.

It was not until November 2019 that a new version of the draft law was introduced in the Federation Council, and because of *Volodina v. Russia* judgment became an object of heated debate in the public arena. The controversy surrounding the Bill showed how difficult it can be to achieve a societal consensus in such a sensitive area. If initially activists and human rights defenders took an active part in the process of drafting the law, at a later stage, when a modified version of the law was presented, they expressed their discontent and disappointment with the result.[57]

One of the most contentious issues in the proposed draft law has been the definition of "family and domestic violence," criticized by both liberal and conservative groups of the society. Namely, the discontent centered around the fact that this phenomenon was defined as

> a deliberate act that causes or contains a threat of causing physical and (or) mental suffering and (or) property harm, which does not contain elements of an administrative offense or a criminal offense.[58]

Activists questioned this conceptualization of violence, pointing that violence as such always contained elements of either an administrative or a criminal offense, and it was hard to imagine what situations the drafters had in mind when they suggested this definition. Practicing lawyers pointed to the uselessness of such a law for the victims due to this conceptual ambiguity.[59]

The question of a restraining/protection order has been at the center of a heated debate as well.[60] What should this order look like? Who should it be enforced by, and how? Will it really protect the victims? Wouldn't it be used by representatives of state institutions as a ground for taking children away from their parents? On the other hand, the lack of such a protective mechanism has been referred to in literature as

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57 Vladislav Gorin, *Negligible and largely useless: Why women's rights advocates in Russia have turned against the draft version of their law against domestic violence*, Meduza, 2 December 2020 (Feb. 12, 2021), available at https://meduza.io/en/feature/2019/12/02/negligible-and-largely-useless.

58 Проект федерального закона «О профилактике семейно-бытового насилия в Российской Федерации» [Draft Federal Law "On the Prevention of Domestic Violence in the Russian Federation"] (Feb. 10, 2021), available at http://council.gov.ru/media/files/rDb1bpYASUAxolgmPXEfKLUIq7JAARUS.pdf.

59 «Ни одну потерпевшую я не смогу защитить этим законом»: Адвокат Мари Давтян о законопроекте о профилактике семейно-бытового насилия // Коммерсантъ. 29 ноября 2019 г. ["I Will Not Be Able to Protect a Single Victim with This Law": Advocate Mary Davtian About the Draft Law on the Prevention of Domestic Violence, Kommersant, 29 November 2019] (Feb. 10, 2021), available at https://www.kommersant.ru/doc/4178442.

60 Почему не нужен закон о профилактике домашнего насилия? Часть III (интервью с Людмилой Виноградовой (членом Общественной палаты Российской Федерации, судьей в почетной отставке)) // YouTube. 16 сентября 2019 г. [Why Is There No Need for a Law on the Prevention of Domestic Violence?" Part III (interview with Liudmila Vinogradova (member of the Public Chamber of the Russian Federation, retired judge)), YouTube, 16 September 2019] (Feb. 10, 2021), available at https://www.youtube.com/watch?v=CATQG8Wplk8.

a serious obstacle to effective protection of victims from their abusers. However, it must also be noted that enforcement of such orders can be rather difficult even in countries where there is such a possibility. Police inertia and unprofessionalism, their dismissive and biased attitudes create a situation when abusers frequently go unpunished.[61]

The necessity of having a special law stems from deficiencies in legislation, and, from the point of view of many researchers, makes it difficult for the victims to have recourse to justice. One of the problems is the so-called private proceedings,[62] when victims are supposed to collect evidence of crimes themselves, which often requires special skills which the victims lack.[63] It can be difficult even for professionals, let alone for people who often endured years-long abuse and suffer from trauma.

Secondly, the de-criminalization of battery that took place in 2017 put cases of non-aggravated first-time instances of battery under administrative offenses. Federal Law No. 8-FZ "On Amendments to Article 116 of the Criminal Code of the Russian Federation" excluded the category of "close persons," making relatives and strangers equal before the law, leaving only racial, ethnic, social or disorderly motives. This has been seen as a dangerous step, also because the police do not see the need to intervene in family matters anymore, thus, a lot of cases remain unnoticed.[64] In addition, when administrative fines are imposed on the abuser, they are often paid out of the family budget.[65] The situation of helplessness and invisibility can be problematic from the point of view of growing homicide rates, when acting in self-defense, victims exceed the acceptable boundaries and end up being convicted for murder under Article 105 of the Criminal Code. According to the study conducted by the United Nations in 2019, 82% of women globally become victims of intimate partner homicide, compared to 18% of men. These figures for intimate partner/family-related homicide represent 64% for women, and 36% of men.[66]

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61 Sandra S. Park, *CEDAW's Promise for Strengthening Law-Enforcement Accountability to Survivors of Domestic and Sexual Violence in the United States*, 2014 Mich. St. L. Rev. 357 (2014) (Feb. 12, 2021), also available at https://core.ac.uk/download/pdf/228470093.pdf.

62 Criminal Procedure Code of the Russian Federation, Arts. 20(2) & 318.

63 "I Could Kill You and No One Would Stop Me": Weak State Response to Domestic Violence in Russia, Human Rights Watch, 25 October 2018 (Feb. 11, 2021), available at https://www.hrw.org/report/2018/10/25/i-could-kill-you-and-no-one-would-stop-me/weak-state-response-domestic-violence.

64 Полиция не выносит ссоры из семьи // РБК. 25 ноября 2019 г. [The Police Keep Quarrels in the Family, RBC, 25 November 2019] (Feb. 10, 2021), available at https://www.rbc.ru/newspaper/2019/11/26/5dd7eeb19a79471ac83c65bc.

65 *Крутихина П.* Декриминализация домашнего насилия: три года спустя // Закон. 2019. № 12. С. 112–119 [Polina Krutikhina, *Decriminalization of Domestic Violence: Three Years After*, 12 Law 112 (2019)] (Feb. 10, 2021), also available at https://igzakon.ru/magazine/article?id=8023.

66 The Global Study on Homicide, U.N. Office on Drugs and Crime (2019) (Feb. 10, 2021), available at https://www.unodc.org/unodc/en/data-and-analysis/global-study-on-homicide.html.

Thirdly, a connected problem is that the state's protection measures can be applied only in situation when a criminal lawsuit begins,[67] but they do not apply in relation to administrative offenses, thus victims of battery are not eligible to receive them.

May activists and researchers recognize, however, that adoption of a special law is not enough, there should be complex measures including training and education of law-enforcement officials, adequate counselling and service-provision to the victims, legal and psychological support to the family members. Complex and long-term measures are necessary to ensure protection of the victims. These measures should be accessible.[68]

And, more importantly, there must be recognition that the problem of domestic violence and violence against women is not a one-time occurrence that involves certain marginalized groups, it is a structural problem, facilitated by the culture of impunity and silence.

5. COVID-19 and Domestic Violence

The year 2020 brought about many challenges not envisaged before. Unprecedented measures like lockdowns, cordoning off cities, various forms of "self-isolation" regimes were introduced worldwide. In these conditions, human rights groups and international organizations started to emphasize how these measures adversely affected the most vulnerable members: children, elderly people, and often, women. In the conditions of quarantine, when it was impossible to obtain support from specialized organizations, friends or family members, many women and girls became vulnerable to abuse on the part of their husbands or intimate partners.[69] On 6 April 2020, U.N. Secretary-General Antonio Guterres emphasized that, "horrifying global surge in domestic violence" was taking place, and that

> healthcare providers and police are overwhelmed and understaffed … local support groups are paralyzed or short of funds. Some domestic violence shelters are closed; others are full.[70]

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[67] Федеральный закон от 20 августа 2004 г. № 119-ФЗ «О государственной защите потерпевших, свидетелей и иных участников уголовного судопроизводства» // СПС «КонсультантПлюс» [Federal Law No. 119-FZ of 20 July 2004. On State Protection of Victims, Witnesses and Other Participants in Criminal Proceedings, SPS "ConsultantPlus"] (Feb. 10, 2021), available at http://www.consultant.ru/document/cons_doc_LAW_48959/.

[68] *Давтян М.* Законопроект о профилактике семейно-бытового насилия // Vmeste-RF. 3 декабря 2019 г. [Mary Davtian, *Draft Law on the Prevention of Domestic Violence*, Vmeste-RF, 3 December 2019], (Feb. 10, 2021), available at https://www.youtube.com/watch?v=iKjma2fg6bI.

[69] "For many women and children, the home is not a safe place": Statement by the President of GREVIO, Marceline Naudi, on the need to uphold the standards of the Istanbul Convention in times of a pandemic, Council of Europe, 24 March 2020 (Feb. 10, 2021), available at https://rm.coe.int/grevio-statement-covid-24-march-2020/pdfa/16809cf55e.

[70] UN chief calls for domestic violence 'ceasefire' amid 'horrifying global surge,' U.N. News, 6 April 2020 (Feb. 10, 2021), available at https://news.un.org/en/story/2020/04/1061052.

Soon after, other organizations continued in the same line by stressing women's vulnerability in the face of the crisis and appealed to their member states to offer special protection to victims.[71]

In late March – early April 2020 reports from various countries showed how complex the problem was. Notwithstanding the fact that victims were reluctant to report abuse (fearing retaliation if they attempted to call the police or other family members for help), figures still showed a dramatic increase in incidents of domestic violence: thus, *Le Monde* reported of the 30% increase in Paris and other French provinces,[72] *EU Observer* gave even a higher a figure of 74% increase in requests for support at Italian anti-violence centers in the period of March 2 and April 5 compared to the monthly average in 2018,[73] and *The Guardian* alarmingly stated that, "Domestic abuse killings 'more than double.'"[74] Notorious murders were reported to have taken place (such as the murder of an Italian doctor Lorena Quaranta by her partner),[75] and such dangerous behaviors as alcohol consumption and other forms of substance abuse continued to be on the rise.[76]

Various measures were reportedly taken by states to address this problem: for instance, in Belgium, hotels offered shelter to victims,[77] in Germany women going to a pharmacy could use a special code-word so that the pharmacist would understand she was in trouble,[78] though those measures were considered inadequate with governments disoriented and unprepared ("Perfect storm"…).[79]

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71 COVID-19 et violence à l'égard des femmes: Ce que le secteur et le système de santé peuvent faire, World Health Organization, 7 April 2020 (Feb. 10, 2021), available at https://apps.who.int/iris/bitstream/handle/10665/331762/WHO-SRH-20.04-fre.pdf?sequence=1&isAllowed=y.

72 Hausse des violences conjugales pendant le confinement, Le Monde, 30 March 2020 (Feb. 10, 2021), available at https://www.lemonde.fr/societe/article/2020/03/30/hausse-des-violences-conjugales-pendant-le-confinement_6034897_3224.html.

73 Valentina Saini, *Italy: After the balcony-singing stopped*, EU Observer, 21 April 2020 (Feb. 10, 2021), available at https://euobserver.com/coronavirus/148116.

74 Jamie Grierson, *Domestic abuse killings "more than double" amid Covid-19 lockdown*, The Guardian, 15 April 2020 (Feb. 10, 2021), available at https://www.theguardian.com/society/2020/apr/15/domestic-abuse-killings-more-than-double-amid-covid-19-lockdown.

75 Vincent Barone, *Italian nurse strangles doctor girlfriend, claims she gave him coronavirus*, New York Post, 1 April 2020 (Feb. 10, 2021), available at https://nypost.com/2020/04/01/italian-nurse-strangles-doctor-girlfriend-claims-she-gave-him-coronavirus.

76 Brigid Delaney, *Drinking in coronavirus isolation: experts warn Australians to monitor their intake*, The Guardian, 6 April 2020 (Feb. 10, 2021), available at https://www.theguardian.com/lifeandstyle/2020/apr/07/drinking-in-coronavirus-isolation-experts-warn-australians-to-monitor-their-intake.

77 Covid-19: à Bruxelles, un hôtel accueille les femmes victimes de violences conjugales, France24, 13 April 2020 (Feb. 10, 2021), available at https://www.france24.com/fr/video/20200413-covid-19-%C3%A0-bruxelles-un-h%C3%B4tel-accueille-les-femmes-victimes-de-violences-conjugales.

78 Häusliche Gewalt: Geheimer Apotheken-Code hilft Frauen in Corona-Zeiten, Stern, 8 April 2020 (Feb. 10, 2021), available at https://www.stern.de/gesundheit/coronakrise--apotheken-helfen-bei-haeuslicher-gewalt-mit-geheimen-code-9214306.html.

79 Perfect storm' for domestic violence during COVID-19, The Telegram, 17 April 2020 (Feb. 10, 2021), available at https://www.thetelegram.com/news/local/perfect-storm-for-domestic-violence-during-covid-19-pandemic-wright-439148.

Although the statistics in this field is uncertain (mostly it is collected by calculating women's calls to help lines), still the numbers are rather shocking: according to U.N. Women estimates, 243 million women and girls (age 15–49) became victims of sexual and/or physical violence by their intimate partner in the year 2020.[80] The pandemic showed that women's rights work during crises and health emergencies should be completely re-formulated and re-oriented since traditional methods did not work anymore.

Reports of domestic violence increase during the pandemic started to circulate in Russia in the end of March-beginning of April, when the first social distancing measures were introduced in the country. Initially, the link between domestic violence and pandemic was voiced in Russia in connection with other countries like China which faced this calamity earlier and reported widespread nature of the abuse in the conditions of self-isolation.[81] During lockdown it was impossible to physically separate the victims from the abusers since movement around the cities was restricted, hostels were closed, and trains and buses were cancelled. At the same time, help centers working with the victims reported significant increase in the number of calls.[82] While the Ministry of Interior reported of a decrease in domestic violence cases during lockdown,[83] Russia's Human Rights Commissioner, Tatiana Moskalkova, based on the reports by NGOs and the media, stated the opposite. She noted 2.5 times increase in numbers (from 6,054 in March 2020 to 13,000 in April 2020).[84] Work on the draft law on domestic violence stopped during the pandemic. Valentina Matvienko, the speaker of Russia's Federation Council, mentioned that the work on the draft law would be resumed as soon as "the circumstances permit."[85]

Some measures were taken by the government and by the private actors, however. For example, public services portal *Gosuslugi* posted information recommending

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[80] The Shadow Pandemic: Violence against women during COVID-19, U.N. Women (Feb. 10, 2021), available at https://www.unwomen.org/en/news/in-focus/in-focus-gender-equality-in-covid-19-response/violence-against-women-during-covid-19.

[81] Anna Andreeva et al., *Women's Rights and the Feminists' "Dirty Plans": Media Discourses During the COVID-19 Pandemic in Russia*, 36(3) Affilia 319 (2020), also available at https://journals.sagepub.com/doi/full/10.1177/0886109920960826.

[82] Domestic violence surge: Here's how Russia's authorities responded to rising domestic abuse during the coronavirus lockdown, Meduza, 17 July 2020 (Feb. 10, 2021), available at https://meduza.io/en/feature/2020/07/17/domestic-violence-surge.

[83] Domestic Violence in Russia: The Impact of the COVID-19 Pandemic, Chatham House, 20 July 2020 (Feb. 10, 2021), available at https://www.chathamhouse.org/2020/07/domestic-violence-russia-impact-covid-19-pandemic.

[84] В России отмечен рост домашнего насилия с 10 апреля в 2,5 раза // РИА Новости. 5 мая 2020 г. [Domestic Violence Has Increased by 2.5 Times in Russia Since 10 April, RIA News, 5 May 2020] (Feb. 10, 2021), available at https://ria.ru/20200505/1570971794.html.

[85] Russia Seeks Protections for Domestic Abuse Victims During Coronavirus Lockdown, The Moscow Times, 22 April 2020 (Feb. 10, 2021), available at https://www.themoscowtimes.com/2020/04/22/russia-seeks-protections-for-domestic-abuse-victims-during-coronavirus-lockdown-a70071.

victims what to do in cases of domestic violence,[86] and police stations were required to provide information about social services. Some hotels allowed women to stay during lockdown.[87] In general, however, these measures were reported to be inadequate and not always accessible.[88] In addition, it was emphasized that the pandemic led to very serious social and economic problems, which had an enormous impact on women, especially, elderly women, single mothers, pregnant women, etc.[89]

During pandemic there has been growing interest to the problem of domestic violence not only among activists and policy-makers, but also among researchers. If publications related to this topic in Russia were rather scarce, in 2020 the number of such publications significantly increased. Researchers sought to examine legal, societal, criminological and other related aspects of domestic violence and violence against women, including psychological violence, domestic violence against minority women, etc. They looked into not just legal and procedural aspects, but also the case-law of Russian courts to point out what problems existed when the courts examined such crimes. For example, how difficult it could be to establish the gravity of battery since often battery could be serious but left no visible marks.[90] Judges' biased attitudes towards the victims (who were often blamed for what happened because they, for example, should have tried to run away from the abuser) were also mentioned.[91] And even if the authors were not always sure why the special law was necessary and what form it should eventually take, they all recognized that the problem existed and must be addressed.

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[86] Меры для предупреждения кризисной ситуации // Госуслуги [Crisis Prevention Measures, Gosuslugi] (Feb. 10, 2021), available at https://www.gosuslugi.ru/domestic_abuse; Куда обратиться пострадавшим от домашнего насилия во время самоизоляции // Госуслуги [Who Should Domestic Violence Victims Contact During Self-Isolation, Gosuslugi] (Feb. 10, 2021), available at https://gu.spb.ru/news/kuda-obratitsya-postradavshim-ot-domashnego-nasili/.

[87] Russia: Surge in violence against women, DW, 4 July 2020 (Feb. 10, 2021), available at https://www.dw.com/en/russia-surge-in-violence-against-women/av-53923220.

[88] Svetlana Gromova & Olga Karacheva, *Domestic violence in the age of COVID-19 in Russia*, Submission on behalf of seven women's rights organisations: "Zona Prava," ANNA – Centre for the Prevention of Violence, Consortium of Women's Non-Governmental Associations, Russian Justice Initiative (RJI), "YouAreNotAlone" Women's Mutual Help Network, The Sisters Centre, The Kitezh Centre (Feb. 10, 2021), available at https://srji.org/upload/medialibrary/fd8/GBV_in_RUSSIA_COVID_19.pdf.

[89] Larisa Zhukova, *How COVID-19 pandemic affected women in Russia*, Heinrich Böll Foundation, 19 June 2020 (Feb. 10, 2021), available at https://eu.boell.org/en/2020/06/18/how-covid-19-pandemic-affected-women-russia.

[90] *Химиченко В*. Побои в семье – анализ споров // Журнал российского права. 2020. № 1; Административное право. 2020. № 2 // СПС «КонсультантПлюс» [V. Khimichenko, *Family Battery: Analysis of Case-Law*, 1 Journal of Russian Law, 2 Administrative Law (2020), SPS "ConsultantPlus"].

[91] *Грязнова Д*. Право жертв домашнего насилия на необходимую оборону: стереотипы и предрассудки в решениях российских судов // Зона Права. 6 ноября 2020 г. [Dariana Gryaznova, *The Right of Domestic Violence Victims to the Necessary Defense: Stereotypes and Prejudices in Russian Courts' Decisions*, Zona Prava, 6 November 2020] (Feb. 10, 2021), available at https://zonaprava.com/events/doklad-zony-prava-rossiyskie-sudi-stereotipno-podkhodyat-k-delam-o-samooborone-pri-domashnem-nasilii/.

Brazil faced very similar challenges as Russia did. First of all, one of the problems was that the number of services offered to women significantly reduced. According to the data gathered by the Brazilian Public Security Forum,

> the number of emergency protective measures granted in São Paulo had dropped 38 percent during the first two weeks of April compared to the same period last year, even as domestic violence calls to the state's emergency 190 hotline rose 45 percent.[92]

In addition,

> In some states, such as Rio de Janeiro, São Paulo, and the Federal District, police stations are still open 24 hours a day. But elsewhere, police stations, including special precincts for women created by the landmark 2006 Maria da Penha law, are operating under reduced hours. São Paulo and Rio de Janeiro are allowing virtual domestic violence complaints, and São Paulo is allowing judges to grant emergency protective measures virtually, and transmitting summonses through WhatsApp.[93]

According to the World Bank estimates, the number of calls women made to the help lines in the period of March-April 2020 in Brazil increased by 27% compared to the same period a year ago.[94] At the same time, police reports on violence against women decreased,[95] which, however, did not mean the number of crimes went down, but that women might have had difficulties contacting the police.

Alcohol and drug use, stress, anxiety, and boredom during confinement increased the likelihood of aggressive behavior, especially among people with dysfunctional personality traits or personality disorders and brought about the need to involve mental health professionals to address domestic violence cases.[96]

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92 Anya Prusa et al., *Pandemic of Violence: Protecting Women During COVID-19*, Wilson Center, 15 May 2020 (Feb. 10, 2021), available at https://www.wilsoncenter.org/blog-post/pandemic-violence-protecting-women-during-covid-19.

93 *Id.*

94 O Combate à Violência contra a Mulher (VCM) no Brasil em época de COVID-19, World Bank, 25 June 2020 (Feb. 10, 2021), available at http://documents1.worldbank.org/curated/en/807641597919037665/pdf/Addressing-Violence-against-Women-VAW-under-COVID-19-in-Brazil.pdf.

95 Violência doméstica durante a pandemia de Covid-19, Fórum Brasileiro de Segurança Pública, 24 July 2020 (Feb. 10, 2021), available at https://forumseguranca.org.br/wp-content/uploads/2018/05/violencia-domestica-covid-19-ed03-v2.pdf.

96 Lisieux E. de Borba Telles et al., *Domestic Violence in the COVID-19 Pandemic: A Forensic Psychiatric Perspective*, 43(3) Braz. J. Psychiat. 233 (2020) (Feb. 10, 2021), also available at https://www.scielo.br/pdf/rbp/2020nahead/1516-4446-rbp-1516444620201060.pdf.

Government and civil-society led responses to domestic violence and violence against women in Brazil included awareness campaigns, dissemination of information, online platforms and apps for reporting the cases (that would allow uploading photos and videos), etc. A special Decree (Decree No. 10.282) was adopted that prescribed provision of essential services to the most vulnerable people during quarantine.[97]

Conclusion

One of the important contributions of international and regional human rights institutions in the field of women's rights protection has been the blurring of the public/private debate that obscured and downplayed women's experience as victims of violence. The U.N. bodies, as well as regional courts, have shown that they are important actors in a global debate on women's rights and have an impact on domestic developments. It must be noted that in international and regional human rights bodies there is some progress regarding the recognition of many contexts and experiences of women who suffer from violence and other social harms.

The need to address the question of intersectionality at both international and domestic levels remains an important issue, however. It has to be seen how these international and regional institutions will be able to respond to such complex issues as violence against women under health emergencies, since pandemic 2020 clearly demonstrated that it is impossible to separate questions of domestic violence from women's social and economic rights that include not only women's financial autonomy but also such issues as access to healthcare, psychological and legal counselling, and social benefits. It has been emphasized by researchers that focus on bodily harm obscures (and even excludes) other aspects of harm women might experience as a result of structural inequalities,[98] thus, examination of wider contexts of harm, including social harm, is very important. It has been recognized that "violence toward women and children increases with alcohol and drug use, mental health issues, and inadequate housing," and can be exacerbated by periods of crisis, thus, it is impossible to address this problem in a vacuum.[99]

> Disconnection from institutional, medical, and informal support networks makes domestic violence, more than ever, isolating and life-threatening. (…)

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97 Gabriela Bastos et al., *Addressing Violence Against Women (VAW) Under COVID-19 in Brazil,* World Bank Group, 25 June 2020 (Feb. 10, 2021), available at https://reliefweb.int/sites/reliefweb.int/files/resources/Addressing-Violence-against-Women-VAW-under-COVID-19-in-Brazil.pdf.

98 Diana Sankey, *Recognition of Gendered Experiences of Harm at the Extraordinary Chambers in the Courts of Cambodia: The Promise and the Pitfalls*, 24(1) Fem. Leg. Stud. 7 (2016).

99 Jean-Baptiste Bouillon-Minois et al., *Coronavirus and Quarantine: Catalysts of Domestic Violence*, Violence Against Women (2020), at 1–3 (Feb. 11, 2021), available at https://journals.sagepub.com/doi/full/10.1177/1077801220935194.

> For many women and children, being quarantined with a violent partner and parent is as dangerous – and for some, more dangerous – than the pandemic.[100]

It is recognized that there is a link between poverty and infectious disease, which can be exacerbated by power disbalances in relations between men and women, and the lack of trust in public institutions.[101] As Russia's case shows, the lack of a special law to protect victims exacerbated an already difficult situation when victims and abusers were forced to self-isolate, and the problem of substance abuse, physical, sexual and verbal violence was noted by the media more and more often. In Brazil, despite the fact that legislative framework was in place, it was still difficult to ensure consistent protection of women, especially women belonging to minorities, refugee women, etc.[102] Thus, it appears imperative that women take an active part in decision-making at the national and local level in times of crisis as well, especially women directly involved in healthcare, service-provision, humanitarian work, etc.

However, given that this problem is not country-specific, the necessity and urgency of strengthened international instruments to combat domestic violence is apparent. It is our hope that in the post-pandemic scenarios states will recognize the need to introduce legislative and other measures to combat this problem not only domestically, but also on the global scale.

Finally, it must be stressed that the states should also deliberate the adoption of an additional protocol to the CEDAW Convention, or a separate convention, that would regulate such questions as violence against women perpetrated online. Pandemic 2020 showed how technologies can be an indispensable part of people's lives, which, however, has multiple negative side effects, including emotional burnout, social media addition, fatigue, and depression.[103] The problem of cyber violence and cyber bullying, especially among schoolchildren and teenagers, has not yet been addressed in international treaties, even though international organizations and NGOs have issued numerous appeals to the states urging them to penalize cyber violence in their criminal law, stating that this kind of violence

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100 Bouillon-Minois et al., *supra* note 99, at 3.

101 Marlene Laruelle et al., *Pandemic Politics in Eurasia: Roadmap for a New Research Subfield*, 68(1) Probl. Post-Communism 1 (2020) (Fen. 10, 2021), also available at https://www.tandfonline.com/doi/full/10.1080/10758216.2020.1812404.

102 Gender and COVID-19 in Latin America and the Caribbean Integrating Gender into the Preparedness and Response Frameworks, U.N. Women Regional Office for the Americas and the Caribbean (2020) (Feb. 10, 2021), available at https://www.onumulheres.org.br/wp-content/uploads/2020/03/enbriefing-coronavirusv1117032020.pdf.

103 Dana R. Garfin, *Technology as a Coping Tool During the Coronavirus Disease 2019 (COVID-19) Pandemic: Implications and Recommendations*, 36(4) Stress Health 555 (2020) (Feb. 11, 2021), also available at https://pubmed.ncbi.nlm.nih.gov/32762116/.

can take many forms, including (sexual) harassment, revenge porn and threats of rape, sexual assault or murder. Perpetrators can be partners or ex-partners, colleagues, schoolmates or, as is often the case, anonymous individuals.[104]

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BATTERED WOMAN SYNDROME: PROSPECT OF SITUATING IT WITHIN CRIMINAL LAW IN INDIA

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In patriarchal cultures, like the one prevalent in India, rigid, polarised and hierarchical gender roles work to establish a strong normative relationship between gender and the treatment of offenders committing violent crimes such as homicide. While most of the common law countries have already undergone a social change towards making their criminal laws more gender-sensitive by accommodating the experiences of battered women, the situation in India is quite different. Indian courts have recognised Battered Woman Syndrome very recently in only three cases, much differently than courts in other jurisdictions. While in other countries, Battered Woman Syndrome has been adduced by the advocates of battered women to support defence pleas, Indian Courts have resorted to it only to explain the effects of a battering relationship. The fact that Battered Woman Syndrome has only been recognised in such a small number of cases and the lack of scholarship in this particular area clearly resonates the resistance of the Indian criminal law towards women's accounts of their experiences. Drawing on the example of the three cases, the author makes an attempt to put forth feminist legal arguments and offer a fresh perspective on the possibility of using Battered Woman Syndrome as a defence to address the concerns of battered women who end the cycle of violence by ending the lives of the abuser in a "kill or be killed" situation. Since Battered Woman Syndrome as a subject has been extensively researched in other common law countries, the present study limits itself to the Indian jurisdiction only. This paper also challenges the effectiveness of the existing defences under the Indian Penal Code, 1860 in accommodating the cases of battered women, and highlights the need for the introduction of a new justificatory defence as a plausible solution.

Keywords: Battered Woman Syndrome; criminal law; defence; gender; homicide; Indian Penal Code.

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Introduction

> Justice may be depicted as a woman, but,
> according to the dominant ideology,
> law is male, not female.[1]

The Battered Women's Movement (hereinafter "BWM") emerged in the United States during the 1970s to focus upon the legal situation of battered women who killed their abusers to put an end to the violence within the four walls of the house. These women faced murder convictions because their cases did not fall within the scope of the traditional defences available to a homicide charge. In many cases, a clear picture emerged of the fact that abused women killed their abusers when they had no other alternatives and the violence had escalated to the point of "kill-or-be-killed."[2] However, because it was developed on the basis of male experiences, the traditional

[1] Christine H. Farley, *Confronting Expectations: Women in the Legal Academy*, 8(2) Yale J.L. & Feminism 333, 348 (1996) (quoting Frances Olsen, *The Sex of Law* in *The Politics of Law* 453, 454 (David Kairys ed., 1990)).

[2] *See* R. Emerson Dobash & Russell Dobash, *Violence Against Wives: A Case Against Patriarchy* 15 (1979) (laid the foundation for the proposition that the use of force against wives should be viewed as an attempt to exercise "coercive control" on the part of the husband to bring about a desired state of affairs, and the abused wives stayed back owing to lack of economic and personal support).

structures of provocation and self-defence doctrines failed to recognise gendered fear and were not concerned with the domestic zone of homicide.[3] The very objective structure of the defences as well as the elements of law, excluded the relevance of women's experiences. As a result, one question that frequently arose during the trials faced by such women was, "Why doesn't she leave the relationship?" For the woman being on the receiving end of torture and violence, moving out of an abusive relationship was an option resulting in the complete absence of any psychological and physical support structure for women in such scenario.[4] It was only in the late 1970s that an American clinical psychologist named Lenore Walker introduced the concept of Battered Woman Syndrome (hereinafter "BWS") to answer the aforesaid question and recognise the severity of intimate partner violence that takes place within the four walls of a household. The term BWS was coined to describe a sociological theory of behavioural patterns based upon the physical and psychological abuse found in women involved in abusive relationships. Walker defined a "battered woman" as:

> a woman who is repeatedly subjected to any forceful physical or psychological behaviour by a man in order to coerce her to do something he wants her to do without any concern for her rights. Battered women include wives or women in any form of intimate relationships with men. Furthermore, in order to be classified as a battered woman, the couple must go through the battering cycle at least twice.[5]

Through her work, Walker countered the idea of "female masochism," stating that people frequently label battered women as masochistic for not leaving the relationship without considering the woman's inability to help herself.[6] For the very first time, violence was recognised outside of the confines of marriage. Walker attributed a battered woman's behaviour to the theories of "learned helplessness" and the "cycle theory of violence."[7] The creation of BWS not only drew public attention to the problem of violence against women, but it also gradually entered the legal arena to support the defence claims of women facing homicide charges.

BWS found recognition in jurisdictions such as the United States and Canada in 1990, and the United Kingdom and Australia (in Queensland) in 1991 where it has been admitted through expert testimony to substantiate a defence plea and justify the reasonableness of a battered woman's actions. Subsequently, these countries reformed their respective criminal laws and gave effect to BWS in three ways to accommodate the

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3 *See* Lenore E. Walker, *Terrifying Love: Why Battered Women Kill and How Society Responds* 49–53 (1989).

4 Lenore E. Walker, *The Battered Woman Syndrome* 86 (4th ed., Springer, 2016).

5 Lenore E. Walker, *The Battered Woman* 16 (1979).

6 *Id.* at ix.

7 Walker 2016, at 50.

circumstances of battered women either by (a) modifying the traditional defences,[8] or (b) creating a new defence,[9] or (c) expanding the scope of expert testimony.[10] Although BWS came as an answer to a simple question raised in trials, it successfully elevated social recognition of the reality of domestic violence and highlighted the need for ungendering criminal law, despite giving rise to the stereotype of battered women as weak, helpless victims. While the aforementioned countries have already undergone a social change towards making their criminal laws more gender-sensitive by accommodating the experiences of battered women, the situation in India is quite different. Despite the fact that domestic violence has been extensively researched in India over the last thirty years, intimate partner violence has only been recognised civilly under the Protection of Women against Domestic Violence Act, 2005 and recognition of battered women's circumstances remains perplexingly under theorised within criminal law in India. Indian courts have very recently recognised BWS in only three cases,[11] much differently than courts of other jurisdictions. While in other countries BWS has been adduced by the advocates of battered women to support defence pleas, Indian courts have resorted to BWS only to explain the effects of a battering relationship. The fact that BWS has only been recognised in a small number of cases proves the resistance of the Indian criminal law towards women's accounts of experiences. Even before the recognition of BWS in India, Ved Kumari had highlighted the fact that the defences under the Indian Penal Code, 1860 (hereinafter "IPC") do not accommodate the circumstances faced by a battered woman.[12] According to a study carried out by Jean Dreze, murders by women are extremely rare and usually occur in response to extreme circumstances like

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[8] *See* Paul H. Robinson, *Abnormal Mental State Mitigations of Murder: The US Perspective* in *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspective* 292 (Alan Reed & Michael Bohlander eds., 2011); Aya Gruber, *A Provocative Defense*, 103(2) Calif. L. Rev. 273 (2015); *see also* Alan Norrie, *The Coroner's and Justice Act 2009 – Partial Defences to Murder (1) Loss of Control*, 4 Crim. L. Rev. 275 (2010) (discussing the newly introduced § 54 and § 55 of the Coroner's and Justice Act, 2009 as a partial defence to homicide).

[9] *See* Amanda Clough, *Battered Women: Loss of Control and Lost Opportunities*, 3(2) J. Int'l & Comp. L. 279, 316 (2016); Susan S.M. Edwards, *Anger and Fear as Justifiable Preludes for Loss of Self-Control*, 74(3) J. Crim. L. 223 (2010).

[10] *See* Elizabeth Sheehy et al., *Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand*, 34(3) Sydney L. Rev. 467, 468 (2012); Department of Justice Canada, Report on Sentencing for Manslaughter Cases Involving Intimate Relationships (2003) (May 18, 2021), available at http://www.justice.gc.ca/eng/rp-pr/other-autre/smir-phiri/bg-cont.html; Anthony Hopkins & Patricia Easteal, *Walking in Her Shoes: Battered Women Who Kill in Victoria, Western Australia and Queensland*, 35(3) Alt. L.J. 132 (2010); New Zealand Law Commission, Understanding Family Violence: Reforming the Criminal Law Relating to Homicide, NZLC R139 (2016) (May 18, 2021), available at https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/R139%20Understanding%20Family%20Violence%20-%20Reforming%20the%20Criminal%20Law%20Relating%20to%20Homicide.pdf.

[11] *Manju Lakra v. State of Assam*, (2013) S.C.C. OnLine Gau. 207; *Amutha v. State*, 2014 (2) M.W.N. (Cr.) 605; *State v. Hari Prashad*, (2016) 228 D.L.T. 1 (D.B.).

[12] Ved Kumari, *Gender Analysis of Indian Penal Code* in *Engendering Law: Essays in Honour of Lotika Sarkar* 139 (Amita Dhanda & Archana Parashar eds., 1999).

harassment or infidelity, with the vast majority of the cases going unreported.[13] This persistently low ratio of women committing murder demonstrates that existing criminal law has developed solely on male experience. In such a scenario, when women face trial for murder, their actions are judged on the basis of this male experience and women are required to fit their psychological traits within the conventional considerations that are pertinent to men and inevitably, when a woman fails to satisfy such considerations, they are termed as offenders.

Indian courts have only used BWS as a theory to explain the consequences of battering rather than as a defence or in support of a defence plea. However, this recognition of BWS solely through judicial discretion leaves open the possibility of conviction for women who kill their abusers. The existing literature on this subject, with reference to the Indian context, has put forth a clear argument for the inclusion of BWS defence to address the concerns of these women without taking into account the inherent limitations of the theory of BWS. However, the actual necessity lies in the reform of the existing criminal law to accommodate the cases of battered women, as well as for women's experiences to be integrated into the criminal justice system. This research paper enriches the existing scholarship relating to BWS in India by bringing together different perspectives and exploring the possibility of situating BWS within criminal law in India to cut into the male-centric structure by addressing the concerns of battered women. The paper offers a critique of the existing defences under the IPC and the discussion also advocates for introducing a new justificatory defence to accommodate the cases of battered women.

1. India and its Battered Women

1.1. Background

Under the influence of the BWM in the United States, the feminist movement in India, also known as the Anti-dowry Violence Movement (hereinafter "ADVM"), began in the early 1970s. Prior to the 1970s, domestic violence in India was an issue which was treated with benevolent neglect. Violence within the four walls of a house was considered a family problem and even the legal authorities surmised that the situation would be best handled if it remained inside the confines of the house. Moreover, obtaining legal redress for victims of domestic violence posed a significant challenge for women, as the existing laws at that point of time were inadequate to protect against the many forms of violence against women. It was only in the 1980s that the IPC was amended to penalise acts of extreme cruelty to women that are likely to drive a woman to commit suicide or cause grave injury under Section 498A, as well as acts of cruelty in response to dowry demands under Section 304B. However, much like the

[13] Jean Dreze & Reetika Khera, *Crime, Gender, and Society in India: Insights from Homicide Data*, 26(2) Popul. Dev. 335 (2000). *See* P.M.K. Mili & Neethu S. Cherian, *Female Criminality in India: Prevalence, Causes and Preventive Measures*, 10(1) Int'l J. Crim. Just. Sci. 65 (2015).

early feminist work in BWM, the ADVM only addressed the problem of wife abuse for dowry demands, ascertaining the fact that abuse took place only within marriage. Due to these limited characterizations, perpetrators of domestic violence unrelated to dowry demands escaped prosecution, contributing to a pervasive societal attitude that is tolerant of other forms of violence against women. The second-wave of the feminist movement in India saw a deviation from the agenda of ADVM and, after much hue and cry over the issue of domestic violence and the awareness campaigns organised by various women's rights groups,[14] the instrumentalities of the State began to recognise the need for laws in order to protect women from all forms of domestic abuse and provide some sort of relief. This led to the creation and enforcement of a new statute, the Protection of Women from Domestic Violence Act, 2005, specifically designed to protect women from abuse within their homes, regardless of their marital status. The changes under this legislation were mainly directed towards improving the responses by legal authorities to domestic violence, the procedure for filing complaints and subsequent prosecution and finally, making attempts to educate the public about the seriousness of the issue, as well as also providing assistance to battered women. Despite the fact that "Cruelty by husband or his relatives" is the most reported crime against women in various States, accounting for 33.2 percent of all crimes in India,[15] the conviction rate is only 15.9 percent.[16] The general attitude seems to be that the sanctity of the family life pervades the world of law enforcement. As a result, the arrest of the offender is generally seen as a last resort in domestic violence issues. It is only in extreme circumstances that a woman might think about ending the violence faced at the hands of her abusive partner.

1.2. Battered Woman Syndrome in India

Unlike other countries, India only recently recognised BWS, and thus there has been limited research on the admissibility of BWS in India. However, the Madras High Court in 1989 had developed the concept of "Nallathangal's Syndrome," which is often considered as the precursor of BWS in India, in *Suyambukkani v. State of Tamil Nadu*.[17] In this particular case, the accused had been living since her marriage in a state of constant adversity, and had also faced abuse by her callous husband. When the situation became unbearable, she decided to commit suicide along with her children,

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[14] With the rising number of reported abuse without any effective legislation for non-dowry abuses, the Lawyer's Collective began working on a draft of model domestic violence legislation in 1992. *See* Indira Jaising, *Domestic Violence and the Law*, 1 J. Nat'l Hum. Rts. Comm'n 72, 73 (2002).

[15] National Crime Records Bureau, Ministry of Home Affairs, Crime in India – 2017 (May 18, 2021), available at https://ncrb.gov.in/en/crime-india-2017-0. *See* also Decoding NCRB Report, The Hindu, 23 October 2019 (Oct. 23, 2019), available at https://www.thehindu.com/news/national/decoding-ncrb-report/article29775632.ece.

[16] Crime in India – 2017, *supra* note 15.

[17] 1989 L.W. (Cri.) 86.

by going to the nearest well. But she survived, and her children died as a result, for which she was accused of murder. The court introduced the concept of Nallathangal's Syndrome by referring to an old Tamil literature named "Nallathangal Ballad" which narrated the tribulations of a rich woman who was reduced to unbearable misery and committed suicide along with her children.[18] The court held that the syndrome could be considered one of the exceptions under Section 300 of the IPC, and she was held guilty of culpable homicide not amounting to murder. However, the first research on BWS, undertaken in 2010, did not speak about the existence of Nallathangal's Syndrome and only highlighted that battered women in India did not have recourse to any legal defences available under the IPC.[19]

Subsequently, in 2013, the Gauhati High Court in *Manju Lakra v. State of Assam*[20] recognised BWS for the very first time in India. The accused, who like every other Indian wife in similar cases, suffered from unprovoked acts of violence, had on one such occasion killed her abusive husband. The incident occurred on a day when her husband came home in a drunken state and started beating his wife with a piece of wood as a result of which she sustained injuries to her head and eyes.[21] Unable to bear the violence at the hands of her husband any longer, she snatched the piece of wood and hit him back on his legs, head, neck, chest and abdominal area, as a result of which he succumbed to death. The trial court had held her guilty of murder and she had preferred an appeal to the High Court. The High Court accepted the fact that the circumstances prevailing in the family of the accused amounted to domestic violence as described under the Protection of Women from Domestic Violence Act, 2005.[22] Unlike in cases in other countries, the accused had not adduced expert evidence on BWS, but it was the court itself that referred to BWS while considering the fact that while it may appear that the husband is the victim and the aggressor is the wife, in reality the wife may be the actual victim.[23] While deliberating upon the issue as to whether the act of the accused fell within the scope of culpable homicide not amounting to murder, the High Court referred to *R v. Ahluwalia*[24] and highlighted the admissibility of BWS in other jurisdictions such as the United States, Australia and Canada to help explain the reasonableness of a woman's actions against her abuser.[25] The High Court also compared the immediacy requirement under Section 304B of the IPC which leads

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18 1989 L.W. (Cri.) 86, ¶21.

19 Paramita Nandy, *Battered Woman Syndrome*, SSRN (2010) (May 18, 2021), available at https://ssrn.com/abstract=1689521.

20 (2013) S.C.C. OnLine Gau. 207.

21 *Id*. ¶3(ii).

22 *Id.* ¶67.

23 *Id.* ¶99.

24 [1992] 4 All E.R. 889.

25 (2013) S.C.C. OnLine Gau. 207, ¶100.

to the unnatural death of a woman to the act committed by the accused in this case, reaching the conclusion that if circumstances potential enough to distinguish the suicide of a woman have been recognised, the same set of circumstances should be equally recognised to be potential enough to turn such women into an aggressor so much so that she ends the life of her abuser.[26] While explaining the sequence of events that led to the act of aggression, the High Court stated that:

> Though she had been controlling and suppressing the rage and the resentment, which had been building up inside her, her rage and resentment were waiting to erupt at any further violent conduct of her husband. The accused-appellant had been, thus, sitting on a volcano of resentment and rage, which had been continuously building up and boiling inside, waiting to burst open and even a small flicker of any further intolerable behaviour of her husband could have made the volcano erupt and that is precisely what happened on the fateful evening, when her husband, having come home in drunken state, as usually he did, started beating her up. The provocation, which the conduct of the accused-appellant's husband so provided to the accused-appellant, was not only grave, but can be perceived as sudden, too.[27]

In light of this, the High Court held that her case would fall well within the First Exception of Section 300 and therefore reduced her sentence.

As a result, BWS came to be recognised in cases other than homicide of abusers by women. In *Amutha v. State*[28], the Madras High Court granted anticipatory bail to a woman, a victim of domestic violence at the hands of her husband, who had pushed her daughters into the well and also jumped into the well herself but survived. The Honourable Court, recognising BWS as accepted in *R v. Ahluwalia*,[29] held that the continuous provocative conduct of the husband for years and the triggering action on the night of the incident caused her to lose self-control and take the decision to kill herself and her daughters in order to put an end to the violence. The High Court also made reference to Nallathangal's Syndrome conceptualised in *Suyambukkani* because the facts in the present case were very similar to those in that case. Apart from these cases, very recently the Delhi High Court in *State v. Hari Prashad*[30] convicted the accused husband for aiding and abetting the suicide of his wife, Pushpa, and held that the provocation by the husband became her compulsion to end the domestic relationship by taking her own life. According to the facts of the

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26 (2013) S.C.C. OnLine Gau. 207, ¶109.

27 *Id*. ¶116.

28 2014 (2) M.W.N. (Cr.) 605.

29 [1992] 4 All E.R. 889.

30 (2016) 228 D.L.T. 1 (D.B.).

case, the accused was dissatisfied with the dowry and used to physically and mentally torture Pushpa. In order to save herself from never-ending violence, she lodged a complaint with the Crime against Women Cell where the accused apologized for his behaviour and promised in writing that he would not consume alcohol or beat her. Nonetheless, on the night Pushpa committed suicide she was brutally beaten by the accused. Even though the trial court had acquitted him, the High Court recognised the concept of BWS while explaining the effect of the battering relationship on the wife by highlighting the fact that the battering episodes kept her in constant fear of harm. The High Court also noted how Pushpa's actions differed from those of other women who kill their abusers to put an end to the violence, which is supported by the BWS evidence, because she was biologically weaker. The High Court finally held the accused guilty under Section 306 of the IPC.

From the foregoing analysis of the cases, a few conclusions may be drawn. To begin with, BWS has only been recognised by the courts as a theory to rely on and explain the effects of battering relationships, as there was no precedent for allowing expert testimony on BWS in any of the cases. Thus, the recognition of BWS only through judicial discretion leaves open the possibility of conviction for women who kill their abusers in such circumstances. Furthermore, because there have been only three cases where BWS has been recognised thus far, the courts have been forced to refer to an international precedent to accommodate the case of a battered woman within the defences claimed. Secondly, the judiciary has used BWS to explain the effects of a battering relationship even in cases where a woman harms herself or someone else other than the abuser. The concept of BWS has also been utilised to establish the guilt of the accused, as in *Hari Prashad*. Thirdly, all of the cases reveal a fundamental issue that only when a woman can no longer find help, or when legal institutions also fail to provide any sort of protection to battered women, do they take such extreme steps.

As a result of the recognition of BWS by the Indian courts, various scholars have started mooting for the inclusion of BWS within the general legal defences. While some have argued in favour of the inclusion of a battered woman's psychological conditions in cases of homicide,[31] others have argued for accommodating the cases of battered women by expanding the structure of the traditional defences. For instance, an argument for incorporating psychological self-defence in the IPC has been put forth by Shreyas Gupta in his work.[32] In order to support his argument, Gupta refers to *R v. Ahluwalia* where the psychological effects of living in a battering relationship were taken into account. Gupta also made an attempt to refer to the expansion of self-defence structures in countries such as Canada, Australia, and others.[33] However, his analysis failed to consider the consequences of the inclusion of such a defence

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[31] Shalu Nigam, *Battered Women Syndrome: Applying this Legal Doctrine in the Indian Context*, SSRN (2016) (May 18, 2021), available at https://ssrn.com/abstract=2819322.

[32] Shreyas Gupta, *Right to Kill: The Case of the Battered Women*, 3(2) Nirma Univ. L.J 59 (2014).

[33] *Id.* at 65.

within the criminal justice system in India as he did not consider the applicability of other defences in cases involving battered women. On the other hand, there is also an argument for the inclusion of the cases of women suffering from BWS by citing the Coroners and Justice Act, 2009 of the United Kingdom.[34] There have been suggestions for amending Sections 300 and 100 of the IPC to modify the requirement of suddenness and immediacy in order to make the defences more suitable for battered women.[35] While the former argument paves the way for a new defence which would result in the acquittal of battered women, the latter puts forth suggestions to make a case for mitigating the liability unjustly imposed by the IPC on battered defendants, who kill their husbands by allowing expert testimony on BWS. These conflicting proposals have made it pertinent to delve into the issue of battered women's defences, the defences which are raised when battered women who have been abused for months and have suffered horrific experiences, strike back and kill their batterers.

1.3. Defending Battered Women in the Court of Law

For a violated woman who is on trial for killing her partner with whom she was involved in a battering relationship, there are several defence tactics which advocates have argued and feminist scholars have advocated that can be used to partially or completely exculpate the woman in other jurisdictions. In India, women accused of homicide have typically pleaded the partial defence of provocation, the complete justification theory of self-defence or a plea of insanity.[36] The discussion here, in particular, outlines the efficacy of possible defences to a homicide charge and their utility in defending battered women who kill their abusers.

1.3.1. Provocation: A Substantive Defence?

The law governing homicides mainly revolves around the idea that the perpetrator was morally culpable and intended to kill the victim. The law attaches the highest level of culpability when such a person acts with premeditation and deliberation. However, the problem arises when such a law is employed to convict a woman for murder. It is a well-known fact that a woman's social reality varies, to a large extent, from that of a man's owing to cultural constructs. Because the law has traditionally been created by and for men, it fails to take into account the differences between the two biologically and socially distinct individuals when applying the legal theories. The problem is even worse for battered women who kill in order to protect themselves or their dependants from further instances of violence, as they are faced with criminal implications which are not designed to accommodate women's behaviour and responses. As a result, they suffer the consequences of murder convictions. However,

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[34] Aman D. Borthakur, *The Case for Inclusion of Battered Woman Defence in Indian Law*, 11(1) NUJS L. Rev. 1 (2018).

[35] *Id.* at 18.

[36] Dreze & Khera 2000, at 337.

Indian courts have accommodated the cases of battered women only within the realm of partial defence of provocation. In such a scenario, it becomes pertinent to examine whether the defence of provocation pleaded by battered women takes into consideration their gender-specific circumstances.

The provocation doctrine owes its development to common law judges who frequently invoked it to mitigate the severity of the death penalty in cases of homicide.[37] Even though times have changed, the fact that provocation is still recognised as a partial defence to a murder charge indicates an empathy for "heat of passion" killings. According to the IPC, provocation in the case of murder is much more than an extenuating circumstance as it takes away homicide from the category of murder and thereby, changes the very nature of the offence. Despite its importance, the law regarding provocation remains in a state of "bewildering uncertainty."[38] The major reason behind this is the acceptance of the objective yardstick, namely, the "reasonable man standard" in order to assess the seriousness of the provocation when pleaded as a defence to a charge of murder. The phraseology, imported from the English courts, has created more confusion rather than providing an easier way of interpreting the entire provocation argument. The reasonable man standard has been consistently used to ascertain the degree of provocation required to succeed in a claim of such defence. According to the terminology of Exception 1 to Section 300 of the IPC, "if the offender whilst deprived of the power of self-control by grave and sudden provocation, causes death …," it is clear that only "grave and sudden provocation" can mitigate the offence of murder. However, even before the emergence of the "reasonable man" standard, the paradigm of provocation evolved in India within the realm of domestic homicides, particularly murders motivated by jealousy and rage. The evolution can be traced back to 1901, when in *Abalu Das v. Empress*,[39] the accused found a man entering his house at night at the invitation of his wife, with whom he had sour relations and being enraged by such an act, he caught hold of the deceased and took him outside the house to some distance and assaulted him so severely that he subsequently died of the injuries received.[40] The Calcutta High Court held that the circumstances under which the deceased was found in the house of the accused on the night of the crime were sufficient to cause grave and sudden provocation to the accused.[41] The High Court also held that the provocation was of such a nature that it would continue to influence the feelings of the accused for a considerable period of time even after the deceased was discovered in the house

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37 Joshua Dressler, *Rethinking Heat of Passion: A Defense In Search of a Rationale,* 73(2) J. Crim. L. & Criminol. 421 (1982).

38 *Id.* at 328.

39 (1901) S.C.C. OnLine Cal. 69.

40 *Id.* ¶1.

41 *Id.* ¶5.

with the accused's wife.[42] Many cases followed, but the most important one was *K.M. Nanavati v. State of Maharashtra*,[43] where the accused pleaded the defence of provocation. In this case, the wife of the accused confessed to him that she had had illicit relations with the deceased. On hearing this, the accused began to consider asking the deceased for an explanation. But after a few hours, he bought a revolver, did some official work, and then went up to the deceased and shot him dead. Since three hours had elapsed between the time the accused heard the news and the time the murder took place, the High Court held that the murder was premeditated and that the accused could not claim the defence of provocation. Despite the fact that the accused could not get the benefit of the defence, the decision went on to establish the law on provocation. Subsequently, in *Chinnan v. State*,[44] where the accused killed the deceased after a quarrel with the deceased over an illicit relationship between the wife of the accused and the deceased, the High Court accepted the accused's plea of provocation and held him guilty of culpable homicide not amounting to murder.[45] In another similar case, *V. Dharmalingam v. State*,[46] the accused and the deceased, his wife, had a strained relationship because he suspected her of infidelity. Despite several warnings, the deceased continued with her illicit relationship and on the night of the incident, she had also threatened the accused, as a result of which he attacked her. The High Court held that the accused was entitled to the benefit of the exception "grave and sudden provocation" and held him guilty of culpable homicide not amounting to murder.[47] These cases give a flavour of the apparent acceptability of being provoked by jealousy or anger whereby men have been able to exact unusual or fatal sanctions on their wives or their paramours. Thus, the provocation defence appears to be plagued by significant gender issues as a result of its origins.

Coming back to the reasonableness standard, it was in *K.M. Nanavati v. State of Maharashtra*,[48] whereby the Supreme Court opined that the test of "grave and sudden provocation" is,

> Whether a reasonable man belonging to the same class of the society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control.[49]

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42 (1901) S.C.C. OnLine Cal. 69, ¶6.

43 A.I.R. 1962 S.C. 605.

44 (1995) S.C.C. OnLine Mad. 314.

45 *Id.* ¶13.

46 (2008) S.C.C. OnLine Mad. 359.

47 *Id.* ¶10–¶16.

48 A.I.R. 1962 S.C. 605.

49 *Id*. ¶85 (K. Subba Rao, J., majority opinion).

The Supreme Court was also of the view that what a reasonable man would do in the face of provocation depends upon

> the custom, manners, way of life, traditional values, etc., i.e., in short, the cultural, social and emotional background of the class of society to which an accused belongs.[50]

What is pertinent to note here is that the objective test has an inherent vagueness and uncertainty. In this relation, it would be relevant to quote the opinion of the Supreme Court in *Budhi Singh v. State of H.P.*,[51] where it was held that,

> The doctrine of grave and sudden provocation is incapable of rigid construction leading to any principle of universal application.[52]

Subsequently, the Supreme Court went on to say that,

> An offence resulting from grave and sudden provocation would normally mean that a person placed in such circumstances could lose self-control but only temporarily and that too in proximity to the time of provocation.[53]

The Supreme Court also relied upon the reasonable man standard in order to conclude that the offence was not culpable homicide amounting to murder.

However, generalising the experiences of the person pleading a defence of provocation with a "reasonable man" is simply abstracting such individuals out of their social reality, thereby conferring on them a formal equality. But this formal equality is merely illusory, since the defendant and the hypothetical "reasonable man" are not in reality equal, which might ultimately lead to unjust consequences. Even though the term 'man' is considered the genderless norm upon which all other forms of identity must rely, the legal system is inherently male and overtly seeks to empower the male norm. Consequently, women experience discrimination in subtle ways through male-centric power dominance, which expects the women to assimilate into the male standard rather than allowing them to maintain a separate position for themselves. In the same way, the defence of provocation is also steeped in masculinity and envisaged mainly in terms of male consciousness notwithstanding the fact that women, especially battered women, do not react to provocation in any typical male-designated way. If this standard is applied in cases involving

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50 A.I.R. 1962 S.C. 605, ¶84.

51 (2012) 13 S.C.C. 663.

52 *Id.* ¶18 (S. Kumar, J., majority opinion).

53 *Id.*

battered women who kill, it would create a double injustice by filtering out the social conditions which may have contributed to the battered woman's act of violence.

The Gauhati High Court in *Tilok Rajawar v. State of Assam*[54] had to determine whether the adequacy of provocation should be measured from the point of view of an "ordinary reasonable man" or that of the alleged offender, taking into account his idiosyncrasies. The High Court was of the opinion that the reasonableness of the offender's action should be determined from the view point of a person in the offender's situation. This requirement makes it inherently difficult for battered women to prove the reasonableness of their action in killing their abuser. Because the woman does not fit the stereotypical norm, irrespective of what evidence has been adduced in her favour, her conduct will be judged against the reasonable man standard without considering the fact that a battered woman's perception of danger might differ from those of men.

Another major difficulty that the defence of provocation poses in front of the battered woman is the test of "proximity" or the requirement of immediacy. In *Sukhlal Sarkar v. Union of India*,[55] the Supreme Court held that a person claiming the benefit of Section 300 Exception 1 should demonstrate that the provocation was grave and sudden enough to deprive him of self-control and that he caused the death of such person while he was still in that state of mind. The term "grave" implies that the provocation is of such nature that it causes apprehension in the defendant and "sudden" implies an action must be instant and unexpected so far as to provoke the defendant.[56] This requirement demands that the accused react immediately after the provoking incident. Any delay between the provocation and the response, is thus interpreted as a contradiction to the loss of self-control which forms the essence of the defence plea. Because of the limitations of the immediacy requirement, which focuses on the most recent act of provocation, the law has struggled to find provocative behaviour that could justify a killing. For instance, in *Gyanendra Kumar v. State of U.P*,[57] where the accused had killed the deceased after quarrelling with him, the Supreme Court upheld his conviction for murder and opined that where there is sufficient time for cooling off, there is no sudden provocation and the act of the accused is deliberate.[58] The standard was further elaborated in *B.D. Khunte v. Union of India*[59] where the accused had been physically assaulted by his superior, the deceased, who was forcing him to engage in unnatural carnal intercourse in order

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54 (1986) S.C.C. OnLine Gau. 113.

55 (2012) 5 S.C.C. 703.

56 *Id.* ¶9–¶10.

57 A.I.R. 1972 S.C. 502.

58 *Id.* ¶9 (followed in *Bati Kunjami v. State*, 1996 Cr.L.J. 1431 (Ori.); *State of Karnataka v. Surendra*, 1995 Cr.L.J. 3824 (Kant.)).

59 (2015) 1 S.C.C. 286.

to satisfy his lust. However, there was a significant time lapse before the accused committed the murder and there was no evidence that the provocation continued. In light of this, the Supreme Court held that this case did not fall under Exception I of Section 3000, because the provocation had to be both grave and sudden in order for the defence to be successful.[60] In *Gnanagunaseeli v. State*,[61] where a woman, who was subjected to repeated insults by her husband, murdered him after discovering an illicit relationship with another woman in their matrimonial abode, the Madras High Court, having accepted the plea of partial defence of "grave" and "sudden" provocation, reduced her offence to culpable homicide not amounting to murder. Thus, it is quite evident that the courts have placed a high value on the requirement of proximity. On the contrary, in the case of battered women, the very nature of the prolonged violence, the apparent initial tolerance by the victim and her failure to respond immediately is contrary to this "heat of the moment" requirement of the elements of provocation. Such delay in reacting to the violence denotes revenge and the law does not recognise revenge *per se*.

However, a change was introduced by the courts with the recognition of the concept of "sustained provocation." In *Suyambukkani*, the High Court which introduced the concept of Nallathangal's Syndrome also conceptualised "sustained provocation" as a judicial creation envisaged by the architects of the IPC.[62] The High Court went on to say that there is a fundamental difference between grave and sudden provocation and sustained provocation because the latter involves a series of more or less grave acts spread out over a period of time, the last of which "acting as the last straw breaking the camel's back may even be a very trifling one."[63] The High Court also examined the possibility of including the syndrome as an exception under Section 300 of the IPC. The High Court held that since on the day of the incident the accused woman was beaten and assaulted by her husband, she decided to take the Nallathangal way, and therefore her act did not fall within the definition of murder as contemplated by the IPC. However, the High Court found her guilty of the offence under Sections 309 and 304 Part I and sentenced her appropriately. Also, in *Vanarani v. State*,[64] the Madras High Court again followed the same reasoning as in the aforementioned case where the accused woman had caused the death of her children and also attempted to commit suicide after facing homicidal violence.[65] The same pattern was followed in *Poovammal v. State*[66] where a grieving mother killed

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60 (2015) 1 S.C.C. 286, ¶14–¶19.

61 1995 (II) C.T.C. 610.

62 1989 L.W. (Cri.) 86.

63 *Id.* ¶21 (David Annoussamy, J., majority opinion).

64 (2001) I.C.T.C. 656, 661.

65 *Id.* ¶1 & ¶12.

66 (2012) 2 M.W.N. (Cri.) 276.

her own son out of frustration and also attempted suicide. It would be pertinent to reproduce an extract from the judgment to understand the decision taken by the Madras High Court:

> There may be incidents/occurrences, which are such that they may not make the offender suddenly make his outburst by his overt act. However, it may be lingering in his mind for quite some time, torment continuously and at one point of time erupt, make him lose his self-control, make his mind to go astray, the mind may not be under his control/command and results in the offender committing the offence. The sustained provocation/frustration nurtured in the mind of the accused reached the end of breaking point, under that accused causes the murder of the deceased.[67]

The Madras High Court held her guilty of culpable homicide not amounting to murder and reduced the sentence imposed by the Trial Court. However, these judgments failed to offer a principled justification for the addition of sustained provocation to the statutory list of exceptions.The decision of the Gauhati High Court in *Manju Lakra*[68] wherein the High Court recognised BWS and broadened the scope of provocation as a defence for battered women who kill their abusers, came as a relief to battered women who kill their abusers. The question was whether the grave and sudden provocation should occur immediately preceding the murder or whether the time lag could be extended to a date far in advance of the date of murder. In this case, the accused woman suffered unprovoked acts of domestic violence, but on one occasion, the violence backfired and devoured the abusive husband. The High Court relied on the decision in *R v. Ahluwalia*, which highlighted the concept of "cumulative provocation," and observed that:

> Where the circumstances immediately preceding the fatal strike, may not be independent of the previous acts, treated so provocative as to make a man lose his power of self-control yet when the series of provocative circumstances preceding the fatal strike, were sufficient to deprive an ordinary man of his power of self-control, it may not be a proper appreciation of plea of provocation if the immediate provocative conduct preceding the cause of death, is taken into account excluding the previous series of acts, which were inextricably connected with the ultimate act of provocation leading to the cause of death.[69]

Thus, as per the opinion of the High Court, the series of acts that constitute "grave" and "sudden" provocation should be such which never really permitted the

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67 (2012) 2 M.W.N. (Cri.) 276, ¶30 (P. Devadass, J., majority opinion).

68 (2013) S.C.C. OnLine Gau. 207.

69 *Id.* ¶87 (I.A. Ansari, J., majority opinion).

defendant to calm down and act (namely, an absence of a cooling off period) and the act immediately preceding the killing of the abuser was the culmination of the previous provocative acts.

What can be inferred from the foregoing analysis is that Indian courts have, in particular circumstances, broadened the scope of partial defence of provocation to accommodate cases of women facing domestic violence and committing homicide as a result of it. However, since the expansion of such defences is a matter of judicial discretion, women face the risk of being convicted of murder. The defence of provocation is not a viable option for battered women who kill, primarily because it is not a justification defence, but rather an excuse which merely reduces the charge of murder to a lighter offence, thereby imposing culpability on the battered woman. It focuses only on the actor by comparing her to an ordinary reasonable man instead of focusing on the act itself, with regard to the circumstances which would justify it. A battered woman does not require an exemption from criminal liability; in fact, she should not be subject to criminal liability at all. Furthermore, considering the way in which the law of provocation has evolved, male defendants benefit in the sense that their offence is mitigated even if it is the result of jealousy or anger, while women defendants are denied a better disposition. This parallel use of the provocation defence for both killings motivated by jealousy and rage and killings out of violence faced at the hands of an abuser is unfair. After all, different reasons for killing should merit different legal responses.

1.3.2. Examining the Doctrine of Self-Defence

Even though Indian courts have not yet accommodated the cases of battered women within the realm of self-defence, many scholars, as discussed in the previous chapter, have mooted for the expansion of the self-defence structure. In such a scenario, it will be pertinent to examine the possibility of extending the right of private defence to battered women who commit homicide as against the partial defence of provocation. In India, criminal law authorises a person who is under a reasonable apprehension that his life is in danger to inflict death upon the aggressor, provided the harm inflicted is not greater than what is actually necessary for the purpose of self-defence. This is based upon the basic norm of self-preservation, which has been duly recognised by the criminal legislations of the majority of countries.[70] Unlike the defence of provocation, self-defence is categorised as a justification defence as it exempts a person completely from criminal liability. When pleaded in case of a homicide charge, if the offence succeeds in satisfying the elements of the defence, there will be complete vindication rather than mere mitigation of a lesser-crime. While explaining the genesis of the self-defence doctrine in India, the Supreme Court in *Surjit Singh v. State of Punjab*[71] observed that,

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[70] *Ratanlal & Dhirajlal's the Indian Penal Code* 200 (K.T. Thomas & M.A. Rashid eds., 2014).

[71] A.I.R. 1996 S.C. 1388.

> Self-preservation of one's life is the necessary concomitant of the right to life enshrined in Article 21 of the Constitution of India, fundamental in nature, sacred, previous and inviolable and such right to self-preservation has a species in the right of self-defence in criminal law.[72]

Countries such as Australia and Canada have already expanded their traditional self-defence structure to defend battered women who kill their abusers.[73] Theoretically, self-defence appears to be most appropriate in defending battered women who kill, in the sense that, when the harm to the batterer is balanced against the abuses inflicted upon the woman, society's interest in the right of bodily integrity along with the harm caused to the violated woman outweighs the harm caused to deter such abuser.

Section 100 of the IPC uses the term "reasonably cause apprehension" which signifies that a

> person who is in an imminent and reasonable danger of losing his life or limb may in exercise of self-defence inflict any harm even extending to death on his assailant either when the assault is attempted or directly threatened and such right of private defence commences as soon as a reasonable apprehension arises which is co-terminus with the duration of such apprehension.[74]

It is evident from the prerequisites that self-defence predominantly relies on the components of imminence, necessity and proportionality. A review of some of the cases where self-defence has been pleaded by women will give a more accurate view of the standard applied in these cases. For instance, in *Malliga v. State*,[75] the deceased brother of the accused had physically assaulted and tried to rape her. The question before the court was whether a helpless woman at an advanced stage of pregnancy, under frequent and imminent threat of rape, is entitled to a right of private defence. The court held that an accused that had a reasonable belief or apprehension of the continuing danger to her body of being raped, as well as harm to the child in her womb was entitled to exercise the right of private defence in terms of Section 100 and 102 of the IPC. The court also held that while the accused bears the initial burden of setting up a plea of self-defence, the burden immediately shifts to the prosecution to establish that the accused had exceeded the right of private defence. In *Meera v. State of Rajasthan*,[76] the accused assaulted her mother-

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72 A.I.R. 1996 S.C. 1388.

73 Sheehy et al. 2012, at 468.

74 *Ratanlal & Dhirajlal's the Indian Penal Code*, *supra* note 70, at 85.

75 (1997) S.C.C. OnLine Mad. 787.

76 (1998) S.C.C. OnLine Raj. 821.

in-law. She pleaded that she acted in the exercise of her right of self-defence. The court held that the accused is not required to prove her right of private defence beyond a reasonable doubt. It is sufficient, if on the basis of the circumstances of a particular case, the version becomes acceptable using the test of preponderance of probabilities. As a result, the court overturned the conviction. In *Champa Rani Mondal v. State of West Bengal*,[77] the accused woman had challenged her conviction for committing the murder of her brother-in-law. According to the facts of the case, the brother in law had tried to rape her and, for the purpose of the same, dragged her to the bed by putting a piece of cloth in her mouth. It was at that very moment when she inflicted two blows of a *katari* upon him as a result of which he succumbed to death.[78] The court acquitted her as she had exercised her right of private defence. Similarly, in *Anuj Jermi v. State*,[79] the deceased father, exhibiting animal behaviour, attempted to rape and murder his daughter, the accused, at knife point. In order to preserve her dignity and life, the accused stabbed her father with the knife nearly three times in his stomach, killing him. The court held that the petitioner acted in the exercise of her right of private defence and therefore was entitled to the benefit provided under Section 100 of the IPC.

The foregoing analysis shows that courts have accepted self-defence pleas only when the "immediacy" requirement has been satisfied. However, battered women react differently and uniquely at each stage of the cycle of violence and the majority of them end up killing the abuser in non-confrontational situations. In such cases, it would be necessary for her to prove that, although her husband was not violent during the commission of the act, she was reasonable enough to believe that if she did not kill him, he would become abusive again, and the next time he would assault her would inevitably lead to her death.[80] The problem with traditional self-defence law is that it permits lethal force to be used in self-defence only in response to an imminent threat. For a woman who is violently abused over a long period of time, the temporary withdrawal of the batterer from blatant violence does not signify the termination of danger.[81] Instead, it gives her a reason to develop a well-founded fear of future attacks based on previous experiences. However, such fear does not constitute imminent danger as understood in legal terms. Although a battered woman may reasonably fear that a violent attack is imminent, it is not considered to be so. As a result, battered women may find it difficult to sustain their self defence claims in the courts. After all, as long as the abuser is asleep

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77 (2000) 10 S.C.C. 608.

78 *Id*. ¶1.

79 (2012) S.C.C. OnLine Mad. 2874.

80 Lorraine P. Eber, *The Battered Wife's Dilemma: To Kill or to be Killed*, 32(4) Hastings L.J. 895, 928–929 (1981).

81 Kumari 1999.

> he does not appear to pose any immediate threat, retreat seems like a viable option and the killing seems like a choice rather than necessity.[82]

Concerning proportionality, it is worth noting that historically, the test of self-defence was created to allow a man to protect himself, his family and his property from an attack by another man of similar size or strength.[83] For instance, in *Vishwanath v. State of U.P.*,[84] a husband attempted to forcibly remove his wife from her brother's house (the accused) and also assaulted her in the process. The question before the court was whether the accused had the right of private defence of the body of his sister to the extent of causing the death of her husband. The court held that the accused had not caused more harm than was necessary because his sister's husband had assaulted her with the intention of abducting her, and thus the accused would not be found guilty of any offence. In *Yogendra Moraji v. State of Gujarat*,[85] the accused had a dispute with the deceased and his associates over payment of dues. The rude behaviour of the accused was resented by the deceased and when he signalled to stop the car of the accused, the accused fired from his revolver without aiming at any particular person. The final shot hit the deceased causing his death, and as a result, the accused was charged with murder. The accused pleaded the right of self-defence, but the court held that he had exceeded his right because such a right could only be availed against an impending danger, present and real. The court also opined that,

> It is a defensive and not a punitive right and therefore the injury inflicted by the person exercising the right should be commensurate with the injury.[86]

Similarly, in *Rizan v. State of Chhattisgarh*,[87] the plea of self-defence was negated because the accused, prior to inflicting injuries upon the deceased, had run to a house to fetch a weapon, and such an act bearing the stamp of a design to kill takes the case out of the purview of private defence. The court held that in order to claim a right of private defence extending to voluntarily causing death, the accused must demonstrate that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous harm would be caused to him.[88]

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82 Katelyn E. Keegan, *The True Man & the Battered Woman: Prospects for Gender-Neutral Narratives in Self-Defense Doctrines*, 65(1) Hastings L.J. 283 (2013).

83 Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 Harv. C.R.-C.L. L. Rev. 623, 635 (1980).

84 A.I.R. 1960 S.C. 67.

85 (1980) 2 S.C.C. 218.

86 *Id.* ¶13–¶15.

87 (2003) 2 S.C.C. 661.

88 *Id.* ¶14.

However, the concept of proportional force, which is based on the notion of people being equal in strength and aggression, is irrational when applied to women. If such a principle of proportionality is applied to the cases of battered women, it may appear absurd in the sense that the male abuser is usually stronger than the woman and since she is familiar with his violent temper and brutal nature, she ends up using deadly force in order to put an end to the violence. Above all, the self-defence structure is governed by the "reasonable man" standard. However, if the courts apply the same standard while examining a battered woman's case in which she has killed her abuser, it would be nothing but blatantly overlooking the problems which the violated woman has had to endure. The circumstances under which a battered woman finds herself are usually perceived differently by her than they may be by others. As a result, the use of the objective standard of reasonableness in order to support a claim of self-defence raises difficulties as these cases do not fulfil the essential pre-requisites. In order to avoid such a situation, the courts must examine the situation from the viewpoint of the woman in order to understand and appreciate what she has been through and the factors which motivated her to kill her abuser. A purely objective "reasonable man" standard is also unduly harsh because it ignores the characteristics which inevitably and justifiably shape the defendants' perspective, thus holding her to a standard that she simply cannot meet.[89] Owing to this reason, using the standard test of self-defence might prove to be detrimental in the case of a battered woman who has killed. Thus, one of the greatest challenges in determining self-defence claims is striking a balance between the defendant's subjective perceptions and those of the hypothetical reasonable person.[90] Nonetheless, deviating from the objective reasonableness standard, the Supreme Court in *Wassan Singh v. State of Punjab*[91] held that

> reasonable apprehension of danger must be judged from the subjective point of view of the accused and cannot be subjected to microscopic and pedantic scrutiny.[92]

In this case, the accused had received as many as nine injuries, two of which were to his head and one of which was an incised wound caused by a sharp weapon. The court stated that under these circumstances, if the accused fired one shot from his gun in self-defence, it could not be said that he had exceeded the right of private defence, because the nature of the assault by the complainant that left him with the injuries could be said to have caused a reasonable apprehension of danger in his mind. This decision appears to be a welcome approach to the doctrine of self-defence.

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89 Elizabeth Kenny, *Battered Women Who Kill: The Fight Against Patriarchy*, 13(1) U.C.L. Jurisprud. Rev. 17 (2007).

90 *Id.* at 36.

91 (1996) 1 S.C.C. 458 (affirmed in *Raj Singh v. State of Haryana*, (2015) 6 S.C.C. 268, 277).

92 *Id.* ¶10 (S.B. Majumdar, J., majority opinion).

In order to accommodate the cases of battered women within the self-defence structure, the courts will have to go beyond the reasonableness standard and certain factors such as a lack of adequate social welfare, an apathetic attitude of police towards domestic violence, as well as the well-founded fear of retaliation, will also have to be taken into consideration while deliberating upon a plea of self-defence, particularly the proportionality of force used, and to understand the reason as to why a battered woman did not flee from her abuser. However, there is an inherent problem with the self-defence plea when compared to the partial defence of provocation. As a justificatory defence, self-defence has an all-or-nothing approach, resulting in either an acquittal or a murder conviction, unlike provocation, which if proven might at least reduce the sentence of the accused when compared to a sentence for murder.

1.3.3. Insanity: Excusing a Battered Woman

Logically, it may appear that the law in general discourages killing others in an act of self-defence when less drastic measures are available to potential victims to avoid harm. However, as previously discussed, there are more than enough reasons to treat the cases of battered women differently. In such a scenario, an alternative defence, as advanced by some scholars, would include the defence of insanity for women who are faced with circumstances under which a traditional self-defence theory is likely to be unsuccessful. After all, an insanity plea focuses solely on the subjective mental state of the defendant, unlike in cases of self-defence which require an objective inquiry into the circumstances of the killing. Indian courts follow the M'Naghten Rules, formulated in the English case *R. v. M'Naghten*,[93] while deliberating on cases where defendants plead insanity as a defence. The M'Naghten Rules, which are the continuing measure of insanity, incorporate a classical thought that is over a century old. Although attempts at modernization have led to some modifications to the rules of criminal responsibility, the statute and significance of the M'Naghten Rules have impeded efforts at creative reconstruction.[94]

Section 84, which embodies the defence of insanity, is based on the fundamental norm of criminal jurisprudence that an act does not constitute a crime unless it is done with a guilty intention. In order to constitute a crime, both the intent and the act must concur. Thus, as per this section, an insane person bears no culpability owing to the fact that he or she lacks the necessary guilty intent. The section specifically uses the term "unsoundness of mind" which may differ in degree and in kind, depending on the circumstances of the case. In *Ratan Lal v. State of M.P.*,[95] the Supreme Court settled that in order to understand what constitutes unsoundness of mind, one can safely classify a person as *non compos mentis,* falling into the category of (a) an idiot, (b) one rendered *non compos* by illness, (c) a lunatic or madman or (d) a drunkard.

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93 *R. v. M'Naghten*, [1843] U.K.H.L. J16.

94 K.M. Sharma, *Defence of Insanity in Indian Criminal Law*, 7(4) J. Ind. L. Inst. 325 (1965).

95 (1970) 3 S.C.C. 533.

Indian courts have interpreted Section 84 to posit two mental conditions which exempt a person from responsibility for their wrongful act, namely, that the unsoundness of mind was such that it rendered him incompetent to know the nature of the act or that it prevented him from understanding the wrongfulness of the act in question.[96]

The courts in India, however, only deal with the question of legal insanity and not medical insanity. Even though from a medical point of view, every person is insane while committing an offence, exemption from culpability can only be confined to those cases in which insanity materially impairs the cognitive faculty of the person to the point where he is unable to distinguish between right and wrong. In order to establish the defence of insanity, the mental condition as per the conditions of this section must have existed at the time the act was committed. The defence of insanity has been mainly raised in homicide cases. For instance, in *Mst. Shanti Devi v. State*,[97] the accused had cut the neck of her child with a razor. On being charged with murder, the accused pleaded insanity. Evidence revealed that prior to the occurrence, the accused had been admitted to a mental hospital and was suffering from Maniac Depressive Psychosis. It was an acute illness, and in that state she was not able to understand what she was doing or the consequences of her actions. The court held that she was entitled to the benefit of Section 84 of the IPC. The Bombay High Court had dealt with a similar situation in *Saraswati Mahadeo Jadyal v. State of Maharashtra*.[98] In this case, the accused had strangulated her week-old infant and abandoned the body in an isolated village. The accused had also admitted that she had strangulated her child because her husband was spending all his money on drinking and was giving her nothing for the household expenses. During the course of the investigation, it was discovered that on an earlier occasion also, the woman had killed her own child, and as a result, she had been committed to a mental hospital where she was diagnosed to be medically unsound. After taking into consideration all the legal and medical factors, the High Court held that the accused was entitled to claim the benefit of Section 84. Similarly in *Sumitra Shriram v. State of Maharashtra*,[99] the accused mother was alleged to have committed the heinous crime of killing her two minor children by throwing them into a well, as well as attempting to kill her third child and end her own life by carrying the child in her arms and jumping into the well. During the course of the investigation, it was found that the accused was suffering from an illness, and the offence she committed was a consequence of her unsound state of mind. The High Court held that, since the conduct of the accused clearly indicated that she did not have the requisite *mens rea* to commit the offence, her case would fall within the purview of Section 84. From the foregoing analysis of the cases, it is clear that every accused who pleaded the defence suffered from

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96 Sharma 1965, at 332.

97 (1967) S.C.C. OnLine Del. 56.

98 1993 Mh.L.J. 1529.

99 2000 (2) Mh.L.J. 149.

a specific "illness" for both medical and legal purposes. The question that may arise here is whether a battered woman who kills her abuser suffers from any specific illness. The answer lies in the discussion that follows.

In *Dayabhai Chhaganbhai Thakkar v. State of Gujarat*, the law on the burden of proof in insanity cases was well established.[100] The Supreme Court began by highlighting the fundamental principle governing the law of insanity, according to which:

> The burden of proof lies on the prosecution to prove beyond reasonable doubt that the defendant caused the death with the requisite intention described in Section 299 of the Indian Penal Code. However, Section 84 being an exception, it has to be read with Section 105 of the Evidence Act, 1872 whereby the burden of proving the existence of circumstances bringing the case within the said exception lies on the defendant.[101]

The Supreme Court appears to have broadened the scope of the defence by stating that:

> Even if the evidence placed by the defendant does not discharge the burden under Section 105 sufficiently, if it is able to raise a reasonable doubt in the mind of the judge, the defendant has to be acquitted on the ground that the prosecution has failed to conclusively prove the guilt of the defendant.[102]

As a result, the law places the burden on the prosecution to prove both *actus reus* and *mens rea* beyond a reasonable doubt. The same was affirmed by the Supreme Court in *Bhikari v. State of Uttar Pradesh*[103] which held that the burden of proving the intention of the accused person, where intention is an ingredient of the offence, is on the prosecution and this burden never shifts.[104] Subsequently, in *Oyami Ayatu v. State of M.P.*,[105] the Supreme Court observed that,

> Section 84 could be invoked by a person to nullify the evidence adduced by the prosecution by establishing that he was at the relevant time incapable of knowing the nature of the act or that what he was doing was contrary to law.[106]

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100 A.I.R. 1964 S.C. 1563.

101 *Id*. ¶5 (K. Subba Rao, J., majority opinion).

102 *Id*. ¶7.

103 A.I.R. 1966 S.C. 1.

104 *Id.* ¶5.

105 (1974) 3 S.C.C. 299.

106 *Id*. ¶6 (H.R. Khanna, J., majority opinion).

The Supreme Court, very recently, clarified the law on this issue by stating that

> though the burden of proof is on the accused as per Section 105, he is not required to prove the same beyond all reasonable doubt but merely satisfy the preponderance of probabilities.[107]

In such a scenario, the defence of insanity can well be pleaded by battered women as they only have to nullify the contention of the prosecution by adducing evidence that she was not in a proper mental condition to understand the consequences of her actions.

Theoretically, the image of a battered woman as portrayed by Walker would clearly fall within the scope of Section 84. A battering relationship can and does have a devastating psychological effect on the violated woman which is even more severe and damaging than the physical abuse itself. The "cycle of violence" theory and the "learned helplessness" concept as put forth by Walker evidently illustrate the consequences of the violated woman's continuous failure to repair or step out of the violent relationship. The result of the cyclical highs and lows inherent in the violent relationship is that the woman's judgement becomes severely impaired. Thus, what follows from such an analogy is that at the time of homicide, the battered woman suffered from an impaired mental state as a result of her repeated beatings and the pre-emptive force used by her was according to her state of mind, necessary to avert an otherwise unavoidable threat by the abuser. The nexus between a woman's impaired judgement and the homicide can be established by proving that the woman viewed her unyielding circumstances from a psychologically distorted perspective, thus rendering it highly unlikely that she could have found any possible alternatives to killing. With respect to the required degree of cognitive dysfunction, she is similar to a person of unsound mind as described under the M'Naghten Rules owing to the fact that she is honestly incapable of understanding that her act was either morally or legally wrong. In such a scenario, it would be easy for a battered woman killing her abuser to prove that she lacked *mens rea* by adducing evidence in order to prove her mental condition at the time when she committed the act. In order to bring the case of a battered woman under Section 84, adducing expert evidence on BWS would be extremely relevant in determining the circumstances in which the battered woman killed her abuser, thereby allowing her to relevantly include all events in order to explain her state of mind. In light of the same, it would be pertinent to analyse *Manju Lakra*, where the High Court itself opined that, as per the circumstances faced by the battered woman, the intention of the woman was not to kill her husband but to put an end to the continuing violent acts and as a consequence thereof, she felt that nothing short of putting an end to the life of her husband would be a solution. Even though the battered woman relied upon the partial defence of provocation, it is believed

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[107] *Surendra Mishra v. State of Jharkhand*, (2011) 11 S.C.C. 495, ¶13 (C.K. Prasad, J., majority opinion).

that the plea of insanity could have easily been resorted to in order to prove that the battered woman while committing the act was not in a state of mind to understand that her act was legally wrong, since she was acting in self-preservation. Since it is an obligation on the part of the prosecution to prove guilt beyond a reasonable doubt, it would have been extremely difficult for them to prove that the *actus reus* concurred with the *mens rea*, since the guilty intent itself was lacking in this case.

Despite the benefits that the defence of insanity has to offer, it has certain inherent limitations attached to it. A major difficulty with the use of this defence is that, instead of providing vindication to the violated woman, it coerces the woman to effectively accept an identification of a psychologically impaired person. It basically reflects the male-centric approach of the legal system whereby men are painted as victims of unreasonable circumstances and women as violators. The invidiousness of this predicament is explained by Sanghvi and Nicolson to mean that unless these women accept a label of psychological abnormality, they run the risk of escaping the prison of domestic violence only to spend a long time in a less metaphorical prison.[108] Another factor that weighs against a plea of insanity is the possibility of an outcome of incarceration in institutions by reason of unsoundness of mind, instead of an acquittal. Furthermore, even after acquittal, the woman might have to face the stigma of being categorised as "insane." This is one of the major reasons why many feminist advocates advise that the defence of insanity should be used "only as a last resort" with full awareness of its social implications.[109] Does a woman, who has suffered in an abusive relationship, deserve such an end? This question has remained unanswered for so long that when a battered woman is found to be "insane," the State merely takes a reactive response rather than making any effort to tackle the real, substantial problem of domestic violence. It is totally unjustified to castigate a battered woman as an "abnormal" scapegoat for taking the law, which failed her, into her own hands to ensure survival.

2. Limitations of Battered Woman Syndrome and the Need for a New Defence

From the analysis in the previous section, it is quite evident that the existing criminal law in India fails to provide a defence which can be consistently implemented to fully justify or excuse a battered woman who killed her abuser in order to put an end to the cycle of violence. The defences discussed are either too severe to apply effectively with any uniformity or have adverse results if applied successfully. Owing to the fact that domestic violence is prevalent within homes, it becomes pertinent to

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[108] Rohit Sanghvi & Donald Nicolson, *Battered Women and Provocation: The Implications of R v Ahluwalia*, Crim. L. Rev. 728 (1993).

[109] Elizabeth M. Schneider & Susan B. Jordan, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, 4(3) Women's Rts. L. Rep. 149, 160 (1978).

consider defining a different approach under which battered women can successfully assert a defence and be acquitted with some degree of reliability. The previous analysis also portrays the latent gender bias operating in the very conceptualisation, formulation and operation of the defences. In order to address this very concern, BWS had gained momentum in the judicial process of various countries, as discussed earlier, which eventually led to criminal law reform to accommodate the cases of battered women. Since India has yet to see such a reform, it will be pertinent to analyse whether incorporating BWS within the framework of criminal law can aid in including the perspectives, interests and experiences of women while deliberating upon these cases of battered women.

2.1. Battered Woman Syndrome: A Convenient Label or Real Syndrome?

There is no doubt that the establishment of BWS has actually exposed the problem of abuse against women. However, introducing BWS as a defence under criminal law in India could be harmful rather than helpful for women who kill their abusers in order to end the cycle of violence. The discussion in the previous section gives a clear picture of the Indian legal system's lack of familiarity with the concept of BWS, so much so that in none of the cases have the advocates defending battered women sought to adduce expert evidence on BWS. The present study shows that introducing BWS as a stand-alone defence will certainly have adverse effects on women who do not fit into the image of battered women, as portrayed by Lenore Walker.[110] The inherent limitation of BWS is the notion of psychological disorder associated with it which portrays a stereotype and makes a battered woman an "irrational being." Do we really need to label a woman as "irrational" in order to justify her act of self-preservation? Instead of emphasising her conduct as being rational, reasonable and comprehensible, BWS attaches a stigma of mental disorder. Apart from that, introducing BWS as a defence might perpetuate a picture of domestic violence as a rare occurrence rather than a common happening which takes place every minute inside the four walls of a household. BWS as a defence might negate the very purpose behind incorporating it, as it in no way addresses the inherent gender-bias of the criminal law and by categorising the woman as "psychologically unstable," it might actually reinforce the existing bias. In such a scenario, it is actually more convenient that India has not yet introduced BWS as a defence to accommodate the cases of battered women. Another point which can be raised is that, if we consider that BWS comprises mental symptoms, why should there be a separate defence when the battered woman can simply rely on an insanity plea? This question has already been answered in the previous chapter as to the repercussions of using the defence of insanity. Using BWS as a defence may help defend the case of a battered woman, but there is a high chance that the woman is likely to be institutionalised

[110] Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20(1) Yale J.L. & Feminism 75 (2008).

owing to the notion of psychological disorder associated with her. As a result, such women may be perceived as suffering from a permanent mental condition that renders them incapable of caring for and protecting their children, dangerous to their dependants, unreliable and beyond hope of rehabilitation.

On the feasibility of introducing BWS evidence in order to address the concerns of battered women, it can be said that adducing expert testimony of BWS actually reinforces the notion of women lacking credibility as witnesses. The woman is supplanted by an expert whereby, "she is only a cog in the machinery, neither believed nor trusted."[111] Moreover, BWS testimony would underline the stereotypes attached to the concept of wifehood. The main reason is that the term does not counteract prejudicial stereotypes of battered women and promote an unbiased assessment of their circumstances, including their fear of harm, their inability to escape, the unresponsiveness of legal authorities and a lack of other alternatives.[112] Instead, it might perpetuate the existing stereotypes and explain what is wrong with such women psychologically.[113] Do we really need a "syndrome" to explain the actions of a battered woman? On the face of it, the syndrome might help in obtaining acquittals, but it may have adverse effects in the future. It might end up penalising those women who do not fit the said psychological profile because it fails to focus on the real issue, namely, the lack of alternatives for battered women, and serves to obscure the fact that existing legal standards of reasonableness do not incorporate these women's experiences. Moreover, the stereotypes embedded in BWS might raise the issue of courts remaining uncertain about how to utilise such expert evidence and that too in the correct way. Limiting expert testimony only to BWS in cases of battered women will result in focussing only on the mental condition of the woman rather than recognising the violent acts committed by her abusive partner. Furthermore, expert evidence on BWS does not confront the narrow, male standard upon which reasonableness is constructed. Although the use of BWS in the judicial process arose in response to issues with the interpretation of male standards, the narrow reasonable standard remains unperturbed, with expert evidence being necessary to explain the departure of the action of a battered woman from that standard.[114] Those who argue in favour of using BWS emphasise the importance of the judges' understanding of the experience such a woman is likely to have endured as a result of the violence. It follows then that BWS can only play a very educative role rather than supporting the defence claims of battered women. This argument can further be justified by the use of the courts to explain the effects of a battering relationship in cases other

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111 Alafair S. Burke, *Rational Actors, Self-Defense and Duress: Making Sense, Not Syndromes out of the Battered Woman*, 81(1) N.C. L. Rev. 211, 221 (2002).

112 David L. Faigman, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72(3) Va. L. Rev. 619 (1986).

113 Sheehy et al. 2012, at 470.

114 *Id.*

than those of homicides committed by battered women.[115] The introduction of BWS testimony may be generally educational for judges and advocates in understanding the effects of abuse in domestic violence, but using it in order to support a defence would obviously undermine a woman's claim to have acted reasonably.

2.2. The Path Ahead: Need for a Complete Defence

Since introducing BWS as a defence or adducing expert testimony on BWS to support a defence plea does not appear to be a viable option, there is indeed a need to formulate a specific defence which will accommodate the cases of battered women. Even though the number of women committing homicides as a result of a battering relationship in India is small, it would be deeply wrong to punish a woman for failure on the part of the State to provide adequate protection to her. In such a scenario, a new complete defence can be framed to address the plight of battered women who kill their abusers. Such a defence must be justificatory in nature, which would result in the acquittal of a battered woman. Furthermore, the provision should be worded in such a manner so that it is clear that it is primarily constructed for women in abusive relationships but that it is also available to men. Such a standard has to be maintained while framing a complete defence so that formal gender neutrality does not obliterate the reality of the victims of domestic violence. To that end, a broad outline for the inclusion of a new defence under Chapter IV of the IPC can be proposed as follows:

> **Act done in furtherance of abuse in a domestic relationship:**
>
> Nothing is an offence by reason that it causes death of the assailant if such an act is done under a reasonable apprehension of danger arising out of violence in a domestic relationship.
>
> Explanation 1 – An apprehension of danger may be reasonable even if the acts of violence are recurrent in nature.
>
> Explanation 2 – The alleged act must be proportional to the apprehended danger in view of the person committing such act.
>
> Explanation 3 – For the purpose of this section, "domestic relationship" shall have the same meaning as under Section 2(f) of Protection of Women from Domestic Violence Act, 2005.

Inclusion of a complete defence in line with the proposed provision will take into consideration the state of the battered woman involved in a turbulent relationship not by pathologising her but treating her as a victim of abuse. The foregoing proposition also does away with the inherent objectivity in the existing defences, as it proposes to judge the danger from the subjective point of view of the person committing the act. However, the defence can only be fully effective if the reasonable

[115] *See State v. Hari Prashad*, (2016) 228 D.L.T. 1 (D.B.); *Amutha v. State*, 2014 (2) M.W.N. (Cr.) 605.

man standard is substituted by a gender-neutral standard which would allow such women to receive fair treatment in courts. A battered woman is obviously not a reasonably prudent person because her circumstances completely differ from that of a person who has not faced such violence. She is an expert on her situation and is better equipped than anyone else to assess when danger is looming. A battered woman has an in-depth knowledge of the actions of her abuser that a woman who has not faced these experiences does not have. Therefore, considering her actions only in the light of a reasonable man, when through no fault of her own she does not qualify as one, is in essence, condemning her for her suffering.[116]

However, in order to effectively use this uniform defence, preventing any sort of misuse, the battered woman would have to fulfil two requirements. Firstly, the woman would have to prove the circumstances faced by her in the abusive relationship and as to why she eventually killed. Such a burden may be discharged with the help of expert testimony. However, instead of adducing evidence on BWS, a broad range of expert testimony under Section 45 of the Indian Evidence Act, 1872 should be allowed by the court to prove the effects of the battering relationship. Such evidence should include evidence of physical, sexual and psychological abuse, including deprivation of financial resources and social isolation, and also include the history of violence. The evidence must be used to discharge the burden imposed upon the battered women under Section 105 of the Indian Evidence Act, 1872. After having discharged such a burden, the advocate defending the battered woman by invoking the gender neutral standard would attempt to prove that under the defendant's circumstances, she acted as a reasonable battered woman would have acted and thus was justified in killing her batterer. The court should take into account all of the existing evidence regarding the defendant's history with the victim and should deliberate upon the issue by viewing the battered woman as having been cumulatively affected by these factors. This would ensure a fair determination of the woman's innocence or guilt. Apart from ensuring fairness, this new defence would serve as a deterrent to men who inflict violence upon their significant other. Seeing that women have recourse to the law, the abusive partner will be deterred from inflicting abuse and the menace of domestic violence would be mitigated to a certain extent.

No law or legal provision can be successful until and unless people are made aware of the consequences of such a provision. In order to deal with the cases of women who commit homicide in these extreme kinds of situations, primarily the judges and the advocates should be sensitised about the persistent domestic violence within families. Even though an argument has been made in this study for the inclusion of a complete defence, efforts should be made so that women would hardly need to confront such a situation where they would have to kill their husbands to put an end to such an abusive relationship. This can only be achieved by changing

[116] Steffani J. Saitow, *Battered Woman Syndrome: Does the Reasonable Battered Woman Exist?*, 19(2) New Eng. J. on Crim. & Civ. Confinement 329, 340 (1993).

the societal attitude towards domestic violence as a serious crime. This demands not only proper implementation of the existing laws on domestic violence by the law enforcement agencies but also committed political pledges by the government to protect women from violence. It is believed that the inclusion of this defence might provide the requisite impetus to challenge the down-grading of domestic violence to the private arena by compelling the legal institutions to treat domestic violence as a serious public issue, which would ultimately reduce the chances of such homicides being committed by women in self-preservation.

Conclusion

The present study began with a quest to examine whether incorporating Battered Woman Syndrome within the framework of criminal law in India will address the concerns of battered women by ungendering the existing criminal law which is resistant towards women's accounts of experiences. The specific question regarding the inclusion of BWS as a defence has been answered in the negative on the ground that the concept, which stereotypes a woman as irrational, reinforces the existing gender bias, thereby leaving the narrow male standards unperturbed. As it is quite evident from this study, the way in which BWS has been resorted to by Indian courts clearly portrays the educative value possessed by the theory to explain the effects of being in an abusive relationship. But to include BWS either as a defence or by way of expert evidence would be more harmful than helpful, considering the inherent limitations attached to the theory itself. BWS unreasonably stereotypes a battered woman who might actually be acting rationally given her prevailing social and living conditions, and by reinforcing the apparent irrationality of her behaviour, it might actually reinforce incapacity and inferiority in women who invoke such a defence.

Given the potential negative consequences of using BWS, it clearly does not seem to be a viable option to incorporate it within our criminal law framework. There might be a chance that if the theory of BWS itself is redefined by eliminating the notion of a "syndrome" and learned helplessness, these negative consequences could be avoided. Furthermore, the need to protect women who have suffered tremendous physical and psychological abuse in their domestic relationships cannot be ignored. The proposal to include a justificatory defence is made by the author on the ground that many battered women are faced with no realistic alternative to the use of lethal force against their abusive partners. It is the law itself that legitimises male violence against women by failing to provide adequate protection to them and their dependent children. In such a scenario, it is not at all reasonable to attach any sort of culpability to a woman who merely acts in order to save her own life or that of her children. However, the inclusion of such a defence does not mean authorising a woman's right to kill. It is just a precautionary measure whereby abusive partners will also be deterred from knowing that women now have recourse to a legal defence.

It is not possible at this juncture to predict the fate of the proposal made owing to the fact that the number of reported cases on this subject is very few. However, it is quite certain that there is a dire need to ungender criminal law in India to recognise circumstances unique to women. Introducing a defence itself will never solve the problem, unless the social conditions which breed, facilitate and maintain violence within the four walls of a household are changed. The first step towards such a change could be to strengthen girls and women so that they are more resistant to abusive behaviour, and also to change the attitudes of men who treat women like property and mere objects of sex. Defences will also not be effectively used in courts unless the stakeholders are educated about the effects of battering relationships as they will eventually be subjected to the ingrained cultural judgement of the judges and, at least to some extent, the blame for such occurrences in the relationship will be attached to her. Instead of limiting the scope of expert testimony to BWS, the help of domestic violence experts can be taken while deliberating upon the cases of battered women to understand the effects of the abusive relationship on the mind and body of the abused woman by not labelling her as an "abnormal" or "irrational" woman, but by treating her as a victim of long-lasting domestic violence. Sensitisation about the effects of being in a battering relationship should not be limited only to the judges but must extend to all the stakeholders, e.g. advocates, police officers, counsellors, and such, associated with the justice delivery system so that they can reframe their own mindset and face reality. Apart from that, the common people also should be educated about the abuse faced by women at the hands of their own partners, so that they can recognise and report such abuse and also remain sensitive to the abused instead of blaming the abused unfairly.

The author has argued for the inclusion of women's experiences into the existing criminal law that will challenge the legal fiction of neutrality and universality. Perhaps, the primary purpose that this study tries to serve is to make lawmakers aware of the fact that there exists a group of women, even though very few, who are badgered and battered by their respective partners, and when they face a do-or-die situation, they end up killing their abusers. The law, which aspires to represent both men and women equally, is in fact "male" and thereby fails to accommodate the circumstances of these women. If the law is to be truly gender-neutral and universal in its approach, it will have to change its practice. Such a change can only be brought about when lawmakers have the knowledge of, and acknowledge the difference between, the circumstances of men and women.

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