BERKELEY JOURNAL OF INTERNATIONAL LAW

VOLUME 28 2010 NUMBER 1

CONTENTS

Articles

HUMAN RIGHTS AND THE LAW OF THE SEA
Tullio Treves 1

WHEN TWO LAWS ARE BETTER THAN ONE: PROTECTING THE RIGHTS OF MIGRANT WORKERS
Marsha Chien 15

CORPORATE SOCIAL RESPONSIBILITY IN CHINA: WINDOW DRESSING OR STRUCTURAL CHANGE?
Li-Wen Lin 64

PRISONER DISENFRANCHISEMENT: FOUR JUDICIAL APPROACHES
Michael Plaxton & Heather Lardy 101

RESPONSIBILITY OF THE STATE UNDER INTERNATIONAL LAW FOR THE BREACH OF CONTRACT COMMITTED BY A STATE-OWNED ENTITY
Michael Feit 142

SQUARE PEG IN A ROUND HOLE: GOVERNMENT CONTRACTOR BATTLEFIELD TORT LIABILITY AND THE POLITICAL QUESTION DOCTRINE
Chris Jenks 178

THE ORIGINS OF DUE PROCESS IN INDIA: THE ROLE OF BORROWING IN PERSONAL LIBERTY AND PREVENTIVE DETENTION CASES
Manoj Mate 216

REGIONAL MINORITIES, IMMIGRANTS, AND MIGRANTS: THE REFRAMING OF MINORITY LANGUAGE RIGHTS IN EUROPE
Stella Burch Elias 261

Berkeley Journal of International Law

Volume 28 | Issue 1 Article 1

2010

Human Rights and the Law of the Sea

Tullio Treves

Human Rights and the Law of the Sea

Tullio Treves*

I.
INTRODUCTION

Today's international law is characterized by the expansion of specialized groups of rules. Scholarly discussion about these "self-contained" regimes tends to underscore the idea that these specialized groups of rules are separate from general international law; that they have their own sources, their own mechanisms to apply in case(s) of non-compliance, and their own courts and tribunals for settling disputes. The presence of these regimes and the increase in the number of international courts and tribunals raises concerns about possible "fragmentation of international law."[1]

Scholars now broadly agree that totally self-contained regimes do not exist. All allegedly self-contained regimes have some connection with general international law. It remains true, nevertheless, that specialized fields of international law, such as human rights law or environmental law, have emerged with clusters of scholars, organizations and sometimes courts and tribunals focusing their attention on these allegedly self-contained regimes.

Law of the Sea is one of the oldest branches of international law. It maintains a doctrinal framework from Hugo Grotius, who provided us with the first of its kind for international law as a whole. As such, the Law of the Sea is naturally more closely connected to general international law than other specialized branches. Even so, the Law of the Sea has its own specialists, a framework general convention, and an international Tribunal.

The Law of the Sea encounters many of the problems that arise when specialized sets of rules overlap. This is particularly true within the framework of the United Nations (UN) Convention on the Law of the Sea (LOS Convention).

---

* University of Milan Faculty of Law, Judge of the International Tribunal for the Law of the Sea.

1. *See, e.g.*, Tullio Treves, *Fragmentation of International Law: The Judicial Perspective*, 23 COMUNICAZIONI E STUDI 821 (2007).

The UN, through the Convention, entrusts various bodies with the task of settling disputes concerning the interpretation and application of the Convention: the Law of the Sea Tribunal, the International Court of Justice (ICJ), and arbitration tribunals. Under the jurisdictional rules of the LOS Convention, these adjudicating bodies become "treaty bodies" whose primary task is to apply the LOS Convention in light of its purposes. The position of these bodies when invested with a dispute on the basis of the LOS Convention is then comparable to the position of a human rights specialized court, such as the European Court of Human Rights (ECHR).

An adjudicating body entrusted with the task of settling disputes concerning the interpretation and application of a particular convention cannot do so by considering that convention in isolation. The courts and tribunals called to settle disputes under the LOS Convention are bound by Article 293 of the Convention, under which the law applicable to them consists of the Convention "and other rules of international law not incompatible" with it.[2]

Yet it remains true that each court and tribunal, and also each of the international instruments these courts and tribunals are called to apply, has a distinct legal perspective. This makes relevant the choice of forum (if there is a choice) or the fact that a case is brought to one specific forum.

Given these overlapping fields of law, in addition to the different consequences of forum on outcomes of cases, I would like to consider the relevance of human rights in the Law of the Sea and also the relevance of the Law of the Sea from the viewpoint of human rights law. While pioneering studies by Oxman in 1997[3] and by Vukas in 2002[4] have explored the former aspect, the second has yet to be studied.[5] Recent cases in the ECHR and the discussion on specialized branches of international law and the perspectives of different adjudicating bodies make this examination timely and necessary.

---

2. United Nations Convention on the Law of the Sea [hereinafter LOS Convention], art. 293, Dec. 10, 1982, 1833 U.N.T.S. 397. Tullio Treves, *The International Tribunal for the Law of the Sea: Applicable Law and Interpretation, in* THE WTO AT TEN, THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM 490 (Giorgio Sacerdoti, Alan Yanovich, Jan Bohanes, eds., 2006).

3. Bernard. H. Oxman, *Human Rights and the United Nations Convention on the Law of the Sea, in* POLITICS, VALUES, AND FUNCTIONS: INTERNATIONAL LAW IN THE 21ST CENTURY: ESSAYS IN HONOR OF PROFESSOR LOUIS HENKIN 377 (Jonathan I. Charney, Mary Ellen O'Connel, Donald K. Anton, eds., 1997).

4. Budislav Vukas, *Droit de la mer et droits de l'homme, in* THE LAW OF THE SEA, SELECTED WRITINGS 71 (Budislav Vukas ed., 2004).

5. *But see*, Paul Tavernier, *La Cour européenne des droits de l'homme et la mer*, in LA MER ET SON DROIT, MELANGES OFFERTES A LAURENT LUCCHINI ET JEAN-PIERRE QUENEUDEC 575 (2003); Sophie Cacciaguidi-Fahy, *The Law of the Sea and Human Rights*, 9 PANOPTICA 1 (2007) *available at* http://www.panoptica.org.

II.
HUMAN RIGHTS FROM THE PERSPECTIVE OF THE LAW OF THE SEA

The LOS Convention is not a "human rights instrument," per se. Its main objectives, like those of the Law of the Sea in general, are different. Yet, concerns for human beings, which lie at the core of human rights concerns, are present in the texture of its provisions. Upon cursory analysis, one may recall provisions about assistance to persons or ships in distress, the obligation of rescue, and the exception to the rule against stopping and anchoring during innocent passage "for the purpose of rendering assistance to persons, ships or aircraft in danger or distress."[6]

Provisions setting limitations to powers of the coastal state to enforce its laws and regulations applicable in the exclusive economic zone find their starting point in the need to protect the individual. We should recall especially the prohibition on imprisonment or other forms of corporal punishment for fisheries violations;[7] the prescription that monetary penalties only be imposed for certain pollution violations;[8] and the requirement that parties who take action and impose penalties after arresting and detaining foreign fishing vessels promptly notify the flag State of these ships.[9]

The provisions of the preceding articles oblige the state that arrests a vessel or its crew for alleged infringements of rules concerning fisheries or pollution to promptly release the individuals upon the posting of a reasonable bond or other financial security. These articles also have the objective of safeguarding the freedom of the crewmembers and the rights of the ship and cargo owners to conduct economic activities. These provisions are strengthened in the framework of the LOS Convention by the option given to the flag State, or to any interested person on its behalf such as the ship owner, to request through expeditious international proceedings before the International Tribunal for the Law of the Sea, a judgment prescribing that the ship and its crew be promptly released upon the posting of a reasonable bond or financial guarantee. Tribunal proceedings are relatively frequent, showing that this procedure has been seen as useful in cases where the behaviour of the detaining State is perceived as unreasonable. States of all continents have participated as plaintiffs or defendants.

In its prompt release judgments, the Tribunal has underlined the relevant provisions' importance for the protection of the individual. In the *Camouco*[10]

---

6. LOS Convention, Dec. 10, 1982, 1833 U.N.T.S. 397, art. 18(2).

7. *Id.* at art. 73(3).

8. *Id.* at art. 230.

9. *Id.* at art. 73(4).

10. Comouco (Panama v. France), ITLOS Reports 2000, 10, 125 I.L.R. 164 (Int'l Trib. L. of the Sea 2000).

and *Monte Confurco*[11] judgments of 2000, the Tribunal gave a broad interpretation of the notion of "detention," as applied to the master and crew of the ship. The French authorities submitted the master, pending judgment, to *contrôle judiciaire* (court supervision), a regime requiring surrender of the master's passport and obliging the authorities verify its presence on a daily basis. The question was whether this practice amounted to "detention" for the purpose of the prompt release proceedings under Article 292 of the LOS Convention. The Tribunal held it did, observing that the master was "not in a position to leave Réunion" where the domestic proceedings were held.[12]

Special attention to the freedom of the master and crew also emerges in two other judgments: the *Juno Trader* case, Saint Vincent and the Grenadines v. Guinea Bissau, of 2004,[13] and the *Hoshinmaru* case, between Japan and the Russian Federation, of 2007.[14] In the former case, although the passports of crewmembers had been returned to their owners by the detaining State, the Tribunal observed that the crewmembers were "still in Guinea Bissau and subject to its jurisdiction."[15] On this basis, it ruled in the operative part that "the crew shall be free to leave Guinea-Bissau without any condition."[16] In the latter case, even though restrictions to the freedom of movement of the master (similar to those of the French *contrôle judiciaire*) had been lifted, the Tribunal, noting that master and crew were still in the Russian Federation, decided, similarly, that "the Master and the crew shall be free to leave without any condition."[17] The reason why the Tribunal insisted in ruling on the freedom of the master and the crew even in situations in which it refrained from declaring that it was in a state of detention under Article 292 may be to eliminate all possible obstacles, bureaucratic or otherwise, to the departure of the ship. This is like the argument the present author, as a judge of the Tribunal, made in a declaration appended to the *Hoshinmaru* judgment.[18] In other words, it could be read as complementing the release of the ship, instead of concerning the release of the master and crew from detention. Yet, it is undeniable that the relevant paragraphs can also be seen as provisions adopted *ex abundanti cautela* to stress how much the Tribunal is keen to protect the rights of the individuals involved in the cases submitted to it.

---

11. Monte Confurco (Seychelles v. France), ITLOS Reports 2000, 86, 125 I.L.R. 220 (Int'l Trib. L. of the Sea 2000).

12. *Camuoco*, 125 I.L.R. 164, at para. 71; *Monte Confurco*, 125 I.L.R. 220, at ¶ 90.

13. Juno Trader (Saint Vincent and the Grenadines v. Guinea Bissau), ITLOS, Reports 2004, 17, 128 I.L.R. 267 (Int'l Trib. L. of the Sea 2004), in the Order of 19 November 2004, 2004/1.

14. *Hoshinmaru* (Japan v. Russian Federation), Order of 9 July 2007, ITLOS Reports 2005-2007, 18, ¶12 (Int'l Trib. L of the Sea 2007).

15. *Juno Trader*, 128 I.L.R. at ¶ 25.

16. *Id.* at ¶ 32.

17. *Hoshinmaru*, at ¶ 33.

18. ITLOS Reports 2005-2007, ¶ 55.

In the *Juno Trader* judgment, the Tribunal indicated that the obligation of prompt release, which excludes imprisonment and corporal penalties, and requires notification of detention and subsequent actions, is connected to human rights considerations. It makes this belief clear even though the expression "human rights" is not used as in Article 73, paragraph 2 and the other provisions of the article where these protections are contained. The Tribunal stated "[t]he obligation of prompt release of vessels and crews includes elementary considerations of humanity and due process of law. The requirement that the bond or other financial guarantee must be reasonable indicates that a concern for fairness is one of the purposes of this provision."[19]

The Tribunal invoked "international standards of due process of law" in the 2007 *Tomimaru* case[20] in order to assess whether confiscation of a vessel had been made in such a way as to permit to the Tribunal to consider that the prompt release proceedings concerning the confiscated vessel were without object (para. 76).

The human rights principles or considerations mentioned so far are directly stated in the LOS Convention or can be inferred from its provisions. The prompt release judgments of the Tribunal for the Law of the Sea illustrate this. Such principles may become applicable in a case concerning the application and interpretation of the LOS Convention even when they do not appear in the latter's provisions. The Law of the Sea Tribunal stated this in its 1999 *MV Saiga Nr. 2* case.[21] In discussing whether the force used by Guinea in stopping and boarding the *Saiga* was excessive, the Tribunal declared that it had to take into consideration the circumstances of the arrest "in the context of the applicable rules of international law." It specified that:

> Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of Article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. *Considerations of humanity must apply to the Law of the Sea as they do in other areas of international law.*[22] (emphasis added)

Reference to considerations of humanity comes from the ICJ *Corfu channel* judgment,[23] and, as seen above, was also used by the Tribunal in the *Juno Trader* judgment as a substitute for human rights.

---

19. *Juno Trader*, ITLOS Reports 2004, 17, 128 I.L.R. 267, ¶ 77. Further developments on the human rights aspects of Article 73(2) are in the separate opinion of the present writer in his capacity of judge of the International Tribunal for the Law of the Sea, ITLOS Reports 2004, 71-74.

20. *Tomimaru* case (Japan v. Russian Federation), Judgment of 6 August 2007, ITLOS Reports, 2005-2007, 74 (Int'l Trib. L. of the Sea 2007).

21. M/V Saiga (No.2) (St. Vincent v. Guinea), ITLOS Reports 1999, 10, 120 I.L.R. 143 (Int'l Trib. L. of the Sea 1999).

22. Id. at ¶ 155.

23. Corfu Channel (U.K and N. Ir. v. Alb.), 1949 I.C.J. 4, at Merits (April 9).

Courts use multiple tools to incorporate human rights law into cases that fall within the LOS Convention. In the *Saiga* judgment, the Tribunal justified integrating international law beyond the scope of the Convention by making reference to Article 293 of the LOS Convention, which explicitly permits the application of other rules of international law not incompatible with the Convention. It may be added that additional instruments for incorporating rules and principles of human rights law into the Law of the Sea context rest in Article 31, paragraph 3(c) of the Vienna Convention on the Law of Treaties. Under this provision, in interpreting a treaty, "there shall be taken into account, together with the context... any relevant rules of international law applicable in the relations between the parties."[24] Leaving aside the complex discussion this provision raises, it can be observed that many conventional human rights rules may become relevant in interpreting the LOS Convention.

The resort to human rights or humanitarian considerations and rules in the context of the Law of the Sea is just at a beginning stage. Other situations may be envisaged that are neither foreseen explicitly or implicitly in the LOS Convention nor have been considered by international courts and tribunals. A possible area of the Law of the Sea where these considerations may be relevant and helpful concerns the provisions, set out in the articles on the exclusive economic zone and on the high seas, that certain activities legal under the LOS Convention shall be conducted with "due regard" to other activities that are equally legal. For instance, the freedom of navigation must be exercised with due regard to the freedom of fishing, and the freedoms of navigation and of fishing must be exercised with due regard to the freedom to lay cables and pipelines.

But how do we solve the problem of "due regard" in instances where it is impossible to conduct both activities simultaneously, thereby making prioritizing necessary? It would seem that a useful criterion would be that of favouring the activity that entails less risk to human life.[25] Existing conventions, such as the COLREG, support this humanitarian view.[26] Reference to human rights, or considerations of humanity, would also be appropriate under Article 31(2)(c) of the Vienna Convention, or Article 293 of the LOS Convention.[27]

---

24. Vienna Convention on the Law of Treaties, art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

25. Tullio Treves, *Le navire et la compatibilité entre les utilisations de la mer*, *in* SOCIETE FRANCAISE DE DROIT INTERNATIONAL, COLLOQUE DE TOULON, LE NAVIRE EN DROIT INTERNATIONAL 151 (1992).

26. Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREGS), Oct. 10 1972, 28 U.S.T. 3459, 1143 U.N.T.S. 346.

27. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 at art. 31(2)(c).

III.
THE LAW OF THE SEA FROM THE VIEWPOINT OF HUMAN RIGHTS

As human rights may be relevant in the application and interpretation of the Law of the Sea, the Law of the Sea may be relevant in the application and interpretation of rules concerning human rights. A court such as the ECHR may have to consider Law of the Sea rules as part of the applicable international law necessary to perform its task of interpreting and applying the relevant human rights instruments. The specific point of view of a human rights court, and of its primary task of applying a human rights instrument, emerges nonetheless in the way the ECHR applies the Law of the Sea.

The ECHR judgment of July 10, 2008 on the *Medvedyev et al v. France* case,[28] as well as the earlier *Rigopoulos v. Spain* of 12 January 1999,[29] are interesting to consider from this point of view. In these cases, ships flying the Cambodian and the Panamanian flags, respectively, were apprehended on the high seas by Navy ships of France and Spain. In both cases, the seizure was conducted in the framework of the fight against drug trafficking and with the authorization of the flag State.[30] Such authorization had been requested on the basis of information that the vessels carried narcotic drugs. This was in fact the case, as huge quantities of drugs were found on board or seen being thrown overboard. In both cases, the members of the crew were taken into custody on the Navy ship, brought to a port of the arresting State, and later submitted to criminal proceedings.

In both cases the crew members claimed that the State detaining them had violated Article 5(3) of the European Convention on Human Rights according to which, *inter alia*, arrested or detained persons "shall be brought promptly before a judge or other officer authorized by law to exercise judicial power."[31] The time elapsed between the moment the vessels were boarded and the crew members taken into custody and the point at which they were presented to a judge (16 days in the *Rigopoulos* case and 13 in the *Medvedyev* case) was claimed to be incompatible with the requirement of "promptitude" set out in the European Convention's provision. The Court stated in both cases that the time elapsed was "in principle incompatible" with such requirement. It also stated that only "exceptional circumstances" could justify such long detention.[32] The Court held that "exceptional circumstances" prevailed in both cases because the arrest was made at a distance of 5,500 kilometres from the Spanish territory in the 1999

28. Medvedyev and Others v. France, no. 3394/03 Eur. Ct. H.R. (2008). Judgment by the Eur. Ct. H. R. Grand Chamber is pending.

29. Rigopoulos v. Spain (dec.), no. 37388/97 Eur. Ct. H. R. (1999).

30. *Medvedyev*, no. 3394/03 Eur. Ct. H.R. ; *Rigopoulos*, no. 37388/97 Eur. Ct. H. R.

31. European Convention on Human Rights 1950, Europ. T.S. No. 5.

32. *Medvedyev*, no. 3394/03 Eur. Ct. H.R., ¶ 35.

case and at a distance of the same order from the French territory in the 2008 case. As the Court said in the *Medvedyev* judgment, in both cases "it was materially impossible to bring the applicant 'physically' before such an authority any sooner. "[33] Consequently, there was no violation of Article 5(3).[34]

The Court in both the *Rigopoulos* and *Medvedyev* cases recognized that detentions lasting for two weeks are incompatible with human rights law requiring detained persons to be "brought promptly" to a judicial authority.[35] However, it considered the need of an arrest on the high seas, in the framework of cooperation in the fight against drug trafficking, involving a considerable distance between the location of arrest and a land territory, created an exceptional circumstance that justified derogation from the governing human rights law. These circumstances demonstrate the relevance of maritime situations in interpreting a human rights law provision.

In the *Rigopoulos* case there was no discussion as to whether the legality of the Spanish arrest of the Panamanian vessel had any influence on the compatibility of the detention of the crew with the European Convention. The judgment just noted that Spain had obtained the authorization of the Panamanian Embassy in Madrid in conformity with Article 17(3) and (4) of the UN Convention against the illicit traffic of narcotic drugs and psychotropic substances made at Vienna on 20 December 1988, in force between Panama and Spain.[36]

To the contrary, this issue of compatibility was a subject of contention in the *Medvedyev* case. The applicant crew members pleaded a violation of Article 5(1) of the European Convention, according to which, *inter alia*: "No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law."[37] The applicant claimed the actors making the arrest did not satisfy the requirement of that procedure under both international and domestic law.[38] In their view no legal basis for arrest and detention could be found in the LOS Convention, because Article 108(2) provides that a State suspecting that a ship flying its flag is engaged in drug trafficking "may request the cooperation of other States to suppress such traffic."[39] This was not the case because Cambodia's acceptance of France's authorization request could not be construed as a request of cooperation made by Cambodia to France. The UN Convention of 1988 could not be invoked either, as Cambodia was not a party to it.

The ECHR, while stating that Article 5(1) concerns "domestic legality,"

33. *Medvedyev*, no. 3394/03 Eur. Ct. H.R., ¶ 67.

34. *Id.*

35. *Rigopoulos*, 12th para. of the "en droit" section"; Medvedyev, ¶¶ 64-65.

36. *Rigopoulos*, 2d para. of the "circonstances particulières de l'affaire" section.

37. *Medvedyev*, App. No. 3394/03 at ¶ 62.

38. *Id.*

39. *Id.* at ¶ 27.

underlined that it must consider all rules applicable to the interested persons "including, when necessary, those whose source is in international law."[40] The ECHR then found that "international law sets out the principle of freedom of navigation on the high seas, save the control and coercion powers of the flag State."[41] Finally, states may exercise such controls "even without the prior consent of the flag State" in the cases of piracy, slave transport, unauthorized broadcasts, or when the ship has no nationality or has the same nationality of the flag State, "or when specific treaties so provide."[42]

The 1988 UN Convention would seem to be – in the view of the Court – one such treaty. The Court classified the provisions of that Article concerning the authorization to take appropriate measures as "derogations" to the "law of the flag" principle.[43] However, as Cambodia was not a party to the 1988 Convention, the Court had to assess the legality of the arrest, and France's request for cooperation from Cambodia, from the perspective of authorization to arrest the vessel based on Article 208(1) of the LOS Convention, which provides for cooperation in the suppression of illicit traffic of narcotic drugs. The ECHR considered, however, that while France's agreement with Cambodia, based on Article 208(1) of the LOS Convention, was a sufficient legal basis for the interception and the taking of control of the Cambodian vessel, this was not the case in regards to "all consequences" of the arrest of the vessel, for example depriving the crewmembers of their liberty for thirteen days. Consequently, applying the European Convention led to the conclusion that France had infringed Article 5(1). In the operative part, the ECHR held that "the determination of the infringement of Article 5(1) gives in itself a sufficient equitable satisfaction for the moral damage suffered by the plaintiffs."[44]

The ECHR's interpretation of the Cambodian note of authorization is also relevant. The Cambodian note authorized the French authorities "to intercept, control and institute legal proceedings against the ship *Winner* flying the Cambodian flag."[45] In the Court's view, this did not include the detention of the crewmembers. However, the Court could arrive at a different view if it considered detention part and parcel of a process included in legal proceedings.

The point that is more interesting to make is, however, a different one. The key conclusion of the reasoning, namely that the legality of the arrest of the vessel depended on the authorization of the flag State, seems correct. However, the steps taken in order to reach this point raise doubts from the point of view of an international lawyer specializing in the Law of the Sea. The approach the Court

40. *Id.* at ¶ 15.

41. *Id.*

42. *Medvedyev*, App. No. 3394/03 at ¶ 54.

43. *Id.* at ¶ 56.

44. *Id.*

45. *Id.* at ¶ 56.

took in regard to the LOS Convention and the 1988 UN Convention on narcotic drugs does not seem to adopt as a starting point the idea that the flag State is free to authorize other States to exercise some or all its powers on its ships, and that all States are free to request such authorization to the flag State. The approach seems to be that a request for and the granting of an authorization needs a legal basis: be it Article 208 of the LOS Convention or Article 17 of the 1988 Convention.

If an international tribunal had decided whether the French had rightfully arrested the Cambodian vessel and rightfully detained its crewmembers, it would have done so by looking directly at the Cambodian authorization and deciding on the basis of whether the authorization covered the action taken by France. The tribunal would have seen Article 208 of the LOS Convention as a provision encouraging cooperation. It would have seen Article 17 of the 1988 Convention as a provision aiming at facilitating and rendering more efficient the cooperation based on the request and grant of an authorization by stressing that the flag state may make the authorization conditional, shall respond expeditiously to requests, and shall designate an authority competent for receiving such requests. Even the obligations ensuing from Article 17 are conditional on the fact that a state can freely request an authorization and a state can freely grant or withhold an authorization.

The ECHR is not, however, an international tribunal authorized to decide on the legality of a ship's arrest on the high seas. Such legality is relevant for it for specific purposes, which are concerned with the rights of individuals. As the Court states, its task includes consideration of the "quality" of the legal rules applicable to the interested parties: "Such quality entails that rules authorizing privation of liberty must be sufficiently accessible and precise in order to avoid any danger of arbitrariness."[46] This explains why a human rights specializedcourt will prefer written to customary law and interpret provisions building on freedoms of States and aiming at facilitating their cooperation, as rules authorizing certain behaviours.

The *Women on Waves* case, decided on 3 February 2009,[47] shows another facet of the way the ECHR utilizes the Law of the Sea. In this case one Dutch and two Portuguese Non-Governmental Organizations (NGOs) argued that the Portuguese government had violated the ECHR by prohibiting access to Portuguese waters for its chartered ship the *Borndiep*. The ship was flying the Dutch flag when the Portuguese government sent a warship to deny it access to its waters. The trip was aimed at conducting activities in favour of legalizing abortion, which was then prohibited in Portugal. As such, the NGOs claimed that Portugal had violated their right of expression and freedom of peaceful meeting

46. *Id.* at ¶ 53.

47. Women On Waves and Others v. Portugal. no. 31276/05 Eur. Ct. H. R. (2009). French only.

and of association under Articles 10 and 11 of the ECHR. The Portuguese government argued that its interference with the right of innocent passage of the *Borndiep* was legal under Articles 19 and 25 of the LOS Convention because the passage entailed violations of Portuguese law. Moreover, such measures corresponded to restrictions on passage "prescribed by law as are necessary in a democratic society. . .for the protection of health or morals" in conformity with Articles 10(2) and 11(2) of the ECHR.

The Court stated at the outset that there had been interference with the rights of the requesting parties under the invoked articles. The question to be resolved concerned whether such interference was "prescribed by law" and "necessary in a democratic society." The Court accepted the view, shared by the parties, that the interference of the Portuguese Government was "prescribed by law" in Articles 19(2)(g) and 25 of the Law of the Sea Convention.[48] It is noteworthy that the ECHR considers the Law of the Sea Convention as "the law" for the purpose of assessing the legality of certain acts of States parties to the European Convention. The approach taken regarding Article 5(1) of the European Convention in the *Medvedyev* case considered above is confirmed.

The Court then concludes, after analyzing a complex array of case law regarding freedom of expression, that the acts of interference with the navigation of the *Borndiep* were not "necessary in a democratic society."[49] In assessing the lack of proportionality of the means adopted by Portugal, the Court noted: "the State certainly had at its disposal other means to attain the legitimate objectives of defending order and protecting health than to resort to a total interdiction of entry of the *Borndiep* in its territorial waters, especially by sending a warship against a merchant vessel."[50] It would be interesting to see whether this argument would be valid in a case regarding interference with innocent passage that was submitted to a court or tribunal that had jurisdiction over cases concerning the interpretation and application of the Law of the Sea Convention.

In another recent judgment the ECHR has had to determine whether a guarantee of three million Euros, fixed by the Spanish judicial authorities for release of Captain Mangouras of the vessel *Prestige* from detention constituted a violation of Article 5(3) of the European Convention.[51] Article 5(3), which guarantees release of detainees prior to trial with allowance for reasonable bail, had to be interpreted by the European Court with respect to relevant case law, in particular the *Neumeister* case of 1968.[52] The Court affirmed that although the amount fixed for release of the captain was admittedly high, it did not contra-

48. *Id.* at ¶ 38.

49. *Id.* at ¶¶ 36-44.

50. *Id.* at ¶ 43, transl. by Tullio Treves.

51. Mangouras v. Spain, no. 12050/04 Eur. Ct. H. R. (2009). The case has been submitted to the Grand Chamber of the European Court, whose judgment is pending.

52. Neumeister v. Austria, (ser. A) (No. 8) Eur. Ct. H. R. (1968).

vene the Convention. The Court stated two main reasons for this decision. The first is the fact that the guarantee, after 83 days of detention, had been paid by insurer of the ship owner "by virtue of the contractual legal relationship which existed between the ship's owners and their insurers."[53]

The second reason, more relevant to the present Article, has to do with the international concern for marine pollution. The court relies on a variety of domestic and international law, including the LOS Convention, and concludes that it cannot overlook the growing and legitimate concern both in Europe and internationally about offences against the environment. It notes in that connection States' powers and obligations regarding the prevention of marine pollution and the unanimous determination of States and European and international organisations to identify those responsible, ensure that they appear for trial and impose sanctions on them.[54]

Values emerging in the Law of the Sea generally are assessed by the EHCR to determine whether they should be balanced against values set out in the European Convention.

IV.
CONCLUSIONS

The Law of the Sea and the law of human rights are not separate planets rotating in different orbits. Instead, they meet in many situations. Rules of the Law of the Sea are sometimes inspired by human rights considerations and may or must be interpreted in light of such considerations. The application of rules on human rights may require the consideration of rules of the Law of the Sea.

When cases involving these overlaps are subject to judicial assessment, the nature and task of the adjudicating body may be decisive. Each adjudicating body has its own perspective, which may bring it to read the same rules differently. This is not, in my view, fragmentation of international law. It is recognition of the complexity of the law and a consequence of the fact that a growing number of specialized courts and tribunals exist for settling disputes arising within this complex regime.

However, questions in which the Law of the Sea and the law of human rights overlap are not always brought to a specialized Law of the Sea or human rights court or tribunal. Cases may be brought to the International Court of Justice under general jurisdictional clauses, which exempt the Court from having to adopt the point of view of the specific instrument under which the case is submitted to it. In these cases the ICJ should reconcile the two sets of principles, or state a justifiable preference for one or the other. Legal advisers of the States

53. *Mangouras*, No. 12050/04 Eur. Ct. H. R. ¶ 39.

54. *Id.* at ¶ 41.

involved, even though duty-bound to plead for the interest of their State, will know that such a balanced result will be one on which both sides may agree.

To obtain such compatibility or to justify such preferences may not be easy. Clear indications of these difficulties are apparent in the recent discussions in the *Tampa*[55] and in the *Cap Anamur*[56] cases, in which Law of the Sea rules on innocent passage and distress had to be reconciled with the human rights principle of *non-refoulement.* Similar difficulties arise in seeking to harmonize naval interdiction programs with *non-refoulement* as well as other human rights of the persons involved.[57]

A recent case highlights similar problems in the field of the fight against piracy. It concerns the Danish Navy ship, *Absalon,* which captured on September 17, 2008, ten suspected pirates in the waters off Somalia. After six days of detention and confiscation of their weapons, ladders and other implements used to board ships, the Danish government decided to free them by putting them ashore on a Somali beach. The Danish authorities had come to the conclusion that the pirates risked torture and the death penalty if surrendered to any Somali authorities. This treatment was unacceptable, as Danish law prohibits extraditing criminals when they may face the death penalty. Additionally, it was not tenable to submit them to trial in Denmark, as it would be difficult to deport them back to Somalia after their sentences were served.[58] It is clear that human rights considerations and expediency prevailed over the fight against piracy.

Subsequent developments have shown that Denmark is not isolated in its view that human rights considerations justify reluctance in prosecuting pirates. The European Union and Kenya concluded an agreement in 2009 regarding the surrender of pirates captured off the coast of Somalia by ships of the European naval "Operation Atalanta." This agreement specified that no person may be transferred to a third State unless the conditions for the transfer have been agreed with that third State in a manner consistent with relevant international law, notably international law of human rights, in order to guarantee in particular that no one shall be subjected to the death penalty, to torture or to any cruel, inhuman or degrading treatment.[59] It is clear that human rights concerns are

55. Ruddock v. Vadarlis (2001) FCA 1329 (Austl.).

56. German Aid Crew Tried in Sicily, BBC News, Nov. 27, 2006, *available at* http://news.bbc.co.uk/2/hi/europe/6188838.stm.

57. *See* Seline Trevisanut, *The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection*, 12 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 205, 222-46 (2008).

58. *See* Marcus Hand, *Danish Navy Releases 10 Somali Pirates*, LLOYD'S LIST, Sep. 25, 2008, *available at* http://www.lloydslist.com/ll/news/danish-navy-releases-10-somali-pirates/20017574257.htm; Alletta Williams, *Worldwide Threat to Shipping, Mariner Warning Information, in* NATIONAL GEOSPATIAL INTELLIGENCE AGENCY (2008) at para. 10, *available at* http://www.nga.mil/MSISiteContent/StaticFiles/MISC/wwtts/wwtts_20081017100000.txt.

59. Exchange of letters between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy

now inextricably intertwined with the concerns of the Law of the Sea.

and detained by the European Union-led Naval Force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer, EU-Kenya, Mar. 6, 2009, 48 ILM 747. *See* introductory note by Eugene Kontorovich. For further developments and references on piracy *see* Tullio Treves, *Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia*, 20 Eur. J. Int'l. L. 399 (2009).

Berkeley Journal of International Law

Volume 28 | Issue 1 Article 2

2010

When Two Laws are Better than One: Protecting the Rights of Migrant Workers

Marsha Chien

When Two Laws are Better than One: Protecting the Rights of Migrant Workers

Marsha Chien*

Does the force of one country's laws stop at its own borders? Mexican nationals working in the United States routinely shuffle between their country of origin and their country of employment. With their families in Mexico and limited paths to U.S. citizenship, Mexican guest workers and unauthorized workers have no choice but to continually migrate across the border for work.[1] However, in forging "transnational identities" without regard to political borders, migrant workers traveling between Mexico and the U.S. are left vulnerable to exploitation by employers in search of a source of cheap labor.

This Article seeks to explore the question of whether Mexico has the power to protect its citizens when they travel to the U.S. for work. Stated in different terms, this Article considers whether U.S. employers must abide by Mexican law when recruiting Mexican nationals to work in the U.S. While it is relatively well-settled that employers must abide by U.S. laws when foreign workers are working in the U.S.,[2] the question of which country's laws apply to the time before and after actual employment, that is, when foreign workers are in transit, remains uncertain. The answer to this relatively straightforward question has a significant impact on the rights of foreign workers who migrate to the U.S. every year.

---

* J.D. Candidate, 2010, University of Pennsylvania Law School; B.A. International Economics, Georgetown University. I am deeply indebted to Professor Kate Griffith at Cornell University and Professor Tobias Wolff at the University of Pennsylvania who both prompted the topic of this Article and commented on its many revisions. I would also like to thank the organizers of the 2008 National Farmworker Law Conference from which I took much inspiration as well as Monica Ager and the Berkeley Journal of International Law for their meticulous review. All errors are my own.

1. Indeed, under H2-A and H2-B programs, Mexican guest workers are legally required to return to Mexico during the off-season. *See* 8 C.F.R. § 214.2(h)(5)(viii)(C) (2009) ("[A]n alien's stay as an H-2A nonimmigrant is limited by the term of an approved [employment] petition.").

2. Notably, even when U.S. laws apply to the employment relationship there is a concern that migrant workers are not adequately protected. U.S. lobbying groups, whose interests do not include the protection of foreign workers, largely shape U.S. laws. To the extent that protections exist for foreign workers, their primary purpose is to protect the domestic labor force from "cheap" foreign labor. *See infra* Part I.

The precarious existence of workers migrating between the U.S. and Mexico stems from the fact that it is unclear *when* workers are protected by U.S. laws, when they are protected by the laws of their country of origin, and when they are covered by both. Given the transnational identity of migrant workers, it is important for legal advocates to be familiar with all the rights migrant workers may assert in U.S. courts. There may be reasons why a migrant worker prefers the law of their country of origin.

For instance, a U.S. law may be ambiguous or silent as to whether U.S. employers should pay social security or relocation costs for a worker that it recruits in Mexico. This state of flux may be because U.S. laws do not directly address the issue, or it may be that circuits differ in their interpretation of the protections afforded under U.S. law. In fact, circuits are currently divided with respect to the latter question of who bears the cost of migrant workers who relocate from their country of origin to the U.S. While the Eleventh Circuit finds the employer bears the burden under the Fair Labor Standards Act (FLSA), the Fifth Circuit finds the employee is responsible for relocation costs.[3]

Regardless which FLSA interpretation the Supreme Court ultimately agrees with, this Article examines the potential for migrant workers recruited to work in the U.S. while living in their home country to assert a claim in U.S. courts under their home country's law. Although migrant workers have brought supplemental claims under foreign law, the courts have not directly addressed the extent to which a home country's laws protect migrant workers.[4] This Article presents the argument that the employment relationship between a migrant worker and his/her employer is regulated by *both* U.S. employment law *and* the employment law of the worker's country of origin. As such, migrant workers may bring a cause of action in U.S. federal courts under U.S. federal law as well as a cause of action under a foreign law based on supplemental jurisdiction.[5]

Part I provides a background on the general condition of migrant workers' rights under U.S. federal and state law and identifies several deficiencies in the protections afforded to migrant workers. Part II introduces a particular circumstance where Mexican law may address deficiencies in U.S. law—that is, when recruited migrant workers from Mexico incur "relocation costs" in traveling from Mexico to their final place of employment. While U.S.

3. *Compare* Arriaga v. Florida Pacific Farms, 305 F.3d 1228, 1242-43 (11th Cir. 2002) *with* Castellanos-Contreras v. Decatur Hotels, LLC, 576 F.3d 274, 284 (5th Cir. 2009).

4. *See, e.g.*, Plaintiffs' Memorandum of Law in Support of Motion for Partial Summary Judgment at 15, Arriaga v. Florida Pacific Farms, No. 99-1726 (M.D.F.L. 2002); Plaintiffs' Memorandum of Law in Opposition to Defendants' Joint Motion for Summary Judgment at 13, Arriaga v. Florida Pacific Farms, (M.D.F.L. 2002) (raising Article 28 in conjunction with a FLSA claim).

5. This Article considers suits brought in federal court only. It should be noted, however, that the choice of law analysis discussed below may also apply in state court.

regulations are largely silent on the issue,[6] Article 28 of Mexico's Federal Labor Law places the burden of these costs on employers. However, in identifying the relevant provision, Part II begs the question – can migrant workers bring a cause of action in U.S. courts under Mexican law in the first place?

Part III presents the legal framework for analyzing when a supplemental foreign law cause of action may be brought in U.S. federal court. The first step is to consider whether the foreign law claims arise from the same case or controversy as the U.S. federal law claim. If this threshold step is met, the federal court will secondly apply a choice of law analysis in considering whether the foreign law is meant to apply extraterritorially. Finally, the third step is to consider whether a conflict exists between the foreign law and any relevant state law. If these three steps are satisfied, U.S. federal courts have discretion to hear a foreign law cause of action in conjunction with a U.S. law cause of action under its supplemental jurisdiction.[7]

Part IV applies the legal framework to the particular circumstance presented in Part II. First, Article 28 of the Mexican Federal Labor Law arises out of the same case or controversy as a U.S. federal law claim such that a U.S. court may exercise supplemental jurisdiction. Second, Article 28 is meant to apply extraterritorially given the language of the provision and given the effects of the employment relationship in Mexico. Third, there is a strong argument that no conflict exists between Article 28 and relevant U.S. state laws. Since the Article 28 claim and the U.S. federal law claim arise out of the same case or controversy, and none of the discretionary exceptions apply, this Article concludes that migrant workers may bring a supplemental claim under Article 28 of the Mexican Federal Labor Law.

I.
INTRODUCTION: MIGRANT WORKERS AND U.S. LAWS

A. Who are Migrant Workers?

The United Nations defines a "migrant worker" as "a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national."[8] Notably, it does not consider whether the person is undocumented or documented, unauthorized or authorized to work. Thus, under the U.N. definition, a foreigner working in the U.S. as a professional with a work visa would be deemed a "migrant worker." For the purposes of this Article, however, I will use the term narrowly to refer only to

6. A limited exception exists with respect to the relocation costs of H2-A guest workers. See *infra* note 87 and accompanying text.

7. *See* 28 U.S.C. § 1367.

8. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, Art. 2, U.N. Doc. A/RES/45/158 (Dec. 18, 1990).

people who are recruited in Mexico for *low-wage* positions in the U.S.[9] Within this context, a "migrant worker" may be one recruited in Mexico and either 1) a guest worker, that is, one who is legally hired under H2-A and H2-B temporary programs, or 2) an unauthorized worker, as in one who possesses no legal proof of any right to be present in the U.S.[10] This Part will consider each status in turn.

1. Guest Workers

The development of U.S. guest worker programs is intricately entwined with U.S. history. The program was an example of immigration policy's long historical connection with the labor demands of U.S. agribusiness. The first Mexican guest worker program was established in 1917 in response to the Immigration Act of 1917. The Act, itself a response to xenophobia, barred the immigration of non-whites in an effort to stem the influx of workers from Asian countries.[11] In an effort to address the resulting labor shortage in the agricultural industry, the 1917 guest worker program carefully classified Mexican nationals as "white"[12] and paved the way for an average of 162,000 workers from Mexico to enter annually.[13]

Throughout the 20th century, the guest worker programs waxed and waned in response to the needs of the U.S. when it was at war, at peace, and undergoing economic growth as well as depression. By 1931, a different kind of labor crisis emerged and Mexican nationals faced a similar fate as their Asian predecessors. The Great Depression led to rampant unemployment and resentment of Mexican "interlopers" led to the forcible removal of thousands of Mexican workers.[14] It was not until World War II that the trend reversed. The Emergency Farm Labor Program, infamously known as the Bracero program, originated from fear that

9. While migrant workers are recruited from a variety of other countries, including Guatemala and El Salvador, the focus of this Article will be on migrant workers from Mexico who make up the bulk of the migrant worker population. In the future, it may be worthwhile to consider a similar analysis based on Guatemala's and El Salvador's labor provisions.

10. Temporary work visas for professionals and other specialty work are outside the scope of this Article. Non-laborers, such as physicians and nurses, are also permitted to enter the U.S. on temporary work visas. However, this Article focuses on low-wage, low-skilled occupations.

11. *See* Lauren Gilbert, *Fields of Hope, Fields of Despair: Legisprudential and Historic Perspectives on the AgJobs Bill of 2003*, 42 HARV. J. ON LEGIS. 417, 426 (2005) (detailing the origins of the temporary guest worker program).

12. *Id.*

13. Alice J. Baker, *Agricultural Guestworker Programs in the United States*, 10 TEX. HISP. J.L. & POL'Y 79, 83 (2004).

14. *See* Gilbert, *supra* note 11, at 426 ("[W]ith the assistance of the U.S. Department of Labor, [west coast growers] turned to Mexican workers in 1917, believing that these workers could be recruited for temporary work and then deported to Mexico when their services were no longer needed.").

an agricultural labor shortage would undermine U.S. national defense.[15] Notably, the agreement finally reached by the U.S. and Mexican governments regarding the Bracero program explicitly recognized Article 28 as applying to the employment relationship between U.S. employers and the workers recruited in Mexico.[16] Enacted in 1942 as an "emergency," the Bracero Program "imported" some four million Mexican-nationals to perform seasonal agricultural work on U.S. farms.[17] The program ended in 1964 amongst outcries of abuse of foreign workers and criticisms that it undermined the wages and working conditions of U.S. citizens.[18]

Yet, despite the proclaimed victory, 1964 was not the end of the guest worker program. Today's H2-A and H2-B guest worker programs are largely considered descendents of the Bracero program.[19] Indeed, at times, the guest worker programs have expanded under the pretext of an "emergency" just like its predecessor.[20] In 2002, 102,615 laborers legally entered the U.S. under the H2-A and H2-B visa programs.[21] Finalized under the Immigration Reform and Control Act of 1986 (IRCA), the H2-A visa program applies to temporary agricultural workers and the H2-B visa program applies to non-agricultural workers.[22] The programs permit employers who anticipate a shortage of U.S. workers to bring nonimmigrant workers to the U.S. for up to one year to perform work of a temporary or seasonal nature.[23]

Like the Bracero program, the H2 visa programs are often criticized. For some, the visa programs undercut the demand for domestic workers and rendering foreign workers vulnerable to exploitation.[24] For others, the visa

15. Baker, *supra* note 13, at 84.

16. *See infra* note 232-237 and accompanying text.

17. OXFAM AM., LIKE MACHINES IN THE FIELDS: WORKERS WITHOUT RIGHTS IN AMERICAN AGRICULTURE 42 (2004).

18. Baker, *supra* note 13, at 84.

19. *Id.* at 87.

20. *See, e.g.*, Rona Kobell & Chris Guy, *House passes extension for visas: Md. Seafood processors hope foreign workers can begin arriving in weeks*, BALT. SUN, May 6, 2005, *available at* http://www.baltimoresun.com/news/maryland/bal-crabs0506,0,235665.story (reporting on a bill that allowed the H2-B cap to be waived with respect to returning H2-B workers due to a labor shortage emergency in the seafood industry).

21. *See* Immigration and Naturalization Service, 2002 Yearbook of Immigration Statistics 118-119 tbl.26 (2003), *available at* http://uscis.gov/graphics/shared/aboutus/statistics/TEMP02yrbk/Temp2002.pdf (tracking the non-immigrants admitted to the U.S. from 1985 to 2002).

22. *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986).

23. *See* OXFAM AM, *supra* note 17.

24. For a more detailed discussion on the latter argument, *see generally* Andrew Scott Kosegi, *The H2-A Program: How the Weight of Agricultural Employer Subsidies is Breaking the Backs of the Domestic Migrant Farm Workers*, 35 IND. L. REV. 269 (2001).

programs encourage exploitative business practices.[25] By barring guest workers from switching employers, guest workers endure dangerous work conditions and low wages in the hopes that their employers will hire them again and petition for a new visa for them in the following season.[26] Excluded from safety net programs,[27] guest workers, often in need of jobs, are unwilling to assert the limited employment rights that they are afforded. Given this, there may be reasons for the Mexican government to believe its law extends to protect its citizens recruited to work in the U.S. much like it argued Article 28 applied under the Bracero program.

2. Unauthorized Workers

For many reasons, the story of unauthorized workers is harder to tell. Often living in fear of deportation, unauthorized workers have always had an incentive to hide and avoid government attention.[28] As such, even the most basic question—how many unauthorized workers are there?—is riddled with empirical problems.[29] While this Article focuses on a subset of unauthorized workers, that is those actually recruited in Mexico to work in the U.S., much of the discussion below applies to unauthorized workers generally.

Much like the modern guest worker program, the rise of unauthorized workers in the U.S. can be linked to the Bracero program.[30] As many more people sought to enter the U.S. than were legally permitted under the Bracero program, an illegal population quickly emerged.[31] Workers seeking jobs in the U.S. learned to bypass the bribes demanded by Bracero recruiters by simply crossing the border illegally.[32] The trend was facilitated by haphazard policies by the Immigration and Naturalization Service (INS), which in some cases granted on-the-spot legalization of Mexican farmworkers.[33]

---

25. For in-depth coverage on the guest worker program from recruitment to employment, *see* Felicia Mello, *Coming to America*, THE NATION, June 7, 2007.

26. OXFAM AM, *supra* note 17, at 43.

27. Mary Lee Hall, *Defending the Rights of H-2A Farmworkers*, 27 N.C. J. INT'L L. & COM. REG. 521, 523 (2002) (noting the exclusion of H2-A workers from safety net programs).

28. *See* Lenni B. Benson, *The Invisible Worker*, 27 N.C. J. INT'L L. & COM. REG. 483, 484 (2002) (commenting on the difficulties of "[c]ounting the invisible").

29. *Id.* at 485 n.4.

30. *See* Cristina M. Rodriguez, *Guest Workers and Integration: Toward A Theory of What Immigrants and Americans Owe One Another*, 2007 U. CHI. LEGAL F. 219, 274 (2007) (describing the emergence of a large undocumented population as one of the primary legacies of the Bracero experiment).

31. Philip L. Martin & Michael S. Teitelbaum, *The Mirage of Mexican Guest Workers*, 80 FOREIGN AFF. 117, 123 (2001) ("Today, scholars largely agree that the 22 years of bracero employment created the conditions for the subsequent boom of unauthorized Mexican migration.").

32. *See id.*

33. KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S. 2 (1992) (noting that, by 1950, the number of Mexicans "legalized" and "paroled" to growers

When the Bracero program finally ended, the precedent was entrenched. Given the lack of job opportunities in Mexico and the promise of better pay in the U.S., the illegal flows continued. Today, unauthorized workers from around the world are recruited as farmworkers, day laborers, domestic workers, and construction workers.[34] While the U.S. Census Bureau admitted to not knowing how many unauthorized migrants were unaccounted for in its 2000 census,[35] the U.S. Department of Homeland Security (DHS) calculates 11.8 million unauthorized immigrants lived in the United States in January 2007.[36] From 2000 to 2007, 470,000 people entered the United States each year without documentation.[37]

The majority of unauthorized workers are Mexican-nationals.[38] In fact, the American Immigrant Law Foundation reported that, since the 1990s, nearly every industry has seen a "dramatic increase in [the U.S.'s] reliance on Mexican workers."[39] Of the 11.8 million unauthorized immigrants living in the U.S. in January 2007, seven million were Mexican-nationals. Of the 470,000 in flows, approximately 330,000 were from Mexico.[40]

Thus, it is widely understood that the U.S. maintains a large population of

---

as braceros was five times higher than the number actually recruited from Mexico).

34. Interestingly, the distribution of the unauthorized workforce across occupations differs from that of native-born workers, Jeffrey S. Passel, Pew Hispanic Center, *The Size and Characteristics of the Unauthorized Population in the U.S.*, ii, *available at* http://pewhispanic.org/files/reports/61.pdf (2006). For example, nearly a third of unauthorized workers were employed in service occupations compared to one-sixth of domestic workers.

35. *See* Kevin E. Deardorff & Lisa M. Blumerman, *Evaluating Components of International Migration: Estimates of the Foreign-Born Population by Migrant Status in 2000*, 3 (U.S. Census Bureau Population Division, Working Paper No. 58, 2001), *available at* http://www.census.gov/population/www/documentation/twps0058.html (assuming a 15% undercount for the foreign-born population given that "[r]esearches have not agreed on how many unauthorized migrants were missed in the census").

36. U.S. Dep't of Homeland Security, Office of Immigration Statistics, *Estimates of the Unauthorized Population Residing in the United States: January 2007*, 1 (Sept. 2008), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2007.pdf. For other estimation of the size of the unauthorized worker population, *see* B. Lindsey Lowell & Roberto Suro, Pew Hispanic Center, *How Many Undocumented: The Numbers Behind the U.S.-Mexico Migration Talks* 5 (2002) *available at* http://www.pewhispanic.org/site/docs/pdf/howmanyundocumented.pdf.

37. *Id.*

38. For a more detailed discussion on the demographics of immigrant workers, *see* Analiz Deleon-Vargas, *The Plight of Immigrant Workers and the Fifth Amendment*, 10 SCHOLAR 241 (2008). For more information of where Mexican migrant workers are living and working, *see* Adam Brower, *Rethinking NAFTA'S NAALC Provision: The Effectiveness of its Dispute Resolution System on the Protection of Mexican Migrant Workers in the United States*, 18 IND. INT'L & COMP. L. REV. 153, 162 (2008).

39. American Immigration Law Foundation, *Mexican Immigrant Workers and the U.S. Economy: An Increasingly Vital Role* 1, 7, Immigration Policy Focus, Sept. 2002, *available at* http://www.immigrationpolicy.org/images/File/infocus/Mex%20Imm%20Workers%20&%20US%20Economy.pdf.

40. *Id.*

unauthorized workers from Mexico. This Article, however, focuses specifically on those unauthorized workers first recruited in Mexico to work in the U.S. It considers the extent to which those recruited in Mexico may assert a claim under Mexican law for the period when traveling to his or her place of employment. While U.S. law has attempted to provide the same protections to migrant workers in the U.S. as it provides to U.S. workers, there may be an argument that an additional protection is needed for those recruited to work thousands of miles from their home and in another country.

B. How are Migrant Workers Protected (or Not Protected) under U.S. and State Laws?

"You only have the right to work, not to anything else."

—Luisa Fernandez, a tomato picker from Immokalee, Florida[41]

Whether explicitly excluded from employment protections by federal statutory language or effectively excluded due to inadequate government enforcement, migrant workers are routinely subject to poor work conditions and abuse by employers. This stems from the fact that many migrant workers are farmworkers who are uniquely exempt from a host of federal labor protections.[42] Additionally, unauthorized workers are barred from a variety of public benefits and government insurance programs.[43] For example, they are barred from receiving the earned income tax credit,[44] unemployment insurance,[45] and housing subsidies.[46] As illustrated by Luisa Fernandez's statement, migrant workers often lack employment protections and access to

41. OXFAM AM, *supra* note 17, at 38.

42. In 1997-1998, the U.S. Department of Labor reported that 52% of all farmworkers were unauthorized workers. *See* Kala Mehta et. al., *Findings from the National Agricultural Workers Survey (NAWS) 1997-1998: A Demographic and Employment Profile of United States Farmworkers*, viii (2000), *available at* http://www.dol.gov/asp/programs/agworker/report_8.pdf.

43. *See* Paul M. Secunda, *"The Longest Journey, with a First Step": Bringing Coherence to Sovereignty and Jurisdictional Issues in Global Employment Law*, 19 DUKE J. COMP. & INT'L L. 107, 118 (2008).

44. *See* Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1, 24-25 (noting that unauthorized workers will not receive any Social Security retirement benefits despite having paid Social Security taxes).

45. *See* Social Security Act, 42 U.S.C. §§ 401-404, 405(c)(2)(B)(i) (2006) (limiting Social Security benefits to elderly and disabled workers other than undocumented aliens). *See also* Eduardo Porter, *Illegal Immigrants Are Bolstering Social Security With Billions*, N.Y. TIMES, Apr. 5, 2005, at A1 ("While it has been evident for years that illegal immigrants pay a variety of taxes, the extent of their contributions to Social Security is striking: the money added up to about 10 percent of last year's surplus").

46. Ironically, while they are required to pay income tax and social security taxes, unauthorized workers will never receive Social Security much less file for income tax refunds. *See id.* (noting that not only do undocumented workers make significant contributions to the Social Security system, "[they] help even more because they will never collect benefits"). *See also*, OXFAM AM, *supra* note 17, at 43.

safety nets under U.S. law. While a supplemental cause of action under foreign law will do little to remedy the following systemic exclusions, it provides an additional litigation method to protect migrant workers under the current laws, as legal advocates wait for broader legislative change.

1. The Absence of Statutory Protections: Federal and State Laws

Statutorily, there is a history of excluding farmworkers from federal protections. The rationale is based on "the fiction . . . that farm workers [are] not really employees in the industrial sense."[47] The National Labor Relations Act (NLRA), for example, specifically excludes farmworkers from its coverage. As a result, farm workers may be fired for joining a labor union or engaging in any collective action against an employer.[48] The Fair Labor Standards Act (FLSA) similarly excludes farmworkers from overtime pay.[49] Workers employed on smaller farms, as in any farm that employs fewer than seven workers in a calendar quarter, are not even protected by FLSA's minimum wage provisions. Even when farmworkers are protected by statute, the protections are incomplete. While protecting unauthorized workers, the Migrant and Seasonal Agricultural Worker Protection Act of 1983 (widely known as AWPA) for example, exempts H2-A workers from its coverage.[50]

The rights of migrant workers under state laws are not much better. While an exhaustive consideration of each state's employment protections is beyond this Article's scope, it may be said that state laws are colored by the fact that agribusiness exercises enormous influence over state governments.[51] For example, neither of the two largest users of agricultural labor, for example, North Carolina and Florida, goes beyond the minimum protections afforded by the federal government with respect to farmworkers. Both states rely on federal

47. CLETUS E. DANIEL, BITTER HARVEST: A HISTORY OF CALIFORNIA FARMWORKERS, 1870-1941 282 (1981).

48. National Labor Relations Act, 29 U.S.C. §§ 151, 152(3) (2006). *See also* Art Read, *Let the Flowers Bloom and Protect the Workers Too – A Strategic Approach Toward Addressing the Marginalization of Agricultural Workers*, 6 U. PA. J. LAB. & EMP. L. 525 (2004) (arguing the current definition of agricultural labor under the NLRA and FLSA exclude more workers than the initial definition used by the National Labor Relations Board before 1946).

49. 29 U.S.C. § 213(b)(12) (2006).

50. 29 U.S.C. § 1802 (8)(B)(ii) (2006) ("The term 'migrant agricultural worker' does not include ... (ii) any temporary nonimmigrant alien who is authorized to work in agricultural employment in the United States under § § 1101(a)(15)(H)(ii)(a) and 1184(c) ...."); *see also* 29 U.S.C. § 10(B)(iii) (2006) (excluding H-2A workers also from the definition of "seasonal agricultural worker").

51. GREG SCHELL, *Farmworker Exceptionalism Under the Law: How the Legal System Contributes to Farmworker Poverty and Powerlessness*, *in* THE HUMAN COST OF FOOD: FARMWORKERS' LIVES, LABOR, AND ADVOCACY 152 (2002) ("[I]n major farm states, agricultural groups have few peers in terms of influence.").

minimum wage standards.[52] With limited political will, state funds allotted for enforcement of state protections are largely inadequate. This effect spills over to the administration of state benefits. In Pennsylvania and Michigan, for example, state courts have significantly reduced the amount undocumented workers may claim for workers compensation.[53]

In summary, the protections afforded migrant workers are limited whether under U.S. federal or state law. While U.S. federal law and the employment protections contained therein suggest a minimum floor for states, in enacting their own labor laws states are free to exceed this federal minimum. However, states, with the exception of California, rarely exceed those minimums established by U.S. federal law and often struggle to meet even those standards.[54]

2. Inadequate Enforcement by Government Agencies

When migrant workers *are* covered by U.S. law, there is an argument that federal enforcement of employment protections is equally inadequate. AWPA, for example, is largely under-enforced. In 2001, the U.S. Department of Labor (DOL) employed just 23 to 24 full-time officials to conduct over 2,000 AWPA investigations.[55] Highlighting the rampant violations of farmworkers' rights, nearly half of those investigations yielded findings of AWPA violations.[56] Likewise, in 2004, DOL investigated 89 H2-A employers, yet there are approximately 6,700 H2-A certified employers nationwide.[57] Even when abuse by the employer was found, the DOL was not precluded from approving the employer's application to import more H2-A workers the following year.[58]

Additionally, the growers' use of farm labor contractors (FLC) to recruit, hire, transport, pay and supervise farmworkers undermines the government's enforcement efforts. Under this system, growers argue FLSA and AWPA regulate "employers" only. Since farm owners do not control or supervise migrant workers, they often argue that the regulations do not apply to them. While both the language and legislative history of FLSA and AWPA suggest a

52. OXFAM AM, *supra* note 17, at 44.

53. *See, e.g.*, Sanchez v. Eagle Alloy Inc., 658 N.W.2d 510 (Mich. Ct. App. 2003) (ruling that employers may cut off wage loss benefits to workers as of the date of discovery of undocumented status); Reinforced Earth Co. v. Workers' Comp. Appeal Bd., 810 A.2d 99, 108 (Pa. 2002) (lowering the burden of proof required of employers seeking to suspend undocumented workers with partial work-related disabilities).

54. OXFAM AM, *supra* note 17, at 44.

55. This number is down from 1979, when DOL employed 58 full-time investigators and the number of investigations was 5,708. *See* OXFAM AM, *supra* note 17, at 47.

56. OXFAM AM, *supra* note 17, at 47.

57. Lornett Turnbull, *New State Import: Thai Farmworkers,* SEATTLE TIMES, Feb. 20, 2005.

58. *See* U.S. GEN. ACCOUNTING OFFICE, H-2A AGRICULTURAL GUESTWORKER PROGRAM: CHANGES COULD IMPROVE SERVICES TO EMPLOYERS AND BETTER PROTECT WORKERS (1997).

broad definition of "employer" is appropriate, courts have sometimes agreed with the growers, defining "employer" narrowly.[59] Despite the DOL's amendment of its regulations to consider "joint employment" by FLCs and growers, much of DOL's enforcement actions remain targeted against FLCs, not growers. As such, the absence of a credible threat of enforcement allows employers to risk labor law violations.

3. Barriers to a Private Right of Action

Lapses in substantive protections and government enforcement are compounded by the practical and procedural barriers facing migrant workers who attempt to assert their legal rights in private suits.[60] First, migrant workers have limited access to legal resources. Legal services organizations that receive federal funding, for example, are barred from representing either unauthorized workers or H2-B workers.[61] The small claims involved in wage and hour claims attract few private attorneys. Additionally, under AWPA, there is no provision granting a successful plaintiff an award of attorneys' fees from the employer.[62]

Second, logistical barriers further hinder migrant workers' ability to seek legal remedies. Many courts' requirement that plaintiffs be present during the discovery period and trial is problematic for guest workers who are legally required to return to their country of origin after several months.[63] For unauthorized workers, employment litigation is foreclosed given their fears of questions regarding their immigration status.[64] Additionally, language barriers

59. In several cases, federal courts have found that the farmer was not legally responsible to workers for violations of their rights because the farmer was not an employer. *See* Aimable v. Long & Scott Farms, 20 F.3d 434, 445 (11th Cir. 1994); Howard v. Malcolm, 852 F.2d 101, 106 (4th Cir. 1998). *See generally*, Bruce Goldstein et. al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment,* 46 U.C.L.A. L. REV. 983, 984 (1999) (arguing that courts' neglect of the statutory definition of "employ," i.e., to suffer or permit to work, has "led to fifty years of inadequately reasoned decisions and inconsistent enforcement of basic labor standards").

60. *See generally,* Laura K. Abel & Risa E. Kaufman, *Preserving Aliens' and Migrant Workers' Access to Civil Legal Services: Constitutional and Policy Considerations*, U. PA. J. CONST. L. 491 (2003). One organization founded in response to the problems presented by transnational litigation is Centro de Derechos Migrante, *see* Victoria Gavito, *The Pursuit of Justice is Without Borders: Binational Strategies for Defending Migrants' Rights,* 14 NO. 3 HUM. RTS. BRIEF 5. *See also* Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights,* 18 HOFSTRA LAB. & EMP. L.J. 575, 592 (2001).

61. *Id.* A recent exception is that of H2-B workers in the forestry industry, *see* Legal Services Corporation, *Temporary Forestry Workers Now Eligible for LSC-funded Legal Services, available at* http://www.lsc.gov/press/updates_2008_detail_T220_R0.php.

62. OXFAM AM, *supra* note 17, at 49.

63. *Id.*

64. *See* Keith Cunningham-Parmeter, *Fear of Discovery: Immigrant Workers and the Fifth Amendment,* 41 CORNELL INT'L L.J. 27, 28 (2008) (noting that *Hoffman* shattered the notion that

further discourage migrant workers from even contacting a lawyer, let alone bringing a suit in state or federal court.

Finally, limits on the available remedies further discourage unauthorized workers from asserting their legal rights. A 2002 U.S. Supreme Court decision, *Hoffman Plastics Compounds v. NLRB,* effectively established a two-tier legal system – one for those entitled to the full range of remedies and another for undocumented workers.[65] After *Hoffman Plastics*, unauthorized workers cannot recover the wages lost in exercising their right to engage in NLRA-protected activity, even when they are working outside the farmworker context.[66] The implications have not been confined to the NLRA.[67] In light of *Hoffman*, for example, the U.S. Equal Employment Opportunity Commission (EEOC) changed its policy and barred undocumented workers who are fired for discriminatory reasons from collecting lost wages remedies.[68] The sum effect is that unauthorized workers cannot seek back pay when their labor rights are violated.[69]

In summary, the protections afforded migrant workers under U.S. law are significantly limited whether they are guest workers or unauthorized workers. The government largely declines to enforce its laws against employers on behalf of migrant workers even when it is clear migrant workers are ill equipped to assert their legal rights.

Importantly, this Article does not propose a remedy to these pervasive and systematic gaps in employment protections for migrant workers. A supplemental cause of action under foreign law will not lift the aforementioned barriers to litigation or increase the U.S. government's enforcement of its own

---

questions about a plaintiff's legal status would fall outside the normal course of civil discovery).

65. Hoffman Plastic Compounds v. N.L.R.B., 535 U.S. 137 (2002).

66. *See* Hoffman Plastic Compounds, 535 U.S. at 137 (holding the policies underlying the Immigration Control and Reform Act of 1986 bar the grant of back pay to an illegal alien).

67. *But see* Chellen v. John Pickle Co., 446 F. Supp. 2d 1247, 1277 (D. Okla. 2006); Zavala v. Wal-Mart Stores, Inc., 393 F. Supp. 2d 295, 323 (D.N.J. 2005); Flores v. Amigon, 233 F. Supp. 2d 462, 463 (E.D.N.Y. 2002); Singh v. Jutla, 214 F. Supp. 2d 1056, 1062 (N.D. Cal. 2002). Most courts have not extended the back pay limitation to minimum wage and overtime protections. These courts generally focus on structural issues such as the distinct nature of back pay under the FLSA, as compared to the NLRA.

68. *See* Employment Opportunity Commission, Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws, *available at* http://www.eeoc.gov/policy/docs/undoc-rescind.html (repealing the 1999 Guidance on Remedies and noting "*Hoffman* may have [an effect] on the availability of monetary remedies to undocumented workers under the federal employment discrimination statutes").

69. Many believe that, after *Hoffman*, immigrants face an increasingly hostile judicial system that will eliminate certain workplace protections in the future, *see* María Pabón López, *The Place of the Undocumented Worker in the United States Legal System After Hoffman Plastic Compounds: An Assessment and Comparison with Argentina's Legal System*, 15 IND. INT'L & COMP. L. REV. 301, 302-03 (2005); Michael Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497, 501 (2004).

labor laws. However, the gaps in protection under U.S. law suggest that, until these problems are addressed, migrant workers must turn to other sources of law. Foreign law may serve as a potential stopgap measure for migrant workers who seek to effectively assert their employment rights. Part II considers foreign sources of law and how the use of two laws may be better than one when migrant workers must navigate labor law issues.

II.
RELOCATION COSTS: WHEN U.S. LAW IS AMBIGUOUS AND THE MINIMUM WAGE IS NOT GUARANTEED (AN APPLICATION)

A. Migrant Workers: "Exploitation Begins at Home"[70]

"Every one of us took out a loan to come here. We had planned to pay back our debt with our job here. They told us we would have overtime, that we could get paid double for holidays, that we would have a place to live at low cost, and it was all a lie."

— Angela*, a guest worker, in an interview with the Southern Poverty Law Center[71]

Migrant workers—both guest workers and unauthorized workers—routinely arrive in the United States with significant debt. The irony for migrant workers is that when they seek better-paying jobs in the U.S., they are left exposed to exploitation by the employer's recruiters who inflate the cost of traveling from the worker's hometown to the worker's place of employment in the U.S. In order to pay the transportation costs, visa-related fees and recruitment fees necessary to work in the U.S., migrant workers often take out significant loans at exorbitant interest rates.[72] The relocation cost problem is compounded by the fact that U.S. employers commonly fail to offer as many hours of work as promised.[73] At best, the effect of this system is that the duration of the migrant worker's employment with the employer extends much longer than the employee originally intended.[74]

---

70. MARY BAUER ET. AL., SOUTHERN POVERTY LAW CENTER, CLOSE TO SLAVERY: GUEST WORKER PROGRAMS IN THE UNITED STATES 27, at 9 (March 2007) http://www.splcenter.org/pdf/static/Close_to_Slavery.pdf.

71. *Id.*

72. A group of Guatemalan workers represented by Southern Poverty Law Center reported that they were charged twenty percent interest each month by a loan shark. *See id.* at 11.

73. Indeed, employers under the H2-A and H2-B programs often seek longer visa periods and know that they must attract workers. Therefore, employers commonly claim to have many more months of work than they actually need. *See id.* at 23-24.

74. At worst, the burden of relocation costs on migrant workers rises to the level of imposing a form of debt bondage. A question left unexplored by this Article is when does the burden of relocation costs on workers rise to the level of labor trafficking. *See* U.S. DEP'T. OF HEALTH & HUMAN SERVS., Human Trafficking: Fact Sheet (2008), http://www.acf.hhs.gov/

For the purposes of this Article, "relocation costs" refer to the sum of three components: transportation costs, visa fees, and recruitment fees. All three costs are largely paid for upfront by the migrant worker. While the Eleventh Circuit Court of Appeals found that employers have some obligation to reimburse migrant workers for transportation and visa costs,[75] in practice it is rare that migrant workers are ever fully reimbursed. Even when employers do pay for travel and visa-related costs upfront, they often deduct these expenses from the worker's wages.

Notwithstanding this limited legal success regarding transportation and visa fees, migrant workers routinely pay the third cost—the grossly inflated recruitment fees charged by private agencies. As detailed in a report for *The Nation*, U.S. employers largely rely on private agencies to find and recruit workers abroad.[76] U.S. employers, in turn, pay these agencies based on the number of workers they find. As such, these foreign agencies hold enormous power in the eyes of potential workers in Mexico.[77] Largely operating in an unregulated industry, some agencies have required workers to leave a property deed as collateral to ensure that the worker "comply" with the terms of their employment contract.[78] Other agencies charge migrant workers a recruitment fee ranging from $500 to over $10,000.[79] The practice is so well-known that at least one U.S. embassy in Latin America is known to have routinely asked prospective workers how much they paid in recruitment fees. The concern was

---

trafficking/about/fact_human. html ("Victims of trafficking are often subjected to debt-bondage, usually in the context of paying off transportation fees into the destination countries. . . . Victims do not realize that their debts are often legally unenforceable . . . In many cases, the victims are trapped into a cycle of debt because they have to pay for all living expenses in addition to the initial transportation expenses."); U.S. DEP'T. OF HEALTH & HUMAN SERVS., Labor Trafficking: Fact Sheet (2008), http:// www.acf.hhs.gov/trafficking/about/fact_labor. html (describing bonded labor, as when a worker's "labor is demanded as a means of repayment for a loan or service in which its terms and conditions have not yet [been] defined or in which the value of the victims' services as reasonably assessed is not applied toward the liquidation of the debt"). For an extensive report on the various forms of trafficking, *see generally* U.S. DEP'T OF STATE, *infra* note 80.

75. *See* Arriaga v. Florida Pacific Farms, 305 F. 3d 1228, 1237 (11th Cir. 2002) (holding that travel and visa costs must be reimbursed within the first week of employment to the extent necessary to avoid pushing the worker's pay below the federal minimum wage).

76. *See* Mello, *supra* note 25. The following are examples of recruitment agencies: Head-Honchos LLC, *available at* http://www.head-honchos.com/12step.html; Recruiting Business Center Corp., *available at* http://recruitmexicanlabor.com/introduction.html, and Más Labor *available at* http://www.maslabor.com/pages/h2aServices.html. Note, this list is meant to illustrate the myriad of recruitment agencies available for "selecting pre-screened qualified workers" in Mexico; it is not meant to serve as an indictment of their recruitment practices.

77. *See* BAUER, *supra* note 70, at 9; Mello, *supra* note 26.

78. BAUER, *supra* note 70, at 11.

79. *Id.* at 9; *see also* Katie L. Griffith, *Globalizing U.S. Employment Statutes Through Foreign Law Influence: Mexico's Foreign Employer Provision and Recruited Mexican Workers*, 29 COMP. LAB. L. & POL'Y J. 383, 388 (2008) (noting a number of lawsuits have alleged employer representatives demanded "grossly inflated" recruitment fees).

that "a high level of indebtedness would cause workers to overstay their visas in order to pay off their debt."[80]

In the end, these costs and related loan interests add up, especially when workers come from distant countries where the cost of travel is steeper.[81] While the exploitation starts at home, the responsibility for this debt system lies on *both* sides of the border. As stated in a 2007 State Department report, the main source of vulnerability for migrant workers is "[t]he intentional imposition of exploitative and often illegal costs and debts on [ ] laborers in the source country or state, often with the complicity and/or support of labor agencies and employers in the destination country or state."[82] Some have argued that the current U.S. guest worker system should be amended to require that the employer requesting labor certification pay the relocation costs of the workers upfront.[83] Yet, as detailed in Part II.B, there remains a lack of clarity as to the extent to which U.S. laws truly reign in U.S. employers recruiting Mexican laborers under abusive terms.

B. Relocation Costs under U.S. Law and Regulations: An Unanswered Question

Under U.S. federal law, it is unclear whether employers are legally responsible for the relocation costs of their workers.[84] AWPA requires agricultural employers disclose the terms of employment at the time of recruitment and to comply with those terms.[85] However, AWPA does not consider who bears the burden of costs incurred during the pre-employment period. Notwithstanding the debate between circuits,[86] FLSA is largely silent on how relocation costs prior to employment factor into its minimum wage guarantees.

When relocation costs are taken into account, they are couched within federal regulations related to the guest worker program. H2-A regulations require employers reimburse workers for the costs incurred for "transportation

---

80. BAUER, *supra* note 70, at 14.

81. Thai and Indonesian workers, for example, paid $5,000 to $10,000 or more for the right to be employed as H2-A workers in North Carolina at less than $10 per hour. *Id.* at 11.

82. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 19 (2007), *available at* http://www.state.gov/g/tip/rls/tiprpt/2007/.

83. Bryce W. Ashby, Note, *Indentured Guests – How the H2-A and H2-B Temporary Guest Worker Programs Create the Conditions for Indentured Servitude and Why Upfront Reimbursement for Guest Workers' Transportation, Visa, and Recruitment Costs is the Solution*, 38 U. MEM. L. REV. 893, 921 (2008)(calling for policy changes in the guest worker program).

84. A narrow exception to this statement is the H2-A program which requires employers pay relocation costs once the worker has completed 50% of his/her employment contract, see *infra* note 87 and accompanying text.

85. 29 U.S.C. § 1821 (2006).

86. A possible exception is 29 U.S.C. § 203(m) under FLSA. *See infra* note 87 and accompanying text.

and daily subsistence from the place from which the worker has come to work for the employer to the place of employment."[87] However, the guarantee only arises upon completion of fifty percent of the work contract; it does not include the most burdensome cost incurred, as in recruitment fees, and it does not extend to unauthorized workers or H2-B workers.

That said, recent cases suggest that courts remain open to recognizing an employer's obligation to pay some relocation costs. In *Arriaga v. Florida Pacific Farms, LLC*, the Eleventh Circuit held H2-A workers from Mexico should be reimbursed for the transportation and visa costs incurred in traveling to the U.S. "to the extent necessary to comply with FLSA."[88] In its reasoning, the court identified an overlap between H2-A regulations and FLSA. Although H2-A regulations seem to require reimbursement only upon completion of fifty percent of the work contract, the court noted, it also mandated that employers "comply with applicable federal, State, and local employment-related laws."[89]

Therefore, under FLSA the court determined that the employer was required to reimburse some of the relocation costs to migrant workers in the first week of employment. In other words, the employer had to reimburse enough of the transportation and visa costs that the workers had paid upfront in traveling to the place of employment in order to ensure workers' wages for the first week provided them a federal minimum wage. All other expenses could be reimbursed at the midway point pursuant to H2-A regulations.[90]

In *Recinos-Recinos v. Express Forestry*, the Eastern District Court of Louisiana extended the reasoning of *Arriaga* to H2-B workers.[91] Concluding that *Arriaga* was a FLSA case, and not a case about H2-A regulations, the court held H2-B workers must likewise be reimbursed to the extent necessary to ensure the federal minimum wage.[92] Notably, however, the H2-B workers were not entitled to full reimbursement at the midway point, as provided to H2-A workers in *Arriaga* who benefitted from H2-A regulations.[93]

---

87. 20 C.F.R. § 655.102(b)(5)(i) (2009).

88. 305 F.3d 1228. For an in-depth discussion of the *Arriaga* case, *see* Ashby, *supra* note 83, at 906-15.

89. 305 F.3d 1228, 1233 (11th Cir. 2002) (quoting 20 C.F.R. §655.103(b)). Notably, under 29 U.S.C. § 203(m), the FLSA deductions provision allows an employer to deduct below minimum wage for "furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees." Under the regulations, if deductions "are primarily for the benefit or convenience of the employer," they are not "other facilities" and therefore, when the deductions bring the worker below minimum wage, it represents an improper FLSA deduction. 29 C.F.R. § 531.32. The challenge with this provision is that the definition of "other facilities" is debated by the courts. *See infra* notes 90-101 and accompanying text.

90. *Id.*

91. 2006 U.S. Dist. LEXIS 2510, at *44-45 (E.D. La. Jan. 24, 2006).

92. *Id.*

93. *Id.*

Recinos-Recinos, in turn, paved the way for *Rivera v. Brickman Group*, which was decided in the Eastern District of Pennsylvania.[94] In *Rivera*, a landscaping company required guest workers to seek employment through a particular recruitment company, which charged each employee certain recruitment fees.[95] The court held the employer liable for the recruitment fees, in addition to transportation and visa-related costs incurred by the employees to the extent it brought wages below minimum wage.[96] This decision was significant for migrant workers because recruitment fees are routinely the most costly of the three relocation expenses.

Nevertheless, it is important to note several limitations of *Arriaga* and the cases that followed. First, *Arriaga*, *Recinos-Recinos* and *Rivera* do not stand for the proposition that employers must reimburse *all* relocation costs. Specifically, *Arriaga* did not reach the issue of recruitment fees because, in that case, it found the individuals charging the recruitment fees were not agents of the employer nor did the employers give those agents actual or apparent authority.[97]

Second, courts have sought to limit the holding in *Rivera*. They assert liability in that case was only triggered because the employer required employees to hire the specific recruitment company charging employees recruitment fees.[98]

Third, while the workers in *Arriaga* were eventually reimbursed for the entirety of their transportation and visa-related expenses, this was done as mandated by H2-A regulations. The workers in *Recinos-Recinos* did not have a similar regulatory guarantee under the H2-B program. In the end, the *Recinos-Recinos* workers were reimbursed for only a part of their transportation and visa-related expenses—that is they were reimbursed the amount necessary to ensure they were always paid a minimum wage *and no more.*

Fourth, one circuit has explicitly disagreed with *Arriaga*. In *Castellanos-Contreras v. Decatur Hotels, LLC*, a decision issued on February 11, 2009, the Fifth Circuit found that FLSA did not require the employer to reimburse employees for transportation, visa, or recruitment fees.[99] In that case, H2-B workers were recruited to fill vacant hotel jobs following Hurricane Katrina, and each worker paid between $3,000 to $5,000 in relocation costs.[100] In a footnote, the court referred to the DOL's December 2008 interpretation of its FLSA

94. 2008 WL 81570 (E.D.Pa. 2008).

95. *Id.* at *14.

96. *Id.*

97. *See* 305 F.3d 1228, 1245-46 (11th Cir. 2002) ("Because the Farmworkers have failed to allege facts to support the creation of apparent authority, the Growers are not liable for the recruitment fees.").

98. *See* 559 F. 3d 332, 340-41 (5th Cir. 2009) (distinguishing *Rivera* because the recruitment fees in that case were for the "primary benefit of the employer").

99. *Id.* at 339 ("We cannot accept the holding in *Arriaga*.").

100. *Id.* at 333.

regulations which stated, "*Arriaga* and the district courts that followed its reasoning in the H-2B context misconstrued the Department [of Labor]'s regulations and [were] wrongly decided."[101] Interestingly, the *Arriaga* cases had largely rejected deference to DOL opinion letters because of their lack of consistency and lack of persuasive value.[102]

In sum, it remains unsettled whether relocation costs are the responsibility of the employer under U.S. law. As noted, the DOL has declined to enforce *Arriaga*.[103] The position of DOL is that it cannot enforce the contractual rights of workers.[104] Given this ambiguous legal landscape in the U.S., a supplemental cause of action based on foreign law may be necessary to ensure migrant workers are not already indebted when they arrive to work in the U.S.

C. Article 28 of the Mexican Federal Labor Law: The Potential for Protection

As examined in Part II, there are a myriad of systemic barriers to migrant workers asserting their employment rights. Although a supplemental right of action based on foreign law may do little to address these broader deficiencies, it may be an important source of protection for migrant workers recruited abroad to work in the U.S.

In considering the significant debt workers incur in traveling to the U.S., a variety of other proposals have been made by legal advocates. Some have recommended federal regulations that would explicitly require employers bear all costs of recruitment fees and increased enforcement of employment protections to prevent abuse by recruitment agencies.[105] Others call for reforming the guest worker program[106] and still others argue for eliminating the guest worker program altogether.[107]

Many legal advocates have argued employers have shielded themselves from any liability by using middlemen and labor brokers. The deficiencies existing in U.S. employment regulations have increasingly pushed legal advocates to consider international and foreign sources of law.[108] For support,

---

101. *Id.* at 339.

102. *Arriaga*, 305 F.3d at 1239 (noting the lack of a coherent or consistent policy by the DOL, thereby not warranting deference under the *Skidmore v. Swift* standard).

103. *See, e.g.*, Luna-Guerrero v. North Carolina Grower's Association, 370 F. Supp. 2d 386, 390 (E.D.N.C. 2005).

104. BAUER, *supra* note 70, at 30.

105. *See id.* at 42.

106. The most prominent demand made by legal advocates is that temporary work visas should no longer be tied to one specific employer. As is, guest workers often suffer the abuse received from their employer because they are barred from seeking other work by other employers under the visa.

107. *See* Michael Wishnie, *Labor Law after Legalization*, 92 MINN. L. REV. 1446, 1447 ("Immigration reform may reasonably be characterized as the most significant labor reform in a generation.").

108. For a discussion on the opposite problem, *see* Paul M. Secunda, *The Longest Journey, with*

these efforts often cite the Supreme Court's decision in *Lawrence v. Texas*, which looked to international norms and foreign practice in striking down a statute criminalizing sodomy.[109] Within the labor context, Professor Beth Lyon argues that international practice and norms should also be used to supplement existing U.S. employment law.[110] In particular, she notes that reference to international law may "tip the balance" in favor of greater protections for undocumented workers.[111]

Likewise, Professor Michael J. Wishnie recommends two ways international law may be used to advance workers' rights. The first is to bring a federal suit under the Alien Tort Claims Act for violations of international labor law.[112] The second is to invoke the international consultative and arbitration processes established by the North American Free Trade Agreement (NAFTA), formerly known as the North American Agreement for Labor Cooperation (NAALC).[113] Still others propose filing claims with international human rights mechanisms, such as the International Covenant on Civil and Political Rights, and regional mechanisms, such as the Inter-American Human Rights System.[114]

While many of these recommendations would improve the chances that migrant workers do not arrive in the U.S. indebted, this Article takes a different approach and considers an existing law that already places the burden of relocation costs on employers – Article 28 of Mexico's Federal Labor Law. In focusing on foreign law, as opposed to international law, the proposal for a

---

a First Step: Bringing Coherence to Sovereignty and Jurisdictional Issues in Global Employment Law, 19 DUKE J. COMP. & INT'L L. 107, 118. Professor Secunda argues that U.S. benefits legislation, namely ERISA, should be granted to foreign employees, both documented and undocumented, working in the U.S.

109. *See* Lawrence v. Texas, 539 U.S. 558, 577 (2003) ("The right the petitioners seek . . . has been accepted as an integral part of human freedom in many other countries.").

110. *See* Beth Lyon, *Tipping the Balance: Why Courts Should Look to International and Foreign Law on Unauthorized Immigrant Worker Rights*, 29 U. PA. J. INT'L L. 169, 207 (2007) (arguing for greater recognition of international norms in the context of employment rights as was done in *Lawrence v. Texas* with respect to gay rights).

111. *Id.*

112. 28 U.S.C. § 1350 (2001) (establishing the right of action and federal jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States").

113. *See* Michael J. Wishnie, *Immigrant Workers and the Domestic Enforcement of International Labor Rights*, 4 U.PA. J. LAB. & EMP.L. 529, 530-31 (proposing legal advocates make greater use of international labor norms and arguing that there is a "need for upward harmonization of labor rights across borders"). For an illustration of the limitations of ATCA, however, *see Sosa v. Alvarez-Machain*, 542 U.S. 692, 694 (2004). For a criticism of NAALC arbitration, *see* Adam Brower, Note, *Rethinking NAFTA'S NAALC Provision: The Effectiveness of its Dispute Resolution System on the Protection of Mexican Migrant Workers in the United States*, 18 IND. INT'L & COMP. L. REV. 153 (2008).

114. *See* Elizabeth Goergen, *Women Workers in Mexico: Using the International Human Rights Framework to Achieve Labor Protection*, 39 GEO. J. INT'L L. 407, 435-40 (suggesting that various international mechanisms may be used to combat gender discrimination in Mexico's workplace).

foreign law cause of action follows the suggestion made by Professor Lyon that foreign law may serve beyond mere guidance for U.S. courts. Translated, Article 28 specifically states:

> The cost of transportation, repatriation, transport to the place of origin, and nourishment of the worker and his family, as applicable, and all costs which arise from crossing the border and fulfillment of the arrangements of migration, or for any other similar concept, will be the exclusive responsibility of the employer. The laborer will receive the whole salary that belongs to him/her [without] any deductions for those concepts.[115]

Given that migrant workers are overwhelmingly Mexican-nationals, there is increasing "interest in the potential application of . . . Article 28 in U.S. courts."[116] As a neighboring country with few economic opportunities, Mexico is the largest source country for both unauthorized workers and low-skilled guest workers.[117] It was estimated that unauthorized workers from Mexico totaled 4.8 million in January 2000 and that Mexico's share of the total unauthorized worker population was 69%.[118] In addition, approximately three-fourths of all low-skilled guest workers are from Mexico.[119] Thus, there is an argument that the applicability of Mexican law in U.S. courts has the potential to apply to a large percentage of migrant workers in the U.S. Most importantly, the protections afforded under Article 28 are clear with respect to relocation costs. Not only does Article 28 explicitly speak to the issue of travel and visa fees, it also places the burden of recruitment fees, or "all costs which arise from . . . fulfillment of the arrangements of migration" on the employer.[120] Recognizing the significance of Article 28, at least one professor has considered a role for the provision in protecting the rights of migrant workers. Professor Kate L. Griffith proposes that Article 28 acts as a "foreign law influence" on U.S. employment statutes in certain circumstances.[121] In other words, Professor Griffith persuasively argues Article 28 can be used as an aid in interpreting FLSA and incorporated as a term of an AWPA working arrangement. The advantage to this approach is that "dynamic incorporation" can "save lawmaking costs, lead to better rules and standards, and solve collective action

115. Ley Federal de Trabajo, art. 28(I)(b), *available at* http://www.diputados.gob.mx/LeyesBiblio/pdf/125.pdf.

116. Griffith, *supra* note 79, at 390.

117. U.S. DEPARTMENT OF LABOR, DEVELOPMENTS IN INTERNATIONAL MIGRATION TO THE UNITED STATES 45 (2004). For more statistics on Mexico and the new immigrant labor force, *see* Ishwar Khatiwada, *New Foreign Immigrants and the U.S. Labor Market*, Center for Labor Market Studies (2006).

118. U.S. DEPARTMENT OF LABOR, *supra* note 117, at 45.

119. BAUER, *supra* note 70, at 14 (presenting a table listing countries of origins for H2 workers).

120. Ley Federal de Trabajo, art. 28(I)(b), *available at* http://www.diputados.gob.mx/LeyesBiblio/pdf/125.pdf.

121. *See* Griffith, *supra* note 79, at 391.

problems."[122] Indeed, some courts have routinely recognized the idea of incorporation in the context of contracts.[123]

This Article, however, considers a more direct function for Article 28. While it does not remedy the inadequate protections under U.S. law or the barriers to private rights of action presented in Part II, Article 28 may serve as the basis for a cause of action independent of a U.S. statute. Applying the employment law of a foreign country in U.S. courts is not without precedent. In *Curtis v. Harry Winston, Inc.*, for example, the Southern District of New York recognized that it could consider Venezuelan labor law where a Venezuelan citizen sued a U.S. employer.[124] Additionally, in *Chinnery v. Frank E. Basil*, the D.C. District Court went a step further in asserting jurisdiction despite an express choice of law provision in the employment agreement to use Saudi Arabian law.[125]

While the individuals in those cases performed services abroad, this Article considers whether a foreign law may also apply even when services are ultimately performed domestically. Part III will present the legal framework for analyzing whether a foreign law may apply when the interests of two different jurisdictions overlap. Part IV will then apply this framework in analyzing Article 28 of Mexico's Federal Labor Law. This Article concludes the foreign law of a country may apply when a worker is both recruited in that country and relocates from that country to their place of employment. For legal advocates, the provision may provide an important right of action for migrant workers in U.S. courts in the absence of more systemic reform of U.S. laws to better protect migrant workers.

III.
LEGAL FRAMEWORK: THE CHOICE OF LAW ANALYSIS

A. Supplemental Jurisdiction and U.S. Federal Courts

Before it is determined that the foreign law is meant to be applied extraterritorially and that a foreign law cause of action does not "clash" with a state law cause of action,[126] the first question that must be answered is whether the case may be heard in U.S. federal court at all. In order for a U.S. federal

122. Michael C. Dorf, *Dynamic Incorporation of Foreign Law*, 157 U. PA. L. REV. 103, 103 (2008) (characterizing incorporation of the law of another polity as a delegation of lawmaking authority).

123. McGhee v. Arabian American Oil Co., 871 F. 2d 1412, 1414 (9th Cir. 1989).

124. 633 F.Supp. 1504 (S.D.N.Y. 1987).

125. 1988 U.S. Dist. LEXIS 19438, 11-12 (D.D.C. Jan. 13, 1988). *But see* U.S. v. McNab, 331 F.3d 1228 (11th Cir. 2003) (providing a cautionary tale with respect to U.S. courts applying foreign law in that the court misapplied Honduran Law).

126. *See infra* Part III.B and Part III.C, respectively.

court to hear a non-federal claim, the non-federal claim must be so related to the claim under original jurisdiction that it forms part of the same case or controversy.[127]

The basis for this supplemental jurisdiction is both constitutional and statutory. In *Osborn v. Bank of the United States*, Chief Justice John Marshall held that the "arising under" language of Article III of the Constitution gave federal courts jurisdiction over non-federal claims that are part of the same case as a federal claim for which there is original jurisdiction.[128] That holding was finally codified by Congress in 1990 under 28 U.S.C. § 1367 after 130 years of judicially-created doctrines of ancillary and pendent jurisdiction.[129]

Under § 1367(a), a federal district court "shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the Constitution."[130] This grant of jurisdiction, however, is not without its limits. First, some circuit courts have approached supplemental jurisdiction restrictively.[131] Although, by its terms, § 1367(a) effectively equates the outer limits of supplemental jurisdiction with the outer limits of that which the Constitution allows, some circuits require a "common nucleus of facts."[132]

Second, and more relevant for the purposes of this Article, the grant of supplemental jurisdiction is subject to § 1367(b). Under §1367(b), a federal court may decline to exercise supplemental jurisdiction if any one of the four exceptions delineated in the statute is met. Specifically, a court may abstain from exercising jurisdiction if: "(1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction."[133]

As a final point, it should not be overlooked that this inquiry is only

127. For a general background on the history of supplemental jurisdiction, *see* C. Douglas Floyd, *Three Faces of Supplemental Jurisdiction after the Demise of United Mine Workers v. Gibbs*, 60 FLA. L. REV. 277, 279 (2008).

128. 22 U.S. 738 (1824).

129. The history behind 28 U.S.C. § 1367 is that Congress sought to overturn the Court's decision in *Finley v. United States*, 490 U.S. 545 (1989). In that case, the Court found it lacked authority to assert jurisdiction over the state law claims against the non-federal defendants).

130. 28 U.S.C. § 1367(a).

131. Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 ARIZ. ST. L. J. 849, 890 (1992).

132. *Compare, e.g.*, Iglesias v. Mut. Life Ins. Co. Of New York, 156 F.3d 237, 241 (1st Cir. 1998) (applying the "common nucleus of facts" standard established in *Gibbs* even after the enactment of § 1367) *with* Channell v. Citicorp Nat'l Servs., Inc., 89 F.3d 379, 385 (7th Cir. 1996) (reading the extent of § 1367 as reaching the outerlimits of Article III).

133. 28 U.S.C. § 1367(b).

necessary when litigants bring a claim in federal court. There are many reasons why a litigant may instead bring suit in state court. Unlike federal courts, state courts are courts of general jurisdiction. As Professor Henry Hart noted, state courts have authority "over all persons and matters within the state's power," and "have . . . at their command a theoretically complete set of answers for every claim of breach of private duty that might be brought before them."[134] Importantly, this means state courts can hear any case whether or not it is anchored to a federal law claim. While this Article focuses on federal practice, state courts are also available to migrant litigants.

B. Extraterritoriality: When Do a Country's Laws Apply Outside its Borders?

The next logical step in considering when a supplemental foreign law cause of action may be brought in a U.S. court is to determine if the foreign law is meant to be applied extraterritorially in the first place. Admittedly, this step may seem unnecessary at first blush. Courts have routinely applied the laws of foreign sovereigns without explicitly considering whether the foreign sovereign mandated it, whether it was implicit, or whether the foreign sovereign even had an interest in applying its laws.[135]

However, the exercise may be considered a "best practice." A choice of law analysis is superfluous if there are not two laws that overlap with respect to a given dispute. As a result, academics have identified two approaches to considering whether a law may be applied extraterritorially–the territorial approach and the "effects test." In practice, however, the two approaches often intersect—laws are presumed not to apply beyond a nation's territory (territorial approach) when a nation has no interest in the activity ("effects test"). Therefore, while Part III.A. discusses the history and development of each approach separately, it is important to keep in mind that clear demarcations are rare and courts will often use ideas from both approaches in the same decision.

As a preliminary matter, it should be noted that the approaches are formulated from the perspective of whether U.S. law, or U.S. legislative jurisdiction, operates outside U.S. borders. The question of whether U.S. law applies abroad differs slightly from the question of whether foreign law applies within the U.S.[136]

---

134. Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 492 (1954).

135. *See e.g.*, Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 482, 491-93 (1983) (permitting suit in federal court based on Netherlands law); Bonstingl v. Md. Bank, N.A., 662 F. Supp. 882, 884 (D. Md 1987)(applying Greek law in a torts case); Kashi v. Philbro-Salomon, Inc., 628 F. Supp. 727, 737 (S.D.N.Y. 1986) (applying Iranian law in a contract dispute); Milkovich v. Saari, 295 Minn. 155 (1973) (concerning Ontario's guest statute in a tort claim); Holzer v. Deutsche Reichsbahn-Gesellschaft, 277 N.Y. 474 (1938) (allowing defendants to invoke a German law defense).

136. *C.f.* Michael D. Ramsey, *Escaping "International Comity,"* 83 IOWA L. REV. 893, 952

Nevertheless, there are several reasons the issues to be discussed are equally applicable in considering whether foreign laws apply within the U.S. First, the principles guiding the territorial approach and the effects test are international in scope. They were first embodied in the Treaty of Westphalia and *S.S. Lotus*, respectively.[137] Respectively, international political bodies in those contexts sought to avoid conflicts between sovereign nations and to take into account the interests of each country involved. As will be discussed, the principles U.S. courts use to determine whether its own domestic laws should apply abroad are largely derived from these international doctrines regarding territorial limits to a country's laws. As such, historical concerns regarding territorial jurisdiction originated on the world stage and therefore apply to both U.S. and foreign laws.

Second, the baseline issue with extraterritoriality is not that two different laws conflict, but that two different territorial jurisdictions overlap.[138] Whether foreign conduct impacts U.S. interests or domestic conduct impacts foreign interests, courts must navigate these overlapping jurisdictions consistently and in accordance with the "practices of nations."[139] As such, international rules regarding legislative jurisdiction play a role as "an interpretive gloss" for both U.S. *and* foreign law.[140] As such, similar to its use in the context of U.S. laws, the territorial approach and/or effects test may be used to determine the applicability of foreign law.

Third, it must be recognized that just as U.S. courts are under no obligation to apply foreign law or defer to foreign legislative acts,[141] foreign courts are equally under no obligation to apply U.S. laws. It would be disingenuous for courts to asymmetrically apply U.S. law to foreign activities, yet bar foreign regulation of domestic activities. Therefore, while appeals for reciprocity are sometimes criticized as ill-defined doctrines,[142] a court may consider the

(1998) (identifying distinct doctrines within the phrase "international comity" including "extraterritorial application of U.S. law" and "enforcement of foreign law" in U.S. courts).

137. *See* Leo Gross, *The Peace of Westphalia: 1648-1948*, 42 AM. J. INT'L L. 20 (1948); S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10.

138. *See* Ramsey, *supra* note 136, at 925 ("Friction arises not from conflicting laws but from conflicting legislative jurisdictions"). The demise of a strict territorial approach to laws is discussed in Part III.A., see *infra* Part III.A.1.

139. *Id.*

140. Ramsey, *supra* note 136, at 930; *see also* Timberlane Lumber Co. v. Bank of America Nat'l Trust & Sav. Ass'n, 549 F.2d 597, 601-605 (9th Cir. 1976) (using international rules regarding legislative jurisdiction to weigh U.S. and Honduran interests under a ten-factor balancing test).

141. *See* Ramsey, *supra* note 136 (noting neither the Constitution nor U.S. law commands application of foreign law).

142. *See* Hilton v. Guyot, 159 U.S. 113, 163-64 (1895) (defining comity as respect for foreign juridical, legislative, or executive acts). *But see* Ramsey, *supra* note 136, at 893, 925 (criticizing "international comity" as confusing inquiries that ought to be clear and distinct and that describing the inquiry as one of "comity," or equitable discretion, disconnects it from international law). While an in-depth discussion of the merits of comity are outside the scope of this Article, note that there are

extraterritoriality of a foreign law just like it considers the extraterritoriality of a U.S. law in the interest of international comity. It should be noted, however, that the court is not simply bowing to "international comity" and applying foreign law. Indeed, applying the *same* meticulous analysis to the extraterritoriality of a foreign law as applied to U.S. laws provides a satisfying justification for hearing a foreign law cause of action in a U.S. court than merely a passing reference to comity.

Finally, it is important to emphasize that both of the following approaches focus on a nation's jurisdiction to prescribe, as is the power of a nation to apply its substantive law to particular persons or events.[143] The jurisdiction to prescribe, or legislate, is separate from the jurisdiction to adjudicate—that is the power of a nation to subject persons or things to the process of its courts—which is also separate from the jurisdiction to enforce, as in the power of a nation to compel compliance with its laws.[144] Therefore, in the U.S., while a court's jurisdiction to adjudicate is clearly restricted by its territory under *Pennoyer v. Neff*,[145] the question of whether the substantive law of another country may prescribe conduct in the U.S. remains ripe for analysis.

1. The Territorial Approach

In the international sphere, the concept of territoriality as a limit to a nation's power holds a long tradition. Under the Treaty of Westphalia of 1648, a sovereign's power, both its jurisdiction and the reach of its laws, was deemed to end at its border.[146] In the U.S., this principle was embodied in *American Banana Co. v. United Fruit Co.* – a case in which Justice Holmes rejected the application of the Sherman Act to conduct outside the United States, stating, "[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."[147]

In the 19th and 20th centuries, U.S. courts largely followed this strict

---

arguments that international comity may not actually support a uniform approach to the question of extraterritorial application of U.S. and foreign laws. International comity may, in fact, play out in opposite directions. For example, in considering whether U.S. law applies abroad, international comity counsels that courts "pull back" in deference to the foreign sovereign. In considering whether foreign law applies to domestic conduct that impacts foreign interests, however, international comity may support a thorough application of the effects test, discussed *infra*.

143. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1987).

144. *Id.*

145. Pennoyer v. Neff, 22 U.S. 714, 720 (1878) ("The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established.").

146. *See* Gross, *supra* note 137, at 28-29 (1948) (noting the Treaty of Westphalia's role in creating an international regime based on territory).

147. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909).

territorial approach in interpreting U.S. and foreign laws.[148] These principles were embodied in the First Restatement of the Conflict of Laws[149] in 1934 and, in fact, remain the approach adopted by several states today. Some commentators have suggested the territorial approach was and remains justified because it is "commonsense" for Congress to legislate with domestic issues in mind.[150] Whatever the merits of those arguments, the original rationale for the territorial approach was to avoid conflict on the international stage.[151] As stated by Joseph Beale, the fear was that anarchy might ensue if "two laws were present at the same time and in the same place upon the same subject."[152]

By the mid-1900s, however, it became clear that "tidy circles demarcating national jurisdiction [based on territory]" were "either impossible or meaningless."[153] An increasingly globalized and economically interdependent world called into question the robustness of using territory as a limit to legislative action.[154] Professor Larry Kramer noted that, "the territorial principle reflected neither what states do nor what they should necessarily want

148. *See, e.g.*, Sandberg v. McDonald, 248 U.S. 185, 195 (1918) ("Legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction."); The Apollon, 22 U.S. 363, 370 (1824) ("The laws of no nation can justly extend beyond its own territories . . . They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction.").

149. RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 378, 382-83 (1934) (applying a vested rights theory, where rights "vest," or attach, in a particular jurisdiction and once vested in one territorially-defined jurisdiction, other jurisdictions were required to respect them).

150. Foley Bros., Inc. v. Filardo, 336 U.S. at 285; *see also* Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L L. 505, 513-16 (1997).

151. This could be considered the "Charming Betsy" principle. In Murray v. Schooner Charming Betsey, Chief Justice Marshal stated "[a]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." 6 U.S. (2 Cranch) 64 (1804). *See also* MacLeon v. U.S., 229 U.S. 416, 434 (1913) (finding the Charming Betsey principle "essential to the peace and harmony of nations").

152. JOSEPH BEALE, A TREATISE ON THE CONFLICT OF LAWS (1935); *see also* Elliot E. Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361, 379-385 (1945).

153. Anne-Marie Slaughter & David T. Zaring, *Extraterritoriality in a Globalized World, available at* http://ssrn.com/abstract=39380; *see also* Anne-Marie Slaughter, *Liberal International Relations Theory and International Economic Law*, 10 AM. U. J. INT'L L. & POL'Y 717, 736 (1995). *But see* Austen Parrish, *The Effects Test: Extraterritoriality's Fifth Business*, 61 VAND. L. REV. 1455, 1503 (2008) (T]here is no reason to assume that the regulation [of transnational activities] must be . . . unilateral and domestic in nature.").

154. *Compare* Mark Gibney & R. David Emerick, *The Extraterritorial Application of United States Law and the Protection of Human Rights: Holding Multinational Corporations to Domestic and International Standards*, 10 TEMP. INT'L & COMP. L.J. 123, 127 (1996) (arguing defendants "hid[e] behind the idea that the extraterritorial application of U.S. law violates the sovereignty of other countries") *and* Jonathan Turley, *"When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598 (1990) (arguing that the presumption should be that statutes *do* apply extraterritorially absent a contrary congressional intent) *with* Parrish, *supra* note 153, at 1478 (arguing that the effects test "provides no meaningful constraint on the exercise of jurisdiction").

in multi-state situations." [155] Other commentators criticized the dubious use of territoriality as a means to prevent enforcement of human and indigenous rights.[156] Still others argued for "'reasonableness' as the touchstone of jurisdictional analysis."[157]

Indeed, some commentators even argued that territoriality was never a hard and fast rule.[158] The result of this change in thinking about the territorial approach was that it became less a strict "choice of law" rule and more a canon of statutory construction—in other words, the prohibition against extraterritoriality became a presumption. Under the current doctrine, the presumption is rebutted upon a showing that the legislature intended for a law to apply outside its borders. Yet, since the presumption remains firmly rooted in the historical prohibition against extraterritoriality, the rebuttal is sometimes a tall order for litigants.

Notably, the presumption is particularly strong in the field of labor law.[159] This fact manifested itself most clearly, at least with respect to the extraterritorial application of a U.S. law in *E.E.O.C. v. Arabian American Oil Co. (Aramco)*.[160] Writing for the majority in *Aramco*, Chief Justice Rehnquist suggested that only a "clear statement in the language of the statute would overcome the presumption."[161] In that case, the Court barred a Title VII action

155. Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179, 184 (1991). For a response to attacks on territoriality, *see* Parrish, *supra* note 153, at 1466-1470.

156. *See, e.g.*, Catherine Powell, *Locating Culture, Identity, and Human Rights*, 30 COLUM. HUM. RTS. L. REV. 201, 206-07 (1999) (criticizing government invocations of sovereignty to limit compliance with international human rights law).

157. *Id.* at 1470. *See* Parrish, *supra* note 153, at 1468. Parrish recognizing the distaste for territoriality by liberal internationalists, realists, and other political schools of thought. *See also* LEA BRILMAYER, CONFLICT OF LAWS 33-46 (2d ed. 1995) (noting that the rise of legal realism challenged territorial approaches to both jurisdiction and choice of law); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (adopting the reasonableness test).

158. Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* 24-25 (1999); *see generally* Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2508 (2005) (providing a general background on the strict territoriality approach).

159. *See, e.g.*, McCulloch v. Sociedad Nacional, 372 U.S. 10 (1963) (holding the National Labor Relations Act was inapplicable to contracts made outside the U.S.); Benz v. Compania Naviera Hidalgo, S.A., 252 U.S. 138 (1957) (Labor Management Relations Act); Jackson v. The Archimedes, 275 U.S. 463 (1928) (the Merchant Marine Act of 1920); Sandberg v. McDonald, 248 U.S. 185 (1918)(rejecting application of the Seaman's Act of 1915 to a contract not made in the U.S., i.e., a dispute between British sailors and their British vessel).

160. *See* EEOC v. Arabian American Oil Co. ("Aramco"), 499 U.S. 244, 248 (1991).

161. Notably, soon after *Aramco*, Congress responded by amending Title VII to provide a "clear statement" that Title VII applies extraterritorially. *See* 42 U.S.C. § 2000e(f), § 2000e-1(c)(1994). For a more detailed analysis on the effect of *Aramco* on Title VII, *see generally* Mary Claire St. John, Note, *Extraterritorial Application of Title VII: The Foreign Compulsion Defense and Principles of International Comity*, 27 VAND. J. TRANSNAT'L L. 869 (1994) and Ryuichi Yamakawa, *Territoriality and Extraterritoriality: Coverage of Fair Employment Laws after EEOC v. ARAMCO*, 17 N.C. J. INT'L L. & COM. REG. 71 (1992).

by a U.S. citizen working in Saudi Arabia despite suggestions that Congress intended Title VII to apply extraterritorially.[162] The Court reached this holding despite the fact that the defendant in *Aramco* was a U.S. company and could not have argued the often-used criticism of extraterritorial applications of law—that the application of U.S. law subjected them to a foreign law to which they had not consented.[163]

However, it is important to highlight a point of flux in the current doctrine. While *Aramco* breathed some life into the presumption, the Supreme Court declined to apply it with respect to U.S. laws on anti-trust and trademark law in *Hartford Fire*[164] and *Steele v. Bulova Watch Co.*,[165] respectively. In *Hartford Fire*, for example, the Court failed to mention the presumption with respect to the Sherman Act.[166] In determining whether Congress intended a law to apply extraterritorially, courts are willing and, in fact, often *do* consider the structure, purpose, legislative history, and administrative interpretations of a statute. Even when the court determines the presumption to bar extraterritorial application of the law, as it did with respect to the Federal Tort Claims Act[167] and the Immigration and Nationality Act,[168] the court respectively considered "congressional intent" and "all available evidence about the meaning of [INA] § 243(h)."

In summary, legislative intent matters. The current doctrine no longer imposes an absolute rule against extraterritoriality. While the presumption seems to present a formidable challenge for litigants seeking extraterritorial application of a given law based on the interpretation found in *Aramco*, the Court has subsequently declined to adopt a clear statement rule or single approach to considering extraterritoriality.[169] In other words, after *Hartford Fire*, the presumption is not an insurmountable barrier to litigants seeking to

162. The majority in *Aramco* rejected the arguments that Title VII regulates "commerce" broadly defined and that the Supreme Court should agree with the EEOC interpretation that Title VII applies extraterritorially. *Aramco*, 499 U.S. at 248. For a more in-depth analysis of Congress's intent in enacting Title VII, *see* Yamakawa, *supra* note 161, at 92.

163. *See infra* text accompanying note 185; *see also* Parrish, *supra* note 153, at 1483 (arguing that extraterritorial application of laws are irreconcilable with "democratic principles" because they "force foreigners . . . to bear the costs of domestic regulation, even though they are nearly powerless to change those regulations").

164. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993).

165. Steele v. Bulova Watch Co., 344 U.S. 280 (1952).

166. *See* Hartford Fire, 509 U.S. at 796 ("[T]he Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."); *see also* William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 98 (1998) (characterizing the *Hartford* decision as "the dog that did not bark").

167. Smith v. United States, 507 U.S. 197, 203-04 (1993).

168. Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 173-74 (1993).

169. *See generally* Dodge, *supra* note 166 (providing an extensive background on the presumption and the evidence sufficient to rebut the presumption).

bring a supplemental cause of action under foreign law.

2. The "Effects" Test

The effects test considers whether a country's laws have extraterritorial applications, thereby undercutting the long-standing principle of territorial jurisdiction. It first made its appearance on the international stage in 1927, in a dispute before the Permanent Court of International Justice (PCIJ). In *S.S. Lotus (France v. Turkey)*, a French steamer collided with a Turkish vessel on the high seas.[170] When the French ship docked in Turkey, Turkish officials arrested, tried, and convicted the French naval officer for criminal negligence.[171] The PCIJ famously upheld Turkey's jurisdiction as well as the application of Turkish law on the ground that "the effects" of the negligence were felt on Turkish territory.

This international application soon influenced American jurisprudence. In 1945, Judge Learned Hand used the effects test for the first time in his quasi-Supreme Court opinion, [172] *United States v. Aluminum Co. of America (Alcoa).* Under the test, courts may consider where the effects are actually felt, public policy, international comity,[173] and legislative intent in determining whether a law should apply extraterritorially. In *Alcoa*, the Sherman Act was applied to agreements intended to affect, and affecting, U.S. commerce. Famously, Judge Hand declared, "[A]ny state may impose liabilities, even upon persons not within its allegiance, for conduct outside its border that has consequences within its borders that the state reprehends."[174]

By the mid 1900s, courts routinely invoked an "effects test" to hold that U.S. laws regulated activities occurring abroad, at least with respect to anti-trust and intellectual property laws.[175] In *Steele v. Bulova Watch Co.*, the Supreme Court formally adopted the reasoning of *Alcoa* to prevent use of the plaintiff's trademark in Mexico.[176] The Court stated that when no conflict arises with foreign law, the "[u]nlawful effects in this country . . . are often decisive."[177]

---

170. S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10.

171. *Id.*

172. Interestingly, in that case, so many Supreme Court justices had to disqualify themselves that the Court lacked a quorum, so, for the only time in history, the Second Circuit sat by designation as the Supreme Court. *See* United States v. Aluminum Co. of America ("Alcoa"), 148 F.2d 416 (2d Cir. 1945).

173. *But see* Ramsey, *supra* note 136, at 893 (arguing that international comity is an expression of unexplained authority, imprecise meaning, and uncertain application).

174. *Alcoa*, 148 F.2d 416 (2d Cir. 1945).

175. *Steele*, 344 U.S. at 280. For a discussion of the possible extraterritorial reach of U.S. law in bankruptcy contexts, *see* David M. Green & Walter Benzija, *Spanning the Globe: The Intended Extraterritorial Reach of the Bankruptcy Code*, 10 AM. BANKR. INST. L. REV. 85 (2002).

176. *Id.*

177. Steele v. Bulova Watch Co., 344 U.S. 280 (1952).

In 1965, this trend was formally recognized in the Restatement (Second) of the Foreign Relations Law of the U.S, which stated federal statutes may apply to conduct "having an effect within[] the territory of the United States."[178] In fact, the D.C. Circuit "went so far as to hold that even foreign plaintiffs could sue foreign defendants . . . for harms that occurred overseas, as long as some harmful effect was felt within the United States."[179]

Today, the current doctrine is largely embodied in the Restatement (Third) of the Foreign Relations Law of the U.S., which permits a state to regulate "conduct outside its territory that has or is intended to have substantial effect within its territory."[180] Notably, the Restatement (Third) observes "[the Holmes opinion in *American Banana*], though still often quoted, does not reflect the current law of the United States."[181] In fact, lower federal courts have routinely applied U.S. laws extraterritorially.[182] Professor Parrish goes a step further and notes, while the "presumption against extraterritoriality remains (at least on the books), in reality it has lost almost all its influence."[183]

Similar to the territoriality approach, however, the effects test has yielded its own debates. Proponents of the test argue extraterritorial application of laws is required from a public policy perspective, particularly with respect to transnational issues such as the environment and labor.[184]However, critics of the effects test disagree, notwithstanding Professor Parrish sounding the death toll on strict territoriality. First, critics argue the effects test is flawed on a theoretical level. In their view, extraterritorial laws are "irreconcilable with democratic principles" because "they force [one population] . . . to bear the costs

178. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 38 (1965).

179. Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2515 (2005) (noting that the Supreme Court overturned the D.C. Circuit Court decision but that the Justice Department generally supports extraterritorial assertions). *See also* Empagran S.A. v. F. Hoffman-LaRoche, Ltd., 315 F.3d 338 (2003), *rev'd* Hoffmann-La Roche Ltd. v. Empagran S.A., 124 S. Ct. 2359 (2004).

180. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402(1)(c) (1987).

181. *Id.* § 415, Reporters' Note 2 (1987).

182. *See, e.g.*, Pakootas v. Teck Cominco Metals Ltd., 452 F.3d 1066, 1071 (9th Cir. 2006)(rejecting the presumption where excluding a statute's foreign application results in harms within the United States); Envtl. Def. Fund v. Massey ("Massey"), 986 F.2d 528, 531 (D.C. Cir. 1993) (finding that an adverse effect within the United States renders the presumption inapplicable, even if significant effects of the conduct are also felt abroad); Tamari v. Bache & Co. (Leb.) S.A.L., 730 F.2d 1103, 1108 n. 11 (7th Cir. 1984) (holding reliance on the presumption is "misplaced" when conduct abroad could affect domestic conditions).

183. Parrish, *supra* note 153, at 1475. *But see* Dodge, *supra* note 166, at 87 ("Although a number of scholars have suggested that the presumption . . . is obsolete . . ., the Supreme Court seems unlikely to follow [suit]").

184. Gibney & Emerick, *supra* note 154, at 141; *see also* Michael J. Calhoun, *Tension on the High Seas of Transnational Securities Fraud: Broadening the Scope of United States Jurisdiction*, 30 LOY. U. CHI. L.J. 679 (1999) (concerning the need for extraterritoriality in cases of transnational securities fraud).

of [another population's governmental] regulation."[185]

Second, critics argue the effects test is difficult to apply in practice. While the Supreme Court in *Aramco* declined to apply the effects test with respect to Title VII, *Aramco* did not bar application of the effects test with respect to other statutes. As such, the district courts are divided as to both the proper role of the effects test and its application. Some lower courts have adopted the view that U.S. law applies only to conduct that has effects within the United States regardless of where the conduct occurs.[186] Others argue that U.S. law applies to both conduct that occurs within the U.S. and has effects outside the U.S. and all conduct that has effects within the U.S.[187] Additionally, lower courts are split on the importance of defendants' intent under the effects test. While the test originally required defendants to have intended the effect be felt in the U.S., some courts have dispensed with any intent requirement.[188]

For the purposes of this Article, it is accurate to state that the effects test is probably not an independent approach to extraterritoriality, but instead a factor that interacts with the presumption. The *Steele* decision provides an illustrative example. In considering the geographical scope of the Lanham Act, the Court in *Steele* began its analysis with the presumption—"the legislation of Congress will not extend beyond the boundaries of the United States unless a contrary legislative intent appears."[189] However, in its reasoning, the Court ultimately applied the effects test—"[the defendant's] operations and their effects were not within the territorial limits of a foreign nation"— and imposed the Lanham Act on conduct occurring in Mexico.[190]

The *Steele* decision is also important because it involved the extraterritorial application of intellectual property law. Intellectual property is an area of law that often sparks the most protest from other sovereigns.[191] Like *Hartford Fire*

185. *See* Parrish, *supra* note 153, at 1483.

186. *See* Zoelsch v. Arthur Anderson & Co., 824 F.2d 27, 32 (D.C. Cir. 1987) ("[W]e might be inclined to doubt that an American court should ever assert jurisdiction over domestic conduct that causes loss to foreign investors."); *see also* Robinson v. TCI/US West Communications, Inc., 117 F.3d 900, 906 (5th Cir. 1997) (finding that the presumption means that the Securities Exchange Act only rarely applies to conduct in the United States that causes no effects here).

187. *Massey*, 986 F.2d at 531 (listing situations where the presumption does not apply, including where there is an "affirmative intention of the Congress clearly expressed" to extend the scope of the statute to conduct occurring within other sovereign nations and where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States).

188. *See, e.g.*, Sabre Shipping Corp. v. Am. President Lines, 285 F. Supp. 949 (S.D.N.Y. 1968); United States v. Imperial Chem. Indus., 100 F. Supp. 504 (S.D.N.Y. 1951).

189. *Steele*, 344 U.S. at 286.

190. *Id.*

191. *C.f.* Melissa Feeney Wasserman, *Divided Infringement: Expanding the Extraterritorial Scope of Patent Law*, 82 N.Y.U. L.REV. 281, 295 (2007) (arguing for U.S. patent law to expand its geographical scope much like U.S. trademark law).

in the context of anti-trust law, *Steele* undermines the argument that courts have adopted a territorial approach in order to avoid international discord.[192] Thus, it appears that a court's decision to read territorial limits into a statute, as the Supreme Court did in *Aramco*, *Smith*, and *Sale*, or a court's decision to reject territorial limits, as the Supreme Court did in *Hartford* and *Steele*, will not be based solely on whether there is a potential for conflict with foreign laws.

In summary, the effects test may both be limited by the territoriality approach and used to rebut the presumption against extraterritoriality.[193] To avoid conflicts with foreign nations and international discord, the effects test may be reined in by the territorial approach. However, at a time when national borders rarely prevent the conduct in one country from affecting another, there has evolved a persuasive argument that a country, when it clearly states its intention, may enact extraterritorial laws that regulate conduct abroad that has effects within the country.

B. Foreign Law versus State Law: A Clash of Civilizations?

The presumption against extraterritoriality is a canon of construction that may be nuanced by the effects test. The practical result of moving away from this presumption is that the legislative jurisdictions of two polities may overlap. Where they do overlap, the court must engage in choice of law analysis to determine which jurisdiction's law governs the subject or conduct in question.

When a U.S. court determines that a foreign law may apply extraterritorially, one of three situations arises regarding the subject or conduct in question: 1) Extraterritorial law and domestic law both govern without any conflict. 2) Domestic law does not govern at all. 3) Extraterritorial law and domestic law both govern, and they conflict with one another.[194] In each situation, the court must ask whether the extraterritorial application of the foreign law will lead to a type of "clash of civilizations"[195] between the laws of the foreign and domestic polities.

For now, this Article assumes that a litigant will bring a cause of action under U.S. federal law or FLSA. Once a cause of action is brought under federal law the issue becomes whether a supplemental claim may be brought

192. While Justice Souter argued there was no conflict of law issue in *Hartford Fire* because no foreign law "require[d] [the defendants] to act in some fashion prohibited by the law of the United States," there was certainly a conflict in the other direction – i.e., the Sherman Act prohibited an act that the British law allowed. *Hartford Fire*, 509 U.S. at 799.

193. The extent to which the effects test is limited by territoriality depends on whether the case involves application of U.S. law abroad or application of foreign law domestically, see *supra* Part III.A.1.

194. *See* Ramsey, *supra* note 136, at 933.

195. SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER (1996) (coining the term "clash of civilizations" in reference to the conflict between people's cultural and religious identities in the post-Cold War world).

under foreign law as opposed to a state domestic law. The following subsections consider a choice of law analysis framework for extraterritorial law and U.S. domestic state law.

1. The Easy Case: Simultaneous Compliance and "False Conflicts"

The easy case arises when there is no conflict between state law and foreign law. This may occur on two different occasions but results in the same outcome, as discussed below. These occasions are: (a) where no conflict exists because simultaneous compliance with foreign and state law is possible, or (b) when a false conflict exists.

a. Simultaneous Compliance

The analysis for simultaneous compliance is relatively simple. This occurs whenever foreign law and state law regulate the same conduct in such a way that both laws may be followed at the same time. The determining factor in this situation is whether U.S. courts will enforce the foreign law in the absence of a constitutional or statutory requirement to do so.[196] Notwithstanding the opportunity for simultaneous compliance, a defendant may argue that the supplemental foreign law cause of action should be dismissed.

There are two reasons why a claim under foreign law should still be recognized in U.S. courts when a state law also exists. First, residents of a jurisdiction in which a court sits may be potential defendants and may not be immune to claims against them arising under another jurisdiction.[197] To avoid the perception of harboring wrongdoers, a U.S. court may seek to adjudicate claims under foreign law. Second, in the alternative, residents of a jurisdiction in which a court sits may be potential plaintiffs and have claims under foreign law.[198] When adjudication in a foreign court is not reasonable or possible, it would be appropriate for a U.S. court to hear the foreign law claim rather than leave residents with outstanding grievances to resolve their disputes through extrajudicial means.

Notably, these justifications for hearing a foreign law claim are already considered by U.S. courts during ordinary contract disputes where the contract stipulates a foreign law as governing. Here, the plaintiff may bring a cause of action under foreign law on U.S. soil and the defendant may be liable to foreign law by virtue of having entered into the contract. Such cases are routinely adjudicated under foreign law in U.S. courts.[199] As such, when simultaneous

196. Ramsey, *supra* note 136, at 934.

197. *Id.*

198. *Id.*

199. *See, e.g.*, Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 491-92 (1983) (agreeing to hear a case where neither party was a United States entity).

compliance is possible, courts have applied foreign law despite the existence of a state law regarding the conduct.

b. False Conflicts

False conflicts require more complex analysis than simultaneous compliance cases. To analyze whether a false conflict exists, the court must identify any underlying policies and relevant interests of both legislative jurisdictions. A false conflict exists when, despite appearances to the contrary, either the foreign nation or the domestic state is uninterested in the dispute at hand. Traditionally, a polity does not apply its law where it has no interest. Captured in the Supreme Court decision *Lauritzen v. Larsen*,[200] Professor Ramsey calls this the "none of your business" rule.[201]

To determine whether a false conflict exists, courts employ the two-component interest analysis laid out by Professor Brainerd Currie in the 1950s and 60s.[202] Under this analysis, the court first ascertains the purpose that led to the adoption of a law by analyzing domestic cases. Second, the court determines which contacts with the forum, if any, bring a multi-state case within the reach of that law.[203] If multi-state contacts do not exist, then there is a false conflict and only the law of the state with contacts applies.[204]

This two-component interest analysis is the approach adopted by many states, including New York after *Babcock v. Jackson*,[205] and its application is perhaps best illustrated in *Tooker v. Lopez*.[206] In that case, the appellant-father brought a wrongful death suit against the New York driver whose car overturned in Michigan, killing both the appellant's daughter and the driver. The defendant asserted the affirmative defense of the Michigan guest statute. In analyzing the first component, the New York court in *Tooker* held that the intention of Michigan's guest statute was to prevent fraudulent claims against Michigan insurance companies. In analyzing the second component, the court held that Michigan had no interest in applying its guest statute to a dispute arising from a

200. 345 U.S. 571 (1953) (holding the U.S. Jones Act did not apply to a dispute between a Danish sailor on a Danish ship in Cuban waters).

201. Ramsey, *supra* note 136, at 920.

202. Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U.CHI.L.REV. 227 (1958), *reprinted in* BRAINERD CURRIE, SELECTED ESSAYS ON CONFLICT OF LAWS (Brainerd Currie ed., 1963); Grant v. McAuliffe, 41 Cal.2d 859 (1953) *reprinted in* BRAINERD CURRIE, SELECTED ESSAYS ON CONFLICT OF LAWS 152-53 (Brainerd Currie ed., 1963).

203. *See* Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 299 (1990) (summarizing the second component as a presumption that a law applies only when its domestic purpose is advanced).

204. Conversely, if multi-state contacts do exist, then there is a true conflict as multiple states' laws apply. A further analysis of this "true conflict" is discussed below, *supra* Part III.B.2.

205. 12 N.Y.2d 473 (N.Y. Ct. App. 1963).

206. 24 N.Y.2d 569 (N.Y. 1969).

car accident given that the defendant was from New York and no Michigan insurance companies were implicated.[207]

While interest analysis is not without its detractors,[208] it supplies a useful mechanism for analyzing state interest in the context of this Article. Foreign interest in governing a subject or conduct is affirmatively established when a court determines that a foreign law is meant to apply extraterritoriality, as explained in Part III.A. However, the question of state interest governing the same subject or conduct remains open.

Notably, if no state interest is identified, it does not always hold that a U.S. court will apply the foreign law.[209] First, a court may dismiss the supplemental cause of action under foreign law for failure to state a claim. Second, as discussed previously, U.S. courts may choose not to enforce the foreign law absent an explicit requirement to do so.[210] Finally, a court may find that the domestic state and the foreign sovereign are equally disinterested. In this "unprovided for case," the court would find that neither the foreign sovereign nor the domestic state's law is sufficiently interested in governing the subject or conduct.[211] In all such instances, the supplemental claim under foreign law will likely fail.

2. The Hard Case: True Conflicts

a. Setting the Stage for a True Conflict

The hard case arises when foreign law and state law come into direct conflict, as in when one cannot simultaneously obey the foreign and state law. With the weakening of the extraterritoriality prohibition and the rise of the effects test, the potential for "true" conflicts increase. A true conflict occurs when, in addition to the foreign law, a state law governs the subject or conduct in question.[212] When this happens, application of a foreign law cause of action potentially displaces the state law cause of action.

---

207. *Id.*

208. The biggest criticism of interest analysis is that it incentivizes courts to create false conflicts. *See* Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 405 (1980) and Joseph Singer, *Facing Real Conflicts*, 24 CORNELL INT'L L.J. 197, 219-20 (1991). *See also* Willis L.M. Reese, *Chief Judge Fuld and Choice of Law*, 71 COLUM. L. REV. 548, 559-60 (1971) (criticizing the difficulty of identifying the policies underlying the relevant laws).

209. Importantly, the question of whether foreign law should be enforced by U.S. courts is distinct from the question of whether a domestic U.S. law applies. *See* Ramsey, *supra* note 136, at 932.

210. *See supra* Part III.B.1.a.

211. *See* Currie, *supra* note 181; *Grant*, 41 Cal.2d 859. *But see* Larry Kramer, *The Myth of the "Unprovided-For" Case*, 75 VA. L. REV. 1045 (1989).

212. Again, it is assumed that the foreign law applies given the extraterritoriality analysis under Part III.A.

Nonetheless, even where a true conflict seems to arise, foreign law might be heard by the court if the scope of the state law is ambiguous.[213] While the justifications for allowing a foreign law cause of action when a true conflict exists are fewer than when simultaneous compliance or false conflict is possible, there may still be a narrow argument that the court should hear the foreign claim. For example, while a state law may regulate the conduct, the state may not have an interest in regulating the conduct in the particular case before the court. This Part will discuss how a court may conduct this choice of law analysis in order to determine whether a foreign law should apply.

As a preliminary matter, it is important to note the subsequent discussion does not consider the true conflict that arises when a defendant uses foreign law as a defense.[214] In those cases, U.S. courts generally have no authority to apply a foreign law defense at the expense of a domestic law.[215] For the purposes of this Article, however, the question is whether a foreign law may serve as a basis for a supplemental cause of action, not whether it may be used as a defense to a state cause of action. This postural difference arguably leaves enough room under a choice of law analysis for a court to consider the foreign law.

b. A Choice of Law Analysis under the Most Significant Relationship Test

There is no uniform federal statute governing choice of law issues and each state adopts its own approach to conflicts. Thus, there are a multitude of approaches to resolving true conflicts, including the traditional approach,[216] an interest balancing approach, comparative impairment test, "better rule" test, and most significant relationship test.

For the purposes of this Article, I will focus on the Second Restatement's most significant relationship test because it is the approach adopted by the largest number of U.S. jurisdictions.[217] In the context of contracts, for example,

---

213. *See Timberland*, 549 F.2d at 615, *on remand* 574 F. Supp. 1453, 1466-73 (N.D. Cal. 1983) (finding that Honduran interests outweighed U.S. interests), *aff'd*, 749 F.2d 1378, 1382-85 (9th Cir. 1984).

214. For an example of when a foreign law was recognized as a defense to a cause of action, *see Holzer*, 277 N.Y. 474 (1938) (recognizing the fact that Germany promulgated laws which required persons of non-Aryan descent to be retired as a defense).

215. Ramsey, *supra* note 136, at 933. The significant factor in *Holzer*, one of a few cases to recognize a foreign law defense, was that the contract of hiring was made and was to be performed in Germany. Under U.S. law, the law of the country or state where the contract was made and was to be performed by citizens of that state governs. *Id.*

216. Sometimes called a jurisdiction-selecting approach, this approach is largely based on territory.

217. A sample of the states that have adopted the most significant relationship test include Alaska, Arkansas, Colorado, Florida, Idaho, Iowa, Kentucky, New Hampshire, Ohio, Oklahoma, Texas, Washington, and Wisconsin, *see* Stephen D. Coggins, *Tort Trial & Insurance Practice Section*, American Bar Association, *Fifty State Survey of Choice of Law Rules, available at*

twenty-four states use the Second Restatement approach.[218] While the test is not without its detractors,[219] this decision to limit the choice of analysis to the Second Restatement is justified by the fact that the test is in many ways all-encompassing.[220] For example, the Second Restatement does not abandon the traditional approach to choice of law. Instead, it chooses a presumptively applicable rule based on territoriality and then tests this choice against 1) basic choice of law principles and 2) other general provisions in light of relevant contacts. Examples of the latter include § 145 (torts), § 188 (contracts), and reach even the more mundane disputes like § 184 (when chattel brought into state after death of owner may be administered).

To illustrate how the Second Restatement operates, consider the general provision regarding contracts for the rendition of services. The presumptive rule under § 196 is to apply the "[l]ocal law of the state where the contract requires that the services . . . be rendered."[221] However, there are several caveats. First, the presumptive rule is subject to § 6, which lists seven choices of law principles that may suggest the law of some other state with the most significant relationship should apply to the dispute.[222] Second, § 196 contains an explicit exception. It reads, "[t]here [may] be occasions where the local law of some state other than that where the services are performed should be applied . . . because of the intensity of the interest of that state in having its local law applied."[223]

As evident, the Second Restatement offers judges room to maneuver in a choice of law analysis. Notably, courts are free to weigh § 6 factors as they see fit.[224] Some courts pay lip service to the presumptive rules but make their own evaluation under § 6.[225] Other courts treat the presumptive rules as jurisdiction-selecting rules that render the Second Restatement effectively no different from

---

http://www.abanet.org/tips/iplc/fiftystates.html (listing the approaches taken by each state).

218. Symeon C. Symedonides, *Choice of Law in the American Courts in 2004: Eighteenth Annual Survey*, 52 AM. J.COMP. L. 919, 942-43 (2004) (also noting 22 states use it for contracts).

219. Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 253 (1992) ("Trying to be all things to all people, [the Second Restatement] produced mush.").

220. In fact, some argue the most significant relationship test is just interest analysis under another guise. *See, e.g.*, Luther McDougal, *Toward the Increased Use of Interstate and International Policies in Choice of Law Analysis in Tort Cases Under the Second Restatement and Leflar's Choice-Influencing Considerations*, 70 TULANE L. REV. 2465 (1996).

221. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 196 (1971).

222. *Id.* at § 6.

223. *Id.* at cmt. d.

224. *See* Borchers, *Courts and the Second Conflicts Restatement: Some Observations and an Empirical Note*, 56 MD. L. REV. 1232 (1997) (noting inconsistent evaluations under § 6).

225. *See, e.g.*, NL Indus. v. Commercial Union Ins. Co., 65 F.3d 314 (3d Cir. 1995); General Ceramics, Inc. v. Firemen's Fund Ins. Co., 66 F.3d 647 (3d Cir. 1995).

the First Restatement.[226] The take home point, however, is that the most significant relationship test offers a kind of "laundry list"[227] of important factors that courts may consider when confronted with a true conflict.[228]

IV.
RELOCATION COSTS: WHEN FOREIGN LAW SPEAKS AND THE RIGHTS OF MIGRANT WORKERS ARE PROTECTED (AN APPLICATION CONTINUED)

A. Article 28 and U.S. Law: Arising out of the Same Case or Controversy

Of the three analyses, the question of supplemental jurisdiction is perhaps the simplest. While no court has directly addressed the issue, several litigants have, in fact, brought a supplemental claim under Article 28 and similar foreign employment provisions. In *Iglesias-Mendoza v. La Belle Farm*, for example, the plaintiffs claimed defendants violated "Mexican Law" in addition to other U.S. statutes.[229] Similarly, in *Aguilar et al. v. Imperial Nurseries et. al.*, the plaintiffs claimed defendants violated Guatemalan labor law.[230] Notably, in the latter case, a default judgment was awarded for, among other things, damages on the cause of action under Guatemalan labor law.

A U.S. federal district court may hear the Article 28 foreign law cause of action, much like it hears state claims, when it arises out of the same case or controversy as a federal law claim.[231] The federal law claim, in the case of relocation costs, would be brought under FLSA, which guarantees to employees certain minimum wages. While it depends on the procedural history of a case, none of the discretionary exceptions likely apply. An Article 28 claim neither presents a novel or complex issue of State law; indeed, an Article 28 claim is not based on state law at all. As such, a U.S. court may hear an Article 28 claim under its supplemental jurisdiction.

---

226. *See, e.g.*, Spinozzi v. ITT Sheraton Corp., 174 F.3d 842 (7th Cir. 1999) (noting that while the Second Restatement "led, alas, to standards that were nebulous...it is "often, however, [that] the simple old rules can be glimpsed through modernity's fog...").

227. DAVID P. CURIE ET. AL., CONFLICT OF LAWS: CASES, ARTICLES, QUESTIONS 206 (7th ed. 2006) (noting the Restatement (Second) was a predictable response to the perceived flaws of the jurisdiction-selecting rules of Restatement (First)).

228. Indeed, the Restatement (Second) is often sharply criticized for reducing certitude with respect to choice of laws.

229. Plaintiffs' Second Amended Complaint, Iglesias-Mendoza v. La Belle Farm, No. 06-cv1756 (S.D.N.Y. filed Nov. 15, 2006).

230. Plaintiffs' Complaint, Aguilar et al. v. Imperial Nurseries et al., No. 07-cv-00193 (D. Conn. filed Feb. 8, 2007).

231. 28 U.S.C. § 1367(a) ("[T]he district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.")

B. Article 28: The Case for Extraterritorial Application

Does Article 28 apply outside its borders? As established in Part III, the answer to this question is governed by the current approach to extraterritoriality and choice of law. Retreating from a strict prohibition against extraterritorial legislative jurisdiction, the current approach establishes a canon of statutory construction that is a presumption against extraterritoriality, which may be rebutted by the effects test. Under the approach, a litigant may consider the following factors: did the legislature expressly intend for its laws to apply outside its borders, would it frustrate a legislature's intent if its laws did not apply, and the location where the effects of the conduct in question are felt.

1. The Territorial Approach: The Presumption and Its Rebuttal

Applying the framework to the application at hand, there is a strong argument that Article 28 applies to the employment relationship when recruitment occurs in Mexico even if the work occurs in the U.S. First, the history of Mexico's Federal Labor Law indicates the law was meant to be enforced even when Mexican citizens work abroad. Originally enacted in 1931 pursuant to Title VI of Article 123 of the Mexican Constitution, the law was described as "one of the most advanced labor codes in the world at its time."[232]

Most importantly, the history of the Bracero program, the ancestor of today's guest worker program, suggests Article 28 applies to U.S. employers recruiting in Mexico. Article 28 was the center of intense negotiations between the U.S. and Mexico with respect to the Bracero program.[233] During the initial negotiations, Mexico insisted U.S. employers pay for the workers' relocation costs as required by Article 28[234] and, in the end, the U.S. stipulated.[235] As such, the text of the original Bracero Agreement in August 4, 1942 and subsequent updates explicitly referred to Mexico's relocation travel costs requirement.[236]

Additionally, the manner in which the Bracero program operated suggests Article 28 was meant to apply extraterritorially to migrant workers recruited in

---

232. MEXICO: A COUNTRY STUDY 41(Tim L. Merrill & Ramon Miro eds., 1997).

233. President Truman's Commission on Migratory Labor stated: "The negotiation [was] a collective bargaining situation in which the Mexican Government [was] the representative of the workers and the Department of State [was] the representative of our farm employers." *See* Kitty Calavita, *supra* note 33.

234. Agreement between the United States of America and Mexico revising the agreement of August 4, 1942 respecting the temporary migration of Mexican agricultural workers, Apr. 26, 1943, 57 Stat. 1152.

235. ERNESTO GALARZA, MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY 48 (1964).

236. *See Agreement on the Temporary Migration of Mexican Agricultural Workers*, Aug. 4, 1942, 56 Stat. 1759; *Agreement Between the United States of America and Mexico Respecting the Recruiting of Mexican Non-Agricultural Workers*, April 29, 1943, 57 Stat. 1353.

Mexico and traveling to the U.S. for work. As Professor Griffith states:

> Not only was Mexico's foreign employer provision included in the text of the bilateral Agreement but there are indications that the substance of Mexico's foreign employer provision may have been enforced in the United States under the Bracero Program. In the 1942 Bracero Agreement, the two governments jointly guaranteed compliance with the terms of the labor contract through administrative and diplomatic channels. The methods and mechanisms of enforcement fluctuated over time. Generally speaking, however, the U.S. Department of Labor, the U.S. Department of Agriculture, and Mexican consuls supervised contracts and enforced the Bracero Agreement's requirements. In the early 1950s, a formal grievance procedure was agreed upon, which relied on "joint decisions" by the Mexican and United States governments.[237]

In other words, given its history and prior inclusion under the Bracero program, Article 28 is "not entirely 'foreign' to the U.S. legal regime."[238]

Additionally, based on the statutory language, the intent of the Mexican legislature is clear – the Federal Labor Law is meant to apply extraterritorially. Article 28 states, "all costs which arise from crossing the border and fulfillment of the arrangements of migration, or for any other similar concept, will be the exclusive responsibility of the employer."[239] In Spanish, the relevant language under Article 28 is "*todos los [costos] que se origenen por el paso de las fronteras y cumplimiento de las disposiciones sobre migración . . . serán por cuenta exclusiva del patrón.*"

Arguably, if the language in Article 28 omitted reference to borders and migration, there may be an argument that it was meant to apply to internal employment relationships within Mexico. However, by including all costs that "arise from crossing the border" it is clear the legislature was concerned with Mexican nationals traveling to work in the U.S. If ambiguity exists as to whether the legislature, for some reason, referred to an internal border between Mexican states or an international border when it used the word *frontera,* this is clarified in its use of *migración*, a word primarily used in the context of migrating across international political borders.[240]

While it is rare that a legislature considers extraterritorial application of its

---

237. Griffith *supra* note 79, at 418-19. *See also* Agreement amending and extending the agreement of August 11, 1951, as amended and extended, Oct. 23, 1959, 10 U.S.T. 2036. Braceros, or Mexican Consuls on their behalf, often made complaints directly to the U.S. Department of Labor. Galarza, *supra* note 235, at 47.

238. *Id.*

239. Ley Federal de Trabajo Art. 28(I)(b) *available at* http://www.diputados.gob.mx/LeyesBiblio/pdf/125.pdf.

240. According to *Diccionario Manual de la Lengua Espanola, migración* in Spanish is defined as "*movimiento de población que consiste en dejar temporal o definitivamente el lugar de residencia para establecerse o trabajar en otro país o región, especialmente por causas económicas, políticas o sociales.*" While this includes in its definition movements to other regions in addition to other countries, it is the movement to other countries that is listed first. Additionally, a more appropriate word is available (and used) for internal movement: *trasladarse.*

laws, it is understandable given that the Mexican Constitution was framed in the aftermath of the Mexican Revolution of 1910 and sought to protect Mexican-nationals from both foreign and domestic exploitation.[241]

Furthermore, Mexican officials interpret the statute as applying to U.S. employers recruiting Mexican-nationals in Mexico. In 1942, for instance, Mexico's Minister of Foreign Affairs contended that "Mexicans entering the United States under this agreement shall enjoy the guarantees of transportation, living expenses and repatriation established in [Mexico's foreign employer provision]."[242] This view continues today. In an affidavit in support of a U.S. lawsuit, one Mexican Consulate stated:

> Abuse of Mexican citizens who are recruited for work in the United States by farm labor contractors is all too common. There are Mexican laws designed to ensure that Mexican workers . . . are not charged for travel expenses. . . . [C]ontractors recruit thousands of Mexican nationals to work in the United S[t]ates in violation of Mexican laws designed to protect our citizens.[243]

Echoing this statement, the former Foreign Minister of Mexico, Jorge Castañeda noted, "We think that the broad immigration and labor agenda includes humane, civil and adequate treatment for Mexicans: Mexicans here, going there; Mexicans as they cross the border; Mexicans when they start work and Mexicans who have already been in the United States for a long time."[244] In other words, Mexican officials continue to confirm that Article 28 was meant to be enforced against U.S. employers recruiting Mexican-nationals in Mexico.

In summary, the history of Article 28, its inclusion in the Bracero program, the statutory language, and affirmations by Mexican officials rebut the presumption against extraterritorially.

2. *The Effects Test*

The effects test also counsels for an extraterritorial application of Article 28. When employers fail to pay the relocation costs of its workers, it is Mexican-nationals who are affected. This is true whether workers pay the costs upfront or whether employers pay and deduct the costs from the employees' first paychecks. In the former case, migrant workers often take out significant loans

---

241. *See* Jenna L. Acuff, *The Race to the Bottom: The United States' Influence on Mexican Labor Law Enforcement*, 5 SAN DIEGO INT'L L.J. 387, 391 (2004) (providing the historical context for Mexico's employment regulations).

242. Agreement between the United States of America and Mexico revising the agreement of August 4, 1942 respecting the temporary migration of Mexican agricultural workers, Apr. 26, 1943, 57 Stat. 1152.

243. Perez-Perez v. Progressive Forestry Servs., 2000 U.S. Dist. LEXIS 414 (D. Or. 2000) (affidavit of Alma P. Soria Ayuso, Consul General for the Consulate of the United Mexican States located in Portland, Oregon).

244. *See* Ginger Thompson, *U.S. and Mexico to Open Talks on Freer Migration for Workers*, N.Y. TIMES, Feb. 16, 2001, at A1.

or collateralize their homes in order to pay the relocation costs before departing from Mexico.[245]

In the latter case, the effect is equally clear, although more indirect. When employers deduct costs from workers' paychecks, the workers' remittances to Mexico are impacted. This fact cannot easily be dismissed. While the amount of money migrant workers send home on a periodic basis is approximately two to three hundred dollars monthly, remittances are Mexico's second-largest source of foreign income after oil exports.[246] In fact, remittances are higher in Mexico than in any other developing country and, in 2003, Mexico received more than $13 billion in remittances.[247]

These remittances are often critical to the development of economic activity in Mexico.[248] For example, several government-sponsored programs channel remittances into infrastructure development and business start-ups.[249] Additionally, remittances often meet the needs of family members in Mexico. In some Mexican states, it is estimated that 80 percent of the money received pays for basic necessities such as food, clothing, health care, transportation, education, and housing expenses.[250]

The current economic crisis highlights the impact of remittances on Mexico.[251] A recent survey of Latino immigrants by the Inter-American Development Bank found that Latino immigrants, responding to the economic downturn and new uncertainties about their future, have stopped sending money

245. *See infra* text Part II.B; *see also* BAUER, *supra* note 70.

246. *See* Deborah Bonello, *Remittances to Mexico Continue to Fall*, L.A. TIMES, Oct. 2, 2008, http://latimesblogs.latimes.com/laplaza/2008/10/remittances-to.html; *see also* Inter-American Development Bank, *Remittances 2005* at 33 (providing statistics on Mexico's remittances). *See generally* Roberto Coronado, *Workers' Remittances to Mexico*, EL PASO BUSINESS FRONTIER, Issue 1 2004, at 1.

247. *Id.*

248. One estimate is that remittances are responsible for about 27 percent of the capital invested in microenterprises throughout urban Mexico and up to 40 percent in states with high migration rates to Mexico. *See* Christopher M. Woodruff & Rene Zenteno, *Remittances and Microenterprises in Mexico*, J. DEV. ECON. (2006).

249. These programs include the *Dos por Uno (Two for One)* program, which matches remittances dollar for dollar and *Invierte en Mexico*, which is run by Mexico's largest development bank and offers start-up capital for small businesses. *See* MIGUEL MOCTEZUMA L., RED INTERNACIONAL DE MIGRACIÓN Y DESARROLLO, INVERSIÓN SOCIAL Y PRODUCTIVIDAD DE LOS MIGRANTES MEXICANOS EN LOS ESTADOS UNIDOS, *availavble at* http://meme.phpwebhosting.com/~migracion/modules/documentos/5.pdf. For more on *Invierte en México*, *see* the Nacional Financiera's Website, http://www.nafin.com.

250. *See Migración México-Estados Unidos: Presente y Futuro, Importancia de las remesas en el ingreso de los hogares*, CONSEJO NACIONAL DE POBLACIÓN, Jan. 2000 (noting this is the case in Michoacan, Guerrero and Oaxaca).

251. Marc Lacey, *Money Trickles North as Mexicans Help Relatives*, N.Y. TIMES, Nov. 15, 2009, at A1 (reporting on the recent evidence of Mexicans supporting unemployed relatives in the U.S. due to the economic crisis).

home to their families in the last two years.[252] In July 2008, for example, remittances dropped 7 percent compared with the previous year – the biggest fall on record as measured by Mexico's central bank.[253]

In summary, the economic crisis illustrates the direct relationship between workers' wages and its impact, or "effects," in Mexico.[254] Thus, application of the effects test confirms that the foreign law should be applied extraterritorially.

C. Article 28 and State Laws

1. The Easy Case

When there is no conflict between foreign law and state law, the argument for enforcing Article 28 in U.S. courts is easier. A U.S. court will likely be open to enforcing an Article 28 claim when a court either identifies the possibility of simultaneous compliance with state law or establishes the existence of a false conflict.

a. Simultaneous Compliance

A migrant worker's strongest argument that U.S. courts enforce Article 28 is that no conflict exists because employers may simultaneously comply with both federal and state law. There are several employment cases in which a court has recognized a foreign law cause of action when it found no conflict with domestic laws. In *Curtis v. Harry Winston*,[255] for example, the court applied Venezuelan labor law, noting that the Venezuelan law was not "repugnant" to U.S. public policy.[256] In that case, a Venezuelan citizen sued a U.S. employer and the Venezuelan labor law afforded greater benefits to workers. Additionally, in *Chinnery v. Frank E. Basil*,[257] the court went a step further in asserting jurisdiction despite an express choice of law provision in the employment agreement to use Saudi Arabian law.[258]

---

252. *See* Julia Preson, *Fewer Latino Immigrants in U.S. Sending Money Home*, INT'L HERALD TRIB., Apr. 30, 2008, *available at* http://www.iht.com/articles/2008/04/30/america/01immig.php (reporting on the IDB study).

253. *See* Laurence Iliff, *Mexicans Feeling the Pinch as Income Stream from U.S. Slows*, DALLAS STAR, Sept. 23, 2008, at A1.

254. For more studies on the impact of remittances on poverty in developing countries, *see generally* THE WORLD BANK, GLOBAL ECONOMIC PROSPECTS (2006); G. Esquivel & A. Huerta-Pineda, *Remittances and Poverty in Mexico*, INTEGRATION & TRADE, July-December 2007, at 27; Elisabeth Malkin, *Study Challenges Assumptions About Money Being Remitted to Mexico*, N.Y. TIMES, July 7, 2005, at C4; and RODOLFO GARCÍA ZAMORA, NEW PATTERNS FOR MEXICO, 19-32 (Barbara J. Merz ed., 2006).

255. 653 F. Supp. 1504 (S.D.N.Y. 2002).

256. *Id.* at 1508.

257. No. 86-2977, 1988 U.S. Dist. LEXIS 19438 (D.D.C Jan. 13, 1988).

258. *Id.* at *11-12 (D.D.C Jan. 13, 1988) (noting that it would apply Saudi Arabian law given

Thus, in the context of relocation costs, Article 28 of Mexico's Federal Labor Law may not be in true conflict when the state law concurs with Article 28 or is silent on the issue; the latter case being more likely. The relationship can be analogized to that between U.S. federal law and state law. U.S. federal law is largely considered a minimum floor for employment protections;[259] when appropriate, state law may establish higher standards. Indeed, basic U.S. policies that ensure safe work conditions and basic Mexican policies that protect its nationals working abroad are in alignment. Similarly, in this case Article 28 may impose a higher standard than the state law when simultaneous compliance is possible. When this occurs, Article 28 may be enforced in U.S. courts.

b. False Conflicts

The process of identifying a false conflict relies in part on the analysis of whether the foreign law is meant to apply extraterritorially. For the purposes of this Article, it is assumed that when a foreign law is determined to apply extraterritorially, the foreign state has an interest in the dispute.[260] The remaining question is whether a competing state interest exists. Although it is evident under the extraterritoriality analysis that Mexico has an interest in applying Article 28 to conduct occurring in the U.S., it may not be clear that states have a competing interest in applying their own contrary law.

Applying this framework to the question of relocation costs, it is clear that a false conflict between foreign and state law may exist, at least in those cases where a state has no interest in protecting the employer-defendant from liability. It should be noted, however, that such a case may be rare. Most states have an interest in protecting employers from liability because it encourages employers to do business within the state.

Nevertheless, given that state interests also seek to protect domestic workers from competition from low-wage workers, the scenario is not impossible. Such a case may arise when an employer-defendant is not incorporated in the state in question or the majority of its business is done outside the state. Even if a state law exists that places the burden of relocation costs on workers, there may be no state interest in allowing the employer-defendants to avail themselves of that law. While it is beyond the scope of this Article to consider the different interests of each state, it suffices to say the possibility for a false conflict exists. When it is identified, U.S. courts may

---

the express provision in the parties' Agreement).

259. Cf. Gary Minda, *Employment Law*, 42 SYRACUSE L. REV. 491, 531 (1991) (noting federal regulations serve as a minimum floor with respect to whistle-blowing regulations); Daniel J. Solove & Chris Jay Hoofnagle, *A Model Regime of Privacy Protection*, 2006 U.ILL. L. REV. 357, 401 (2006) (noting the general approach is that federal regulations serve as a minimum floor that states may exceed).

260. *See supra* Part III.B.2.

consider a claim under Article 28.

2. The Hard Case

When Article 28 truly conflicts with state law, as interpreted by the court, the rule embodied in § 196 of the Second Restatement presumes that the law of the state where services are rendered should apply. Since a migrant worker's "services" are rendered in the U.S., the presumption is that U.S. state law applies. However, the inquiry does not end there; the caveats or factors identified in Part III.B.2 must be considered. Although there is no uniform approach to considering or weighing these factors, there remains an argument that U.S. courts should apply Article 28.

a. § 6 Caveats – Justified Expectations

First, § 6(2)(d) of the Second Restatement discourages disruption of "justified expectations" and the justified expectation of parties is that Mexican law applies. This argument is strongest with respect to H-2 guest workers since employers sign documentation explicitly promising to abide by relevant federal, state, or local employment laws.[261] Under this fact pattern, the presumptive rule of § 187 of the Second Restatement, that is, the law chosen by the parties in a contract, may be relied upon instead of § 196. Because legal obligations routinely arise in both Mexico and the U.S. prior to when actual work begins, there is a strong argument that the relevant "local law," i.e., the law chosen, is the law where recruitment occurs, i.e., Mexico.[262]

With respect to workers who have no explicit protection available in their contract, the argument is weaker; however, Mexican law may still apply. Even without express promise by employers to follow the relevant local law, it may be argued that the location of the pre-employment period still matters. For example, alongside the place of performance and the location of the subject matter of the contract, § 188 of the Second Restatement considers the place of contracting and the place of negotiation of the contract as factors to be taken into account in determining the applicable law.[263]

Additionally, even without an explicit provision, it is reasonable to believe that the expectation of parties is that Mexican law applies given that Mexican

261. 20 C.F.R. §§ 655.203(b), 633.103(b), 655.3(b) (West 2009). ("As part of the temporary labor certification application, the employer shall include assurances, signed by the employer, that . . . the employer will comply with applicable Federal, State and local employment-related laws").

262. *See* Griffith, *supra* note 79, at 399 (proposing the same argument in the context of incorporation of Article 28 by reference in AWPA).

263. RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 188(2) (1971) (governing contract issues in the absence of effective choice by the parties).

law was applicable at the time of contracting.[264] Indeed, in many states, the traditional rule is that the law of the state where the contract is made, that is, where the last act legally necessary to bring the contract into effect occurs, governs a contract.[265] This line of reasoning has been invoked in several cases considering whether Article 28 is incorporated into U.S. law.[266] Thus, from an objective standard, it is likely that a grower who recruits in Mexico and a worker recruited in Mexico expect Mexican law to apply to their activities in Mexico.[267]

Finally, as mentioned previously, Congress often creates legal obligations for employers at times and in places prior to the start of the traditional employment relationship.[268] Likewise, in Mexico, Article 28 requires recruiters and employers alike to respect a broad array of worker rights, suggesting the employment relationship is created, or is "cognizable," in Mexico.[269] Thus, in determining the "relevant law," both Mexico and the U.S. find the location of the pre-employment period matters.

b. Section 6 Caveats – Needs of the Interstate and International System

Under section 6(2)(a) of the Second Restatement, the needs of the interstate and international systems must be considered. As such, section 6(2)(a) requires U.S. courts to enforce Article 28 domestically in two ways.[270] First, U.S.-Mexico relations call for recognition of an Article 28 cause of action in U.S. courts. Although the balance of power between the nations is often characterized as lopsided in favor of the U.S., Mexico is an important ally to the

264. Griffith, *supra* note 79, at 401-407.

265. For an illustration of this traditional contract rule in action, *see* Crawford v. Manhattan Life Ins. Co. of N.Y., 221 A.2d 877 (Pa. 1966). Nationwide Mutual Insurance Co. v. Malta, 434 A.2d 164 (Pa. 1981).

266. *See, e.g.*, Wales v. Jack M. Berry, Inc., 192 F. Supp. 2d 1269, 1287 (M.D. Fla. 1999); Colon v. Casco, Inc., 716 F. Supp. 688 (D. Mass. 1989).

267. Notably, a subjective test may require the Mexican worker and the U.S. employer actually knew Article 28 applied.

268. *See* 29 U.S.C. § 1831(e) ("No farm labor contractor, agricultural employer, or agricultural association shall knowingly provide false or misleading information to any seasonal agricultural worker concerning the terms, conditions, or existence of agricultural employment"). For more information on the legislative history of AWPA, *see* Bill Beardall, Equal Justice Center, *Migrant and Seasonal Agricultural Worker Protection Act, Outline and Annotations* (Updated and annotated by Greg Schnell, Migrant Farmworker Justice Project, Apr. 2009).

269. *See* Jennifer Hill, *Binational Guest Worker Unions: Moving Guest Workers into the House of Labor*, 35 FORDHAM URB. L.J. 307, 332-333 (2008) (arguing that an employment relationship exists in Mexico for both the purposes of enforcing minimum employment guarantees and for the purposes of workers exercising union rights).

270. It is important to note that neither of these ways should be labeled as "international comity." *See* Ramsey, *supra* note 127, at 936.

U.S. in its War Against Drugs and its War Against Terror. Allowing foreign law causes of action is a relatively low-cost way for the U.S. to foster what some in Congress call a "special relationship" with Mexico.[271] Second, as a signatory to several international labor standards, the U.S. has agreed to provisions that were sometimes stricter than that otherwise provided under U.S. federal and state laws.[272] For example, both North American Free Trade Agreement (NAFTA) and Central America Free Trade Agreement (CAFTA) provide protections that go beyond U.S. laws.[273]

c. Section 196 Caveat – Intensity of the Foreign State's Interest

In the comments to section 196, the Second Restatement provides an exception to the presumptive rule. In the case where another state has an interest in having its local law apply, that state's law applies. To some extent, this caveat may be thought of as similar to the public policy exception used under the traditional approach to choice of law[274] or as a variant on the interest analysis approach.[275]

Whichever perspective is adopted, the "intensity of interest" analysis largely mirrors the analysis of whether there was intent to apply the foreign law extraterritorially. While it will not be repeated here, it suffices to say Mexico has asserted an interest in having Article 28 apply to conduct in the U.S. Notwithstanding Mexican interest in protecting its nationals, the "intensity" of Mexico's interest is reflected in the history and language of the statute, statements by Mexican officials, and the fact that the conduct directly affects the Mexican economy.

d. Applying the Test: Mexico Has the Most Significant Relationship

In summary, Article 28 should apply given the factors listed in section 6 and the "intensity of the interest"[276] Mexico has in having its local law applied.

---

271. *See, e.g.*, 147 Cong. Rec. 10380-01 (2001) (statement of Sen. Dodd) (identifying the "special relationship" between the U.S. and Mexico in the context of fighting terrorism), 147 Cong. Rec. 5413-06 (2002) (statement of Rep. Pence) (noting the "special relationship" between the U.S. and Mexico).

272. *See generally* Marisa Anne Pagnattaro, *Leveling the Playing Field: Labor Provisions in CAFTA*, 29 FORDHAM INT'L L.J. 386 (2006).

273. *Id.*; *see also* Wishnie, *supra* note 113.

274. *See, e.g.*, Louks v. Standard Oil Co. of New York, 224 N.Y. 99 (1918) (applying the public policy exception).

275. Under an interest analysis, the relative interests of the competing jurisdictions are balanced and the law of the jurisdiction with the greater interest applies. *See* Lilienthal v. Kaufman, 239 Or. 1 (1964). Some states have adopted a related comparative impairment test. *See* Bernard v. Harrah's Club, 16 Ca.3d 313 (1976).

276. RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 196, cmt. d.

This argument's reliance on the factors listed in section 6 should not be troubling. There are many cases where the presumptive rules are ignored and the courts solely base their analysis on the section 6 factors. For example, in *Wood Bros. Homes, Inc. v. Walker Adjustment Bureau,* the court first went through the entire section 6 analysis to determine New Mexico law applied. Only as an afterthought did it add, "*A fortiori*, the presumption of section 196 that New Mexico law applies has not been rebutted."[277]

V.
CONCLUSION

This Article presents the argument that both U.S. laws and the laws of the worker's country of origin may regulate the employment relationship between a migrant worker and his or her employer when a worker is migrating between the two countries. Notably, this approach is not without its challenges. It largely depends on the choice of law approach adopted by U.S. courts toward legislative jurisdiction. In finding that U.S. courts should enforce Article 28, the analysis applies the effects test, incorporates factors such as the needs of the international system and justified expectations of parties, and considers state interests. While this methodology is sound under modern approaches to choice of law, it may be harder to defend under a strict territorial, or jurisdiction-selecting, approach.

That said, at least in those jurisdictions that employ a modern approach to choice of law, there is a strong suggestion that migrant workers who are recruited in Mexico and must travel from Mexico to the United States should not bear the costs of relocation under Article 28 of Mexico's Federal Labor Law. U.S. courts may choose to enforce Article 28 in addition to U.S. law because Article 28 was meant to apply extraterritorially, no conflict arises with state laws, and Mexico has an interest in seeing its laws enforced. Just as U.S. workers bring supplemental state law cause of actions in addition to federal claims, Mexican-nationals should likewise be permitted to bring a supplemental claim under Article 28.

A U.S. report stated, "Governments of destination countries for migrant workers have a special obligation to ensure that those workers are not subjected to servitude . . . [and] [g]overnments of major source countries have obligations . . . to protect [ ] workers' interests by limiting pre-departure fees and 'commissions' to reasonable levels."[278] While this Article is limited to the question of relocation costs when a U.S. employer recruits workers in Mexico, other countries sending large number of workers to the United States, such as Guatemala, have similar laws and a similar analysis may be applied.

As a final note, there are a myriad of ways U.S. employment regulations

277. 198 Colo. 444, 449 (1979).

278. U.S. DEP'T OF STATE, *supra* note 82, at 16.

fail to protect migrant workers where a foreign law provides a right of action.[279] This Article does not address the majority of the systemic problems of inadequate and unequal protection under U.S. law discussed in Part I. For example, in addition to provisions relating to relocation costs, Article 28 requires the payment of social security benefits while U.S. law does not explicitly bar it.[280]However, it may be that a choice of law analysis would similarly allow enforcement of the foreign law in U.S. courts. In considering these other applications, the analysis regarding supplemental jurisdiction will be the same. While this Article examines the question within the context of an employee's relocation costs to the U.S., the analysis may be applicable in other areas where U.S. law is deficient or "silent" and foreign law "speaks."

279. *See supra* Part I (detailing deficiencies in U.S. laws in the protection of migrant workers).

280. Ley Federal de Trabajo: art. 28(I)(c), *available at* http://www.diputados.gob.mx/LeyesBiblio/pdf/125.pdf.

Berkeley Journal of International Law

Volume 28 | Issue 1 Article 3

2010

Corporate Social Responsibility in China: Window Dressing or Structural Change

Li-Wen Lin

Corporate Social Responsibility in China: Window Dressing or Structural Change?

Li-Wen Lin*

ABSTRACT

In recent years many indigenous corporate social responsibility (CSR) initiatives have emerged in China. The Chinese CSR initiatives include laws and regulations, governmental instructions and guidelines, non-governmental standards and organizations. The recent growth of the Chinese CSR initiatives deserves an analysis of the CSR development in China, especially given that China's international image is usually associated with human rights abuses, substandard products, sweatshops, and serious environmental pollution. How sincere and serious are the Chinese CSR measures? Are they simply window dressing or is there any real structural change? This Article overviews major Chinese CSR initiatives and analyzes the Chinese CSR development from the perspectives of the historical and ideological foundations, instrumental motivations, and institutional environments in China.

I. INTRODUCTION

Corporate social responsibility (CSR) essentially requires companies to conduct business beyond compliance with the law and beyond shareholder wealth maximization. It suggests that companies should do more than they are obligated under applicable laws governing product safety, environmental protection, labor rights, human rights, community development, corruption, and so on; it also suggests that companies should consider not only the interests of shareholders but also those of other stakeholders (e.g., employees, consumers, suppliers, and local communities). CSR requires companies to provide not only the quantity of goods, services, and employment but also the quality of life for those whose interests are affected by corporate activities. The abstract concept of CSR has been transformed into a long list of corporate practices including,

* Paul F. Lazarsfeld Fellow, Department of Sociology, Columbia University; JSD (2008), LLM (2005), University of Illinois at Urbana-Champaign. I am grateful to Professors Cynthia Williams, Ruth Aguilera, Tom Ginsburg and Tom Ulen. Errors remain my own.

but not limited to, environmental management systems, eco-friendly and safe products, labor protection measures and welfare plans, corporate philanthropy and community development projects, and corporate social and environmental performance disclosure.[1]

China seems an awkward case in terms of CSR development. China is infamous for sweatshops and environmental pollution problems. The recent series of scandals of Chinese substandard products has again confirmed the shocking fact that many Chinese companies are unscrupulous about making money at the expense of human lives.[2] Made-in-China products are popularly associated not only with low prices but also low product quality and irresponsible production processes. Ironically, the widespread image of Chinese corporate irresponsibility may be a main driver for CSR development in China.

Since 2004 CSR has become a prominent issue in Chinese academic and policy forums.[3] As this Article shows, in recent years many public and private CSR initiatives have emerged in China. The Chinese government in particular plays an important role in guiding the CSR discourse. The leading example is Article 5 of the 2006 Chinese Company Law, which requires companies to "undertake social responsibility" in the course of business.[4] Another important state-led measure is the promulgation of the CSR principles for the Chinese central-government-controlled companies to follow. Some private initiatives are growing as well, such as the Responsible Supply Chain Association's CSC9000T and the Chinese industrial associations' joint declaration of the Chinese CSR Industrial Principles.

On the one hand, CSR advocates may be glad to see the growth of CSR initiatives in China. On the other hand, they may also cast doubt on the real purposes and effectiveness of these Chinese CSR initiatives. Are these Chinese CSR measures simply window dressing, through which China just intends to improve its tarnished international image? This question particularly arises from the notorious fact/allegation that the Chinese government pushes or uses companies as vehicles of human rights abuses. For example, the Chinese

1. For a brief history about the CSR concepts and practices since the 1950s, see Archie B. Carroll, *A History of Corporate Social Responsibility*, *in* THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY (A. Crane, A. McWilliams, D. Matten, J. Moon and D. Siegel eds., 2008).

2. *See e.g.*, David Barboza, *Why Lead in Toy Paint? It's Cheaper*, N.Y. TIMES, Sept. 7, 2007; Andrew Martin, *Melamine from U.S. Put in Feed*, N.Y. TIMES, May 31, 2007; Walt Bogdanich, *Toxic Toothpaste Made in China is Found in U.S.*, N.Y. TIMES, June 2, 2007.

3. By using the term "gongsi shehui zeren" (corporate social responsibility) for title search in the China Academic Journals Full Text Database, this author found only 1 article published in 1994, 2 in 1998, 1 in 1999, and 1 in 2001. But since 2002, the literature has grown noticeably: 8 articles in 2002, 15 in 2003, 21 in 2004, 39 in 2005, 172 in 2006, 104 in 2007, and 57 in 2008 (as of Aug.). For an overview of the discussion path, *see* YOHUAN LI, QIYE SHEHUI ZEREN ZAI ZHONGGUO [CORPORATE SOCIAL RESPONSIBILITY IN CHINA] 4-7 (2007).

4. *See* Chinese Company Law (2006), art.5.

government requires search engine companies to conduct censorship based on the instructions provided by the Chinese government officials.[5] The Chinese government also has aggressively employed the state-owned enterprises to acquire its political and economic interests in many conflict zones in Africa. For instance, international human rights organizations have seriously condemned China National Petroleum Corporation (CNPC), a state-owned enterprise directly controlled by the Chinese central government, for its indirect involvement in the Darfur genocide.[6] These cases are contrary to the generally understood idea of CSR and raise doubt about the Chinese government's motive of promoting CSR.

This Article analyzes the question from the ideological, instrumental, and institutional dimensions. The ideological dimension finds that the charitable practices by traditional Chinese family enterprises, the socioeconomic function of state-owned enterprises under Chinese traditional communism, and the newly-minted Chinese socialist percept provide footholds for CSR in China. The instrumental dimension considers the economic pressure in the global market and the social, economic and political interests within China. However, the political, legal and economic institutions in China still pose great challenges for the true furtherance of CSR. With respect to the public initiatives, this Article suggests that it is fair to say the Chinese government may be sincere in promoting CSR to the exclusion of human rights issues. China has relatively consistent political and economic interests in promoting the labor and environmental aspects of CSR. The Chinese government's implicit exclusion of human rights from its official CSR measures signals a CSR discourse with Chinese characteristics. With respect to the private initiatives, private actors are becoming acquainted with the CSR standards in the global market, but the implementation is still subject to Chinese companies' technological capacity and bargaining power in relation to their international buyers.

The study on CSR development in China offers important implications for the CSR development in global and comparative senses. CSR initiatives are part of the global governance scheme. Globalization not only creates huge business space for corporations but also more out-of-reach areas for national regulators. Many innovative transnational governance mechanisms outside the traditional regulatory territory have emerged to capture the emptiness. Still, global regulatory order is inevitably shaped and constrained by the existing institutions

---

5. *See* HUMAN RIGHTS WATCH, RACE TO THE BOTTOM: CORPORATE COMPLICITY IN CHINESE INTERNET CENSORSHIP (2006) (illustrating how companies such as Yahoo, Google and Microsoft assist internet censorship in China), *available at* http://www.hrw.org/en/reports/2006/08/09/race-bottom.

6. *See* Stephen Diamond, *The PatroChina Syndrome: Regulating Capital Markets in the Anti-Globalization Era*, 29 J. CORP. L. 39 (2003); Patrick Keenan, *Curse or Cure? China, Africa, and the Effects of Unconditioned Wealth*, 27 BERKELEY J. INT'L L. 89 (2009) (noting that Chinese oil companies are not directly involved in the conflicts of Darfur).

at the country level; any design of global regulatory order cannot be practicable if it fails to consider the effects of implementing such global regulatory law in a given country. The CSR development in China is a good example for evaluating the effects of global governance on the local level. In particular, the contemporary CSR movement is primarily pushed by the civil society in developed countries, but the movement has great impact on developing countries in the age of globalization. The impact can interact with the local environments of developing countries, producing some intended and unintended effects. Moreover, the Chinese case study also suggests that different countries have different indigenous CSR courses. The understanding and implementation of CSR is subject to cultural and institutional settings. It indicates the importance of comparative research for the study of CSR.[7]

This Article is arranged as follows. Part II overviews the recent development of major Chinese CSR initiatives. It shows that CSR has gained an institutionalized position in the Chinese legal and political system. Additionally, some private actors have mobilized resources to develop CSR standards with Chinese characteristics. This overview sets the stage for the discussion in the following parts. Part III traces the related ideological roots of CSR in China. The indigenous ideologies echo many aspects of modern CSR generally understood in western societies. Part IV analyzes the instrumental motivations behind the Chinese CSR measures. There are external and internal forces that push China to embrace CSR, though with some qualifications. Part V elaborates upon the political, legal and economic institutional constraints on the CSR development in China.

II.
CORPORATE SOCIAL RESPONSIBILITY INITIATIVES IN CHINA

This section gives an overview of major Chinese CSR initiatives in the very recent years. The initiatives include corporate law, CSR standards and implementation guidelines, social and environmental information disclosure regulations, capital market regulations in connection with environmental performance, responsible production standards, and nongovernmental CSR organizations. This overview sets the stage for understanding the current CSR development in China.

7. *See* Cynthia A. Williams & Ruth V. Aguilera, *Corporate Social Responsibility in Comparative Perspective*, *in* OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY (A. Crane, A. McWilliams, D. Matten, J. Moon and D. Siegel eds., 2008).

A. Public Initiatives

1. The Company Law

CSR is a concept closely related with the stakeholder model of corporate governance. In this regard, the Chinese company law may coexist harmoniously with CSR. When the Chinese legislators drafted the company law in the early 1990s, the idea of modern CSR was not conceptualized however. Employee participation in corporate governance provided in the 1994 Company Law was more of a politically and economically path-dependent product. The traditional Chinese socialist ideology celebrated workers. The Constitution of the People's Republic of China states that the country is led by the proletariat and is based on the alliance of workers and peasants.[8] Under the traditional Chinese socialist model, the workers were a powerful political group with strong representation in the national and local people's congresses, thus influencing policy directions and resource distribution. The workers participated in decision making within factories, particularly with regard to wages, benefits and bonuses.[9] This historical background influenced the path of Chinese corporate governance.

The 1994 Company Law did not explicitly refer to CSR, but it echoed some aspects of CSR, particularly regarding the rights of employees in a company. Under the 1994 Company Law, the role of employees was institutionalized into the corporate governance structure. Limited liability companies established by two or more state-owned enterprises (SOEs) were required to include employee representatives on the board of directors; and the employee representatives should be selected by employees.[10] Limited liability companies and joint-stock companies were required to include employee representatives on the board of supervisors.[11]

The 1994 Company Law further required companies to protect the advisory roles of employees in the corporate decision-making process. Companies were required to consult with trade unions and employees when making decisions concerning employee wages, welfare, safe production processes, and other issues related to employees' interests; companies were also required to invite employee representatives to attend relevant meetings.[12] Moreover, companies were required to consult with trade unions and employees when deciding significant operation issues.[13]

The 1994 Company Law also specified measures concerning labor rights.

---

8. *See* PRC'S CONSTITUTION, art. 1.

9. *See* DANG DAI ZHONGGUO SHE HUI JIE CENG YAN JIU BAO GAO [A RESEARCH REPORT ON SOCIAL STRUCTURE IN CONTEMPORARY CHINA] 141 (Xueyi Lu ed., 2002).

10. *See* Chinese Company Law (1994), arts. 45 & 68

11. *See id.* arts. 52 & 124.

12. *See id.* arts. 55 & 121.

13. *See id.* arts. 56 & 122.

The emphasis on labor rights is a reflection of the socialist ideology under the rein of the Chinese Communist Party. According to Article 15, "Companies must protect legal rights of employees, strengthen labor protection measures, and realize safe production; companies may through a variety of measures support employee education and training, and thereby improve the quality of employees." Article 16 required that "employees can establish trade unions according to the law to engage in union activities and protect legal rights of employees; companies shall provide necessary conditions to enable such activities." It further required that "wholly state-owned limited liability companies shall according to the Constitution and other laws implement democratic management through general meetings of employee representatives and other forms."[14]

Article 14 was the overarching provision broad enough to contain the idea of CSR. According to Article 14, "Companies must comply with the law, conform to business ethics, strengthen the construction of the socialist civilization, and subject themselves to the government and public supervision in the course of business." Under Article 14, a company must not only comply with the law but also observe business ethics. In other words, it indicated that companies should go beyond compliance with the law, a concept commonly found in the definitions of CSR. Moreover, a company is subject not only to the supervision of the government but also the public. Public supervision may be understood to include supervision by consumers, communities, and other stakeholders.[15]

Overall, the concept of CSR was partially embodied in the 1994 Company Law, although the term "social responsibility" was absent. For advocates of CSR, this indirect recognition of CSR was not enough. Professor Junhai Liu, a forerunner in advocating CSR from a legal perspective in China, proffered reasons for the absence of clear emphasis on CSR in the 1994 Company Law. First, the importance of CSR was downplayed against a background in which the government vehemently helped state-owned enterprises (SOEs) shirk debt and extricated them from the function of social services.[16] An important purpose of the company law was to activate the profit-seeking motivation of SOEs. Article 5 therefore purposefully declared that "a company shall operate independently and be responsible for its own profits and losses." Given this macro-economic background, the Chinese legislators were unlikely to place the idea of CSR in a conspicuous position. Second, the mainstream economic and legal scholars at that time were enchanted by ideas such as corporate profit-maximization, free competition, and enabling law; and they did not have a clear

14. See *id.* art. 16.

15. *See* JUNHAI LIU, GONGSI DE SHEHUI ZEREN [CORPORATE SOCIAL RESPONSIBILITY] 84, 122 (1999).

16. *Id.* at 85-86.

idea about the accompanying negative effects.[17] Finally, the hastiness in legislation failed to consult the update-to-date development of corporate law in developed countries.[18]

The 1994 Company Law was criticized for its inability to cope with the changing economy in China. A comprehensive revision process of the company law therefore began in 2004. CSR was one of the many issues considered in the revision. As of October 27, 2005, the National People's Congress (NPC) passed the new company law, which took effect on January 1, 2006. The 2006 Company Law gives explicit recognition to CSR.

The legislative process in China is still not transparent, so it is hard to know what the exact deliberation was in the legislative process of the new company law. Nevertheless, some government officials and scholars who participated in the legislative process compiled the opinions considered in the legislative process and published them, which may serve as an alternative source of the legislative history.[19] In the legislative process, a group of thirty-one NPC delegates from Shanghai proposed that the company law should make clear that "companies must protect and improve the interests of other stakeholders in addition to shareholders."[20] This group of the NPC delegates also proposed that CSR may be included as one of the legislative purposes of the company law. A NPC delegate from Jilin Province also proposed that the company law should address shareholder wealth maximization and CSR as well. He proposed that, in addition to protecting shareholders' interests, "companies should also consider other social interests such as the interests of employees, consumers, creditors, local communities, environments, socially disadvantaged groups, and the general public."[21] Some NPC delegates from Guangdong Province suggested that the company law should contain a specific section defining the relationships between a company and its stakeholders.[22] The Shanghai Stock Exchange recommended that to clarify the social responsibility of companies, Article 14 of the 1994 Company Law should be amended as "a company must comply with the law and protect public interests in the course of business activities."[23]

Legislative drafters in the law making process also considered the academic

17. *See id.*

18. *See id.*

19. *See* 1-3 A RESEARCH REPORT ON THE AMENDMENTS TO COMPANY LAW (Kongtai Cao et al., eds. 2005). The Chinese government did not disclose official documents concerning the legislative history. The editors of this report compiled the opinions considered in the legislative process. The leading editor was and is still the head of the State Council's Legislative Affairs Office, responsible for drafting laws and regulations. Other editors were and are still also affiliated with the Office; and some are prominent law professors in China.

20. *See id.*

21. *See id.*

22. *See id.*

23. *See id.*

debate on CSR.[24] Chinese corporate law scholars disagree over whether CSR should be explicitly enshrined in company law. Some scholars argue for the inclusion of CSR in company law because it would help clarify the purposes of a company: profit-making and social responsibility.[25] Some scholars however take a conservative attitude toward emphasizing CSR in company law. One of their main concerns is that the zealous celebration of CSR in company law would endanger the for-profit nature of corporations.[26] Also, given that the profit-maximization awareness has not been successfully implanted into Chinese SOEs, the celebration of CSR in company law might mislead SOEs to sacrifice profitability.[27] Moreover, they also express concern that the government might use CSR as a cloak for political intervention to pursue its own political interests at the expense of the interests of minority shareholders, which can be a threat to economic efficiency.[28]

Low transparency in the legislative process leaves it unclear why the legislators finally decided to incorporate CSR into the company law. However, the recognition of CSR is clearly symbolized in Article 5 of the 2006 Company Law. Article 5 states, "[i]n the course of doing business, a company must comply with laws and administrative regulations, conform to social morality and business ethics, act in good faith, subject itself to the government and the public supervision, and undertake social responsibility."[29]

In addition to the general principle concerning CSR, the 2006 Company Law also improves employee rights in corporate governance, which may help to illustrate the intention of Article 5. In the legislative process, many NPC delegates and consulted entities recommended the improvement of employee participation in corporate governance.[30] As a result, Articles 52 and 118 require

---

24. *See id.*

25. For the leading literature advocating CSR in Chinese company law, *see* JUNHAI LIU, *supra* note 15.

26. *See* Mingtian Chen, *Gongsi de Shehui Zeren – dui Cuantong Gongsifa Jiban Linian de Xiuzheng [Corporate Social Responsibility—An Amendment to the Fundamental Concept of the Traditional Corporate Law]*, 6 SOUTHEAST ACAD. RES. 79, 84 (2003); Jian Fan, *Cong Gongsi de Yinglixin yu Shehui Zeren Kan Gongsifa Xiuding Zhidao Sixiang [The Guiding Philosophy of the Revision of the Company Law, A View from the For-Profit Nature of Corporations and Corporate Social Responsibility]*, *in* MODERN COMPANY LAW IN TRANSFORMATION 64 (Baoshu Wang et al., eds 2006).

27. *See* Fen Yi, Gongsi Shehui Zeren Bian—Jian Lun Zhongguo Gongsifa de Lifa Xuanze [The Corporate Social Responsibility Debate – The Legislative Choice of Chinese Company Law], *in* MODERN COMPANY LAW IN TRANSFORMATION 468-471 (Baoshu Wang et al., eds., 2006); YOSU ZHOU, XIN GONGSIFA LUN [NEW CORPORATE LAW] 91-92 (2006).

28. *See* Fen Yi, *supra* note 27, at 468-469; Yosu Zhou, *supra* note 27, at 92.

29. *See* Chinese Company Law (2006), art.5.

30. Thirty-one NPC delegates from Shanxi Province proposed that company law should expand employee participation in corporate governance and protect legal rights of employees; the All China Federation of Trade Unions recommended all companies should include employees in corporate governance; the number of employee representatives on the boards should be specified;

the board of supervisors should include employee representatives; and the number of employee representatives should not be lower than one third of the supervisory board. The minimum number of the employee representatives on the supervisory board was not required in the 1994 Company Law; the lack of the minimum number requirement was often attributed as one of the major reasons for ineffective employee participation in corporate governance.[31] Moreover, the 2006 Company Law also restates the importance of labor protection by adding that "the representative of the trade union may in accordance with the law enter into a collective contract on behalf of employees with the company in respect of wages, work hours, welfare, insurance, labor safety, etc."[32]

2. General Principles of Corporate Social Responsibility

In January 2008 the State-Owned Assets Supervision and Administration Commission of the State Council (SASAC) released the Guide Opinion on the Social Responsibility Implementation for the State-Owned Enterprises Controlled by the Central Government (hereafter "Guide Opinion").[33] The Guide Opinion is an important legal document explaining the Chinese central government's attitude toward CSR. Currently there are about one hundred fifty state-owned enterprises (SOEs) directly under Chinese central government's control, and therefore subject to the Guide Opinion.[34] These enterprises are large and highly visible in China; most of them (or their subsidiaries) are listed

---

the collective contracts and equal bargaining should be included; the ratio and usage of employee welfare funds should not be unilaterally determined by management but by negotiation between employees and companies. The Beijing Bar Association recommended all companies should be required to consult with employees when deciding matters that materially affect employees interests; the company law should specify the number of employee representatives on the boards of directors and supervisors. The Legislative Affairs Office of the State Council recommended when all companies with employees above a certain number should include employee representatives on the supervisory board. The China National Petroleum Corporation recommended the company law should increase the number of employee representatives on the boards of directors and supervisors when the company is wholly owned by the state, but some of the representatives recommended the company law should delete provisions concerning trade unions, leaving the issues to labor law or trade union law. *See supra* note 19, Vol. 1, at 27, 49, 53, 57, 143-144 (2005).

31. JUNHAI LIU, *supra* note 15 at 580; ZHONGGUO GONGSI ZHILI BAOGAO 2007 [CHINA CORPORATE GOVERNANCE REPORT 2007] 49 (2007). Still, the implementation of the new requirement remains far from satisfactory according to a 2007 survey by the Shanghai Stock Exchange. According to the survey, 59.2% of the sample listed companies (135 companies) failed to meet the requirement. *See* Research Center of Shanghai Stock Exchange, ZHONGGUO GONGSI ZHILI BAOGAO 2007 [CHINA CORPORATE GOVERNANCE REPORT 2007] 49 (2007).

32. *See* Chinese Company Law (2006), art. 18.

33. SASAC, Guanyu Zhongyang Qiye Luxing Shehui zeren de zhidao yijian [The Guide Opinion on the Social Responsibility Implementation by the Central-Government-Controlled State-Owned Enterprises], http://www.sasac.gov.cn/n1180/n1566/n259760/n264851/3621925.html.

34. *Id.*

companies on the Shanghai or Shenzhen Stock Exchanges, and some of them are on the Hong Kong or even overseas stock exchanges.

The Guide Opinion contains four parts. The first part explains why CSR is important for the SOEs controlled by the Chinese central government.[35] The Guide Opinion explicitly lists four reasons. First, CSR is a concrete measure of promoting social harmony. Second, these SOEs are the backbone of China's economy and security, affecting every aspect of Chinese people's living. Therefore, implementation of CSR is important to meet public expectations. Third, CSR is the unavoidable option for sustainable development. CSR helps organizational creativity, corporate image, the quality of employees and corporate cohesion. Fourth, CSR is a necessity for the SOEs to participate in the international market and society.[36]

The second part of the Guide Opinion considers the fundamental principles in the implementation of CSR. It expects the SOEs to become "leading examples" for all Chinese companies. The SOEs should "integrate CSR into corporate reforms," "adapt CSR measures compatible with conditions at the national and organizational level" and "step by step implement them."

The third part of the Guide Opinion sets forth the major contents of CSR for the central-government-controlled SOEs. The major contents include eight broad topics: (1) complying with the law and honestly conduct business; (2) increasing profitability; (3) improving product and service quality; (4) upgrading resources efficiency and environmental protection; (5) improving innovation and technology; (6) assuring production safety; (7) protecting employees' legal rights; and (8) actively engaging in charity.

Finally, the Guide Opinion proposes major implementation measures. First, in order to promote the awareness and cultivate a culture of CSR, the SOEs are encouraged to educate their employees on CSR topics, and include CSR discussion in their important meetings. Second, the SOEs are encouraged to include CSR into corporate governance, development strategy, and production process.[37] The SOEs may establish CSR management, auditing and evaluation systems. Third, the SOEs may issue periodic CSR reports or sustainability reports, disclosing information concerning CSR performance, measures and plans. Fourth, the SOEs may research and learn successful CSR experiences of domestic and foreign companies. Fifth, the organs of the Chinese Communist Party structured within the SOEs should promote CSR through its political resources. Overall, the Guide Opinion lays out some broad but still vague CSR principles for the SOEs.

In a separate press release, the State-Owned Assets Supervision and

35. *Id.*

36. *Id.*

37. Section IV of the Guide Opinion, *supra* note 33.

Administrative Commission of the State Council (SASAC) also explained the background information concerning the promulgation of the Guide Opinion.[38] The SASAC recognized that CSR has become a new trend at the global level, referring to a proliferation of CSR initiatives such as UN Global Compact, ISO 26000, and multinational companies' codes of conduct and sustainability reports. The SASAC also considered that CSR has gained increasing importance in China, mentioning the new company law, pro-CSR statements made by President Hu Jintao, and sustainability reports by a few Chinese SOEs. In the SASAC's view, however, the contents and measures of CSR for the central-government-controlled SOEs were still unclear in the global and domestic CSR movements. Therefore, the SASAC began a research project on CSR in 2006, which resulted in the Guide Opinion. The SASAC official further explained that there are various definitions of CSR proposed by international organizations (e.g., UN and World Economic Forum), and the definitions share some common ideas but also have different emphases.[39] The CSR principles for the Chinese SOEs should be consistent with the international trend but also be compatible with the national and organizational reality in China.[40] In other words, the Guide Opinion is based on international definitions of CSR but adapted with "Chinese characteristics."

Overall, the Guide Opinion basically covers most of the common topics appeared in the international CSR standards. But it is noticeable that the Guide Opinion does not include human rights protection as the core contents of CSR. Therefore, for example, PetroChina and its parent company CNPC—both subject to the Guide Opinion—may still satisfy the CSR standards despite the allegations of their involvement in human rights violations in Darfur, Sudan.[41]

3. Corporate Social and Environmental Disclosure

Corporate social and environmental disclosure has become an important component of the CSR implementation package. In some developed countries, corporations are required to disclose their social and environmental performance to their shareholders and the public.[42] Following this trend, the Chinese

38. *See* SASAC, Press Release, Q&A between the SASAC Official and News Reporters, *available at* http://www.sasac.gov.cn/n1180/n1566/n259760/n264866/3621552.html (last visited July 6, 2008).

39. *Id.*

40. *See id.*

41. *See supra* note 6.

42. For France, *see* Lucien J. Dhooge, *Beyond Voluntarism: Social Disclosure and France's Nouvelles Regulations Economiques*, 21 ARIZ. J. INT'L & COMP. L. 441 (2004); for the UK, *see* Cynthia A. Williams & John M. Conley, *Triumph or Tragedy? The Curious Path of Corporate Disclosure Reform in The U.K.*, 31 WM. & MARY ENVTL. L. & POL'Y REV. 317 (2007); for Norway, *see* Audun Ruud et al., CORPORATE RESPONSIBILITY REPORTING IN NORWAY: AN ASSESSMENT OF THE 100 LARGEST FIRMS, Program for Research and Documentation for a Sustainable Society,

government has launched several Chinese CSR disclosure initiatives.

Since 2007, the State Environmental Protection Administration (SEPA, now the Ministry of Environmental Protection of China) has begun a series of measures concerning corporate environmental reporting.[43] In 2007 the SEPA promulgated the Regulation on Environmental Information Disclosure (Trial Edition) (hereunder "the Regulation"), which took effect on May 1, 2008.[44] The Regulation mandates environmental agencies and heavy-polluting companies to disclose certain environmental information to the public.[45] According to the official statement by the Vice Minister of the SEPA (Mr. Pan Yue), the Regulation has three significant meanings.[46] First, environmental disclosure is

---

Center for Development and the Environment, University of Oslo (2005), *available at* http://www.prosus.uio.no/publikasjoner/Rapporter/2005-9/rapp9.pdf.

43. For a summary of the measures, see Disanxiang Huanjing Jingji Zhengce Luse Zhengquan Zhidao Yijian Chutai, 2008 Nian Jiang Jianli Shangshi Qiye Huanjing Xinxi Tongbao Zhidu [The Third Environmental Economic Policy is Up, Environmental Disclosure System for Listed Companies Will be Established in 2008], Press Release of the Ministry of Environmental Protection of People's Republic of China (Feb. 25, 2008), http://www.mep.gov.cn/xcjy/zwhb/200802/t20080225_118588.htm.

44. *See* Huanjing Xinxi Gongkai Banfa [the Regulation on Environmental Information Disclosure], Order No. 35 (2008) of the Ministry of Environmental Protection of the People's Republic of China.

45. The Regulation imposes disclosure obligations on environmental agencies and companies, but this Article discusses corporate disclosure only. For companies, there are two kinds of disclosure: voluntary and mandatory. The Regulation encourages all companies to voluntarily disclose the following information: (1) environmental guidelines, annual environmental goals and results; (2) annual resources consumption; (3) the condition of environmental investment and environmental technology development; (4) the types, discharge amount, and density of pollutants; (5) the construction and operation of environmental protection facilities; (6) waste processing and recycling; (7) any voluntary agreement concerning environmental protection with the environmental agencies; (8) the performance of corporate social responsibility; (9) any other environmental information. According to the Regulation, companies may voluntarily disclose the environmental information through media, internet or publishing corporate environmental annual reports. The Regulation further authorizes environmental agencies to award companies that voluntarily engage in environmental reporting. Environmental agencies may publicly applaud disclosing companies through local major media and give them priority in financing or subsidies.

But when a company is on the environmental agency's list of companies whose pollutant emission exceeds national or local standards, the company is mandated to disclose the following information to the public: (1) the names, discharge methods, discharge density, aggregate amount, the exceeding amount of major pollutants; (2) the construction and operation of environmental protection facilities; (3) emergency plans for environmental disasters. The company is required to disclose through local major media to the public within 30 days when the environmental agency releases the list. Environmental agencies (central and local) are required to disclose lists of heavy-polluting companies under the Regulation. In short, certain heavy polluting companies are under obligation to disclose environmental information to the public.

46. *See* Shoubu Huanjing Xinxi Gongkai Banfa Chutai Qiangzhi Huanbao bumen he Wuran Qiye Gongkai Huanjing Xinxi Pan Yue Huyu yi Gongzhong Shendu Canyu Tuidong Wuran Jianpai [The First Regulation on Environmental Disclosure is Up; Environmental Agencies and Heavy-Pollution Companies are Required to Make Environmental Disclosure; Pan Yue Appeals to In-Depth Public Participation to Reduce Pollution and Emission], Press Release of

an important measure to build a harmonious society. Environmental disclosure can build a communication bridge between the public and the government, through which the public can exercise environmental rights to monitor development projects and polluting companies. Different interest groups can constructively interact with one another and avoid conflicts. Second, environmental disclosure is a necessity for building socialist democracy and the rule of law. Timely disclosure enables the public to participate in environmental policymaking. Third, environmental disclosure helps to deepen administrative reforms and build a service-oriented government. The statement also referred to the point that China's failure to achieve its 2006 emission reduction goal indicated the complexity of the environmental problem. It is a problem involving "adjustment of the traditional development model and its consequent interest structure;" and "the adjustment cannot rely on a few environmental agencies but needs public participation." The government should provide institutional mechanisms for public participation, and environmental disclosure is an important "institutional underpinning."[47]

The two Chinese stock exchanges, the Shenzhen and Shanghai Stock Exchanges, recently also have taken actions in promoting CSR disclosure. In 2006 the Shenzhen Stock Exchange released the Guide on Listed Companies' Social Responsibility (hereafter "Shenzhen Guide"). "The [Shenzhen] Guide is promulgated based on the Company Law and the Securities Law with purposes of achieving scientific development, building a harmonious society, advancing toward economic and social sustainable development, and promoting corporate social responsibility."[48] By the end of April 30, 2007, the fiscal year following the release of the Shenzhen Guide, twenty listed companies on the stock exchange had published separate CSR reports along with their 2006 annual reports, ten of which clearly mentioned the Shenzhen Guide as a reference.

The Shanghai Stock Exchange also launched CSR disclosure initiatives. In May 2008 it promulgated the "Guide on Environmental Information Disclosure for Companies Listed on the Shanghai Stock Exchange" (hereafter "Shanghai Guide") and "Notice on Strengthening Social Responsibility of Listed Companies" (hereafter "Notice"). Under the scheme provided in the Shanghai

---

the Ministry of Environmental Protection of People's Republic of China, (Apr. 25, 2008), *available at* http://www.zhb.gov.cn/xcjy/zwhb/200704/t20070425_103120.htm.

47. *See id.*

48. *See* art. 1 of the Shenzhen Guide. According to Article 35 in the Guide, "the [Shenzhen] Stock Exchange encourages listed companies to establish social responsibility reporting systems based on the rules set forth in the Guide, and periodically examine and assess their corporate social responsibility performance and existing problems." Article 36 suggests that "listed companies may issue CSR reports along with their annual reports." Article 36 further suggests that "the social responsibility reports should contain at least the following information: (1) the system and performance concerning employee, environment, product quality and community relationships; (2) a statement concerning any gap between implementation performance and the Guide, and give explanations; (3) improvement measures and concrete timetables."

Guide and the Notice, certain public companies are required to disclose environmental information in a timely manner to the public and all companies are encouraged to publish CSR reports in addition to annual financial reports.[49] In December 2008, the Shanghai Stock Exchange further accelerated the development of CSE disclosure by mandating three types of listed companies to issue the CSR annual report from the fiscal year of 2008.[50] The companies include companies that are listed in the Shanghai Stock Exchange Corporate Governance Index, companies that list shares overseas, and companies in the financial sector. According to the information released by the Shanghai Stock Exchange, there were 290 listed companies publishing CSR reports for the fiscal year of 2008. Among the 290 companies, 258 companies issued the report because of the mandatory requirement while 32 companies did it voluntarily.In 2007, the securities regulatory agency of Fujian Province issued a regulatory

49. Under the scheme provided in the Shanghai Guide and the Notice, there are three kinds of disclosure: real-time disclosure of significant environmental events, special disclosure by blacklisted companies, and CSR annual reports. The former two have underpinnings in environmental regulation and therefore are mandatory in nature.

The real-time disclosure of significant environmental events is to require a listed company within two days of the occurrence of any of the following environmental events to disclose possible impact on its operation and stakeholders. The environmental events, simply speaking, include significant investments in projects that have material environmental impact, significant investigations or punishments by the government because of environmental law violations, material litigations concerning environmental problems, being blacklisted by environmental agencies, announcement of a new environmental law or regulation that may have material impact on corporate operation, and any other events that may have significant impact on stock prices.

The special disclosure by blacklisted companies is to require companies blacklisted by environmental agencies to disclose the following information within two days of the announcement of the blacklist. The information briefly speaking includes the kinds, density, and quantity of pollutants, condition concerning environmental protection facilities, environmental emergency plans, and preventive measures concerning emission reduction.

As to CSR annual reports, listed companies are encouraged to publish annual CSR reports along with their annual financial reports on the website of the Shanghai Stock Exchange. The Shanghai Stock Exchange gives suggestions about what to disclose, including the following information: environmental protection policies, annual goals, and performance; annual consumption of resources and energy; environmental investment and environmental technology development; the kinds, quantity, density and whereabouts of the pollutants; condition of environmental protection facilities; waste recycling; voluntary agreements on environmental improvement with environmental agencies; awards granted by environmental agencies; and other environmental information voluntarily disclosed. The Shanghai Stock Exchange also suggests that listed companies may disclose in their annual CSR reports "social contribution per share," deriving from the idea of earnings per share.

50. *See* Shanghai Zhengquan Jiaoyisuo guanyu Zuohao Shangshi Gongsi 2008 Nian Luxing Shehui Zeren de Baogao ji Nebu Kongzhi Ziwo Pigu Baogao Pilou Gongzuo de Tongzhi [The Shanghai Stock Exchange's Notice Concerning Listed Companies' Implementation of Corporate Social Responsibility Reporting and Internal Control Self-Evaluation Reporting in 2008] (Dec. 4, 2008) (on file with author); Shanghai Zhengquan Jiaoyisuo Guanyu Zuohao Shangshi Gongsi 2008 Nian Niandu Baogao Gongzuo de Tongzhi [The Shanghai Stock Exchange's Notice Concerning Listed Companies' Preparation for 2008 Annual Report] (Dec. 30, 2008) (on file with author).

instruction requiring listed companies incorporated in the Fujian jurisdiction to publish an annual CSR report along with the annual financial report.[51] Moreover, in 2008 the agency further issued the Guide on Social Responsibility of Listed Companies, Securities and Futures Management Institutions, and Securities and Futures Services Institutions (hereafter "Fujian Guide").[52] The Fujian Guide is intended to "implement scientific development, construct a harmonious society, advance the implementation of corporate social responsibility in the construction of the capital market, and therefore to realize the sustainable development of the companies themselves, of society and of the environment."[53] The Fujian Guide urges listed companies and securities firms to issue CSR reports along with their annual reports. According to the Fujian Guide, through CSR reports, listed companies and securities firms can "improve CSR dialogue mechanisms, so they can understand and respond to stakeholders' suggestions in a timely fashion, and proactively subject themselves to the supervision of stakeholders and of society at large."[54] In order to promote CSR and CSR reporting, the regulatory agency also urged listed companies to sign CSR declarations, and launched a training conference to educate listed companies about how to implement CSR and CSR reporting.[55] According to Mr. Renhua Yue, the Director of the Fujian securities regulatory agency, the motivation of all the initiatives is based on the belief that "CSR is not window dressing, but a requirement for corporate long-term development."[56]

4. Socially Responsible Investing and Environmentally Responsible Financing

Recent research has become certain about the positive relationship between

51. *See* Fujian CSRC, Guanyu 2007 nian Niandu Baogao Xiangguan Gongzuo de Buchong Tongzhi [A Complementary Notice Concerning the 2007 Annual Report], *available at* http://www.csrc.gov.cn/n575458/n870603/n1335084/10379111.html.

52. Fujian Shangshi Gongsi, Zhengquan Qihuo Jingying Jigou, Zhengquan Qihuo Fuwu Jigou Shehui Zeren Zhiyin, [The Guide on Social Responsibility of Listed Companies, Securities and Futures Management Institutions, Securities and Futures Services Institutions], Fujian CSRC[2008] No. 30, *available at* http://www.csrc.gov.cn/n575458/n870603/n4243228/10347251.html.

53. *See* art.1 of the Fujian Guide.

54. *See* art. 44 of the Fujian Guide.

55. *See* Chuanzhong Yang & Yochuan Zhang, *All the Listed Companies Incorporated in the Fujian Province Publish CSR Reports*, SHANGHAI SECURITIES POST, A1, May 23, 2008, print and electronic versions *available at* http://paper.cnstock.com/paper_new/html/2008-05/23/content_61852450.htm.

56. *See* Miao Kang, *Fujian Zhengjianju: Xiaqu Shangshi Gongsi Bianzhi Nianbao Shi Bixu Jiaru Shehui Zeren [CSRC: Corporations Incorporated in Fujian Jurisdiction should Include CSR Information When Preparing for the Annual Report]*, XINHUA NEWS, Jan. 18, 2008, *available at* http://news.xinhuanet.com/newscenter/2008-01/18/content_7445136.htm (reporting the speech in the Fujian CSR training program delivered by Mr. Renhua Yue).

CSR and corporate financial performance.[57] The positive relationship between CSR performance and financial performance strongly suggests that investment analysis should include social and environmental factors. The investment analysis approach generally is called "socially responsible investing" (SRI).

SRI recently has emerged in China. In May 2006 the Bank of China launched the first SRI fund in China, the Sustainable Growth Equity Fund. In March 2008, the Industrial Management Company made the initial public offering of the Xingye SRI Fund to domestic investors in China.[58] Moreover, China's first SRI index was launched at the beginning of 2008 by the Shenzhen Securities Information Company and Tianjin Teda Company. The index, called "TEDA Environmental Protection Index," focuses on the top 40 environmentally responsible companies listed on the Shenzhen and Shanghai Stock Exchanges. In August 2009, the Shanghai Stock Exchange also launched the "Responsibility Index", selecting the top 100 socially responsible companies on the stock exchange.[59]

The Chinese government recently began to use financial channels to improve corporate environmental performance. In July 2007, the Chinese government initiated the green credit policy. The State Environmental Protection Administration (SEPA), the People's Bank of China, and the China Banking Regulatory Commission (CBRC) jointly promulgated the Opinion on Enforcement of Environmental Law and Prevention of Credit Risks, directing Chinese banks to incorporate corporate environmental performance into credit assessments.[60] According to the Opinion, the purpose of the decision is to increase the costs of violating environmental law and improve corporate environmental performance. The linkage between corporate environmental performance and the availability of loans basically works as follows. Environmental agencies at all levels should build an information database containing standardized information concerning corporate environmental

57. There has been a debate about CSR performance and financial performance for decades; but the recent and important study with more rigorous methodology by Marc Orlitzky et .al., confirms the positive relationship; the Orlitzky's study examines 52 studies which represent the population of prior empirical studies. *See* Marc Orlitzky et. al., *Corporate Social and Financial Performance: A Meta-Analysis*, 24 ORG. STUD. 403 (2003).

58. *See* William Baue, *Bank of China International Investment Managers Launches First SRI Fund in China,* SOCIALFUNDS, Sustainability Investment News, June 6, 2006, *available at* http://www.socialfunds.com/news/article.cgi/2026.html; for the information about Xingye Social Responsibility Fund, including prospectuses, *see* http://www.xyfunds.com.cn/column.do?mode=searchtopic&channelid=2&categoryid=822.

59. *See* Shanghai Stock Exchange, http://www.sse.com.cn/ps/zhs/sjs/hotspot/hotspot20090805a.html; http://www.sse.com.cn/ps/zhs/sjs/hotspot/hotspot20090721a.html.

60. *See* Guanyu Luoshi Huanbao Zhengce Fagui Fangfan Xindai Fengxian de Yijian [The Opinion on Enforcement of Environmental Law and Protection of Credit Risks], Huanfa (2007) No. 108 [The Document of Ministry of Environmental Protection (2007) No. 108], *available at* http://www.zhb.gov.cn/info/gw/huangfa/200707/t20070718_106850.htm.

violations, environmental approval records, clean production certifications, and environmental excellence awards. The environmental agencies should provide the information to banks; and banks should incorporate the information into credit assessments. Along with the release of the Opinion, the SEPA immediately began the green loan program by blacklisting 30 companies for serious environmental violations and reporting the information to the credit management system of the People's Bank of China.[61]

Some Chinese banks have informally reported their progress in implementing the green loan policy. For example, the Industrial and Commercial Bank of China, one of the five major banks in China, claimed that it had screened its 59,000 corporate clients in 2007 to assess environmental performance, whereby "78 percent were cleared for green loans of more than 200 million RMB, accounting for about 80 percent of the total."[62]

In January 2008, the SEPA signed an agreement with the International Financial Corporation (IFC) to develop guidelines for the green credit policy in China.[63] Under the Agreement, the SEPA and IFC will develop green credit guidelines for a number of key polluting sectors (e.g., pulp and paper mills, and mining), allowing banks to integrate environmental risks into their credit assessment process practicably. Moreover, the SEPA and other government agencies will jointly develop measures to introduce the IFC Performance Standards and Equator Principles to China. The Equator Principles, initiated by the IFC and a number of large banks (e.g., Citigroup, HSBC), are a set of standards for the financial industry to evaluate social and environmental risks in project financing.

In addition to the green credit scheme, the SEPA recently coordinated with the China Securities and Regulatory Commission (CSRC) to initiate a series of measures generally called "green securities."[64] Under the green securities

---

61. *See* Attachment 2 in the Press Release of Ministry of Environmental Protection of the People's Republic of China, Huanbao Zongju Shoudu Lianshou Renmin Yinhang Yinjianhui yi Luse Xindai Ezhi Gao haoneng Gao Wuran Hangye Kuozhang [The Ministry of Environmental Protection coordinated with the People's Bank of China, the China Banking Regulatory Commission to Suppress the Expansion of Pollution-Heavy and High-Energy-Consumption Industries through the Use of Green Credit], Press Release, July 30, 2007, *available at* http://www.zhb.gov.cn/xcjy/zwhb/200707/t20070730_107365.htm.

62. *See* Xiaohua Sun, *China to Bring in Green Loan Benchmark*, CHINA DAILY, Jan. 25, 2008, *available at* http://www.chinadaily.com.cn/bizchina/2008-01/25/content_6420781.htm.

63. *See* IFC Environment Highlight January 2008, China EPA, IFC to Develop Guidelines for Ground-breaking National Green Credit Policy, *available at* http://www.ifc.org/ifcext/enviro.nsf/Content/Highlights_January2008_ChinaGreenCredit.

64. *See e.g.,* Guanyu dui Shenqing Shangshi de Qiye he Shenqing Zairongzi de Shangshi Qiye Jinxing Huanjing Baohu Hecha de Tongzhi [Notice Concerning the Environmental Checks on IPO Application by Companies or Re-Financing Applications by Listed Companies], SEPA [2003] No. 101, *available at* http://www.sepa.gov.cn/info/gw/huangfa/200306/t20030616_85622.htm; Guanyu Jiaqiang Shangshi Gongsi Huanjing Baohu Jiandu Guanli Gongzuo de Zhidao Yijian [The Guide Opinion on Strengthening Checks on

scheme, companies in 13 high-pollution and high-energy-consumption industries are subject to environmental performance reviews when applying for initial public offering (IPO) or refinancing. According to Mr. Yue Pen, the Vice Minister of SEPA, in the latter half of 2007, the SEPA completed 37 companies' environmental performance reviews for IPO applications, failing 10 companies, some of which are large companies, such as China Coal Energy Corporation, the second-largest coal producer by output in China.[65] The reasons that these companies failed to pass the reviews include: failure to strictly implement environmental impact evaluations; failure to phase out outdated facilities; failure to install environmental protection facilities required by law; emissions exceeding the permitted level; environmental protests, etc.

B. Private Initiatives

1. CSR Standards and Guidelines

Global supply chains play an important role in disseminating the concept of CSR in China. Multinational companies' codes of vendor conduct and other similar responsible production standards such as SA8000 are the main instruments for introducing CSR into China. These foreign responsible production standards however have confronted resistance in China. For many years, there has been a strong voice calling for China's own responsible production standards, particularly with regard to labor standards. Some suppliers in the textile and apparel industries where foreign responsible production standards are common have tried to gain leverage against the foreign standards by forming associations and developing their own standards. The prominent example is the CSC9000T developed by the China National and Textile and Apparel Council and other representatives of Chinese corporations.[66] CSC9000T (China Social Compliance 9000 for Textile and Apparel Industry) is a social management system, which is designed in social parlance to imitate ISO14000, the internationally-recognized environmental management tool.[67] CSC9000T provides objectives in the areas of management system, employment contract, child workers, forced or compulsory labor,

---

Listed Companies' Environmental Protection Performance], SEPA [2008] No. 24, *available at* http://www.sepa.gov.cn/info/gw/huangfa/200802/t20080225_118650.htm.

65. *See* Disanxiang Huanjing Jingji Zhengce Luse Zhengquan Zhidao Yijian Chutai, 2008 Nian Jiang Jianli Shangshi Qiye Huanjing Xinxi [The Third Environmental Economic Policy Is Up, Environmental Disclosure System for Listed Companies Will be Established in 2008], Press Release of the Ministry of Environmental Protection of People's Republic of China (Feb. 25, 2008), *at* http://www.mep.gov.cn/xcjy/zwhb/200802/t20080225_118588.htm; *China Takes Green Steps, Delaying Pollutors IPOs*, (Chinese) WALL ST. J., Feb. 26, 2008 (reporting which companies' IPO or refinancing applications were denied by the CSRC because of the green securities program).

66. *See* the official website of CSC9000T, http://www.csc9000.org.cn/.

67. *See* Item 2 of the Scope Section in the CSC9000 Principles and Guidelines.

working hours, wages and welfare, trade unions and collective bargaining, discrimination, harassment and abuse, and occupational health and safety.

CSC9000T, like other Chinese CSR guidelines, self-claims itself a set of standards with "Chinese characteristics."[68] At first glance, CSC9000T seems to be very similar to other certifiable responsible production standards prevalent at the international level. CSC9000T is not a set of standards designed for certification, however. It builds on an evaluation model, in which third party evaluation organizations evaluate suppliers' social performance and give advice on how to improve it. Therefore, CSC9000T takes a much softer approach than the certifiable standards developed by international NGOs or multinational companies based in developed markets. The standards set forth in CSC9000T are long-term goals rather than immediately required standards. The Chinese suppliers further soften the stiffness of social performance requirements by holding control over the whole evaluation process. The evaluation process is controlled by the Responsible Supply Chain Association (RSCA) whose members are the same companies subject to the evaluation process. From a western buyer's perspective, it may be too early to tell whether CSC9000T is a genuine device to protect labor rights or a cunning contrivance. However, based on the 2006 CSC9000T Annual Report, it may herald a Chinese way of implementing socially responsible standards.[69] The Annual Report discloses the identity of ten participant companies and the preliminary evaluation result, in which it reveals serious and prevalent violation of minimum wages, working hours and health protection. Such revelation may dismantle some suspicion of deception. It also in particular addresses the harmonious and cooperative interaction between the companies and the evaluators during the evaluation process, the importance of training and technical supports, and the flexibility of correcting problems with different urgency levels. Although CSC9000T uses so-called "third party evaluation organizations" to conduct evaluations, it does not stress the independent or adversary dimension that is typically associated with a third-party auditor. Rather, according to the Report, it is the "cooperative and harmonious" relationship between the CSC9000T evaluators and companies that inspires corporate commitment to labor rights improvement.[70] The stress on such cooperative and harmonious relationships may have its root in the Chinese cultural preference for non-adversary mechanisms such as mediation and conciliatory negotiation to solve disputes,[71] but it also strongly resonates the

68. *See* CSC9000T Principles and Guidelines.

69. *See* CSC900T, 2006 CSC9000T ANNUAL REPORTS, Chinese and English versions, *available at* http://www.csc9000.org.cn/.

70. *See id.*

71. *See* Carlos de Vera, *Arbitrating Harmony: 'Med-Arb' and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China*, 18 COLUM. J. ASIAN L. 149 (2004) (arguing that the Chinese arbitration system's intermingling of arbitration and mediation, though contrary to the western notion of impartial arbitration, has its roots in China's

cross-country finding that capacity-building assistance to suppliers in developing countries is an important complement to adversary monitoring for effective implementation of social responsible production.[72] In summary, the Chinese suppliers are trying to find their own way, in which they can strike a balance between satisfactory working conditions and business reality in China.

In addition to the CSC9000T for the textile and apparel sector, a set of cross-sector standards also emerge in China. In April 2008, eleven industrial associations in coal, mechanics, steel, petroleum and chemicals, light industry, textiles, building materials, non-ferrous metals, electricity, and mining industries jointly promulgated the Social Responsibility Guide of the China Industrial Companies and Industrial Associations (hereafter "the Industrial Guide").[73] According to the preamble in the Industrial Guide, "the behavior principles, the goals, and the indicators set forth in the Industrial Guide are compatible with the current reality of China's socioeconomic and industrial development." It further states that "from a global view, given the cross-national differences, developed countries and developing counties have different systems and standards of social responsibility." Therefore, the associations "endeavor to propose a set of corporate-level and industrial-level guidelines that connect with the international trend, match China's reality, and possess Chinese characteristics, thereby promoting and advancing the implementation of social responsibility by the Chinese industrial companies and industrial associations."[74] The Industrial Guide can be regarded as the most comprehensive CSR standards in China thus far. According to the Industrial Guide, all industrial companies and industrial associations should establish a comprehensive CSR system.[75] The comprehensive CSR system should include the management system, the institution system, the information system, and the monitoring system.

---

cultural disposition towards harmony).

72. *See* Richard Locke et. al., *Does Monitoring Improve Labor Standards? Lessons from Nike* (MIT Sloan Sch. of Mgmt. Working Paper No. 24, 2006) (arguing that after surveying over 800 of Nike's suppliers in 51 countries, monitoring suppliers and providing them with capacity building support is more conducive to improving conditions than monitoring alone); Richard Locke & Monica Romis, *Beyond Corporate Codes of Conduct: Work Organization and Labor Standards in Two Mexican Garment Factories* (MIT Sloan Sch. of Mgmt., Working Paper No. 4617-06, 2006) (arguing that monitoring plus technical and organizational assistance helps suppliers to improve working conditions).

73. *See* Zhongguo Gongye Qiye ji Gongye Xiehui Shehui Zeren Zhinan [*The Social Responsibility Guide of the China Industrial Companies and Industrial Associations*], CHINA INDUSTRY NEWS, Apr. 16, 2008, at A3, *available at* http://www.cinn.cn/show.asp?ClassID=33&id=44792.

74. *See id.*

75. *See id.*

2. CSR Organizations, Forums and Awards

A number of organizations with the specific purpose of promoting CSR in China recently have been established. The important ones include China CSR, SynTao, China CSR Map, and the Chinese Business Council for Sustainable Development, just to name a few. Major Chinese print media sources such as China Economic Weekly, China WTO Tribune, Nanfang Weekend also frequently publish special issues on CSR and periodically hold CSR forums and announce CSR awards. A leading nationwide CSR award is the Top 100 Corporations in the Annual CSR Survey, a program launched in 2006 by Peking University, Environmental Magazine, and the China Central Television (CCTV), which is commonly considered as the principal mouthpiece of the Chinese government.

C. Understanding the Initiatives in the Chinese Context

So far this Article has overviewed major CSR initiatives in China. The overview shows that CSR has gained some recognition by the government, academia, media, industrial associations, and companies in China. The Chinese governmental policies and laws explicitly recognize the importance of CSR and Chinese companies are becoming familiar with the concept of CSR and starting CSR programs.

Many of the Chinese CSR initiatives are explicitly intended to develop CSR with "Chinese characteristics." The Chinese government plays an important role in directing the discourse of Chinese CSR. A definitional characteristic implied in the state-led Chinese CSR initiatives is that human rights issues are excluded from the scope of Chinese CSR. Private initiatives such as CSC9000T also develop its own features to differentiate from western-based CSR standards and suit the needs of Chinese companies.

The literal analysis of these Chinese CSR initiatives gives ideas about the CSR development in China. But a thorough understanding of the formation and limitations of the CSR initiatives entails an analysis concerning the political and socioeconomic environment in China. The following parts of this Article are to analyze the historical, ideological, instrumental and institutional foundations and limitations of CSR development in China.

III.
HISTORICAL AND IDEOLOGICAL FOUNDATIONS

A. The Social Responsibility of Family Enterprises in the Traditional Chinese Society

"*Gongsi shehue zeren*" ("corporate social responsibility") is a neologism in

Chinese. It is apparently a translation from English, which has led many to claim its complete foreignness to the Chinese society. In fact, business practices of traditional Chinese family enterprises resonate with certain aspects of CSR.

The ideology of orthodox Confucianism is hostile to profit-making and business. As Professor Teemu Ruskola argues, under the anti-mercantile climate, traditional Chinese business organizations often claimed themselves as an extension of families or clans, using the kinship cloak to hide the truly business nature and to gain recognition by the state.[76] When the legitimacy of business was based on the ideology of kinship, it also meant that business had inherent social responsibilities. Family enterprises had responsibilities not only to their family members but also the larger social communities and even to the state (the "political family").[77] This broad scope of responsibilities shared the main idea of modern CSR – corporations should be accountable not only to shareholders but also other stakeholders (e.g., local communities).

Zhan Buddhism and Daoism also influenced business practices in the traditional Chinese society. The secularization of Zhen Buddhism and Daoism combined with the Confucianism during the sixteenth and eighteenth centuries (Ming and Qing Dynasties) induced a culture of diligence, honesty and charity among businessmen.[78] Chinese businessmen realized their social significance and revealed willingness to contribute to the society. In the sixteenth and eighteenth centuries a large number of successful businessmen, particularly from the provinces of Shanxi and Anhui, donated large portions of their wealth to charitable works and even took over certain social functions that were used to be performed by local governments.[79] They built shelters for the poor, established schools for poor students, and constructed roads to facilitate transportation.

The charitable works were not just morally motivated but also legally urged. For example, an edict issued in 1731 by an emperor of the Qing Dynasty proclaimed that "the ideal way for a wealthy household to perpetuate itself included the need to be constantly vigilant, even in peacetime, in dispensing relief and aid to the poor."[80] The charitable works therefore were part of efforts to discharge the family enterprises' broad social and political duties.

The historical roots/tradition of CSR helps to explain the recent public

---

76. *See* Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 STAN. L. REV. 1599 (2000) (analyzing the corporate nature of Chinese clan corporations).

77. *See supra* note 60, at 1608, 1664 (arguing family enterprises' responsibility to family members and local communities), 1622 (arguing Confucian political and social construct is an extension of family governances).

78. For the leading research on this topic, see generally SHI-YING YU, ZHONGGUO JINSHI ZONGJIAO LUNLI YU SHANGREN JINGSHEN [THE RELIGIOUS ETHICS AND BUSINESSMAN SPIRITS IN CHINA BETWEEN 16TH AND 18TH CENTURIES] (1987).

79. *See id.* at 98 & 161.

80. *See supra* note 76, at 1664.

outrage in China over corporate donations for the victims of the 2008 devastating earthquake in Sichuan, China. The Chinese major media and the public seriously criticized many Chinese and foreign companies for their "stingy" donations for the earthquake relief work, despite these companies had already donated a fair amount of money immediately after the earthquake.[81] The criticized companies were forced by the public pressure to pour a lot more money than the amount they originally planned. Leaving other controversial questions aside, this high-profile event seems to suggest that the charity aspect of corporate responsibility is strongly rooted in the Chinese society.

But the historical trace of CSR in the Chinese context has limitations in understanding modern CSR. First, the charitable activities were usually limited to the businessmen's clans and home towns. The recipients of the donations typically were those with certain familial or geographical ties with the businessmen. Second, charitable activities are only a small facet of modern CSR.

B. The Socio-Economic Function of State-Owned Enterprises in Traditional Chinese Communism

The concept of CSR, when discussed in the Chinese communist setting, is easily confused with the idea of state-owned enterprises as social services and benefits providers (*qiye ban shehui*) in the traditional Chinese communist economy. The misunderstanding of CSR as degeneration into the Chinese old unproductive economic model caused some worries in the early stage of developing CSR in China.

Before the economic reform, a state-owned enterprise (SOE) was not only a production unit but also a social services center. A SOE shouldered an important function of providing a cradle-to-grave welfare package to employees and their families. In addition to its main business, a SOE in the old days also extended its operation to educational institutions (e.g., kindergartens, elementary

81. The most criticized Chinese company was Vanke, a public company listed on the Shenzhen Stock Exchange. Mr. Shi Wang, the chairman of the Vanke board of directors, made a statement on his blog that "it is proper for Vanke to donate RMB 2 million; China is a disaster-prone country; charity donations are common; therefore corporate charity donations should be done in a sustainable way and should not become a burden on corporations." He also stated that "there is an internal rule regarding the Vanke employee donation campaign: ordinary employees should not donate more than RMB 10 [about $ 1.44] per person; the purpose of the rule is not to transform donations into burdens." These statements aroused huge outrage in China. Multinational companies such as McDonalds, Nokia, and Samsung etc. were also under attack. Under the tremendous public pressure, these multinational companies eventually resorted to the Ministry of Commerce for help, asking the Ministry of Commerce to make a statement to show that the multinational companies were not stingy with donations and to pacify the public anger. Mr. Deming Chen, the Minister of the Ministry of Commerce, therefore on May 22, held a press conference to show that the stingy charge against these multinational companies was groundless. *See* http://www.nfdaily.cn/finance/finance_list/content/2008-05/23/content_4411340.htm.

and high schools, and libraries), health care institutions (e.g., hospitals and sanatoriums), old age pensions, and many other facilities (e.g., restaurants, dormitories, barber shops, bath facilities, and entertainment clubs) for the benefits of employees and their families.[82] These social services operations were structurally attached to and financially reliant on the SOE.

There are important distinctions between CSR and *qiye ban shehui.* First, *qiye ban shehui* is an old economic model operated in the traditional Chinese communism while modern CSR, spreading from the West, is a partial solution to irresponsible corporate conduct in globalization. Second, CSR's beneficiaries include, but are not limited to, employees, creditors, consumers and local communities while *qiye ban shehui* only concerns about employees.[83] Third, the focus of CSR is about corporate obligations to society while the core of *qiye ban shehui* is social security.[84]

Qiye ban shehui requires enterprises to set up internal units providing comprehensive social services. Such model is blamed as one of the main causes for dragging the financial performance of SOEs.[85] In order to modernize the SOEs, the Chinese government in recent years has channeled efforts into separating the social services operations from the main business of the SOEs. The SOEs are restructured as modern companies focusing on their main business only. The social services operations are cut off from the reformed corporations; for example, elementary and high schools can be handed over to local governments; hospitals can be structured as independent legal entities with profit or non-profit purposes; restaurants and entertainment clubs can be formed as independent business organizations.

Removing the social services operations from the SOEs, however, does not mean the reformed corporations undertake no social responsibilities. The essence of separating the social services operations from the main business operation is to make the SOEs specialized in their core business. The reformed corporations are still required to provide health care to their employees, for example, through buying health insurance, rather than through setting up hospitals within the corporations. CSR absolutely is not a relapse into the *qiye ban shehui* model in the old days. Although CSR requires a corporation to take care of social problems arising from its business course, the corporation's solutions are not equivalent to the *qiye ban shehui* model.

The reform of SOEs in China instead reveals the importance of CSR. First,

---

82. *See* BAOHUA DONG, LAODONG GUANXI DIAOZHENG DE SHEHUIHUA YU GUOJIHUA [THE SOCIALIZATION AND INTERNATIONALIZATION OF LABOR RELATIONS ADJUSTMENTS] 242-251 (2006); JUNHAI LIU, GONGSI DE SHEHUI ZEREN [CORPORATE SOCIAL RESPONSIBILITY] 12-14 (1999).

83. *See id.*

84. *See id.*

85. *See* Baohua Dong, *supra* note 82, at 245-247.

because the SOEs undertook the social security function in the old economy, removing the social services operations from the SOEs may seriously affect employees' interests. Second, the restructuring process of the SOEs usually involves large-scale layoffs of employees. How to properly settle the redundant employees without causing social unrest has been an important question. In the transitional period, balancing the interests of stakeholders in the SOEs is an important task, which therefore echoes some aspects of CSR.

C. Development Policy – Sustainable Development and Harmonious Society

CSR is commonly associated with sustainable development. Sustainable development has been repeatedly enshrined in the Chinese government's policy statements since 1992. The Chinese government signed the Declaration on Environment and Development at the United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro, Brazil, 1992. Following the adoption of the Declaration is a stream of government policy guidelines explicitly linked to the concept of sustainable development, including the Ten Policies on China's Environment and Development released in 1992; China's 21 Agenda – the White Paper on China's Population, Environment and Development published in 1994; the Ninth, Tenth and Eleventh Five-Year Plans for National Economic and Social Development, respectively adopted in 1996, 2001 and 2006 by the National People's Congress of China.[86]

In October 2006, the Sixth General Meeting of the Sixteenth Central Commission of the Chinese Communist Party made an important declaration that "building a harmonious society" is the long-term goal of the Chinese socialism.[87] According to the declaration, there are many existing problems that can cause conflicts and damage social harmony, mainly including: inequality in regional development, population pressure and environmental pollution, unemployment, income inequality, low accessibility and quality of health care and social security.[88] Solving these problems is the current chief mission of the Chinese Communist Party, as the Declaration made clear.

These policy statements have symbolic importance for advancing CSR in China. They politically legitimate the status of CSR and open a door for public discussion of CSR relevant issues.

---

86. *See* Five Year Plans, http://www.china.org.cn/english/features/guideline/156529.htm (English version); *see also* GUILIN GAO, GONGSI DE HUANJING ZEREN YANJIU [RESEARCH ON CORPORATE ENVIRONMENTAL RESPONSIBILITY] 149-152 (2005).

87. *See The Sixth General Meeting of the Sixteenth Central Commission of the Chinese Communist Party, Zhonggong Zhongyang guanyu Goujian Shehui Zhuyi Hexie Shehui Ruogan Zhongda Wenti de Jueding* [*Several Important Resolutions on the Construction of Socialist Harmonious Society by the Central Commission of the Chinese Communist Party*], Oct.11, 2006, http://news.xinhuanet.com/politics/2006-10/18/content_5218639.htm.

88. *See id.*

IV.
INSTRUMENTAL MOTIVATIONS

A. Economic Interests in the Global Market as the External Push

The idea of CSR was transported to China in the 1990s mainly through global supply chains. The anti-sweatshop movement and environmental movement have caused multinational companies to adopt social and environmental standards in selecting their suppliers.[89] The standards can be internal voluntary codes of conduct established by a multinational company itself (e.g., Wal-Mart Standards for Vendor Partners; Nike's Code of Conduct) or external voluntary standards by non-governmental organizations (e.g., SA8000 established by Social Accountability International; Apparel Certification Program by Worldwide Responsible Apparel Production; ISO 14001 by the International Organization for Standardization). At the micro-level, Chinese suppliers have to prove that they meet the social and environmental standards in the production process in order to gain business from western-based multinational companies. At the macro-level, China has to respond to the CSR demand in the global market in order to retain economic growth.

Trade is an important account for the remarkable economic growth in China. With the accession to the WTO, China has become more integrated with the global economy. The integration means China n ot only has the power to affect the global market, but it also has to adjust itself to the market. Sensitivity to demand in the market is a necessity to survive in competition. The United States and the EU are the major markets to which China exports.[90] The consumers in these markets tend to express preference for products made in a socially and environmentally responsible manner. China as a seller has to satisfy their demands; otherwise, other competitors will fill in and take the market share.

The Chinese government and suppliers, however, initially held a strong resistant attitude toward the enhanced social and environmental standards in global supply chains, particularly with regard to labor protection measures.[91]

---

89. *See, e.g.*, Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559, 1573-1600 (1990) (providing a historical review of the growth of codes of conducts fostered by scandals); Sean D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 COLUM. J. TRANSNAT'L L. 389, 397-402 (2005) (explaining the impetus for the proliferation of codes of conducts).

90. *See id.*

91. This author has discussed the resistance in detail elsewhere, so a short summary would suffice here. *See* Li-Wen Lin, *Corporate Social Accountability Standards in the Global Supply Chain: Resistance, Reconsideration, and Resolution in China*, 15 CARDOZO J. INT'L & COMP. L. 321 (2007).

The resistance basically is grounded on four reasons: protectionism, commercialization, lack of localization, and imbalance of bargaining power. Because the enhanced social and environmental standards would increase production costs, developing countries such as China tend to regard the standards as protectionist measures to slash developing countries' competitiveness. Also, the high certification costs and incompetent certifiers associated with the implementation of the standards have led many Chinese manufacturers to think the standards as an extortion scheme, in which they need to pay off the certifiers to get a certificate of CSR. Chinese manufacturers also have claimed that the standards do not fit in with Chinese economic reality, in which most of the indigenous companies are still in the early stage of development and therefore lack resources to devote to labor and environmental protection. Moreover, Chinese manufacturers with weak bargaining power cannot make global buyers share the implementation costs of the standards, and therefore they have reduced incentives to honestly implement the standards.

It is commonly reported that many Chinese manufacturers use deceptive strategies such as double-bookkeeping in order to maintain economic interests (i.e., gaining business without actually implementing the CSR standards). Another important response to maintain economic interests in the international responsible production movement is to create indigenous CSR standards to compete against foreign standards; the CSC9000T discussed in Part II is an example of such countermeasures. Through establishing its own definitions and standards, China may gain control over the development of CSR. Economic interests may be maintained when CSR standards are not dominated by developed countries.

In face of the economic pressure in global supply chains, the Chinese government, companies and scholars have debated for years how to respond to the movement of responsible production at the global level. There have been two competing views in China about the role of social and environmental standards in global supply chains: a trade barrier in favor of developed countries or a passport to the global market. After years of debate, the resistance now does not possess much political clout. As shown below, in addition to the recognition of CSR as the unavoidable global trend, the domestic economic, social and environmental changes are becoming important underpinnings for the CSR development in China.

B. Social and Environmental Problems as the Internal Pull

China has enjoyed a remarkable economic growth since 1980s, but the growth comes with social and environmental costs. Chinese companies did not develop a sense of responsibility in the course of making profits. Some Chinese scholars argue that the rampage of corporate irresponsibility in China has a root in the political ambience in the initial stage of economic development. In the

1980s and early 1990s the main focus of the Chinese government was to revamp the moribund SOEs. The purpose of the restructuring was to wean the SOEs from financial reliance on the government and to instill the idea of profit seeking into the sluggish enterprises.[92] The Chinese government had a much more consistent commitment to restructuring SOEs than to developing the private sector.[93] The 1988 amendment to the Constitution qualified the private sector as "supplementary" to the China's economy and still placed the sector under "guidance, supervision, and control of the state."[94] It was not until 1997 that the Chinese government recognized the serious importance of the private sector and further affirmatively encouraged the development of that sector.[95] Therefore, one the one hand, the high-profile infusion of profiting seeking into the SOEs caused an unwitting side effect of disregarding other purposes of corporations, including social responsibility.[96] On the other hand, privately-owned enterprises, faced with the high uncertainty in macroeconomic policies, had diminished expectation of on-going business relationships and therefore dared to act in a dishonest and irresponsible way.[97]

Meanwhile, the competition for foreign investment among the Chinese local governments also exacerbated the culture of corporate irresponsibility. The Chinese local governments usually do not hesitate to grant regulatory exemption privileges in order to attract investors. The quality of working conditions and the protection of natural environments usually gave way to local economic growth.

The social, environmental and economic conditions have greatly changed over the past twenty years, however. In the recent years, the consequences of corporate irresponsibility have loomed large and caused outrage within China. Before 2004, China had a seemingly inexhaustible supply of cheap labor from its rural areas. However, the labor shortage in major exporting areas since 2004 may herald the end of the situation. Low wages and poor working conditions were the major reasons for the labor shortage, according to a government report.[98] Workers in developing countries are usually silent regarding their

92. *See* Donald C. Clarke, *What's Law Got to Do with It? Legal Institutions and Economic Reform in China*, 10 UCLA PAC. BASIN L.J. 1, 8 (1992).

93. *See* Donald C. Clarke et. al., *The Role of Law in China's Economic Development*, GWU Law School Public Law Research Paper No. 187 (2006).

94. *See id*, at 12.

95. *See id*, at 14.

96. *See* JUNHIA LIU, *supra* note 15, at 85-86.

97. *See* Jingjing Wang, *Zhidu Anpai dui Qiye Chengdan Shehui Zeren de Yingxiang* [*The Effects of Institutional Arrangements on Corporate Social Responsibility*], *in* ZHONGGUO QIYE SHEHUI ZEREN BAOGAO [A REPORT ON CHINESE CORPORATE SOCIAL RESPONSIBILITY] 114-115 (2006).

98. *See* Ministry of Labor and Social Security, Guanyu Minggong Duanque De Diaocha Baogao [Report on Labor Shortage] (2004); David Barboza, *Sharp Labor Shortage in China May*

rights, particularly in China where freedom of association is prohibited. However, Chinese workers have voiced their anger through their exodus from sweatshops.

Other government reports also indicate that workers are increasingly willing to manifest/act on their dissatisfaction with corporate irresponsibility. For example, labor dispute cases received by the Labor Dispute Arbitration committees nationwide increased sharply over the past ten years, from about 90,000 cases in 1998 to about 500,000 cases in 2008.[99] The statistics do not include labor disputes unreported to the committees. The main issues in the cases were concerning nonpayment and illegal reduction of wages, insurance and welfare, termination of employment, and occupational injury. The rapid growth of labor disputes places serious pressure on the Chinese government to address the labor problems.

Environmental degradation is an alarming issue and taking an economic and social toll in China. The Chinese government is openly worried about this problem. In September 2006 State Environmental Protection Administration (SEPA) and the State Statistics Bureau issued a Green GDP report stating that in 2004 environmental pollution cost China $64 billion, equivalent to 3.05% of GDP that year.[100] According to a special report that SEPA and the World Bank released in February 2007 only one percent of China's total 560 million urban residents breathed air of quality that satisfied current European Union safety standards; about 47 billion cubic meters of water below quality standards was nevertheless supplied to households, industry and agriculture; about 100 billion cubic meters of the total water supply (500 billion cubic meters) in China was contaminated.[101]

According to the World Bank officials, the report also included the death toll from air and water pollution, but the result was removed from the published version because SEPA feared the result would cause social unrest in China.[102] It was estimated that outdoor air pollution caused 350,000 to 400,000 premature deaths a year; indoor pollution contributed another 300,000 people; and 60,000

Lead to World Trade Shift, N.Y. TIMES, Apr. 3, 2006, at A1.

99. *See* National Bureau of Statistics of China, 2007 Laodong he Shehui Baozhang Shiye Fazhan Tongji Gongbao [2007 STATISTICS COMMUNIQUE OF LABOR AND SOCIAL SECURITY DEVELOPMENT], *at* http://www.stats.gov.cn/tjgb/qttjgb/qgqttjgb/t20080521_402481634.htm; Shanghai Stock Exchange Research Center, Zhongguo Gongsizhili Baogao (2007): Liyi Xiangguanzhe yu Gongsi Shehui Zeren [CHINA CORPORATE GOVERNANCE REPORT (2007): STAKEHOLDERS AND CORPORATE SOCIAL RESPONSIBILITY] 38-39 (2007).

100. Pollution costs China 511.8b yuan in 2004, XINHUA, Sept. 7, 2006, http://www.gov.cn/english/2006-09/07/content_381756.htm.

101. *See* China SEPA & World Bank, COST OF POLLUTION IN CHINA, *available at* http://siteresources.worldbank.org/INTEAPREGTOPENVIRONMENT/Resources/China_Cost_of_Pollution.pdf.

102. *See* Joseph Kahn & Jim Yardley, *As China Roars, Pollution Reaches Deadly Extremes*, N.Y. TIMES, Aug. 26, 2007.

died from diarrhea and other diseases in relation to water pollution.[103] The social unrest concern of SEPA could be understandable. From 1995 to 2006, the number of petitions concerning environmental problems filed with the environmental agency increased by ten times (616,122 petitions in 2006), which posed a great challenge to the environmental agency with limited resources.[104] Based on the experiences over the past years, an environmental problem would likely escalate to protests if it is not reasonably solved through petition.[105] In recent years, Chinese citizens have staged many high-profile protests concerning environmental issues; some of the protests amassed thousands of protesters.[106] On the one hand, this signals that corporate environmental irresponsibility now is subject to public scrutiny in China. On the other hand, environmental problems are becoming a threat to social stability.

In the Chinese political context, social and environmental problems pose a serious challenge to the legitimacy of the ruling Chinese Communist Party (CCP). Good performance in improving living quality of the Chinese population is believed to be the most important pillar of the CCP's political legitimacy.[107] The Chinese government has tried to redress social and environmental problems through various channels, and one of the important channels is the legal system. The philosophy is that, if Chinese citizens can air their grievance through the legal system, they would not seek political revolution against the CCP.[108] But the construction of effective legal institutions takes considerable time, and China is still less than satisfactory. Other complementary mechanisms should be devised. The promotion and indoctrination of CSR may be one of the complementary mechanisms for the institutional weaknesses. In this regard, the Chinese government has a political motive in promoting CSR.

---

103. *See id.*

104. In 1995, there were 58,678 petitions filed with the environmental agencies nationwide; in 2006, the number increased to 616,122. *See* Zhifeng Tong, *Dui Wuoguo Huanjing Wuren Yinfa Quntixin Shijian de Skao* [*Some Thoughts on Protests Arising From Environmental Pollution in China*], *in* ZHONGGUO HUANJING DE WEIJI YU ZHUANJI (2008) [CRISES AND TURNING POINTS OF CHINA'S ENVIRONMENTS (2008)] 149-156 (2008); *see supra* note 85 (reporting that that the SEPA only has "about 200 full-time employees, compared with 18,000 at the EPA in the United States").

105. *See* Zhifeng Tong, *supra* note 104, at 150 (reporting that 62.2% (10,285) of 16,523 protests that occurred in the Guangdong province between 2000 and 2004 was caused by the reason that they could not be resolved through the petition system).

106. *See* Zhifeng, *supra* note 104, at 153.

107. Political scientists call this kind of legitimacy "performance legitimacy." *See e.g.*, JOSEPH FEWSMITH, CHINA SINCE TIANANMEN: THE POLITICS OF TRANSITION 9 (2001) (arguing that since 1980s the Chinese government has been much more reliant on performance legitimacy than ideological legitimacy).

108. *See* Mary E. Gallagher, *"Use the Law as Your Weapon!": Institutional Change and Legal Mobilization in China*, *in* ENGAGING THE LAW IN CHINA 57 (2005).

C. CSR as a Strategy of Pressing Foreign Companies to Improve the Quality of Living in China

While indigenous Chinese suppliers are being pushed hard by multinational companies to implement CSR, the Chinese government and media in return also call for CSR practices by multinational companies that have direct operations in China. The Chinese CSR initiatives that target foreign multinational companies therefore may be deemed as a strategy to partially counterbalance or return the pressure imposed by multinational companies. CSR can be a legitimate strategy to take foreign companies under scrutiny and to transfer wealth from foreign companies to Chinese society.

In recent times, the Chinese media have enthusiastically disclosed and condemned many foreign-based multinational companies in China for their unsafe products or production processes, including Häagen-Dazs' unsanitary kitchens, Kentucky Fried Chicken's illegal use of red dye in food, Nestlé's unsafe iodine in infant formula, to name just a few.[109] The Research Center on Transnational Corporations of the Ministry of Commerce also has produced a series of reports targeting on CSR performance of foreign companies in China and advocated that foreign companies should undertake CSR in China.[110] According to the reports, many foreign companies engage in irresponsible conduct in China including tax evasion, bribery, monopoly, poor labor protection, environmental pollution, and product safety.[111]

The Chinese government also helped Chinese workers take actions against foreign companies. A leading case may be the unionization of Wal-Mart stores in China. Wal-Mart opened its first store in China in 1996 and quickly expanded to more than 200 hundred stores in the next few years. The expansion of Wal-Mart stores drew attention from the Chinese government. The All China Federation of Trade Unions (ACFTU), the only legitimate labor union in China and known for its close affiliation with the Chinese government, had criticized Wal-Mart for its refusal to set up labor unions.[112] After making fruitless requests to Wal-Mart, the ACFTU organized a grassroots movement among Wal-Mart workers and in 2006 successfully pressed Wal-Mart to accept the

---

109. *See e.g.*, Seung Ho Park & Wilfried R. Vanhonacker, *Kuaguo Gongsi Yinhe Shiqu Zunjing: Jiang Zhongguo Dangzuo Shiyanshi? [Why Multinational Companies Lose Respect? Treating China as a Laboratory?]* (giving a summary of recent events of multinationals' irresponsibility in China and analyzing the causes), PEOPLE DAILY ONLINE, Nov. 22, 2007, *available at* http://mnc.people.com.cn/GB/6562449.html.

110. *See* KUA GUO GONG SI ZHONGGUO BAO GAO [REPORT OF TRANSNATIONAL CORPORATIONS IN CHINA] (Lezhi Wang ed., annual publications from 2004-).

111. *See id.*

112. *See* Wal-Mart Watch, *Breaking from Tradition: The Unionization of Wal-Mart China*, *available at* http://walmartwatch.com/research/documents/breaking_from_tradition_the_unionization_of_wal_mart_china/.

establishment of labor unions in all Wal-Mart stores in China.[113] The labor unions have obtained pay raises by negotiating with Wal-Mart's management. The ACFTU further announced that it will press all foreign companies to establish labor unions in China.[114] All the cases above show that China is becoming vigilant about foreign companies' CSR performance in China.

V.
INSTITUTIONAL CONSTRAINTS

A. Political Institutions: Constraints on Non-Governmental Organizations and Sensitive Issues

The CSR movements in developed countries are regarded as social movements. They are "collectivities acting with some degree of organization and continuity outside institutional or organizational channels for the purpose of challenging . . . the extant authority," here challenging the institutionalized logic of single-minded profit maximization as the corporate goal.[115] Non-governmental organizations (NGOs) are the critical player in the CSR movement. But the pattern of the Chinese CSR development is quite different from its western counterpart. Although NGOs in China have increased rapidly over the past decade, the formation of NGOs is still controlled by the governmental authority and NGOs' CSR agenda should play out within the political environment permitted by the government.[116] State-led CSR initiatives in China consequently take on a more influential role than in many other countries worldwide. State-led CSR initiatives on the one hand give legitimacy for CSR NGOs, but on the other hand delimit the boundary of CSR issues permitted in China.

It is accepted that the Chinese government is more tolerant of environmental NGOs than other kinds of NGOs working on topics such as human rights, labor rights and diseases.[117] This indicates that CSR's environmental aspect can develop more easily in China than the human rights and labor rights aspects.

Chinese NGOs are more inclined to use non-confrontational tactics (e.g., public education, information dissemination, salon discussions, field trips, and

113. *See id.*

114. *See* Jiao Wu, *80% Foreign Firm Workers to Have TUs*, CHINA DAILY, Jan. 9, 2008, *available at* http://www.chinadaily.com.cn/china/2008-01/09/content_6379854.htm.

115. *See* David Snow et. al., *Mapping the Terrain*, *in* BLACKWELL COMPANION TO SOCIAL MOVEMENTS 11 (2004).

116. *See* Guobin Yang, *Environmental NGOs and Institutional Dynamics in China*, 181 THE CHINA QUARTERLY 46 (2005).

117. *See* Gerald Chan et. al., *China's Environmental Governance: The Domestic-International Nexus*, 29 THIRD WORLD QUARTERLY 291,292 (2008).

litigation) to advance their CSR agenda. Although Chinese NGOs are constrained in setting issues, they have learned how to push the issue boundary by strategically "using the regime's own words as a weapon of protest, resistance and collective action."[118] The state-led CSR initiatives may therefore provide some protection for NGOs to promote CSR.

B. Legal Institutions: Ambiguous Rules and Implementation Gaps

The review of Chinese CSR initiatives in Part II shows that CSR has been institutionalized in the Chinese legal system. On the one hand, the institutionalization gives CSR a legal status in China. On the other hand, incorporating CSR into law mires CSR in the problems of the Chinese legal system—ambiguity and unpredictability in rules and deficiency in implementation.

The legal effects of the CSR initiatives—whether they are legally binding or simply advisory—quite often are unclear. Article 5 of the 2006 Chinese Company Law, as discussed in Part II, is a great example. Chinese corporate law scholars have different interpretations of the effect of Article 5. Some scholars understand it as an exhortatory rather than mandatory provision while some interpret it as part of fiduciary duties under the company law. Currently the real effect of Article 5 is aligned with the former view given that the law does not specify the contents of CSR and shareholders have very limited access to enforce fiduciary duties in courts to specify the "inherent incompleteness" of the duties.[119]

Moreover, the government-led CSR initiatives are quite uncertain and unpredictable. Some CSR initiatives are only temporary and in the trial stage, such as the Regulation on Environmental Information Disclosure, detailed in Part II.A.3. The uncertainties in the CSR initiatives may cause Chinese companies to choose a wait-and-see policy and withhold true commitment.

Implementation deficiency is another problem. The Chinese legal system is notorious for the gap between the law on the books and the law in practice. Many of the mandatory CSR initiatives are largely unenforced.

C. Economic Institutions: Weak Demand from Consumers and Investors

Consumers are an important stakeholder in CSR development in Western countries. By making purchasing decisions, consumers can strongly affect the

---

118. *See supra* note 93, at 52.

119. *See* Katharina Pistor & Cheng-Gang Xu, *Fiduciary Duty in Transitional Civil Law Jurisdictions: Lessons from the Incomplete Law Theory*, *in* GLOBAL MARKETS, DOMESTIC INSTITUTIONS: CORPORATE LAW AND GOVERNANCE IN A NEW ERA OF CROSS-BORDER DEALS 77-106 (Curtis J. Milhaupt ed., 2003).

economic interests of corporations and therefore change corporate behavior. However, CSR standards at the moment are primarily implemented in export-oriented companies in China. Companies targeting the Chinese domestic market are largely unaffected by the standards because Chinese consumers have not yet shown a strong demand for products made in a socially and environmentally responsible manner. Chinese consumers have long followed the rule of "live within one's income" and the virtue of thrift.[120] They care more about physical conditions and functions of products than process information as to how products are made.[121] Furthermore, since Chinese consumers have long lived in planned consumption and low consumption environments, the concept of consumer rights is still new to them.[122] In recent years, the Chinese media have become active in disclosing terrifying practices in food production processes so Chinese consumers have increased awareness of food safety. But the transformation from consumer awareness to consumer action remains elusive, and it is also complicated by deficiencies in legal and regulatory institutions, such as the lack of consumer rights lawyers.[123]

Socially responsible investors are another important group of CSR advocates in western countries. Over the past decade, developed countries have witnessed a strong growth of socially responsible investing (SRI), according to statistics SRI communities provided.[124] SRI has evolved from eccentric practices by a small club of faith-based investors to innovative strategies by a large community of giant financially-sophisticated investors.[125] Major asset management companies offer a variety of SRI products. Large institutional investors, particularly pension funds that focus on long-term growth (e.g., CalPERS, the largest public pension fund in US) have adopted responsible

120. *See* LI LI-QING & LI YIAN-LING, QIYE SHEHUI ZEREN YANJIU [STUDIES ON ENTERPRISE'S SOCIAL ACCOUNTABILITY] 301, at 221 (2005).

121. *See* Douglas A. Kysar, *Preference for Process: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 529 (2004).

122. *See* LI LI-QING & LI YIAN-LING, *supra* note 120, at 221-222.

123. *See* Howard W. French, *As China's Economy Roars, Consumers Lack Defenders,* N.Y. TIMES, July 8, 2007, http://www.nytimes.com/2007/07/08/world/asia/08china.html.

124. For example, in the United States, the SRI assets grew from $639 billion in 1995 to $ 2.71 trillion in 2007, accounting for 10% of all assets under professional management in the securities market. 124.In Europe, the assets involved in SRI significantly increased from €360 billion in 2003 to €1.033 trillion in 2005. *See* Social Investment Forum, EXECUTIVE SUMMARY OF 2007 REPORT ON SOCIALLY RESPONSIBLE INVESTING TRENDS IN THE UNITED STATES, *available at* http://www.socialinvest.org/resources/pubs/documents/FINALExecSummary_2007_SIF_Trends_wlinks.pdf. *See* European Sustainable and Responsible Investment Forum, EUROPEAN SRI STUDY 2006, *available at* http://www.eurosif.org/publications/sri_studies.

125. SRI has religious origins. *See* Steve Schueth, *Socially Responsible Investing in the United States*, 43 J. BUS. ETHICS 189, 189 (2003) (giving a brief history of SRI; explaining that "[i]n early biblical times Jewish law lay down many directives on how to invest ethically," and the Quakers and Methodists have avoided profits at the expense of killing and slavery of human begins; also arguing that the avoidance of investment in sin stocks originated from the religious beliefs).

investment principles. Leading financial information services have launched a number of SRI indexes, including Dow Jones Sustainability Index and FTSE4Good Index Series. Through the power of capital, investors press companies to engage in CSR behavior.

Currently the structure of the Chinese capital market poses serious questions for the SRI development in China. First, Chinese investors have not yet developed an appetite for SRI. The Chinese securities market has been infamous for excessive speculation. Indigenous Chinese investors are obsessed with short-term profits, rather than long-term investment.[126] The short-term investment environment is not conducive for SRI that usually has long-term orientation. Previously, insurance companies and pension funds (the social security fund), which tend to be more long-term oriented, were not allowed to invest in the securities market.[127] But recent policy changes have relaxed the restriction, so insurance companies and pension funds may be the potential capital source for SRI in China.[128]

Second, the market segmentation of the Chinese securities market slows the penetration of SRI investors who are now primarily foreign investors. In order to control/stabilize its securities market, the Chinese government segments the market into the A-share and the B-share markets. The segmentation would make the Chinese domestic securities market less connected with international securities markets. The A-share market is open to domestic investors and qualified foreign institutional investors (QFIIs) only. Foreign investors cannot invest in the A-share market unless approved as QFIIs. The B-share market suffers from low liquidity and has been sluggish for years, only playing a marginal role in the Chinese securities market.

Foreign investors are more interested in entering into the A-share market, instead of the B-share market. By the end of February 2008, there were 52 foreign institutional investors approved by the CSRC, with investment quota of RMB 9.995 billion granted by the State General Administration of Foreign Exchange (SAFE).[129] So far, the Chinese government has maintained a restricted policy toward foreign investment in its domestic securities market. At present, investment by foreign investors only accounts for a small fraction of the

126. Based on the data released by the Shanghai and Shenzhen Stock Exchange, the average annual turnover ratio between 1993 and 2006 was 483%. Between January and May 2007, the annual turnover ratio was even up to 739%, which means investors held a certain share less than 2 months. For the detailed data, see Hongming Jin, *Guanzhu Liutonggu Huansholu zhibiao [Concerns about the Turnover Ratio Indicators of Tradable Stock]*, SHANGHAI SECURITIES POST, July 16, 2007.

127. *See* Temporary Provisions on National Social Security Funds Investment Management (investment in securities cannot exceed 40% of total assets).

128. *See id.*

129. *See* CSRC, QFIIs Zige Tongji Qingkuang Biao [The Statistics Concerning the QFIIs], http://www.csrc.gov.cn/n575458/n776436/n804980/n828538/n828649/n9954004.files/n9954003.doc.

market. The marginal role of foreign investors implies that the driving force of SRI in the Chinese securities market should come from within. But as suggested above, indigenous Chinese investors, particularly retail investors (as opposed to institutional investors), have little awareness about SRI and thus are not a major impetus for CSR.

VI.
CONCLUSION

In recent years many indigenous CSR initiatives have emerged in China. The Chinese CSR initiatives include laws and regulations, governmental instructions and guidelines, non-governmental standards and organizations. The recent growth of the Chinese CSR initiatives deserves an analysis of the CSR development in China, especially given that China's international image is usually associated with human rights abuses, substandard products, sweatshops, and serious environmental pollution. How can these Chinese CSR initiatives gain footholds in China? Are they just expedient strategies to beautify China's tarnished international image? As observed in developed countries, many companies use CSR as a tool of public relations. In this sense, the suspicion of CSR as window dressing does not just surround Chinese companies but companies regardless of their nationality. But indeed, the local institutional environments compound the suspicion in the Chinese context.

This article argues that China has historical foundations and many real incentives to develop CSR, but meanwhile there are many political, social and economic constraints that do not allow CSR to develop at a quicker pace. The Chinese government plays an important role in developing the indigenous CSR initiatives. The government has political, social and economic motivations to *encourage* and also to *control* the development of CSR in China, resulting in uneven development of CSR issues. Environmental issues have the broadest space to develop while human rights have the most limited. Chinese companies also have mixed incentives to *adopt* and *maneuver* CSR initiatives. The private CSR initiatives such as CSC9000T reveal Chinese companies' efforts to strike a balance between responsible production and cruel business reality.

Based on the experience in developed countries, the CSR development is a long process rather than an overnight change.[130] China is unlikely an exception to that experience. Modern CSR was ushered into China in the late 1990s and is just gaining attention there. In the early stage of development, it is reasonable to expect that there is a gap between the words promised in the CSR initiatives and the real implementation of the CSR measures. But the existence of the gap does not relegate the CSR initiatives to simple window dressing. In the early stage,

130. *See supra* note 1.

the effects of the CSR initiatives may rest more on awareness-raising and course-defining than complete implementation. The recent growth of the Chinese CSR initiatives may be regarded favorably as the initial step toward making CSR take roots in China.

Berkeley Journal of International Law

Volume 28 | Issue 1 Article 4

2010

Prisoner Disenfranchisement: Four Judicial Approaches

Michael Plaxton

Heather Lardy

Prisoner Disenfranchisement: Four Judicial Approaches

Michael Plaxton*
Heather Lardy**

The right to vote occupies a central place in democratic thought and in constitutional law. During the twentieth century, constitutional democracies have tended to extend the franchise to once-excluded groups: women, racial and ethnic minorities, the indigent and the illiterate. Having extended the franchise to these groups, a legislature could not try to withdraw it without inviting great political controversy. This kind of controversy, however, does not tend to erupt when legislatures propose to disenfranchise criminal offenders serving terms of imprisonment. There may be no political costs in disenfranchising prisoners. Indeed, doing so may allow politicians to appear "tough on crime." For this reason, courts are most likely to consider the constitutionality of legislative restrictions on the right to vote in prisoner disenfranchisement cases. These cases implicate, more obviously than other rights cases, deep questions concerning the basis for legal authority and civic duty in a democratic society, and the relationship between a government and the people it governs. It is, therefore, interesting to explore how courts around the world have approached the issues raised in prisoner disenfranchisement litigation.[1]

---

* Assistant Professor of Law, University of Saskatchewan.

** Senior Lecturer in Law, University of Aberdeen. The authors are grateful to Dwight Newman, Mark Carter, Glen Luther, Angus Campbell and Matyas Bodig for their comments and suggestions. The usual disclaimer applies.

1. There is a growing literature on the issue, much of it centred on the United States, where some states practice the perpetual disenfranchisement of ex-prisoners. *See, e.g.*, Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality and "The Purity of the Ballot Box,"* 102 HARV. L. REV. 1300 (1989); Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537 (1993); *One Person, No Vote: The Laws of Felon Disenfranchisement*, in Developments in the Law, 115 HARV. L. REV. 1838 (2002); Scott M. Bennett, *Giving Ex-Felons the Right to Vote*, 6 CAL. CRIM. L. REV. 1 (2004); Lauren Handelsman, *Giving the Barking Dog a Bite: Challenging Felon Disenfranchisement under the Voting Rights Act 1965*, 73 FORDHAM L. REV. 1875 (2005); JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY (2006). Constitutional doctrine in the U.S. remains governed by the Supreme Court's ruling in *Richardson v. Ramirez*, 418 U.S. 24, 44 (1974), that the practice is authorized by section 2 of the 14th Amendment (permitting a reduction in the Congressional representation of states disenfranchising "except for participation in

This Article attempts just such an exploration. It examines four cases, each decided by a high court in a different jurisdiction: *Sauvé v. Canada (Chief Electoral Officer)*,[2] *Minister for Home Affairs v NICRO (National Institute for Crime Prevention and the Reintegration of Offenders)*,[3] *Hirst v. United Kingdom*,[4] and *Roach v. Electoral Commissioner*.[5] In each case, the respective court either struck down disenfranchising legislation as unconstitutional or declared it incompatible with an international human rights instrument. The thesis of this Article is modest, in keeping with its exploratory mission. It purports to show that, although the above decisions reflect different modes of reasoning when confronted with legislation disenfranchising prisoners, several common themes run through them.

Parts I through IV, which together represent the bulk of this Article, examine the reasoning employed by the courts in the four cases noted above. Part I analyzes the Supreme Court of Canada's 2002 decision in *Sauvé v. Canada*. This is an appropriate starting point, inasmuch as the other decisions all reference *Sauvé* to a greater or lesser extent. This is not just a historical accident. As we will see, the majority and dissenting opinions in *Sauvé* provide the most sophisticated judicial treatment of the kinds of arguments available to a government attempting to justify limitations on the right to vote. Though the majority opinion is grounded in many unspoken and contestable premises, it sets the benchmark for principled analysis.

Part II discusses the South African Constitutional Court's 2004 decision in *NICRO*. There, the government failed to convince the Court that it had a legitimate reason to disenfranchise prisoners.[6] In this respect, the case resembles *Sauvé* in that a majority of the Supreme Court of Canada expressed strong doubts that the disenfranchising legislation in issue advanced a pressing and substantial objective. *NICRO* is less convincing than *Sauvé*, however, because the latter case was decided after the government presented a strong case (indeed, a case supported by expert testimony by legal theorists).[7] By contrast, *NICRO* featured weak government submissions incapable of doing meaningful justificatory work.

Part III reviews the European Court of Human Rights' 2005 decision in *Hirst*. Unlike *Sauvé* and *NICRO*, *Hirst* did not turn on whether the disenfranchisement of prisoners furthered a legitimate state aim. Rather, it

---

rebellion or other crime") and is thus not governed by the equal protection principles arising from section 1 of that Amendment and applicable to other voting rights issues.

2. Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519 (Can.).

3. Minister for Home Affairs v Nat'l Inst. for Crime Prevention and the Reintegration of Offenders (NICRO) 2004 (5) BCLR 445 (CC) (S. Afr.).

4. Hirst v. United Kingdom (No.2), App. No. 74025/01, 42 Eur. H.R. Rep. 41 (2006).

5. Roach v. Electoral Commissioner, (2007) 233 C.L.R. 162.

6. *See NICRO*, 2004 (5) BCLR 445 (CC) (S. Afr.).

7. *See Sauvé*, [2002] 3 S.C.R. 519 at para. 53.

turned on the disproportionate impact on prisoners' right to vote. We will see, however, that the Court declined to explain why the state's reasons for disenfranchising prisoners were incapable of justifying a limitation on the right to vote, and that its refusal to do so made its proportionality analysis inherently suspect.

Part IV examines the Australian High Court's 2007 decision in *Roach*. Unlike the other jurisdictions we consider, Australia has no "bill of rights" and so its High Court does not engage in the sort of robust proportionality inquiry that we might see under the Canadian Charter of Rights and Freedoms, the South African Constitution, or the European Convention of Human Rights. The Australian High Court, in *Roach*, confined its inquiry to the question of whether there was a rational connection between the disenfranchisement of prisoners and the government's objectives.[8] Since both *Sauvé* and *NICRO* were also decided on that basis, the central issue in *Roach* was the same as the issue in those two cases. As we will see, though, the majority did not predominantly examine the government's objectives on principled grounds, but rather relied on a historical analysis. Furthermore, it misunderstood the basis on which *Sauvé* was decided, and therefore chose not to draw upon the reasoning of the *Sauvé* majority.

Part V considers a number of common themes running throughout the four cases. First, we briefly note that the four cases do not support prisoners' voting rights as robustly as one might expect. Second, we observe that the cases all explore the extent to which legislatures should be free to experiment with democratic institutions by altering the boundaries of the electorate. Third, we consider the fact that, in each case, the government in question argued that the disenfranchisement of prisoners would advance the collective sense of civic responsibility in the community. Fourth, we consider how the courts treat the idea of "universal suffrage." Finally, we look at the extent to which the different courts wrestle with the implied contractarian premises underlying the governments' civic responsibility arguments.[9]

---

8. *See Roach*, (2007) 233 C.L.R. 162 at para. 8; see also Graeme Orr & George Williams, *The People's Choice: The Prisoner Franchise and the Constitutional Protection of Voting Rights in Australia*, 8 ELECTION L.J. 123, 124 (2009) [hereinafter *The People's Choice*] (arguing that the Court should subject electoral law to strict scrutiny).

9. We do not isolate for scrutiny in this part the argument that the disenfranchisement may be justified as a form of criminal punishment. This is because the governments' claims about the punitive nature or effects of the disenfranchisement were not offered in any of the cases as the ultimate or sole justification for the respective bans. Nor were they articulated plainly in the language of criminal justice. And in none of the statutory regimes scrutinized was the disenfranchisement imposed by a judge as part of a criminal sentencing process. The ban in each case was formalized as a voter disqualification rather than as an explicit criminal penalty. And as a provision of election law—a civil and constitutional regime—rather than of criminal law, the disenfranchisement, like its defense, was founded more heavily on claims about democracy than on those of criminal justice.

I.
SAUVÉ V. CANADA (CHIEF ELECTORAL OFFICER)

Section 3 of the Canadian Charter of Rights and Freedoms states: "Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein."[10] The Canada Elections Act denied the right to vote to any criminal offender serving a sentence of two years or more in prison.[11] In *Sauvé*, a narrow majority of the Supreme Court of Canada struck down the relevant section of the Act as unconstitutional.

At first glance, it might seem obvious that the Act offends the Charter, given that the latter expressly guarantees the right to vote to "every citizen." Indeed, the government in *Sauvé* conceded that the Act infringed section 3 of the Charter.[12] Section 1 of the Charter, however, permits "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[13] The decision in *Sauvé*, then, turned on whether the government demonstrably justified the disenfranchisement of offenders serving a sentence of two years or more in a way that is consistent with a free and democratic society. The majority concluded that the government did not. Its reasons for drawing that conclusion were unusual and striking.

In determining whether the government has justified an infringement of rights under section 1 of the Charter, one applies a two-stage test.[14] First, the government must prove that the rights-infringing legislation was motivated by a pressing and substantial objective.[15] Second, the government must prove that the way in which it has approached that objective was reasonable and demonstrably justified.[16] In deciding whether the second part of the test is satisfied, the government must show that (a) there was a rational connection between the legislation and the objective such that the impugned legislation was capable of advancing the objective in question; (b) the legislation minimally impaired rights, given the government's objective; and (c) the legislation in question represented a proportionate response to the problems which made the objective pressing and substantial in the first place.[17] In most Charter cases, the constitutionality of legislation has turned on whether it represents a

10. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 3 (U.K.) [hereinafter *Canadian Charter*].

11. Canada Elections Act, R.S.C., ch. E 2, § 51(e) (1985), amended by 1993 S.C., ch. 19 § 23 (Can.).

12. *See Sauvé*, [2002] 3 S.C.R. 519 at para. 6.

13. *Canadian Charter, supra* note 10, § 1.

14. *See* R. v. Oakes, [1986] 1 S.C.R. 103 at para. 69.

15. *Id.*

16. *Id.* at para. 70.

17. *Id.*

proportionate response. The majority opinion in *Sauvé*, by contrast, found that the government failed to show a rational connection between the Act and the government's objective. Indeed, the government had trouble convincing the majority that there was any pressing and substantial objective to advance in the first place.

A. Pressing and Substantial Objective

The Charter implicitly denies that certain phenomena can be cited by the government as "problems" which demand a response (legislative or otherwise). It regards certain attempts at justification, in other words, as non-starters. In *Oakes*, the Supreme Court stated:

> A second contextual element of interpretation of s. 1 is provided by the words "free and democratic society." Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.[18]

Though the majority did not refer to this passage from *Oakes*, it noted that certain kinds of justifications have been effectively taken off the table: "[T]he range of constitutionally valid objectives is not unlimited. For example, the protection of competing rights might be a valid objective. However, a simple majoritarian preference for abolishing a right altogether would not be a constitutionally valid objective."[19] As the emphasized line in the above passage suggests, the government has special difficulty showing that it is a problem that a class or group of citizens possesses the vote, given that the right to vote is core to the very idea of a free and democratic society. The majority in *Sauvé* echoed this observation, remarking: "[W]hen legislative choices threaten to undermine the foundations of the participatory democracy guaranteed by the *Charter* that courts must be vigilant in fulfilling their constitutional duty to protect the integrity of this system."[20]

Notably, the government presented no evidence that the enfranchisement of the prisoners in issue interfered with the electoral process or otherwise produced

18. *Id.* at 136 (emphasis added).

19. *See Sauvé*, [2002] 3 S.C.R. 519 at para. 20.

20. *Id.* at para. 15.

detrimental effects.[21] Instead, the government argued that disenfranchisement of these prisoners would produce two salutary outcomes. It would, first, "enhance civic responsibility and respect for the rule of law."[22] Second, it would serve as an additional punishment.[23] As the majority noted, these objectives have an intuitively compelling quality about them – they *sound* important.[24] The government did not, however, point to any deficit in civic responsibility or respect for law specifically attributable to the enfranchisement of criminal offenders; nor did the government explain how sentences were otherwise inadequate by virtue of prisoners' right to vote. Since the government did not aver to any particular problems, the majority hesitated to conclude that the objectives offered by the government were truly "pressing and substantial" as opposed to merely desired.[25]

Ultimately, the majority accepted the government's claim that the objectives in question were "pressing and substantial" for no other reason than "prudence" – that is, the majority accepted the claim simply for the sake of argument.[26] It could take that approach because the absence of a particular problem, with which the government was ostensibly trying to cope, made it difficult for the government to prove that the disenfranchisement of some prisoners could achieve the aims which animated the impugned provision in the first place.[27] The government, for this reason, ran into trouble at the rational connection stage of the *Oakes* test.

B. The Rational Connection Test I – Respecting Law

Since the government could point to no concrete problem clearly tied to the enfranchisement of certain prisoners, it also could adduce no evidence that disenfranchising those prisoners would achieve the government's stated objectives. The government could do no more than claim that the disenfranchisement of certain prisoners was inherently capable of enhancing respect for law. The majority explained the theoretical foundation of that claim in these terms:

> The government advances three theories to demonstrate rational connection between its limitation and the objective of enhancing respect for law. First, it submits that depriving penitentiary inmates of the vote sends an "educative message" about the importance of respect for the law to inmates and to the citizenry at large. Second, it asserts that allowing penitentiary inmates to vote

21. *Id.* at para. 21.
22. *Id.*
23. *Id.*
24. *Id.* at para. 22.
25. *Id.* at paras. 24, 26.
26. *Id.* at para. 26.
27. *See id.*

> "demeans" the political system. Finally, it takes the position that disenfranchisement is a legitimate form of punishment, regardless of the specific nature of the offence or the circumstances of the individual offender. In my respectful view, none of these claims succeed.[28]

The majority rejected each of these arguments. It rejected the first on the basis that "denying penitentiary inmates the right to vote is bad pedagogy."[29] The majority drew this conclusion on the basis that, when the government strips citizens of the vote, it diminishes the force of its claim that law has legitimate authority over citizens and that citizens ought to obey it. The majority stated:

> Denying penitentiary inmates the right to vote misrepresents the nature of our rights and obligations under the law and consequently undermines them. In a democracy such as ours, the power of lawmakers flows from the voting citizens, and lawmakers act as the citizens' proxies. This delegation from voters to legislators gives the law its legitimacy or force. Correlatively, the obligation to obey the law flows from the fact that the law is made by and on behalf of the citizens. In sum, the legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen to vote. As a practical matter, we require all within our country's boundaries to obey its laws, whether or not they vote. But this does not negate the vital symbolic, theoretical and practical connection between having a voice in making the law and being obliged to obey it. This connection, inherited from social contract theory and enshrined in the *Charter*, stands at the heart of our system of constitutional democracy.[30]

There is a great deal to unpack in this passage. As an empirical claim, it is debatable: the suggestion that people experience an obligation to obey the law because they have the opportunity to contribute to policy through the electoral process is a difficult proposition to verify.[31] Though the majority tries to marginalize the experience of non-voters, it is telling that they too ostensibly regard themselves as having legal obligations. Perhaps the majority would argue that non-voters regard themselves as (to use Hart's distinction) obliged rather than obligated.[32] It is, however, just as possible that both voters and non-voters regard themselves as obligated because, whether they contribute to policy debates or not, they think themselves better off insofar as they receive the protection of the law. Indeed, Hobbes argued that citizens should reason in just this way.[33] From that perspective, the right to vote is a privilege—or franchise—granted to citizens in the sense that the law would retain its authority with or without citizen participation in elections. Regarded as a privilege, the right to vote can be suspended or cancelled. Furthermore, the government could reasonably claim that, by suspending the right to vote of serious offenders, it would remind citizens of the benefits they enjoy by subjecting themselves to

28. *Id.* at para. 29.

29. *Id.* at para. 30.

30. *Id.* at para. 31.

31. Consider the empirical research of TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990).

32. *See* H.L.A. HART, THE CONCEPT OF LAW 77-96 (2d ed. 1994).

33. *See* THOMAS HOBBES, LEVIATHAN (Penguin Classics 1985) (1651).

law, and remind them that those benefits hinge on their continued obedience to it. Writing for the dissent, Gonthier J. argued that the government could reasonably adopt this *kind* of contractarian reasoning. Indeed, at times he edged towards the claim that the government was not just entitled to disenfranchise serious offenders, but that it *ought* to do so:

> Permitting the exercise of the franchise by offenders incarcerated for serious offences undermines the rule of law and civic responsibility because such persons have demonstrated a great disrespect for the community in their committing serious crimes: such persons have attacked the stability and order within our community. Society therefore may choose to curtail temporarily the availability of the vote to serious criminals both to punish those criminals and to insist that civic responsibility and respect for the rule of law, as goals worthy of pursuit, are prerequisites to democratic participation.[34]

This emphasis on "stability and order" is striking because, as Hobbes realized, a legal order may be able to achieve such things even in non-democratic countries.[35] (Indeed, a legal order in a non-democratic country may be able to achieve those ends far more efficiently). By emphasizing this basis for respecting the law, the government would provide citizens a reason for obeying the law that would exist whether or not there are any occasional or systemic deficits in the democratic process. The government could strengthen the case for respecting the law, in other words, by reducing the public's expectations concerning what law should achieve and how it should be created.

The dispute between the majority and the dissent can be reduced to a dispute over how to interpret the government's objective. The dissent's account of legal authority, however, only serves to enhance respect for law *in its thinnest sense*. The majority seems to have asked itself a different question, namely, whether disenfranchisement could enhance that special kind of respect for law *created in a constitutional democracy like Canada*. If we understand the government's objective in that thicker sense, it seems clear that a quasi-Hobbesian analysis will not suffice precisely because that analysis will justify respect for law in democracies and tyrannies alike. Any strategy adopted by the government to encourage respect for law *as a democratic institution* will, as the majority stated, need to emphasize the fact that those subject to the law by and large contribute to its creation.[36] But the government, again as the majority observed, de-emphasized that very fact when it portrayed the right to vote as a privilege which may be stripped from citizens:

> The "educative message" that the government purports to send by disenfranchising inmates is both anti-democratic and internally self-contradictory. Denying a citizen the right to vote denies the basis of democratic legitimacy. It says that delegates elected by the citizens can then bar those very citizens, or a

34. Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519 at para. 116 (emphasis added).

35. *See* HOBBES, *supra* note 33.

36. *Id.* at para. 31.

> portion of them, from participating in future elections. But if we accept that governmental power in a democracy flows from the citizens, it is difficult to see how that power can legitimately be used to disenfranchise the very citizens from whom the government's power flows.[37]

Furthermore, the majority implied that the government cannot choose to enhance respect for law in only the thin sense; that is, it cannot choose to enhance law as a decontextualized institution. Thus, the government cannot argue that, although democratically-created laws have special virtues, it did not purport to emphasize those virtues over the virtues of law more widely understood.

It is not immediately obvious why the government could not have such a "thin" objective. Indeed, as the majority itself notes, not every person in Canada will experience the law as the product of a process in which she participated,[38] and so non-citizens, those under the age of majority, and citizens who have simply decided not to vote may all regard the law as something foisted upon them. It may be that the fact that *others* elected the lawmakers increases non-voters' sense of obligation. If not, the government would have good reason to encourage respect for law (whether democratically-created or not) as an institution.

The majority rejected this approach, apparently on the basis that the Constitution itself presupposes that law will be created democratically. This inference was, again, drawn from the language of section 1: the government's objective must be consistent with a free and democratic society.[39] The majority seems to have taken this to mean that the government cannot create "law," properly described, which has not been created democratically, and therefore cannot intend to enhance respect for law which is anything other than democratic. But, as we have seen, laws are always created without the participation of every person expected to obey them. The majority took the view that these exclusions from the franchise do not make Canadian law any less democratic – that a fully-functioning democracy need not recognize a right to vote for non-citizens and children.[40] Quite the contrary, the majority stressed that Canada now enjoys "universal suffrage" and that the universality of the franchise gives Canadian law its special claim to legitimacy:

> The right of all citizens to vote, regardless of virtue or mental ability or other distinguishing features, underpins the legitimacy of Canadian democracy and Parliament's claim to power. A government that restricts the franchise to a select portion of citizens is a government that weakens its ability to function as the legitimate representative of the excluded citizens, jeopardizes its claim to

37. *Id.* at para. 32.

38. *Id.* at para. 37.

39. *Canadian Charter, supra* note 10, § 1.

40. *See Sauvé*, [2002] 3 S.C.R. 519 at para. 37 (discussing the exclusion of underage citizens).

representative democracy, and erodes the basis of its right to convict and punish law-breakers.[41]

Because the majority took the view that the Charter presupposes universal suffrage, it likewise claimed that the government cannot strip citizens of the right to vote simply on the basis of some moral defect. The government, it argued, cannot enhance respect for the law as a democratic institution if the government conveys the message that it can pick and choose who shall has the right to vote on the basis of some favored character traits.[42]

But, of course, the government *does* pick and choose who may vote – non-citizens, for example, are routinely denied the right to vote.[43] The majority had no apparent difficulty with that, and so begs the question: why is the franchise "universal" merely because all *citizens* are presumptively entitled to vote? This point has great significance because, if non-citizens and underage citizens may be excluded without eroding the universality of the franchise—*i.e.*, without making the legal system any less democratic—then it becomes theoretically possible for the government to likewise disenfranchise *other* classes and groups without offending the system's democratic character. Justice Gonthier seized upon this very point, observing that, although the franchise has been traditionally reserved for citizens,[44] the question was not whether prisoners are citizens, but whether they are members of the political *community*. Though a person's citizenship creates a presumption that she is a member of the community, as Justice Gonthier suggested, it by no means follows that a citizen *must* be a member of the community. Serious criminal offenders, he concluded, have temporarily ruptured their connection to the community, and so fall outside the class of people entitled to participate in the electoral process:

> [C]itizenship or residency is a reasonable minimum requirement for voting, since such indicators are often equated with identification to a particular political community. The importance of the nexus, however, also helps to understand the context of the particular disenfranchisement in question in the case at bar. The disenfranchisement of serious criminal offenders serves to deliver a message to both the community and the offenders themselves that serious criminal activity will not be tolerated by the community. In making such a choice, Parliament is projecting a view of Canadian society which Canadian society has of itself. The commission of serious crimes gives rise to a temporary suspension of this nexus: on the physical level, this is reflected in incarceration and the deprivation of a range of liberties normally exercised by citizens and, at the symbolic level, this is reflected in temporary disenfranchisement. The symbolic dimension is thus a

41. *Id.* at para. 34 (emphasis added).

42. *Id.* at para. 37.

43. The citizenship qualification is itself problematic, offering an uncertain account of how the status and roles of the citizen relate to entitlement to vote. *See* Jean L. Cohen, *Changing Paradigms of Citizenship and the Exclusiveness of the Demos*, 14 INTERNATIONAL SOCIOLOGY 245 (1999); Heather Lardy, *Citizenship and the Right to Vote*, 17 O.J.L.S. 75 (1997).

44. *Sauvé*, [2002] 3 S.C.R. 519 at para. 117.

> further manifestation of community disapproval of the serious criminal conduct.[45]

In reply, the majority suggested that if the government wanted to enhance respect for law as a democratic institution, it should have emphasized the connection that serious offenders have to the political community, not labeled them as "outsiders."[46]

Given that section 3 of the Charter specifically reserves the vote for "every citizen," we may wonder what difference it makes that a citizen is ostensibly not a member of the political community. The dissent clearly proceeded on the basis that section 1 permits infringements of section 3 and therefore allows the government to impose limits on the extent to which "every citizen" may vote. Since that right can be limited, the dissent reasoned, it makes sense to ask whether the citizens who have been prevented from voting are members of the community or not. The majority understood the notion of a limit on section 3 somewhat differently, implying that the government could only limit the voting rights of citizens by restricting the time, place, and manner by which the vote could be exercised – not by narrowing the class of citizens who could exercise it. When discussing the minimal impairment test, the majority remarked:

> The question at [the minimal impairment] stage of the analysis is not how many citizens are affected, but whether the right is minimally impaired. Even one person whose *Charter* rights are unjustifiably limited is entitled to seek redress under the *Charter*. It follows that this legislation cannot be saved by the mere fact that it is less restrictive than a blanket exclusion of all inmates from the franchise.[47]

The majority's view should be preferred, and reflects the view taken by the European Court of Human Rights in *Hirst*.[48]

In short, the majority's reasons for rejecting the government's argument that the disenfranchisement of serious offenders could enhance respect for the law rests upon a chain of contentious (and frequently buried) premises. Specifically, it rests upon the premise that the government could not intend to enhance respect for law in the thin sense. This, in turn, depends upon the premise that the Charter presupposes that law in a democratic society is created democratically, and that "democratically" should be understood as requiring the state to provide all citizens with the right to vote. This reading of "democratically" itself depends on the idea that, even though many classes and groups in Canadian society are excluded from the franchise altogether, Canada nonetheless has "universal suffrage" at least for the purposes of constitutional analysis. The dissenting opinion takes issue with all these premises to a greater or lesser extent. At the core of each of these sub-disputes lies one troubling

45. *Id.* at para. 119.

46. *Id.* at paras. 38-40.

47. *Id.* at para. 55.

48. *See* Hirst v. United Kingdom (No.2), App. No. 74025/01, 42 Eur. Ct. H.R. 41 (2006) at para 77.

truth: Canada subjects many people within its borders, everyday, to a law created through a process in which they cannot participate.

C. Rational Connection Test II – Demeaning the Political System

As we have seen, the majority rejected the claim that the Constitution permits the state to exclude citizens from the franchise. They were particularly unimpressed by the argument that it would demean the political system to allow certain classes of citizens to participate in the electoral process. This claim, the majority held, is incompatible with the Charter's presumption that all persons must be treated with dignity and respect. They cursorily remarked:

> The idea that certain classes of people are not morally fit or morally worthy to vote and to participate in the law-making process is ancient and obsolete. Edward III pronounced that citizens who committed serious crimes suffered "civil death", by which a convicted felon was deemed to forfeit all civil rights. Until recently, large classes of people, prisoners among them, were excluded from the franchise. The assumption that they were not fit or "worthy" of voting—whether by reason of class, race, gender or conduct—played a large role in this exclusion. We should reject the retrograde notion that "worthiness" qualifications for voters may be logically viewed as enhancing the political process and respect for the rule of law. As Arbour J.A. stated in *Sauvé No. 1*, . . . since the adoption of s. 3 of the *Charter*, it is doubtful "that anyone could now be deprived of the vote on the basis . . . that he or she was not decent or responsible."[49]

Again, we may wonder why it is that non-citizens are barred from voting if not on the basis (at least in part) that they are presumptively unworthy of the franchise. It seems wrong to suppose that non-citizens are insufficiently well-versed in the political issues circulating in their host state – or, at least, that they suffer from these infirmities more than citizens. Their disenfranchisement likely stems, at least to some extent, from suspicions surrounding their "otherness" — their status as aliens whose good character cannot safely be presumed.

This issue becomes especially urgent when we consider the majority's concluding thoughts on the government's second objective:

> Denial of the right to vote on the basis of attributed moral unworthiness is inconsistent with the respect for the dignity of every person that lies at the heart of Canadian democracy and the *Charter*: compare *August*, *supra*. It also runs counter to the plain words of s. 3, its exclusion from the s.33 override, and the idea that laws command obedience because they are made by those whose conduct they govern. For all these reasons, it must, at this stage of our history, be rejected.[50]

If denial of the franchise offends an individual's dignity, then non-citizens are offended in this way on a regular basis. If it only offends the dignity of citizens, then the majority should have explained what quality makes citizens materially different from non-citizens, since it may be that serious criminal offenders lack

49. *Sauvé*, [2002] 3 S.C.R. 519 at para. 43.

50. *Id.* at para. 44 (emphasis added).

that quality. As we have seen, Justice Gonthier's argument that people who lack a connection to the political community may be disenfranchised, and that serious criminal offenders lack such a connection, rests on this point. The majority did not do enough to explain why, given that the constitution allows non-citizens to be treated as non-members of the political community, the legislature cannot assign prisoners to that category as well.

D. Rational Connection Test III – Punishment

Finally, the majority rejected the claim that the provision in question could further legitimate penological aims—in particular, deterrence, rehabilitation, retribution, and denunciation.[51] First, because disenfranchisement is automatically triggered by a sentence of two years or more, there is no guarantee that disenfranchisement is a suitable punishment for all those affected by the Act.[52] This means that offenders may not deserve to be disenfranchised, and that the Act cannot be justified on retributivist grounds. Furthermore, disenfranchisement does not denounce any particular type of conduct.[53] Second, for the reasons we have already explored, the majority concluded that there is no evidence that disenfranchisement will encourage greater respect for law. On this basis, the majority concluded that disenfranchisement would neither deter nor rehabilitate criminal offenders.[54] Obviously, both arguments depend on premises which implicitly grounded the majority's other rational connection analyses. If we agree with the majority that (a) serious criminal offenders do not, just by virtue of committing a serious criminal offence, lack some quality possessed by other citizens; and (b) the government cannot encourage respect for law as an instrument of order and stability without also emphasizing its character as a democratic institution, we will find its reasoning persuasive. If not, we will think that the majority has begged the question yet again.

E. Minimal Impairment

The majority, then, found that the government failed to prove that a rational connection existed between its three objectives and the disenfranchisement of offenders serving a sentence of two years or more. It nonetheless addressed, albeit fleetingly and only for the sake of argument, the minimal impairment stage of the *Oakes* test. The majority found that, because the government provided no basis for concluding that those sentenced to two years imprisonment or more necessarily deserve to lose the right to vote, it could not

51. *Id.* at para. 49.
52. *Id.* at para. 48.
53. *Id.* at para. 51.
54. *Id.* at para. 49.

show that the Act infringed section 3 of the Charter as little as possible.[55] The dissent stressed that the minimal impairment test does not require the least impairing legislation imaginable, and that the court should adopt a deferential posture when assessing whether the legislation is appropriately tailored.[56]

II.
MINISTER FOR HOME AFFAIRS V. NICRO

Unsurprisingly, given its political history, the South African Constitution is committed to the non-discriminatory distribution of the franchise. The Constitutional Court first ruled on the issue of prisoner voting rights in *August v. Electoral Commission.*[57] That case concerned the lack of prison facilities for registration and voting. The law at that time did not formally disqualify prisoners from voting, but neither did it place any obligation on either the prison or the electoral authorities to facilitate voting by inmates. The Constitutional Court held in *August* that the applicants had been effectively deprived of their constitutional right to vote by the absence of processes permitting the exercise of the right.[58] This was not, however, an unambiguous endorsement of prisoners' constitutional right to vote. The Court expressly rejected the claim that Parliament could not formally ban prisoner voting.[59] In the absence of such a ban, however, facilities must be made available for its exercise by all those permitted by the constitution to vote. Justice Sachs, echoing the argument that prisoners are disqualified on grounds of moral unfitness, observed that "in a country like ours, racked by criminal violence, the idea that murderers, rapists and armed robbers should be entitled to vote will offend many people."[60]

August obligated the government to facilitate prisoner voting, but only because prisoners were not formally disenfranchised through legislation. The legislature could statutorily restrict prisoners' right to vote if it had "reasonable and justifiable" grounds for doing so.[61] That is precisely what it did, explicitly

55. *Id.* at para. 55.

56. *Id.* at para. 163.

57. August v. Electoral Commission 1999 (4) BCLR 363 (CC) (S. Afr.). *See also* comment in N. Mbodla, *Should Prisoners Have a Right to Vote?*, 46 J. OF AFR. L. 92 (2002).

58. *August*, 1999 (4) BCLR (353) (CC) at para. 35 (observing that the disenfranchisement was occasioned "not by legislation but by logistics" impeding the exercise of the franchise).

59. *Id.* at para. 31.

60. *Id.*

61. Section 36 of the Constitution permits, and specifies criteria for, limitations of the freedoms protected by the Bill of Rights. It states:

> (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> a) the nature of the right;

disenfranchising all prisoners serving a sentence of imprisonment without the option of a fine.[62] The National Institute for Crime Prevention and the Reintegration of Offenders (NICRO), as well as two criminal offenders serving prison sentences, challenged the law before the High Court. The Minister for Home Affairs intervened to bring the matter before the Constitutional Court as a matter of urgency. The Constitutional Court delivered its judgment in *Minister for Home Affairs v. NICRO* just six weeks before the 2004 general election.

Chief Justice Chaskalson, writing for a lop-sided majority of the Constitutional Court, remarked that "in light of our history where denial of the right to vote was used to entrench white supremacy and to marginalize the great majority of the people of our country, it is for us a precious right which must be vigilantly respected and protected."[63] The Constitution proclaims the state's respect for the value of "universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government."[64] A further key protection is offered by section 3, which provides that all citizens are equally entitled to the rights, privileges and benefits of citizenship, and are equally subject to its duties.[65] Section 19(3)(a) of the Constitution stipulates that "every adult citizen has the right to vote in elections for any legislative body established in terms of the Constitution and to do so in secret."[66]

According to the government, the disenfranchising legislation achieved three objectives: it preserved the integrity of the voting process; it removed the special costs associated with providing voting facilities for prisoners; and it communicated an aggressive attitude towards crime.[67] The first objective arose from the government's anxieties about the special security and administrative

---

b) the importance of the purpose of the limitation;

c) the nature and extent of the limitation;

d) the relation between the limitation and its purpose; and

e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

S. AFR. CONST. 1996, § 36.

62. Electoral Laws Amendment Act 34 of 2003 s. 4(f).

63. Minister for Home Affairs v Nat'l Inst. for Crime Prevention and the Reintegration of Offenders (NICRO) 2004 (5) BCLR 445 (CC) at para. 47 (S. Afr.). *See also August*, 1999 (4) BCLR (353) (CC) at para. 17 (S. Afr.) ("The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts").

64. S. Afr. Const. 1996. § 1.

65. *Id.* at § 3.

66. *Id.* at § 19(3)(a).

67. *NICRO* 2004 (5) BCLR 445 (CC) (S. Afr.) at paras. 40-46. It is interesting, although not necessarily instructive (given the sketchy account offered of all its claims) that the government did not choose to identify directly a punitive aim for the law.

arrangements necessary to provide mobile polling stations in prisons.[68] As presented, this argument relied heavily on claims about costs. The government explained that it wanted to improve voting facilities for disabled, infirm, or pregnant citizens, and that they would be further disadvantaged if resources were instead directed toward prisoner voting.[69] The government expressed concerns about fraud and the possibility of tampering with prisoner ballots, arguing that the special arrangements needed to counter this would strain the financial resources available to administer elections.[70] The argument about the integrity of the voting process, as the government chose to frame it, cannot be dissociated from claims about cost.

The cost argument was made more directly in the government's second claim: "it would not be fair . . .to devote resources to criminals who are responsible for their own inability to vote, if similar provision cannot be made for deserving categories of people who through no fault of their own are unable to register to attend polling stations on election day."[71] The Court rejected this explanation: "The mere fact that it may be reasonable not to make special arrangements for particular categories of persons who are unable to reach or attend polling stations on election day does not mean that it is reasonable to disenfranchise prisoners."[72]

It is difficult to understand why the government thought this argument would succeed. By basing its argument on the relative virtues of different groups of citizens, the government claimed a constitutional authority—dressed up as an argument about cost—to distribute the right to vote on the basis of the presumed moral worth of the members of those groups. The majority, like the majority of the Supreme Court of Canada in *Sauvé*, rejected that premise. Resource arguments, it held, may have relevance when assessing the adequacy of polling arrangements for (enfranchised) citizens. They cannot, however, be used to constructively disenfranchise an entire category of citizens deemed less deserving.[73]

The government's third stated objective related to its interest in transmitting a "tough on crime" message to its citizens. The majority rejected this explanation: "A fear that the public may misunderstand the government's true attitude to crime and criminals provides no basis for depriving prisoners of fundamental rights that they retain despite their incarceration."[74] Chief Justice

68. *Id.* at para. 40

69. *Id.* at para. 41.

70. *Id.* at para. 40.

71. *Id.* at para. 46.

72. *Id.* at para. 53.

73. *Id.* at para. 48. On the resource argument, see Part V.B.

74. *Id.* at para. 56 (stating that "it could hardly be suggested that the government is entitled to disenfranchise prisoners in order to enhance its own image").

Chaskalson did recognize that this formulation of the government's interest might conceal an underlying and implied interest in reinforcing citizens' awareness of their civic duties. He denied, however, that this objective could have any independent standing as a constitutional goal. In the Court's view, a deterrence objective founded on the idea of civic duty could be regarded as "legitimate and consistent with the provisions of section 3 of the Constitution."[75] Justifying the voting ban on this basis, though, "raises difficult and complex issues."[76] Ultimately, the government could not take advantage of Chief Justice Chaskalson's generous interpretation of its third objective; the government said little about the connection between prisoner disenfranchisement and civic responsibility, and the Court was not obligated to develop its thinking on the matter.

Like the majority opinion, the two dissenting opinions alluded to the constitutional relevance of the idea of civic duty. Justice Madala urged that the various objectives underlying the disenfranchisement be treated "holistically as an attempt by government to inculcate responsibility in a society which, for decades, suffered the ravages of apartheid."[77] His understanding of the idea of civic responsibility led him to conclude that "you cannot award irresponsibility and criminal conduct by affording a person who has no respect for the law the right and responsibility of voting."[78] In his view, the government had done enough to show that the law served this valid purpose. Justice Ngcobo took the view that "the government has a legitimate purpose in pursuing a policy of denouncing crime and promoting a culture of the observance of civic duties and obligations."[79] He would have upheld the law, though he would have exempted prisoners still awaiting the outcome of an appeal.[80]

Both dissenting opinions assumed that enfranchisement presupposes civic responsibility, but neither explained how this view could be reconciled with a constitutional right to vote as a protection against disenfranchisement. Electoral democracy may value responsible citizenship, but this does not show that the Constitution permits the disenfranchisement of irresponsible citizens. Not all the desirable attributes to which democracy aspires may be translated into constitutionally validated rules of conduct for voters. If only dutiful citizens qualify as voters, constitutional doctrine must explain why. The weak arguments presented in this case prevented the Court from articulating such a doctrine, although the majority frequently referred to *Sauvé* to show how the

75. *Id.* at para. 57.

76. *Id.* at para. 58.

77. *Id.* at para. 113.

78. *Id.* at para. 117.

79. *Id.* at para. 145. It is worth observing that, although the Court blurs these two purposes together, they are in fact separate.

80. *Id.* at para. 153.

government might have tried to support its third objective, and to highlight the impoverished nature of the government's reasoning. At the same time, the majority observed that this case is "markedly different"[81] from *Sauvé*, ostensibly because the latter was grounded in detailed submissions about the nature and impact of the policy of prisoner disenfranchisement. In *NICRO*, by contrast, "the policy issue [was] introduced into the case almost tangentially", *i.e.*, as an afterthought, when it became clear that the cost-based and logistical arguments were inadequate.[82] The government's failure to present and defend arguments based on clearly articulated and permissible constitutional aims denied the Court the opportunity to develop a corresponding critique of the matter from a South African perspective. As a result, the decision leaves open the possibility that a reformulated restriction on prisoner voting would be found constitutional. At the same time, the decision does not tell us how a court should assess the constitutionality of such a restriction.

Despite the stunted analysis of the issues in *NICRO*—a consequence of the government's impoverished account of its objectives—the judgment does provide a rough indication of the direction which the South African Constitutional Court may take in future prisoner disenfranchisement claims. The Court appeared receptive to the notion that ideas about civic duty are relevant to the constitutional justification of restrictions on the right to vote. The majority rejected the argument that the cost of enfranchising prisoners might justify their disenfranchisement, and also dismissed the deterrence-based justification. The government's presentation of the case did not offer the Court the scope to fully examine claims about the relationship between civic duty and the right to vote. The majority was, however, receptive to the general claim that restrictions on the right may be capable of constitutional justification on this ground. This suggests that the Court might be willing to accept the constitutionality of prisoner disenfranchisement if the government were able to provide a convincing account of the link between that practice and a sufficiently definite and precise understanding of the idea of civic duty.

III.
HIRST V. UNITED KINGDOM

The European Court of Human Rights considered the question of prisoner disenfranchisement in the context of a challenge to United Kingdom law.[83] The

81. *Id.* at para. 66.

82. *Id.*

83. Hirst v. United Kingdom (No.2), App. No. 74025/01, 42 Eur. H.R. Rep. 41 (2006). The Government referred the case to a Grand Chamber after a ruling by a Chamber of the Court in Hirst v. United Kingdom (No. 2), App. No. 74025/01, 38 Eur. H.R. Rep. 40 (2004) that the ban violated the Convention.

relevant statutory provision disenfranchised all convicted prisoners.[84] The applicant argued that the consequent deprivation of his right to vote violated Article 3 of Protocol 1 to the European Convention on Human Rights.[85] The Court ruled in favor of the applicant, a Grand Chamber holding that the United Kingdom's blanket disenfranchisement of all convicted prisoners breached the Convention because it constituted a disproportionate interference with the right to vote: the law made no attempt to link the disenfranchisement to the nature or severity of the offence or to the length of the sentence. The approach of the European Court of Human Rights to the interpretation of the guarantees provided by the Convention is distinct from domestic constitutional adjudication in the degree of latitude it permits to States (the margin of appreciation) to supply a degree of national character to the rights. This margin is acknowledged by the Court to be especially wide in the area of electoral law.[86] This important difference apart, the approach of the Court of Human Rights to the review of rights claims is broadly similar to that of constitutional courts in national jurisdictions. The Court employs the same sort of ends-means analysis, assessing the aims of the challenged law and measuring the proportionality of the methods used in furtherance of those aims. This analysis in *Hirst*, as is usual in the Court's decisions, is brief. The judgment provides little scrutiny of the aims asserted by the U.K. in defense of the law. The proportionality analysis, which forms the core of the opinion, provides only a partial and rather superficial critique of those aims. The Court compounded these problems by displaying a staunch deference to the state's own appreciation of the limits on the right, sketching a margin without drawing any detectable doctrinal lines.[87]

---

84. The Representation of the People Act, 1983, c. 2 § 3(1). This law was amended by the Representation of the People Act 2000, section 2, inserting section 3A into the 1983 Act to enfranchise remand prisoners, confining the disenfranchisement to convicted prisoners and those offenders detained in a psychiatric facility.

85. European Convention for the Protection of Human Rights and Fundamental Freedoms, protocol 1, art. 3 (Rome, 4 Nov. 1950), 312 E.T.S. 5, *as amended by* Protocol No. 3, E.T.S. 45 [hereinafter *European Convention on Human Rights*]. "The High contracting parties undertake to hold free elections at reasonable intervals by secret ballot under conditions which will ensure the free expression of the opinion of the people." The Court of Human Rights interprets this provision as protecting an individual human right to vote. *See* Mathieu–Mohin v. Belgium, App. No. 9267/81, 10 Eur. H.R. Rep. 1 (1987).

86. *Mathieu*, 10 Eur. H.R. Rep. 1 at para. 52; Zdanoka v. Latvia, App. No. 58278/00, 45 Eur. Ct. H.R. 478, para. 115 (2006).

87. The failure of the Court to specify any clear parameters on state power is criticized in the concurring opinion of Judge Calflisch, who suggests three such limits: (a) a blanket ban is unacceptable; (b) the disenfranchisement should be determined by a judge and not by the executive; and (c) where the ban is phrased as forming part of the offender's criminal punishment, it should extend during the punitive part of the sentence only and not (as in *Hirst*) into any subsequent period of preventive detention imposed to counter the risks of releasing the offender. *Hirst*, 42 Eur. H.R. Rep. 41 at paras. 7-8 (Calflisch, J., concurring). The joint dissenting opinion of Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens is also critical of ruling for giving "States little or no guidance as to what would be Convention-compatible solutions." *Id.* at para. 8 (Wildhaber, J., Costa, J.,

A. Legitimate Objectives and Legislative Means

The Convention does not expressly state that the right to vote can be limited at all: Article 3 of Protocol 1, phrased as a guarantee of free elections which the contracting States are obliged to observe, refers neither to a right nor to any grounds for its limitation.[88] This absence of a limitations clause distinguishes the right to vote from many other rights in the Convention – notably, those contained in Articles 8 to 11.[89] The Court has consistently held, however, that the right to vote is not absolute.[90] Indeed, it has held that a member state can justify limiting the right to vote for a range of reasons that would not provide valid grounds for limiting the rights to peaceful assembly, association and expression. An objective can provide a valid reason for limiting the right to vote so long as it is compatible "with the principle of the rule of law and the general objectives of the Convention."[91] The Court has explained this approach in the following terms:

Because of the relevance of Article 3 of Protocol No.1 to the institutional order of the State, this provision is cast in very different terms from Articles 8-11. Article 3 of Protocol No. 1 is phrased in collective and general terms, although it has been interpreted by the Court as also implying individual rights. The standards to be applied for establishing compliance with Article 3 must therefore be considered to be less stringent than those applied under Articles 8-11 of the Convention.[92]

In other words, the Convention merely requires that the state create an institutional framework capable of delivering free elections – it does not dictate any particular institutional arrangements by which that end is to be achieved, and it does not explicitly give individuals the right to vote in the elections so devised. The Convention implicitly recognizes, then, that there may be any number of ways in which democratic institutions can be structured, and that it falls to each member state, as caretaker for the collective good of its citizens, to decide which way is best. As we will see, this idea that the state is responsible for experimenting with democratic institutions is developed in *Roach*. For now, it is important to observe that the Court has adopted a deferential posture when determining whether a stated objective is capable of justifying a limit on the right to vote, in recognition of the considerable collective interests at stake.

The United Kingdom, like the government in *Sauvé*, primarily justified the disenfranchisement of prisoners on the basis of its interests in punishing

---

Lorenzen, J., Kovler, J., & Jebens, J., dissenting).

88. *European Convention on Human* Rights, *supra* note 85, protocol 1, art. 3.

89. *Id.*, sect. 1, arts. 8-11.

90. *Mathieu*, 10 Eur. H.R. Rep. 1 at para. 52; *Zdanoka*, 45 Eur. Ct. H.R. 478 at para. 115(b).

91. *Zdanoka*, 45 Eur. Ct. H.R. 478 at para. 115(b).

92. *Id.* at para 115(a). The Court also announced that the tests of "necessity" or "pressing social need" are not relevant to the analysis of restrictions on the electoral rights. *Id.* at para. 115(c).

offenders and in promoting civic responsibility and the rule of law.[93] The European Court of Human Rights, however, devoted little attention to the question of whether these objectives were adequate or whether there was a rational connection between those objectives and the policy of disenfranchisement. The Grand Chamber noted that the Chamber judgment had expressed reservations as to the validity of the asserted aims but found "no reason in the circumstances of this application to exclude those aims as untenable or incompatible *per se*" with the Convention right to vote.[94]

In taking this position, the Court echoed Justice Gonthier in *Sauvé*, who likewise took the view that the courts should defer to the government on such philosophical issues.[95] Justice Gonthier, however, justified his conclusion by showing how a reasonable person might conceive of the social contract in such a way that the disenfranchisement of prisoners is consistent with the existence of civic duty in a constitutional democracy. There was no such analysis in *Hirst*. One might be forgiven for supposing that, so long as the member state phrases its objective in sufficiently abstract and portentous language, the Court will refuse to challenge the state's contention that the policy in question is rationally connected to that objective.

It is important to keep in mind that, as the *Sauvé* majority showed, the practice of prisoner disenfranchisement need not purport to encourage civic responsibility. The state's argument in *Hirst* depended on contestable assumptions about the links between criminal offending and democratic participation. The image of the dutiful citizen could be countered with an image of prisoners as penitent (or at least educable) wrongdoers receptive to the sort of rehabilitation which their enfranchisement might support. The image of the electorate as a closed community of well-behaved democrats from which prisoners are excluded may be contrasted with the idea of an inclusive franchise open to the appeals of the disenfranchised. The *Hirst* Court, by deferring to the state on "philosophical" questions effectively marginalized a robust conception of the right to vote at the outset of its analysis.

B. Proportionality and the Margin of Appreciation

As we have seen, the Court adopted a deferential posture when determining whether the state's proffered objective was capable of justifying a limitation on the right to vote. In deciding whether the limitation was proportionate, this deferential attitude re-emerged to some extent: the Court did not seriously weigh

93. Hirst v. United Kingdom (No.2), App. No. 74025/01, 42 Eur. H.R. Rep. 41, para. 74 (2006).

94. *Id.* at para. 75. *See also* the Chamber judgment, where the Court accepted, despite its doubts, that the aims could be regarded as legitimate "even on an abstract or symbolic plane." Hirst v. United Kingdom (No. 2), App. No. 74025/01, 38 Eur. H.R. Rep. 40 at para. 47 (2004).

95. Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519 at para. 101.

the salutary effects of the legislation against the seriousness of the limitation. It is hard to see how it could do so, given that it did not actually decide that the legislation was rationally connected to the objective in the first place.[96] Nonetheless, the Court struck down the legislation on proportionality grounds on the basis that it stripped *all* non-remand prisoners of the right to vote, and therefore did not minimally impair the right.[97]

The trouble, of course, is that the Court did not explain how and why disenfranchisement could be rationally connected to the promotion of civic responsibility at all; without doing so, it could not explain why the disenfranchisement of one prisoner might be more or less wrongful than the disenfranchisement of another. The United Kingdom argued on this basis that the Court should defer to its judgment about how the objective could best be advanced and, therefore, how far the limitation on the right to vote should go. The Court rejected this argument, finding that the state had not weighed the competing interests with sufficient care, and so had not done enough to justify judicial deference.[98]

In a sense, this seems eminently reasonable: the state cannot claim that its disenfranchising legislation deserved deference, as a judgment about the best way to advance the public's collective interest in well-functioning democratic institutions, when it did little to weigh that interest at the time the disenfranchising legislation was drafted and enacted. At the same time, it is striking to see a court denounce legislation on the basis that it was enacted too quickly: democratically elected legislatures frequently pass laws in response to some public outcry – in, as it were, the heat of the moment. No one would argue that this is a good way to craft a statute, but it is rarely claimed that it amounts to a constitutional problem threatening the statute's validity.[99] The United Kingdom also relied upon the margin of appreciation doctrine to support its claim that the Court should defer to its approach to the objectives (assuming their validity).[100] The doctrine reflects the Court's respect for state legislative autonomy and distinctive national understandings of particular human rights. It permits the Court to delineate (however approximately) a zone within which states may give effect (or "appreciate") their understandings of Convention

96. This point is picked up in the joint concurring opinion of Judges Tulkens and Zagrebelsky, in whose view the law, irrespective of any argument about proportionality, lacks any rational basis because "the real reason for the ban is the fact that the person is in prison." *Hirst*, 42 Eur. H.R. Rep. 41 (Tulkens, J., & Zagrebelsky, J., concurring).

97. *Hirst*, 42 Eur. H.R. Rep. 41 at para. 82.

98. *Id.* at para. 79. The UK Parliament debated the issue, briefly, during the passage of the Representation of the People Act 2000. *See supra* note 84.

99. As the joint dissenting opinion authored by Judge Wildhaber observes, "it is not for the Court to prescribe the way in which national legislatures carry out their legislative functions." *Id.* at para. 7 (Wildhaber, J., Costa, J., Lorenzen, J., Kovler, J., & Jebens, J., dissenting).

100. *Hirst*, 42 Eur. H.R. Rep. 41 at para. 52.

doctrine on the right to free elections. Of course, this assumes that the disenfranchising legislation truly reflected an appreciation of prisoners' interest in participating in the democratic process. As we have seen, the Court doubted that the U.K. government had bothered to consider those interests at all. Even if it had, the Court took the view that the blanket ban on prisoner voting did not fall within such a margin – that it was simply too indiscriminate.[101]

Again, it is not clear from the Court's judgment why a blanket ban falls outside the range of reasonable interpretations of the right to vote. Because the Court did not more carefully examine the state's objectives, it did not explain why some people might be disenfranchised but not others. The ruling demands only that legislators should exercise care in making decisions about prisoner disenfranchisement if they expect deference from the courts in applications for judicial review. That is, to be sure, a positive outcome in itself. A legislature may, however, fully ventilate an issue—*i.e.*, *look* like it has seriously weighed all competing interests—but nonetheless decide to impose something *approaching* a blanket ban. The Court has not yet clearly said why or how a near-blanket ban devised under such circumstances could be incompatible with the right to vote. It has, in other words, encouraged experimentation with ideas about suffrage in the absence of a clear account of the terms of the right. This is especially problematic given the potential implications of the Court's doctrine for the laws of other signatory states to the Convention which maintain rules disenfranchising prisoners.[102]

IV.
ROACH V. ELECTORAL COMMISSIONER

According to section 7 of the Australian Constitution, Senators must be "directly chosen by the people of the State."[103] Section 24 of the Constitution similarly requires members of the House of Representatives to have been "directly chosen by the people of the Commonwealth." The *Commonwealth Electoral Act* 1918 (Cth), as amended by the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act* 2006 (Cth), disqualified those convicted of a criminal offence, and serving a sentence of full-time detention, from voting in elections for the Senate and the House of Representatives.[104] In *Roach*, a majority of the High Court ruled that the Act, in

101. *Id.* at para. 82.

102. This point is made in Judge Wildhaber's dissenting opinion, noting that thirteen of the forty-five contracting States disenfranchise prisoners and that "all states with such restrictions will face difficult assessments as to whether their legislation complies with the requirements of the Convention". *Id.* at para. 6 (Wildhaber, J., Costa, J., Lorenzen, J., Kovler, J., & Jebens, J., dissenting).

103. Commonwealth of Australia Constitution Act, 1900, § 7 (U.K.).

104. Commonwealth Electoral Act, 1918, c. 93 § (8AA) (Cth.), *as amended by* the Electoral

its amended form, violated sections 7 and 24 of the Constitution.[105] The majority was represented by a three-judge plurality opinion written by Justices Gunmow, Kirby and Crennan, as well as a concurring opinion penned by Chief Justice Gleeson. Justices Hayne and Heydon each wrote in dissent. Among the four opinions, however, there is in fact strikingly little disagreement in principle. Indeed, the various opinions complement each other in many respects. For this reason, we will consider them together.

A. The Implementation of Democratic Institutions

Chief Justice Gleeson's ruling was most grounded in considerations of constitutional and political theory. Chief Justice Gleeson emphasized that the Australian Constitution was not the product of a rights-based culture, but the creation of people who wanted to form a federal union based on British institutions – and, notably, Parliamentary sovereignty.[106] He made this appeal to "social facts" to underscore the point that institutions of democracy are creatures of statute; that, although the Constitution requires members of the Senate and the House of Representatives to be chosen by the people, it allows the government to determine the means by which this choice is made.[107] Indeed, it seemed that Chief Justice Gleeson wanted to use the case as an opportunity to show just how committed the Australian Constitution is to the doctrine of Parliamentary sovereignty; if, he seemed to argue, the Constitution leaves it to Parliament to devise the machinery of democracy, then Parliamentary authority must be logically prior to respect for democratic values and cannot rest on conformity with them.[108]

This point was quietly picked up by the three-judge plurality, as well as Justice Heydon (writing in dissent). They emphasized that democracy is a work-in-progress, an on-going experiment, and that government must be free to try new approaches for administering democracy without fear that, having tried one technique, it will be locked into that approach for perpetuity. The plurality remarked:

---

and Referendum Amendment (Electoral Integrity and Other Measures) Act, 2006 (Cth).

105. Roach v. Electoral Commissioner, (2007) 233 C.L.R. 162.

106. *Id.* at paras. 1-2.

107. *Id.* at paras. 4-6.

108. The trouble with this reasoning is that Chief Justice Gleeson did not explore the conditions of the framers' respect for Parliamentary sovereignty; in particular, he did not consider whether that respect might have been premised on the tradition of democracy in Britain. Such a question is important: if a robust democracy was a condition for the framers' commitment to Parliamentary sovereignty, then they may have perceived the authority of Parliament as depending to some extent upon the creation of institutions that would strengthen the connection between law-making and popular will as much as possible. This, in turn, affects the way in which we should read the phrase "directly chosen by the people of the State." The problem with Chief Justice Gleeson's historical account, then, is not that it is historical, but that it is not historical enough – he provides just enough information to beg the question.

> The plaintiff's case proceeds on the footing that questions respecting the extent of the franchise and the manner of its exercise affect the fundamentals of a system of representative government. However, it has been remarked in this Court that in providing for those fundamentals the Constitution makes allowance for the evolutionary nature of representative government as a dynamic rather than purely static institution. Ultimately, the issues in the present case concern the relationship between the constitutionally mandated fundamentals and the scope for legislative evolution.[109]

Two points are worth mentioning about these comments. First, they tie neatly into the observation made by Chief Justice Gleeson that the Constitution does not specify how representatives are to be chosen by the people; it specifies only that Parliament is constitutionally required to devise institutions allowing them to make that choice. That being the case, it would be peculiar if the Constitution barred Parliament from experimenting with the institutional design of democracy so that it could be as efficient and robust as possible. The Constitution cannot be so short-sighted. That argument, however, has limited force. It can explain why Parliament ought to have the freedom to tinker with the mechanisms by which the people can make their choice. It is not obvious, however, that Parliament ought to have the same freedom to narrow the boundaries of "the people" itself.

This raises the second point. Though the above argument, in favor of institutional experimentation, emphasizes the need to give Parliament the freedom to determine how democracy can be made to work better, the question of whether a group or class is entitled to vote is not a proposition that can be tested empirically. It is a moral question that cannot be resolved with any amount of experimentation, but only through sustained reflection. The plurality did not speak of experimentation – only of "evolution."[110] That language suggests not just a process by which the legislature can tinker with the nuts and bolts of institutions, but a process of reflection whereby the implications of democratic principles themselves can be further explored and understood.[111] That reflective process, whereby the legislature must constantly confront its own (in)coherence as a representative body, is surely salutary; we want a legislature to have the power to expand the franchise – to follow the inclusive logic of democracy in the face of exclusionist traditions. This is surely what it means to have a legislature committed not only to the text but the spirit of the Constitution. Without this freedom, historically disadvantaged groups could never become full participants in the political community. It is not so obvious, though, why we should place much (if any) constitutional importance on the power of the legislature to *narrow* the class of persons who have the franchise. We may think that the state should be continually working to expand its (and

109. *Roach*, 233 C.L.R. 162 at para. 45. *See also* Justice Heydon's remarks at para. 180.

110. *Id.* at para. 45.

111. This kind of evolution is the subject of Martha Nussbaum's recent work. *See* MARTHA NUSSBAUM, FRONTIERS OF JUSTICE (2006).

our) moral horizons, and not perpetually second-guessing the advances it has made.[112]

B. Universal Suffrage and the Standard of Review

As we have seen, various members of the Court stressed the idea that Parliament has a great deal of leeway in devising mechanisms by which representatives can be chosen by the people. No matter which mechanism is devised, though, Chief Justice Gleeson claimed that it must accommodate "universal suffrage."[113] This sounds more impressive than it is – the Chief Justice quickly observed that there is nothing universal about universal suffrage. It permits exceptions. Parliament has leeway in determining which exceptions to recognize.[114] It must, however, have a "substantial reason" for limiting a group's right to vote, inasmuch as "[a]n arbitrary exception would be inconsistent with choice by the people."[115] This reasoning, on its face, is somewhat curious: if Parliament is entitled to devise exceptions to the right to vote—if it can do so without undermining the universality of "universal suffrage"—we might wonder why it must provide substantial reasons to justify the exception. After all, if "universal suffrage" by definition means something less than *universal* suffrage, then a person cannot make a valid constitutional objection to Parliament's exception of certain groups solely on the basis that the exception makes the right to vote less than universal.[116] And, in the absence of a valid objection, there seems nothing for Parliament to justify. Before we can say that Parliament owes a justification, we would need to find something objectionable in the *kind* of exception it has crafted – in the kind of groups excluded from the franchise. Chief Justice Gleeson alludes to this very point when discussing the sort of reasons available to justify an exception:

> It is difficult to accept that Parliament could now disenfranchise people on the ground of adherence to a particular religion. It could not, as it were, reverse Catholic emancipation. Ordinarily there would be no rational connection between religious faith and exclusion from that aspect of community membership involved

112. This view of franchise reform is borne out by the manner in which current political debates about existing voter qualifications are structured, being phrased in terms of extending the right to vote (to those below the current age limit, or persons with mental impairment, or resident non-citizens, or expatriates), never as a claim about the legitimacy of disenfranchising a sector of the current electorate. Academic debate reflects a similar "universalizing" momentum. *See, e.g.*, Kay Schriner, Lisa A. Ochs & Todd G. Shields, *The Last Suffrage Movement: Voting Rights for Persons with Cognitive and Emotional Disabilities,* 27 PUBLIUS 75 (1997); Claudio Lopez-Guerra, *Should Expatriates Vote?*, 13 J. POL. PHIL. 216 (2005); Jane Rutherford, *One Child, One Vote: Proxies for Parents*, 82 MINN. L. REV. 1464 (1998).

113. *Roach,* 233 C.L.R. 162 at para. 6.

114. *Id.* at paras. 6-7.

115. *Id.* at para. 8.

116. *See The People's Choice, supra* note 8, at 136 (observing that the majority's approach is "hamstrung by its circularity").

> in participation, by voting, in the electoral process. It is easy to multiply examples of possible forms of disenfranchisement that would be identified readily as inconsistent with choice by the people, but other possible examples might be more doubtful. An arbitrary exception would be inconsistent with choice by the people. There would need to be some rationale for the exception; the definition of the excluded class or group would need to have a rational connection with the identification of community membership or with the capacity to exercise free choice. Citizenship, itself, could be a basis for discriminating between those who will and those who will not be permitted to vote. Citizens, being people who have been recognised as formal members of the community, would, if deprived temporarily of the right to vote, be excluded from the right to participate in the political life of the community in a most basic way. The rational connection between such exclusion and the identification of community membership for the purpose of the franchise might be found in conduct which manifests such a rejection of civic responsibility as to warrant temporary withdrawal of a civic right.[117]

This passage suggests that Parliament, when it provides "substantial reasons" for crafting an exception, does not purport to limit or curtail universal suffrage. Rather, it justifies disenfranchisement by denying that the Constitution guarantees the right to vote to the excluded group in the first place. It can make this argument by claiming that those who have been disenfranchised are outside the boundaries of the political community. To put the matter another way, "universal suffrage" *is truly universal* but only relative to a particular class of persons; namely, those who are members of the political community and have the capacity to exercise free choice. Those who are not members of that community may be denied the right to vote without offending either the principle of universal suffrage or sections 7 and 24 of the Constitution.

Those serving a sentence for a serious criminal offence, Chief Justice Gleeson claimed, fall into the category of persons who may be so excluded.[118] They fall into this category ostensibly because, by engaging in serious criminal conduct, they have implicitly rejected the notion that they owe responsibilities by virtue of their membership in the community. Without that sense of responsibility—that is, without respect for the community's legal order—an offender is not *really* a member of the political community irrespective of his formal status as a citizen.[119] In making this argument, Chief Justice Gleeson drew upon Justice Gonthier's opinion in *Sauvé*. Though he never explicitly acknowledged that Justice Gonthier was writing in dissent, Chief Justice Gleeson attempted to cast doubt on the extent to which the majority decision in *Sauvé* could inform the Court's reasoning in *Roach*:

> The litigation in *Sauvé* concerned an issue similar to the present, but the issue arose under a different legal regime. *The Canadian Charter of Rights and Freedoms*, in s3, guarantees every citizen the right to vote. Section1, however,

117. *Roach,* 233 C.L.R. 162 at para. 8.

118. *Id.* at para. 19.

119. *Id.* at para. 12.

> permits "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." This qualification requires both a rational connection between a constitutionally valid objective and the limitation in question, and also minimum impairment to the guaranteed right. It is this minimum impairment aspect of proportionality that necessitates close attention to the constitutional context in which that term is used. No doubt it is for that reason that the parties in the present case accepted that *Sauvé* (like the case of *Hirst* discussed below) turned upon the application of a legal standard that was different from the standard relevant to Australia. The Supreme Court of Canada had previously held that a blanket ban on voting by prisoners, regardless of the length of their sentences, violated the Charter. The legislature changed the law to deny the right to vote to all inmates serving sentences of two years or more. Dividing five-four, the Supreme Court of Canada again held that the legislation violated the Charter. The central issue was whether the s1 justification (involving the minimum impairment standard) had been made out.[120]

These remarks further flesh out the implications of the claim that legislatures have a great deal of leeway when determining who shall have the right to vote. Since legislatures may, but need not, exclude certain classes from the franchise, it follows that different legislatures may disagree as to the precise margins of the excluded classes though all provide a degree of inclusiveness necessary for a democratic society. The above passage suggests that, under the Canadian Charter, the government runs afoul of the Constitution not only when it violates some absolute minimum threshold of inclusiveness, but also when it fails to show that it has included as many people as possible given the pressing and substantial objectives which motivated the exclusion in the first place. The Australian Constitution imposes no such burden on the government, which can legislate as it likes so long as it does not violate the minimum threshold. The plurality quietly accepted this view when it formulated the "substantial reason" test, asking itself whether the exclusion of a group or class from the franchise is rationally connected to an objective consistent with representative government.[121] For this reason, both the plurality and Chief Justice Gleeson made a number of large claims about the limited extent to which constitutional reasoning can be transplanted from one jurisdiction to another.[122]

Although the plurality and Chief Justice Gleeson were quite right that constitutional context matters, they gravely misrepresented the issue in *Sauvé*. That case indeed turned on the application of section 1 of the Charter. It was decided, however, not on the basis of minimal impairment, but rather on the basis that the government showed no *rational connection* between the disenfranchising legislation in issue and the government's objective of

120. *Id.* at para. 15.

121. *Id.* at para. 85.

122. *Id.* at paras. 17, 101. *See also* the dissenting remarks of Justice Hayne at paras. 159-166. Such claims bear a striking resemblance to arguments made by Justice Scalia in Roper v. Simmons, 543 U.S. 551 (2005).

encouraging respect for the law.[123] The majority in *Sauvé* did not rule that the legislature disenfranchised too many people, but that the government failed to justify disenfranchising *anyone at all*. According to the majority in *Sauvé*, the government could only use section 1 to justify burdening the right to vote to a certain degree – not to justify removing the right to vote altogether. The *Roach* plurality's mistake would make no difference if the proffered objective in *Sauvé* was different from that provided in *Roach*. It appears, however, that they are the same. The *Sauvé* majority's reasoning, therefore, cuts to the heart of the argument relied upon by the plurality and Gleeson C.J. Since they misunderstood that reasoning, they provided no retort.

Much of the three-judge plurality's decision, like that of Justice Hayne, dwells on how the *framers* understood the right to vote. The plurality observed that, historically, it was thought acceptable and appropriate to exclude from the franchise those convicted of serious criminal offences, since such people lacked the character to participate in matters pertaining to the public interest. It was largely on this basis that the plurality concluded that the challenged provision failed to pass constitutional muster. Like Chief Justice Gleeson, the plurality simply concluded that the legislation failed to distinguish between the different levels of culpability among offenders.[124] Unlike Chief Justice Gleeson, or the Supreme Court of Canada in *Sauvé*, the *Roach* plurality did not ground its decision in a conceptual analysis of the relationship between voting, character, and citizenship. Rather, it based its decision on the simple failure of the legislation to conform to the framers' intentions. The plurality briefly noted that prisoners remain citizens, and that the Constitution envisages their re-integration into the community.[125] It did not, though, say why the Constitution would envisage such a thing or why it is a fact worth mentioning. We might suppose that the plurality was alluding to the sort of social contract analysis undertaken by the Supreme Court of Canada—perhaps suggesting *sub silentio* that the framers of the Australian Constitution would have been heavily influenced by that kind of political theory—but this is unclear. In any case, history rather than theory seems to do most of the heavy lifting in the plurality opinion.

Ultimately, though both the plurality and Chief Justice Gleeson found that the legislation in issue violated the Constitution, both also accepted that Parliament *could* disenfranchise serious offenders. The plurality upheld the earlier legislation which disenfranchised offenders serving a sentence of three years or more.[126] This legislation, the plurality concluded, sufficiently distinguished between serious and non-serious offenders.[127] Chief Justice

123. Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519 at para. 53 (Can.).

124. *Roach*, 233 C.L.R. 162 at paras. 90, 102.

125. *Id.* at para. 84.

126. *Id.* at para. 102.

127. *Id.* at paras. 101-102.

Gleeson suggested that the Constitution *might* allow Parliament to disenfranchise many offenders sentenced to less than three years on the basis that they too could be regarded as "serious offenders."[128] The dissenting opinions, therefore, have much in common with the plurality and concurring opinions. Indeed, one might argue that the dissenting opinions simply apply the logic of the "substantial reasons" test used by the plurality and Chief Justice Gleeson. Both the plurality and Chief Justice Gleeson seemed to accept that encouraging civic responsibility represents an objective consistent with representative democracy.[129] Both accepted, moreover, that the substantial reasons test simply required the government to show that a rational connection existed between disenfranchisement and that objective.[130] But why think that the government cannot encourage a sense of civic responsibility by disenfranchising non-serious offenders? They are, after all, still *offenders*. If we accept that the duty to obey the law rests on some sort of social contract, non-serious offenders have broken that contract just as surely as any others. By holding that the disenfranchisement of serious offenders satisfied the rational connection test, while simultaneously holding that there was nothing more than the rational connection test, the plurality and Chief Justice Gleeson seem committed to upholding the legislation challenged in *Roach*.

V.
SOME COMMON THEMES

The decisions in *Sauvé*, *NICRO*, *Hirst*, and *Roach* are grounded in different forms and standards of reasoning. Nonetheless, we can detect a number of themes and issues which the courts all confronted to a greater or lesser extent.

A. Pyrrhic Victories?

It is worth observing at the outset that, although legislation was struck down or declared incompatible in all four cases, none confidently stand for the proposition that the broad disenfranchisement of prisoners is constitutionally problematic. Although all four courts emphasized the importance of the right to vote, none were prepared to treat disenfranchisement as inherently incompatible with it.[131] *Sauvé* was decided by a narrow 5:4 majority. In *NICRO*, the South

128. *Id.* at para. 19.

129. *Id.* at paras. 18-9, 89, 101-2.

130. *Id.* at para. 85.

131. *See* Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519, paras. 9, 14 (Can.) (per McLachlin, C.J.) (The right to vote is "fundamental to" and "a cornerstone of our democracy'); Minister for Home Affairs v Nat'l Inst. for Crime Prevention and the Reintegration of Offenders (NICRO) 2004 (5) BCLR 445 (CC) at para. 47 (S. Afr.) (per Chaskalson, C.J.) ("The right to vote is foundational to democracy.... It is for us a precious right which must be vigilantly respected and

African Constitutional Court invalidated the legislation in issue only because the government was unprepared to justify the claim that the disenfranchisement of prisoners could inculcate a sense of civic duty; it hedged its bets that a more compelling argument could be made in another case. Furthermore, the government can still rely on *dicta* from *August* that the disenfranchisement of prisoners is probably justifiable to some extent. The European Court of Human Rights, in *Hirst*, heavily relied on the legislature's apparent failure to critically reflect upon its objectives when drafting the legislation.[132] The Court did not suggest that those objectives were indefensible or that they are inherently illegitimate. The Court's superficial analysis of the government's stated objectives leaves open the possibility that those objectives could justify the disenfranchisement of many prisoners (though a blanket ban is likely off the table). Finally, the Australian High Court in *Roach* struck down one disenfranchising statute, but upheld another, and Chief Justice Gleeson appeared unwilling to say that the statute could not have gone even further without offending the Constitution.[133]

B. The Value of Institutional Experimentation and Resource-Based Arguments

All the cases discuss the extent to which legislatures should be free to experiment with alternative means of delivering free elections. In *Hirst*, the European Court of Human Rights implicitly deferred to the United Kingdom's claim that it could achieve its objective of encouraging civic responsibility by disenfranchising prisoners, and it indicated a willingness to defer to member states with respect to decisions about how far the right to vote could be limited to achieve that objective.[134] This deference—rooted in the Convention doctrine of the margin of appreciation—was grounded in the view that free elections ultimately promote a collective interest, and that domestic legislatures, not courts, are uniquely well-positioned to decide how that interest can best be advanced.[135] The Australian High Court, in *Roach*, likewise stressed that courts should defer to the legislative determinations regarding the manner in which

protected"); Hirst v. United Kingdom (No.2), App. No. 74025/01, 42 Eur. H.R. Rep. 41 at paras. 58-59 (2006) (observing that the right "is crucial to establishing and maintaining the foundations of an effective and meaningful democracy" and "is not a privilege"). *Roach,* 233 C.L.R. 162, provides—unsurprisingly, given the absence of a tradition of explicit constitutional rights in Australia—the least enthusiastic acknowledgement of the constitutional status of the right to vote. *See* para. 7 (per Gleeson, C.J.) (acknowledging that the Constitution's provision for government "by the people" has "come to be a constitutional protection of the right to vote") and para. 86 (Gummow, J.) (observing that "this case concerns not the existence of an individual right, but rather the extent of the limitations upon legislative power derived from the text and structure of the Constitution").

132. *See Hirst*, 42 Eur. H.R. Rep. 41 (2006).

133. *Roach,* 233 C.L.R. 162 at para. 19.

134. *See Hirst*, 42 Eur. H.R. Rep. 41 (2006).

135. *See id.*

elections are administered, and the kinds of people who should be permitted to participate in them.[136] In *Roach*, this deference was justified through an appeal to "parliamentary sovereignty" rather than a "margin of appreciation."[137] The effect, however, is the same. To be sure, both *Hirst* and *Roach* rest on the premise that legislatures cannot have *unlimited* authority to tinker with the voting rolls – that, *e.g.*, the blanket disenfranchisement of prisoners represents a bridge too far. At the same time, though, the courts in both cases have trouble explaining why this kind of broad disenfranchisement is impermissible. This difficulty is tied, in both cases, to a lack of theoretical engagement with the respective legislatures' stated objectives.

NICRO and the majority opinion in *Sauvé* show the least deference to legislatures, and this lack of deference is directly tied to doubts—whether implied or explicit—about the extent to which lawmakers need the freedom to engage in institutional experimentation. In *NICRO*, the South African government explicitly justified its claim to deference on the basis that the resources needed to make prisoner voting possible would be better allocated elsewhere.[138] Among the four cases we have examined, *NICRO* was the only case where the government stated this kind of resource-based objective. As we have seen, the Constitutional Court rejected it as a valid objective, at least in the context of a blanket ban. This is understandable: a government could always save money by not holding elections, and it seems wrong to allow mere frugality to justify sweeping away democracy altogether or to constructively disenfranchise whole classes. We should acknowledge, though, that the government did not present any evidence that special economic conditions compelled the government to make the choices it made, and that this was not the ideal case for deciding whether economic conditions can *ever* justify restrictions on the manner in which the right to vote may be exercised. Reasonable people may disagree on that point, especially in a country like South Africa, where scarce resources are needed to combat many pressing social concerns like housing and crime control.[139] In any event, the *NICRO* Court clearly indicated that it will turn a skeptical eye to such arguments when and if they are made

136. *See Roach*, 233 C.L.R. 162 at para. 102.

137. *See id.*

138. *See* Minister for Home Affairs v Nat'l Inst. for Crime Prevention and the Reintegration of Offenders (NICRO) 2004 (5) BCLR 445 (CC) at para. 44 (S. Afr.).

139. Consider the Supreme Court of Canada's decision in Newfoundland (Treasury Board) v. N.A.P.E., [2004] 3 S.C.R. 381 (Can.), where resource-based arguments were successfully used to justify a limitation on the right to equality. *See*, especially, para. 75:

> The financial health of the Province is the golden goose on which all else relies. The government in 1991 was not just debating rights versus dollars but rights versus hospital beds, rights versus layoffs, rights versus jobs, rights versus education and rights versus social welfare. The requirement to reduce expenditures, and the allocation of the necessary cuts, *was* undertaken to promote other values of a free and democratic society...

(and supported with an appropriate evidentiary foundation).

The majority's opinion in *Sauvé* most clearly emphasized that the state cannot experiment with voting entitlements of citizens: it must provide all citizens with the vote. The state can limit the right to vote, but this only means that it can burden each citizen's ability to exercise that right (for instance, by making voting stations further apart), not strip it away altogether. The suggestion is that the legislature can experiment with the way votes are cast and with some of the conditions under which votes are cast, but that it cannot experiment with the right of some citizens to vote in the first place. The Court in *NICRO* did not go so far, but neither did it reject the *Sauvé* majority's argument out of hand.

C. Encouraging Civic Responsibility

In all four cases, the government relied on the claim that the disenfranchisement of at least some prisoners would encourage civic responsibility and respect for the rule of law (though, in South Africa, this argument was clearly used reluctantly and at the prodding of the Court itself). The argument met with mixed levels of success. It was utterly rejected by the majority in *Sauvé*, but accepted by the plurality in *Roach*. The Constitutional Court in *NICRO* was receptive to the claim, but the government could not assert it forcefully enough and only the dissent accepted it outright. The Court in *Hirst* avoided addressing the merits of this argument altogether.

The argument is tightly bound to the other themes running through the cases.[140] Obviously, the government invoked the need to inculcate civic responsibility to buttress its claim that it could reasonably fiddle with democratic institutions. More than this, though, the civic responsibility argument implicitly claims that the state is entitled to restrict the vote to citizens satisfying a test of moral fitness, and in this sense implicates what it means for a democracy to feature "universal suffrage." Furthermore, prisoner disenfranchisement is said to inform citizens' collective sense of civic responsibility because it reinforces the existence of a social contract.

As Justice Gonthier's analysis in *Sauvé* shows, the civic responsibility argument presupposes that, by breaching the criminal law, an offender has removed herself from the community by failing to acknowledge her moral

140. The argument was raised in *Sauvé, Hirst* and *Roach* in tandem with the distinct claim that disenfranchisement constitutes a supplementary form of criminal punishment (conceptualized as a straight consequence of the act of offending rather than as an idea about a deeper sort of civic irresponsibility). The court in each case was unenthusiastic about the merits of this claim, preferring instead to concentrate on the argument that the disenfranchisement is punitive in a broader sense that does not depend on its characterization as a formal criminal law punishment. *See* Christopher P. Manfredi, *Judicial Review and Criminal Disenfranchisement in the United States and Canada*, 60 THE REV. OF POLITICS 277 (1998) for an argument (in defense of a voting ban) founding on a connection between the ideas of punishment and civic virtue.

responsibilities to it.[141] The argument is not implausible. It is, as we have seen, associated with influential contractarian arguments for a duty to obey the law. Moreover, we noted in the discussion of *Sauvé* that we can deny the force of the civic responsibility argument only by begging a series of questions that the majority did not directly confront.

If the civic responsibility argument has force, however, it also tends to prove too much: if true, it appears to support the conclusion that the government can disenfranchise not only *some* criminal offenders, but *all* of them. That, in the end, may be its greatest weakness. The respective courts were reluctant to say that the state is justified in disenfranchising an offender simply because she has committed *any* criminal offence; that an offender can be treated as having divorced herself from the community by committing offences that we typically regard as trivial. Hence, the courts in *Hirst* and *Roach* both found the blanket nature of the disenfranchisement fatal to the constitutionality of the law in question, though neither regarded the civic responsibility argument problematic in itself.

It is quite understandable that the courts would prefer not to say that the violation of the criminal law *per se* makes a person morally unfit to vote (and therefore susceptible to disenfranchisement). After all, everyone commits some criminal offences *sometimes*, though they are not necessarily prosecuted for their criminal conduct. To avoid the conclusion that anyone can be deprived of the right to vote on grounds of moral unfitness, we need a principled basis for distinguishing serious criminal offences from less serious ones. The respective governments did not provide such a basis in any of the cases reviewed. As a result, they were effectively compelled by the force of their own reasoning to make the sweeping claim that they had the authority to deny the franchise to a whole class of citizens.

There is a further, decidedly awkward question to ask: if criminal offenders are morally unfit to vote, how does a prison sentence improve their moral fitness? Justice Gonthier appeared to say that the completion of a sentence would lead to the offender's return—both physically and symbolically—to the community.[142] That is, however, mysterious. If we are to avoid concluding that the disenfranchisement of prisoners represents the creation of a moral fitness test that anyone can fail, we need a theory of civic responsibility much more sophisticated than anything argued in any of the four cases – including *Sauvé*.

---

141. With respect to the legislative schemes discussed here, offending is accompanied by a temporary suspension of membership, rather than its permanent loss. This may explain the observation by the *Roach* majority that "[p]risoners who are citizens and members of the Australian community remain so" despite the Court's endorsement of a ban on those serving sentences of three years or more. Roach v. Electoral Commissioner, (2007) 233 C.L.R. 162 at para. 84.

142. Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519 at para. 120 (Can.).

D. Engagement with the Implied Social Contract

In each of the four jurisdictions we have examined, the government justified the disenfranchisement of prisoners at least in part on the basis that doing so would encourage civic responsibility among citizens. The presupposition, of course, is that citizens *ought* to feel some sort of civic duty; that prisoner disenfranchisement reveals a moral obligation that would otherwise exist anyway. This obligation is typically grounded in the idea of a social contract.[143] The precise nature of that contract is most hotly and explicitly contested in *Sauvé*.

As we have seen, the majority in *Sauvé* partly rested its conclusion, that there was no rational connection between the disenfranchising legislation in issue and the government's objective of encouraging civic responsibility, on the premise that Canadian citizens contract into a particular *kind* of legal order. Specifically, they contract into a legal order in which authority flows from "the people" to its representatives, and not the other way around.[144] Because the government takes its authority from the vote, it cannot pick and choose who is entitled to vote.[145]

The dissenting judges in *Sauvé*, on the other hand, took the view that the government could choose to enhance respect for law (as we have said, "in the thin sense") by appealing to nothing more than the value of stability and order; *i.e.*, to the primary good of having a "sovereign" empowered to impose order from above. On this view of the legal order, sovereignty has logical priority over citizenship and the franchise, and so the government has the authority to decide whether certain classes should have the vote in the first place. Justice Gonthier, writing the dissenting opinion in *Sauvé*, expounded this view chiefly to underscore its reasonableness – that is, to establish that this was one of several reasonable ways to envision the social contract in Canada, and that the Court should defer to the government on this point of political philosophy.[146] We have seen that this authority-centered model of the social contract has been enthusiastically adopted by various other judges. Justice Madala, dissenting in *NICRO*, suggested that the government was reasonable in not wanting to "reward" criminal conduct with the franchise – implicitly reasoning that the

143. This is not to say that it must be grounded in contractarian premises. It may, for example, be grounded in republican ideas of civic virtue. *See* Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045 (2002) (distinguishing "contractarian liberal" and "civic-virtue republican" arguments, and arguing that neither justifies the ban). This distinction was not made in the cases discussed here, and is not pursued in our discussion.

144. *See* Sauvé, 3 S.C.R. 519 at para. 31.

145. *Id.* Nor, arguably, should it regard prisoners as "[r]epudiating the entire social contract with a single felonious breach." Afi S. Johnson-Parris, *Felon Disenfranchisement: The Unconscionable Social Contract Breached*, 89 VA. L. REV. 109, 131 (2003).

146. *Sauvé*, 3 S.C.R. 519 at paras. 101-02 (Gonthier, J., dissenting).

franchise is a privilege conferred by the government.[147] Chief Justice Gleeson, concurring in *Roach*, likewise endorsed the reasoning described by Justice Gonthier in *Sauvé*.[148]

Indeed, the *Sauvé* majority's reasoning has not traveled nearly as well as that of the *Sauvé* dissent. The *NICRO* majority cited Chief Justice McLachlin's opinion to illustrate the complexity of the questions raised by the government's objective of increasing civic responsibility, but it did not explicitly endorse the way in which the *Sauvé* majority resolved them.[149] The *Hirst* majority chose not to adopt any particular conception of the social contract at all, tacitly following Justice Gonthier on the narrow point that the state deserves deference on questions of political philosophy.[150] The plurality of the Australian High Court, in *Roach*, appears to have misunderstood the reasoning in *Sauvé* altogether, and in any event grounds its judgment in history rather than philosophy.

The majority opinions in *NICRO* and *Hirst*, and the plurality opinion in *Roach*, are at best ambivalent towards the highly rights-centered conception of the social contract urged by Chief Justice McLachlin, though they all reach similar conclusions as that reached in *Sauvé* and (with the exception of *Roach*) cite the *Sauvé* majority opinion extensively. High courts outside Canada have been quite reluctant to require the state in their respective jurisdictions to construct objectives that fit a particular philosophical model of the social contract. Unsurprisingly, this reluctance increases or decreases depending on the nature of the (quasi-)constitutional document in play. In Canada, section 1 of the Charter specifically avers to the rights-centeredness of Canadian legal and political discourse, making certain models of the social contract—those which primarily emphasize authority and security—markedly less tenable.[151] The European Convention of Human Rights must accommodate a range of cultural attitudes towards sovereignty and rights, and so it is perhaps no great surprise that the Court in *Hirst* opted not to prefer one conception of the social contract over several others. The Australian Constitution, meanwhile, is not overtly rights-centered at all, and so the Court in *Roach* scarcely addressed the theoretical issues.

There is, indeed, something rather peculiar about the suggestion that the courts can forbid the state from making the philosophical claim that an interest in stability and order provides a reason for citizens to respect the law whether or not they have contributed to the process by which it was made. Either it

147. *See* Minister for Home Affairs v Nat'l Inst. for Crime Prevention and the Reintegration of Offenders (NICRO) 2004 (5) BCLR 445 (CC) at para. 117 (S. Afr.).

148. *See* Roach v. Electoral Commissioner, (2007) 233 C.L.R. 162 at para.19.

149. *See NICRO* 2004 (5) BCLR 445 (CC) at paras. 61-62.

150. *See* Hirst v. United Kingdom (No.2), App. No. 74025/01, 42 Eur. H.R. Rep. 41 (2006).

151. *See Canadian Charter, supra* note 10, § 1.

provides a reason or it does not. If it does, then it is startlingly artificial for a court to pretend otherwise just because the legal order in question recognizes constitutional rights. Throughout the "war on terror," many have argued that an existential threat to the state can justify the suspension of rights; that the Constitution is not a "suicide pact."[152] The implicit premise, of course, is that the state has logical priority over the rights-claims to which it is ordinarily subject. It is, therefore, far from obvious that a quasi-Hobbesian case for civic duty loses all its resonance in a constitutional democracy.

We may find it odd to see the *Sauvé* majority explicitly ruling out certain kinds of philosophical arguments, but it is also striking that the courts which least engaged the theoretical issues were also those least equipped to decide the very practical question of whether the government's objectives were rationally connected to the legislation in issue. The proportionality inquiry in *Hirst* was virtually incoherent because it refused to decide whether the government's objective could be rationally connected to the disenfranchisement of prisoners; it could not decide that question without asking itself (a la the majority in *Sauvé*) how civic responsibility could be justified in a modern constitutional democracy. The majority in *NICRO* overtly acknowledged that it could not assess the government's reasoning without a higher level of argumentation.[153]

Roach is intriguing because most of the judges in that case attempted to decide it with reference to history rather than philosophy; *i.e.*, by showing that the framers of the Australian Constitution would have thought that the disenfranchisement of prisoners was tied to a concern about their moral fitness. It refused to engage on a more theoretical level with what it means to be morally fit enough to vote – to show civic responsibility. This failure hamstrung the *Roach* plurality in its attempt to articulate a coherent basis for drawing a constitutional line at the blanket disenfranchisement of prisoners, but not elsewhere.

E. Universal Suffrage

The idea of civic responsibility is closely connected to both citizenship and suffrage. If a person is responsible, she must be responsible *to someone*.[154] In the case of civic responsibility, one is responsible to a particular political community. To be a citizen is ostensibly to be a member of the class to whom civic responsibility is owed, and also a member of the class owing it. Voting is one important way in which citizens exercise civic responsibility, and so suffrage has a close symbolic relationship to citizenship. It is a mark of one's

152. *See* Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson J., dissenting); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963).

153. *See, e.g., NICRO* 2004 (5) BCLR 445 (CC) at paras. 65-67.

154. *See* R.A. DUFF, ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW, ch. 2 (2007).

membership in a community of self-rulers. This community can, however, re-define itself: voters may lose their membership if they fail to meet the standards prescribed by the polity. This means that a prisoner voting ban may be justified in terms which emphasize ideas of suffrage as membership of a community of deserving citizens, rather than as a purely legal entitlement to participate in periodic elections. The difficulty for the courts is that the constitutional right to vote exists principally to protect against such selective, merit-based distributions of the franchise. Courts charged with enforcing the right to vote must provide an account of the franchise which is compatible with the emphasis of the rights-tradition on equal and near-universal distribution of the franchise as a matter of inherent human entitlement rather than awarded civic status. Constitutional rights cannot comfortably accommodate the notion of merit hidden within descriptions of suffrage as a reward for being an observant member of the polity.

Prisoner disenfranchisement poses a challenge for courts precisely because it plays on a powerful and surviving intuition that moral fitness or worth (summarized in such bans as conformity to the criminal law) might legitimately determine who votes. This intuition is arguably so strong because it echoes ongoing legislative, judicial and popular awareness that the right to vote is at best an approximate translation of ideas about suffrage. While no legislator or judge would proclaim hostility to an express constitutional guarantee of the right to vote, it is conceivable that such actors might wish to recognize aspects of the suffrage ideal which voting rights doctrine threatens to undermine.

The prisoner disenfranchisement cases, to a greater or lesser extent, all ask what it means for a democracy to have "universal" suffrage. The courts all agree that a modern democracy must have universal suffrage if it is to count as a democracy in the first place, and that the law in their respective jurisdictions presupposes it. Nevertheless, all permit the disenfranchisement of segments of the population. As we noted in the discussion of *Sauvé*, the problem arises primarily because the presence of foreign nationals within domestic borders complicates any claim that, in a modern democracy, those subject to law contribute to its creation. Either the restriction of the franchise to citizens is inconsistent with that claim, or the franchise by definition extends only to citizens. The courts have invariably taken the second view of the matter in the cases we have reviewed. They have, however, disagreed about the basis for restricting the franchise to citizens, and this has led to disputes over whether certain classes of *citizens* may be disenfranchised. Thus, although the entire Supreme Court of Canada agreed that only citizens can have an unqualified right to vote, the dissenting judges on that Court explained that position by claiming that citizens have a particular characteristic which makes them presumptively, but not invariably, suitable for the franchise. The *Sauvé* dissent used that reasoning, in turn, to explain how the government could justify disenfranchising certain criminal offenders. Chief Justice Gleeson then went further with this reasoning in *Roach*, using it to justify the disenfranchisement of a wider class of

criminal offenders, as well as the mentally impaired. The other members of the *Roach* Court likewise operated on the assumption that Parliament could disenfranchise whole classes of society without affecting the universality of the franchise.

This reasoning, of course, conceptually places the exclusion of groups and classes at the heart of democracy itself. At its most inclusive, it excludes all foreign nationals living within domestic borders. As we have already suggested, this problematizes (at least to some extent) any claim that the law in democratic societies has a special claim to legitimacy which the law in non-democratic societies lacks.[155]

As we have seen, the exclusion of foreign nationals from the franchise on the basis of their non-membership in the political community anticipates the exclusion of some citizens on the basis of their own lack of membership (at least, in some thicker sense than mere possession of citizenship). The judges that have acknowledged the legitimacy of that kind of disenfranchisement have done so on the basis that some citizens do not belong to the political community of the country in question. Obviously, though, reasonable people can disagree about the sorts of values and attitudes that a member of the political community should be expected to have. Presumably, given that the four cases we have reviewed all arose in *liberal* democratic societies—meaning that they are ostensibly neutral as to competing conceptions of the good life—membership cannot be premised on the endorsement of a particular lifestyle.[156] At the same time, however, it must involve something more than mere acquiescence to the law's authority since, as we suggested earlier, a person may experience law as capable of creating obligations for her even if she had no part in the law-forming process. We would not, without substantially more theoretical engagement, claim that this tension is irresolvable. It is, however, real.[157]

VI.
CONCLUSION

Together, the four decisions we have reviewed show an intriguing cross-section of judicial attitudes towards the nature of democracy, the structure of rights and obligations in a democratic society, and the role of legislatures in fashioning and maintaining democratic institutions. They also reveal varying

155. *See* our above discussion of *Sauvé*.

156. Thus, both Ronald Dworkin and John Rawls have justified their respective brands of liberalism by ostensibly appealing to values that do not presuppose a particular conception of the good. *See* JOHN RAWLS, POLITICAL LIBERALISM (1996); RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY (2000). *See also* Jesse Furman, *Political Illiberalism: The Paradox of Disenfranchisement and the Ambivalences of Rawlsian Justice*, 106 YALE L.J. 1197 (1997) (discussing the tension between liberal toleration and the practice of exclusion).

157. *See* Heather Lardy, *Citizenship and the Right to Vote*, 17 O.J.L.S. 75 (1995).

levels of intellectual engagement with theoretical and historical questions. Although there are grounds for criticizing this limited engagement, the reasons for it are clear. Courts confronted with prisoner disenfranchisement claims face two challenges. The first and most obvious is the need to provide reasons for their decisions which connect the relevant democratic ideas and practices to constitutional doctrine. In this respect the task they face is the same as that confronted in any case involving a constitutional right practiced in the political sphere. The cases reviewed demonstrate the courts' limited success in framing such reasons. The second challenge is less obvious and more difficult; it is also specific to the jurisprudence of the right to vote. Prisoner disenfranchisement is an aspect of democratic practice which poses a challenge for political theory as well as for constitutional law. Courts trying to resolve the constitutional questions are generally aware of the need to conceptualize the issues in terms which accommodate the reflections of political philosophy, even if those ideas are not fully or satisfactorily explored in their judgments. The problem the courts face is that disenfranchisement is a practice that is poorly defended by political theory. The accounts of reasons for excluding some groups from the franchise tend to be hazardously indeterminate, where they are offered at all. The model of universal suffrage is generally proffered either as an uncontentious description of an attained goal, or as a standard to which democracies unquestioningly aspire.[158] It is in this atmosphere of casual disregard of the need to conceptualize disenfranchisement as a problem about how democracy is understood—and not just about how it happens to be practiced—that courts are expected to determine whether and how its use can be constitutionally limited.

Legislatures may be better-suited to addressing these practical and theoretical questions, but vested interests, limited parliamentary time, and other political pressures make that unlikely.[159] The disenfranchised may have more opportunity to start a meaningful, principled debate about suffrage and democracy by engaging in constitutional litigation. Yet, despite the personal victories for the claimants in the cases we have discussed, the courts are clearly reluctant to hold that prisoners are entitled to exercise the franchise. This can largely be attributed to the slipperiness of "universal suffrage." The "universe" to which it refers is not the universe of people affected by the law in a given jurisdiction, but the universe of people who have a moral claim on others in a particular political community. It follows that the courts cannot identify

158. *See* Ludvig Beckman, *Who Should Vote? Conceptualizing Universal Suffrage in Studies of Democracy*, 15 DEMOCRATIZATION 29 (2008) (suggesting a basis for normative analysis of suffrage distribution to counter this tendency).

159. The UK Government has clearly been reluctant to propose reforms in response to the *Hirst* judgment. It has so far failed to move the process beyond "consultation." *See* Susan Easton, *Electing the Electorate: The Problem of Prisoner Disenfranchisement*, 69 MODERN L.R. 443 (2006); Robert Jago & Jane Marriott, *Citizenship or Civic Death? Extending the Franchise to Convicted Prisoners*, 5 WEB JCLI (2007).

violations of the right to vote without making some kind of statement about the conditions under which individuals have requisite "moral standing." Because the laws that construct the electorate also purport to define the political community—to define the class of moral claimants—they do not only threaten the right to vote. They can delimit the circumstances under which the right to vote applies in the first place. The courts' challenge is to lay down constitutional principles capable of circumscribing the power of legislatures to define the right to vote itself, without impugning the legislatures' legitimate authority over matters of social policy. The four cases discussed here engage with this task to varying degrees, but there is more work to be done.

Berkeley Journal of International Law

Volume 28 | Issue 1 Article 5

2010

Responsibility of the State under International Law for the Breach of Contract Committed by a State-Owned Entity

Michael Feit

Responsibility of the State Under International Law for the Breach of Contract Committed by a State-Owned Entity

Michael Feit*

I. INTRODUCTION

In many countries, entities that are owned by the state but possess a separate legal personality ("state-owned entities"[1]) play a key role in strategically important sectors. State-owned entities are especially common in utilities and infrastructure industries such as production and distribution of energy (hydroelectric power, oil, gas, and coal), posts and telecommunications, transportation (railway, airports and airlines), and financial services.[2] Foreign investors looking to participate in such businesses frequently enter agreements with state-owned entities. When a state-owned entity breaches the agreement,

---

* Dr. Michael Feit is a senior associate in the Litigation/Controversy Department, and a member of the International Arbitration Practice Group of Wilmer Cutler Pickering Hale and Dorr LLP. Prior to joining the firm, Dr. Feit was an associate at the Swiss law firm Walder Wyss & Partners Ltd., where he was a member of the Litigation and Arbitration Team. Dr. Michael Feit graduated from the University of Zurich both as licentiatus iuris (magna cum laude; J.D. equivalent) and doctor iuris (summa cum laude; received award for outstanding performances in business law) and from New York University School of Law (LLM; Dean's Graduate Award Scholar). The author would like to thank Professor Robert Howse of New York University School of Law for his valuable comments on earlier drafts of this article. Disclaimer: The views expressed in this article are the views of the author alone and do not necessarily reflect the views of Wilmer Cutler Pickering Hale and Dorr LLP.

1. State-owned entities may be fully, majority or minority owned by the state. As a survey of the Organization of Economic Co-operation and Development ("OECD") dating from 2005 has revealed, on average, in OECD countries more than half of the state-owned entities are fully owned by the state and twenty percent are majority owned. OECD, CORPORATE GOVERNANCE OF STATE-OWNED ENTERPRISES 33 (2005). State-owned entities often take the form of regular private entities and are subject to the same corporate regulations; in OECD countries, the most common legal form of state-owned entities is the private limited liability company, the joint stock company is second most-common. *Id.* at 36.

2. *Id.* at 34; OECD, OECD GUIDELINES ON CORPORATE GOVERNANCE OF STATE-OWNED ENTERPRISES 9 (2005).

foreign investors often seek to address their claim directly against the host state.

This article analyzes several questions that are relevant for assessing whether the state can be held responsible for a contractual breach by state-owned entities. To begin, I look briefly at choice of forum considerations that motivate investors to pursue direct state responsibility. Then, I examine the legal grounds on which and circumstances under which the conduct of a state-owned entity can be attributed to the state. Based on that framework, I then analyze which international obligations might be infringed by a breach of contract. Last, I address specific questions in relation to the responsibility of the state under the Energy Charter Treaty of 1994 ("ECT").

II.
INVESTORS' MOTIVATION TO OBTAIN ICSID JURISDICTION

One motive for pursuing direct responsibility of a state is that the state-owned entity might not have sufficient funding to meet the resulting award. Another reason will often be that the investor wishes to submit the dispute to the International Centre for Settlement of Investment Disputes ("ICSID"). While the first motive is quite evident, the latter may need further explanation.

ICSID has jurisdiction for disputes arising directly out of an investment between a contracting state of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention") and the national of another contracting state, provided the parties gave their consent in writing.[3] Generally, the investor will seek to submit its claim to ICSID if he believes that the courts in the host state will not adjudicate the dispute impartially and independently. Even if the investment agreement concluded with the state-owned entity calls for arbitration, for example under the Arbitration Rules of the United Nations Commission on International Trade Law, the investor might still prefer to bring its case before ICSID because ICSID arbitration possesses several characteristics which make it particularly attractive for an investor. For instance, an ICSID award is not subject to any review not foreseen in the ICSID Convention and is to be recognized by the contracting states as if it were a final judgment of a court in that state.[4] In addition, host states have a strong incentive to comply with ICSID awards because of the institutional link of ICSID to the World Bank.[5]

Accordingly, the substantive question of direct state responsibility has important strategic and practical ramifications. Against this background it becomes clear why the investor will often argue that the host state itself is

3. ICSID Convention art. 25(1).

4. ICSID Convention arts. 53(1), 54(1).

5. *See* CHRISTOPH SCHREUER, THE WORLD BANK/ICSID DISPUTE SETTLEMENT PROCEDURES, *available at* http://www.univie.ac.at/intlaw/ICSID.pdf (last visited Feb. 17, 2010).

responsible for the breach of contract committed by one of its entities. The respondent state, in turn, can be expected to deny its responsibility by pointing out that the contract was concluded with an entity which enjoys its own legal personality. In addition, the state will quite likely argue that the ICSID tribunal does not have jurisdiction to hear a claim based on the alleged breach of contract.

III.
ATTRIBUTION OF CONDUCT OF A STATE-OWNED ENTITY TO THE STATE

The first step to establish state responsibility is to determine whether the breach of contract committed by a state-owned entity can be attributed to the state. This section first explains why attribution is relevant both from a procedural and a substantive perspective. Thereafter, it examines the legal grounds on which—and the circumstances under which—acts of a state-owned entity can be attributed to the state.

A. Twofold Relevance of Attribution

In order to establish state responsibility, it must first be determined whether the breach of contract committed by a state-owned entity can be attributed to the state. This question has twofold relevance. It is dispositive to decide both 1) whether a tribunal has jurisdiction under the ICSID Convention, and 2) whether the state is liable for such conduct. Thus, this question is of importance from both a procedural and a substantive perspective.

Under article 25(1) of the ICSID Convention, the jurisdiction of ICSID only extends to disputes between a contracting state and a national of another contracting state. ICSID lacks jurisdiction to arbitrate disputes between two private parties. If the act of a state-owned entity cannot be attributed to the state, ICSID does not have jurisdiction. Moreover, a state can only be held liable for acts of its entities if such conduct is attributable to the state. If the act cannot be attributed to the state, it has no responsibility towards the investor.

The twofold relevance of attribution was aptly observed by the tribunal in *Maffezini v. Kingdom of Spain*.[6] The tribunal thereby rightly noted that "[w]hile the first issue is one that can be decided at the jurisdictional stage of these proceedings, the second issue bears on the merits of the dispute and can be finally resolved only at that stage."[7] Since attribution is relevant in both stages

6. Maffezini v. Kingdom of Spain, Award on Jurisdiction, ICSID Case No. ARB/97/7, para 75 (Jan. 25, 2000) ("[T]he Tribunal has to answer the following two questions: first, whether or not SODIGA is a State entity for the purpose of determining the jurisdiction of ICSID and the competence of the Tribunal, and second, whether the actions and omissions complained of by the Claimant are imputable to the State.").

7. *Id.*

of the proceeding, the question arises as to what extent the tribunal should accept the investor's substantive case when establishing its jurisdiction. This question is of course especially relevant when the tribunal wishes to bifurcate procedure between jurisdiction and the merits, as often occurs in investment disputes.[8]

In *Maffezini*, the tribunal concluded that at the procedural stage it is sufficient if the investor is able to make a *prima facie* case that the acts of the state-owned entity are attributable to the state.[9] It left the substantive determination of whether the claimed acts and omissions can properly be attributed to the state to be assessed during proceedings on the merits.[10]

The *prima facie* test is in fact a well established threshold for determining jurisdiction in investment dispute cases, especially with regard to rationae materiae.[11] Further examples in which an ICSID tribunal applied the *prima facie* test are *CMS v. Argentina*[12], *SGS v. Philippines*[13] and *Salini v. Jordan*.[14] Non-ICSID tribunals have also applied the *prima facie* test, as in the case of *UPS v. Canada*.[15]

B. *The ILC Articles on Responsibility of States for Internationally Wrongful Acts*

The relevant rules on attribution for the purpose of state responsibility under international law are contained in the Articles on Responsibility of States for Internationally Wrongful Acts ("ILC Articles"). The International Law Commission ("ILC") adopted the final version of the ILC Articles at its fifty-third session in August 2001. In December 2001, the United Nations General Assembly adopted Resolution 56/83, which "commend[ed] [the articles on responsibility of States for internationally wrongful acts] to the attention of Governments without prejudice to the question of their future adoption or other appropriate action."[16] The ILC Articles are not a treaty which is in force, but

8. Audley Sheppard, *The Jurisdictional Threshold of a Prima-Facie Case*, *in* P. MUCHLINSKI ET AL., EDS., THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 941-2 (2008).

9. *Maffezini*, *supra* note 6, at para. 89.

10. *Id.*

11. Sheppard, *supra* note 8, at 960, 933.

12. CMS Gas Transmission Company v. The Argentine Republic, Decision on Jurisdiction, ICSID Case No. ARB/01/8, paras. 22, 35 (July 17, 2003).

13. SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, Decision on Jurisdiction, ICSID Case No. ARB/02/6, paras. 26, 157 (Jan. 29, 2004).

14. Salini Costruttori S.p.A. and Italstrade S.p.A. v. Jordan, Decision on Jurisdiction, ICSID Case No. ARB/02/13, para. 151 (Nov. 9, 2004).

15. United Parcel Service v. Canada, Award on Jurisdiction, UNCITRAL (NAFTA), paras. 30-37 (Nov. 22, 2002).

16. GA Res. 56/83, para. 3 (2001), *available at* http://www.un.org/Depts/dhl/resguide/r56.htm

tribunals and commentators alike consider the ILC Articles to "accurately reflect customary international law on state responsibility."[17]

C. The ILC Articles in Investor-State Disputes

Not infrequently respondent states argue that the ILC Articles cannot be applied in investor-state disputes because the ILC Articles solely address responsibilities as between states.[18] However, this argument is not convincing. Article 1 of the ILC Articles reads as follows:

> *Article 1. Responsibility of a State for its internationally wrongful acts*
> Every internationally wrongful act of a State entails the international responsibility of that State.[19]

The commentary to the ILC Articles as adopted by the ILC in 2001 (the "Commentary") points out that article 1 of the ILC Articles "covers all international obligations of the State and not only those owed to other States."[20] Thus, article 1 is clearly not limited to obligations to other states. The Commentary continues that state responsibility extends to breaches of international law where the primary beneficiary of the obligation breached is an *individual* or an *entity other than a state*.[21] Based on these passages, "there is no doubt that the ILC Articles may also be relevant with respect to non-state parties"[22] and that "[they] are applicable to investment arbitrations."[23] This view is shared by most commentators.[24]

This opinion is also in line with the practice of several arbitral tribunals that have applied the ILC Articles to investor-state disputes. For instance, in *Maffezini*,[25] *Noble Ventures, Inc. v. Romania*,[26] and *Eureko v. Poland*,[27] the

---

(last visited Feb. 17, 2010).

17. Kaj Hobér, *State Responsibility and Attribution*, *in* MUCHLINSKI, *supra* note 8, at 553. *See also* Noble Ventures, Inc. v. Romania, Award, ICSID Case No. ARB/01/11, para. 69 (Oct. 12, 2005) ("While those Draft Articles are not binding, they are widely regarded as a codification of customary international law.")

18. Hobér, *supra* note 17, at 552.

19. ILC Articles, art. 1.

20. *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001*, [2001] 2 Y.B. INT'L LAW COMM'N 87.

21. *Id.* at 87-88; see also at 32.

22. Hobér, *supra* note 17, at 553.

23. Kaj Hobér, *State Responsibility and Investment Arbitration*, *in* C. RIBEIRO, ED., INVESTMENT ARBITRATION AND THE ENERGY CHARTER TREATY 266 (2006) (citations omitted).

24. Karl-Heinz Böckstiegel, *Applicable Law to State Responsibility under the Energy Charter Treaty and other Investment Protection Treaties*, *in* RIBEIRO, *supra* note 23, at 259 ("And most commentators agree that [the ILC Articles] are applicable not only between states, but also for relations between states and foreign investors insofar as these are subject to international law such as in the ECT.").

25. *Maffezini*, *supra* note 6.

ILC Articles were used to determine whether an act of a state organ or of a state-owned entity can be attributed to the state. There is thus a widespread understanding that the rules of international customary law on state responsibility as formulated in the ILC Articles cover obligations of the state towards individuals and legal entities and are therefore applicable to investor-state disputes.

D. Structure, Function, or Control as a Necessary Element for Attribution Under the ILC Articles

The ILC Articles contain several provisions on attribution: Article 4 refers to conduct of state organs, article 5 to conduct of persons or entities exercising elements of governmental authority, and article 8 to conduct directed or controlled by a state. Articles 4, 5, and 8 each set forth a basis for attribution to the state. However, the main focus of this article lies on article 5. Article 5 reads as follows:

> *Article 5. Conduct of persons or entities exercising elements of governmental authority*
> The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.[28]

The Commentary makes clear that article 5 is meant to cover a wide variety of bodies which, though not organs, may be empowered to exercise elements of governmental authority. According to the Commentary, this includes public corporations, semipublic entities, public agencies and even private companies, provided that in each case the entity is empowered by the law of the state to exercise functions of a public character normally exercised by state organs, and the conduct of the entity relates to the exercise of the governmental authority concerned.[29]

Accordingly, attribution under article 5 is based on a functional assessment ("The conduct of a person or entity . . . which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law").[30] The dispositive element in article 5 of the ILC Articles is "governmental authority." In order to determine whether an act is governmental, the Commentary proposes to rely on the particular

---

26. *Noble Ventures*, *supra* note 17, at 69-70.

27. Eureko B.V. v. Republic of Poland, Partial Award and Dissenting Opinion, 33-34 (*ad hoc* arbitration seated in Brussels, Aug. 19, 2005).

28. ILC Articles, art. 5.

29. ILC Articles with commentaries, *supra* note 20, at 43.

30. ILC Articles, art. 5.

society, its history and traditions.[31] According to an alternative approach, the assessment should be based upon a comparative standard and it should be determined from an objective point of view whether the act is normally regarded as governmental in a contemporary setting.[32]

By contrast, attribution under article 4 depends on a structural assessment ("The conduct of any State organ shall be considered an act of that State under international law . . . whatever position it holds in the organization of the State").[33] In article 8 of the ILC Articles, attribution is based on control ("The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State").[34]

Attribution can be based on either article 4, 5 or 8. Thus, in order to attribute conduct that constitutes a breach of international law to the state, it is sufficient if one of the elements is present in the entity that carried out that conduct: the entity is an organ of the state (structure), it is empowered to "exercise elements of the governmental authority" (function), or it is controlled by the state (control).

A good example for a diligent analysis of whether a certain conduct of an entity is attributable to the state is *Maffezini*.[35] Emilio Augustín Maffezini, a citizen of Argentina, together with the private Spanish corporation Sociedad para el Desarrollo Industrial de Galicia ("SODIGA"), established a Spanish corporation named Emilio A. Maffezini S. A. ("EAMSA") for the production of chemical products in Galicia, Spain. The project failed, and Maffezini brought suit against Spain on the argument that the failure was the result of acts and omissions of SODIGA. Since SODIGA was a public entity, so the argument continued, its wrongful acts and omissions were attributable to Spain.[36] Spain, however, essentially relied on a structural assessment when it maintained that SODIGA was a private entity whose conduct cannot be attributed to Spain.[37]

The tribunal initially clarified that even under the structural test it was clear that companies such as SODIGA could not be held to fall entirely outside the overall scheme of public administration. In fact, the tribunal observed, there existed a variety of public entities that were governed by private law but which would occasionally exercise public functions that were governed by public law.

---

31. ILC Articles with commentaries, *supra* note 20, at 43. *See also* Hobér, *supra* note 17, at 270.

32. RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 200 (2008).

33. ILC Articles, art. 4.

34. ILC Articles, art. 8.

35. *Maffezini*, Award on the Merits, ICSID Case No. ARB/97/7 (Nov. 13, 2000).

36. *Maffezini*, Award on Jurisdiction, *supra* note 6, at para. 72.

37. *Id.* at 73. *See also* Award on the Merits, *supra* note 35, at para. 47.

However, the tribunal noted that the structural test was but one element to be taken into account. Other elements to which international law looked were, in particular, the control of the company by the state or state entities and the objectives and functions for which the company was created.[38]

The tribunal continued by stating that it would rely on a functional test in order to establish whether the conduct of SODIGA was governmental rather than commercial in nature and, hence, could be attributed to Spain.[39] After applying the functional test, the tribunal arrived at the interim conclusion that the conduct of SODIGA was partially governmental and partially commercial in nature. Since only the former were attributable, the tribunal categorized the various acts and omissions giving rise to the dispute.[40] The tribunal turned to the contention of Maffezini that the project failed because SODIGA provided faulty advice regarding the cost of the project, which turned out to be significantly higher than originally planned. Based on a functional assessment, the tribunal found that SODIGA was not discharging any public functions in providing the information, for which reason this conduct could not be attributed to Spain.[41]

In his second claim, Maffezini argued that he was put under political pressure to go ahead with construction works even though the project was not yet approved by an environmental impact assessment. This caused additional costs at a later stage of the project. The tribunal found that Spain and SODIGA did nothing more than insist on the observance of the applicable law and that Maffezini took an independent decision to proceed with the construction before approval was granted.[42]

The third claim related to a transfer made from Maffezini's personal account to EAMSA as a loan, even though he did not consent to the loan. Spain denied the allegations on the grounds that Maffezini had consented to the loan, had authorized the transfer of funds and had mandated Luis Soto Baños, SODIGA's representative in EAMSA, to undertake these operations. Since Baños was for these purposes acting as the personal representative of Maffezini, Spain submitted that his acts could not be attributed to SODIGA.[43]

Based on the fact that Baños discussed the transfer of these funds with the President of SODIGA and that the latter authorized him to proceed as he thought best while a similar authorization was not sought from Maffezini, the tribunal found that Baños was not acting in this operation as the personal representative of Maffezini but as an official of SODIGA. Therefore, the tribunal concluded, it

38. *Id.*, Award on the Merits, at 48-50.

39. *Id.* at para. 52.

40. *Id.* at para. 57.

41. *Id.* at paras. 58-64.

42. *Id.* at paras. 65-71.

43. *Id.* at paras. 72-73.

had to be asked whether that action was purely commercial in nature or whether it was performed in the exercise of SODIGA's public or government functions. Handling of the accounts of EAMSA as a participating company, managing its payments and finances and generally intervening on its behalf before the Spanish authorities without being paid for these services were in the tribunal's view all elements that responded to SODIGA's public nature and responsibility. In addition, the tribunal noted that the transfer was in fact an increase of the investment. A decision to increase the investment, taken not by Maffezini but by the entity entrusted by the state to promote the industrialization of Galicia, could not be considered a commercial activity. Rather, the tribunal found, it grew out of the public functions of SODIGA. Consequently, the tribunal held that the acts of SODIGA relating to the loan were attributable to Spain.[44]

The analysis on attribution conducted in *Maffezini* is particularly remarkable in two aspects. First, the tribunal correctly noted that the mere fact that SODIGA was a private corporation under Spanish law did not mean that it could not be considered a state organ under international law. This is in line with the Commentary to the ILC Articles, which emphasizes that according to article 4(2) of the ILC Articles, characterization as a state organ under international law does not depend on the status of the entity under domestic law.[45] Second, the examination conducted by the tribunal aptly shows that the functional test of article 5 of the ILC Articles must be applied on a case-by-case basis. Acts and omissions of a state-owned entity that is not a state organ cannot be automatically attributed to the state. Rather, every conduct for which the investor considers the state to be responsible has to be independently examined. Only if the tribunal finds this conduct to be governmental in nature can it be attributed to the state.[46]

---

44. *Id.* at paras. 76-83.

45. ILC Articles with commentaries, *supra* note 20, at 42.

46. Another example for an analysis of whether a certain conduct of an entity is attributable to the state is AMTO LLC v. Ukraine, , Decision, Arbitration No. 080/2005, paras. 101-02 (Arbitration Inst. of the Stockholm Chamber of Commerce, Mar. 26, 2008). In this case, the tribunal firstly determined that the state-owned entity Energoatom was not an organ of the Ukrainian state. Consequently, the tribunal noted that the conduct of Energoatom can only be attributed to the state where it was shown that Energoatom was exercising governmental authority or acted on the instructions of, or under the direction or control of, the state in carrying out the conduct. Most recently, Bayindir Insaat Turizm Ticaret VE Sanay A.S. v. Islamic Republic of Pakistan, Award, ICSID Case No. ARB/03/29, paras. 117-30 (Aug. 26, 2009) deserves favorable mention. Here, the tribunal systematically examined whether the public corporation National Highway Authority ("NHA") was a state organ, an instrumentality acting in the exercise of governmental powers or whether it was acting under the direction or control of the state. Due to the separate legal status of the NHA, the tribunal discarded the possibility of treating the NHA as a state organ under Article 4 of the ILC Articles. With regard to Article 5 of the ILC Articles, the tribunal firstly noted that it was not disputed that the NHA was generally empowered to exercise elements of governmental authority. It pointed rightly out, however, that the existence of these general powers was not sufficient in itself for Article 5 of the ILC Articles to apply. Attribution under that provision rather

E. Piercing the Corporate Veil

A special form of attribution which deserves to be mentioned for the purposes of this article is the principle of "piercing the corporate veil." This principle's viability in international law was acknowledged in the leading case *Barcelona Traction*[47] and was recently reaffirmed in *Tokios Tokeles v. Ukraine*.[48] The tribunal in *Tokios* noted that the International Court of Justice did not attempt to define the precise scope of conduct that might prompt a tribunal to pierce the corporate veil. However, since the tribunal was satisfied that the case did not present any conduct which constituted an abuse of legal personality, it did not need to clarify the requirements of this principle under international law in more detail.[49]

The basic difference between the principle of "piercing the corporate veil" and the rules of attribution as reflected in the ILC Articles is that under the former, the contract itself is attributed to the state, while under the latter, only the act which constitutes the breach of international law is attributed for the purpose of state responsibility.[50] What this means will be dealt with in detail in the next section.

IV.
BREACH OF CONTRACT MUST CONSTITUTE A VIOLATION OF INTERNATIONAL LAW

In order to hold a state responsible under international law, the breach of contract must constitute a violation of an international obligation. This section first explains why the violation of an international obligation is relevant both from a procedural and a substantive perspective. It then examines the legal grounds on which—and the circumstances under which—a contractual breach

---

required in addition that the instrumentality acted in a sovereign capacity in that particular instance. Since the tribunal denied that the NHA was acting in exercise of governmental authority, it turned to Article 8 of the ILC Articles whose application it confirmed.

47. Barcelona Traction, Light and Power Co. Ltd. (Second Phase) (Belgium v. Spain), 1970 I.C.J. 3 (Feb. 5).

48. Tokios Tokelés v. Ukraine, Decision on Jurisdiction, of Apr. 29, 2004, para. 54 ICSID Case No. ARB/02/18, 2005 (quoting *Barcelona Traction* at para. 56): "In [*Barcelona Traction*], the International Court of Justice ('ICJ') stated, 'the process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law.' In particular, the Court noted, '[t]he wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to *prevent the misuse of the privileges of legal personality*, as in certain cases of *fraud* or *malfeasance*, to protect *third persons* such as a creditor or purchaser, or to *prevent the evasion of legal requirements or of obligations*.'"

49. *Id.* at para. 56.

50. Richard Happ, *The Nykomb Case in the Light of Recent ICSID Jurisprudence*, *in* RIBEIRO, *supra* note 23, 315, at 324.

amounts to such violation.

A. Twofold Relevance of Violation of International Obligation

As with the assessment of whether the claimed conduct is attributable to the state, the determination of whether the conduct violated an international obligation has twofold relevance. First, the violation of a treaty provision is relevant with regard to the jurisdiction of ICSID. Second, it is also a necessary requirement to establish the responsibility of the state under international law.

As stipulated in article 25(1) ICSID Convention, ICSID jurisdiction depends on the written consent of both parties. In a dispute between an investor and a state-owned entity, the investor will typically rely on the dispute settlement clause of the applicable bilateral investment treaty ("BIT") or another investment treaty. The treaty may contain either a narrow or wide dispute settlement clause. An example of a narrow clause is article 26(1) ECT which reads:

> Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.

Article 26(4) ECT contains the written consent of the contracting states to ICSID jurisdiction in the event the investor chooses to submit the dispute there. Thus, ICSID has jurisdiction for claims raised by the investor based on the alleged breach of an obligation placed in Part III. Article 26(1) ECT and similar dispute settlement clauses do not allow for the submission of claims based on a breach of contract, unless the breach amounts to a violation of the treaty.[51] Under treaties with a narrow dispute clause, the investor must hence establish that the state-owned entity violated a treaty provision. Otherwise ICSID does not have jurisdiction to hear his claim. The treaty may, however, contain a wide dispute settlement clause which provides that "any" or "all" disputes between a state and a foreign investor can be submitted to ICSID. It is disputed whether such a clause allows for the submission of disputes relating to a breach of contract which do not amount to a breach of the treaty.[52]

The violation of a treaty provision is, however, not only relevant with regard to ICSID jurisdiction, it is also a necessary requirement to establish the responsibility of the state under international law. Article 1 and 2 of the ILC Articles reflect this principle:

> *Article 1. Responsibility of a State for its internationally wrongful acts*
> Every internationally wrongful act of a State entails the international responsibility of that State.

---

51. *Id.* at 319.

52. *Id.* at 320.

Article 2. Elements of an internationally wrongful act of a State
There is an internationally wrongful act of a State when conduct consisting of an action or omission:
(a) is attributable to the State under international law; and
(b) constitutes a breach of an international obligation of the State.[53]

Hence, the violation of an international obligation is relevant both from a procedural and a substantive perspective. The question thus arises as to what extent the tribunal should rely on the investor's allegation that the contractual breach amounts to a treaty violation when determining its jurisdiction.

Arbitral tribunals have in fact already been confronted with this question. In *SGS v. Pakistan,* the tribunal applied a *prima facie* test according to which the tribunal relied on the characterization of the case by the investor as long as "the facts asserted by the Claimant are capable of being regarded as alleged breaches of the BIT."[54] In *SGS v. Philippines*, the tribunal used a slightly stricter variation of the *prima facie* test: "Provided the facts as alleged by the Claimant and as appearing from the initial pleadings fairly raise questions of breach of one or more provisions of the BIT, the Tribunal has jurisdiction to determine the claim."[55] Under the formulation of the *prima facie* test in *SGS v. Philippines*, the tribunal has jurisdiction if the facts presented by the investor "fairly raise questions of breach of one or more provisions of the BIT."[56]

B. Attribution Under the ILC Articles is Limited to Conduct that Constitutes a Breach of International Law

Occasionally, one can find language in case law which suggests that under the ILC Articles, already the conclusion of the contract will be attributed to the

53. ILC Articles, arts. 1-2.

54. SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, Decision on Objections to Jurisdiction, ICSID Case No. ARB/01/13, paras. 144-45 (Aug. 6, 2003):

At this stage of the proceedings, the Tribunal has, as a practical matter, a limited ability to scrutinize the claims as formulated by the Claimant. Some cases suggest that the Tribunal need not uncritically accept those claims at face value, but we consider that if the facts asserted by the Claimant are capable of being regarded as alleged breaches of the BIT, consistently with the practice of ICSID tribunals, the Claimant should be able to have them considered on their merits. We conclude that, at this jurisdiction phase, it is for the Claimant to characterize the claims as it sees fit. We do not exclude the possibility that there may arise a situation where a tribunal may find it necessary at the very beginning to look behind the claimant's factual claims, but this is not such a case.

55. *SGS v. Philippines*, *supra* note 13, at para. 157 ("In accordance with the basic principle formulated in the Oil Platforms case [...], it is not enough for the Claimant to assert the existence of a dispute as to fair treatment or expropriation. The test for jurisdiction is an objective one and its resolution may require the definitive interpretation of the treaty provision which is relied on. On the other hand, as the Tribunal in *SGS v. Pakistan* stressed, it is for the Claimant to formulate its case. Provided the facts as alleged by the Claimant and as appearing from the initial pleadings fairly raise questions of breach of one or more provisions of the BIT, the Tribunal has jurisdiction to determine the claim.").

56. *Id.*

state.[57] Such wording is, however, imprecise since Articles 4, 5, and 8 of the ILC Articles do not provide general rules on attribution meaning that any act can be attributed to the state if the requirement of structure, function, or control is met. The scope of these provisions is, rather, limited to conduct which constitutes a violation of international law. Thus, the conclusion of a contract by a state-owned entity cannot be attributed to the state, even if the state-owned entity was empowered with governmental authority. What is attributable, however, is the breach of the contract if it amounts to a breach of an international obligation.

That the ILC Articles do not contain general rules of attribution is already suggested by their title which reads "Responsibility of States for Internationally Wrongful Acts" and the wording of article 2 of the ILC Articles. The Commentary on the ILC Articles further supports the interpretation that the principles on attribution are inseparably linked to conduct that is a violation of international law. When introducing the provisions on attribution, the Commentary states:

> *The question of attribution of conduct to the State for the purposes of responsibility is to be distinguished from other international law processes by which particular organs are authorized to enter into commitments on behalf of the State.* . . . Such rules have nothing to do with attribution for the purposes of State responsibility. In principle, the State's responsibility is engaged by conduct incompatible with its international obligations, irrespective of the level of administration or government at which the conduct occurs. *Thus, the rules concerning attribution set out in this chapter are formulated for this particular purpose,* and not for other purposes for which it may be necessary to define the State or its Government.[58]

The commentary makes clear that the provisions on attribution were drafted with the specific purpose to provide rules on attributing conduct which constitutes a breach of international law. In addition, legal scholars advocate that the ILC Articles should not be confused with rules on agency as they exist under private law. Evans, for example, notes that, with regard to the scope of the ILC Articles:

> The rules of attribution specify the actors whose conduct may engage the responsibility of the State, generally or in specific circumstances. *It should be stressed that the issue here is one of responsibility for conduct allegedly in breach of existing international obligations of the State. It does not concern the question which officials can enter into those obligations in the first place.*[59]

---

57. *See, e.g., Noble Ventures*, Award, *supra* note 17, at para. 68 ("And secondly, as already indicated above, there is the more specific question as to whether one can regard the Respondent as having entered into the SPA (as well as other contractual agreements which have allegedly been breached), breach of which could consequently, by reason of the umbrella clause, be regarded as a violation of the BIT.)

58. ILC Articles with commentaries, *supra* note 20, at 39 (emphasis added and citations omitted).

59. MALCOLM EVANS, INTERNATIONAL LAW 460 (2d ed. 2006) (emphasis added).

Moreover, Happ has noted that the ILC Articles should not be used to attribute acts other than violations of international law:

> Contrary to a recently voiced opinion, it is not possible to attribute a contract concluded by a sub-division or state-entity to the state by using the rules on state responsibility. The rules of attribution have been developed in the context of attributing acts to the state in order to determine whether those acts are in breach of international law. They cannot be applied mutatis mutandis. A clear distinction exists between the responsibility of a state for the conduct of an entity that violates international law (e.g. a breach of treaty) and the responsibility of a State for the conduct of an entity that breaches a municipal law contract.[60]

Article 7 of the ILC Articles illustrates quite well that the attribution regime under the ILC Articles does not fit to attribute acts such as the conclusion of contracts. According to this article, conduct of an entity empowered to exercise elements of governmental authority shall be considered as an act of the state, even if it exceeds its authorities or contravenes instructions. According to the Commentary, this provision applies even where the entity in question has manifestly exceeded its competence.[61]

While this provision makes perfect sense in connection with the attribution of wrongful conduct, it appears to be inappropriate when it has to be decided whether the conclusion of a contract can be attributed to the state. In the latter case, it rather seems to be decisive whether the investor was reasonably entitled to believe that the state-owned entity was empowered to act on behalf of the state, a question which must arguably be decided under the domestic law of the host state. In sum, the ILC Articles can only be used to attribute conduct which constitutes a breach of an international obligation. Consequently, the conclusion of a contract is not attributable to the state under the ILC Articles.

C. Circumstances Under Which the Breach of Contract May Amount to a Violation of an International Obligation

Article 12 of the ILC Articles defines the breach of an international obligation as an act of a state which is not in conformity with what is required of it by that international obligation, regardless of its origin or character. The characterization of an act as internationally wrongful is made on the basis of international law, irrespective of how such act is characterized by municipal

60. Happ, *supra* note 50, at 324 (citations omitted). A different position is arguably taken by Nick Gallus, *An Umbrella Just for Two? BIT Obligations Observance Clauses and the Parties to a Contract*, 24 ARB. INT'L 1, 157-70 (2008). Gallus accepts that "[p]rimarily, international law rules of attribution are traditionally applied to acts breaching an international law obligation." *Id.* at 166. With regard to the umbrella clause, however, he seems to suggest that the ILC Articles should be applied to attribute both the undertaking of the obligation and the subsequent breach. *See id.* at 167: "To establish that a state breaches an obligations observance clause through the sub-state entity's failure to observe its obligations, a claimant will therefore need to apply the rules in ILC Articles 4, 5 and 8 to both the act of entering the obligation and the act of breach."

61. ILC Articles with commentaries, *supra* note 20, at 45.

law. An act can thus constitute a violation of an international obligation even though it is lawful under municipal legislation.[62]

Article 12 of the ILC Articles applies to all international obligations of a state. International obligations may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order.[63] For the purpose of this article, it is of interest whether there exists a general international obligation to observe contractual obligations. The Commentary to the ILC Articles takes the position that ". . . the breach by a State of a contract does not as such entail a breach of international law. Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party."[64]

As observed by Wälde, this opinion is in line with the general view according to which a mere breach of contract does not constitute a violation of international law.[65] It may, however, constitute a violation of an international obligation under certain conditions. Such conditions are, for instance, present if the non-observance of a contractual obligation constitutes a violation of the obligation to provide fair and equitable treatment of foreign investments or to observe obligations entered into by the state (the latter is often referred to as an "umbrella clause"). A contractual breach may also amount to an expropriation in which case compensation is owed. The following will examine when a breach of contract may constitute a violation of one of the aforementioned obligations or amount to an expropriation.

D. Fair and Equitable Treatment

Most BITs and other investment treaties provide for fair and equitable treatment of foreign investments. Article 1105(1) of the North American Free Trade Agreement of 1992 ("NAFTA"), for instance, stipulates that "[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."[66]

One aspect of the fair and equitable treatment provision is the obligation to

---

62. ILC Articles with commentaries, *supra* note 20, at 36. *See also* Böckstiegel, *supra* note 23, at 263.

63. ILC Articles with commentaries, *supra* note 20, at 55. *See also* Hobér, *supra* note 17, at 562-63.

64. ILC Articles with commentaries, *supra* note 20, at 41 (citations omitted).

65. Thomas W. Wälde, *Contract Claims Under the Energy Charter Treaty's Umbrella Clause: Original Intentions Versus Emerging Jurisprudence, in* RIBEIRO, *supra* note 23, at 205, 209.

66. North American Free Trade Agreement of 1992 [hereinafter NAFTA], 32 ILM 289, 605 (1993), art. 1105(1).

comply with contractual obligations.[67] The scope of this obligation is however not quite clear. Some tribunals noted in more general language that the fair and equitable treatment provision extends to violation of contracts. In *Mondev v. USA,*[68] for instance, the tribunal remarked with regard to the argument that governments might not be subject to the same rules of contractual liability as are private parties, that "a governmental prerogative to violate investment contracts would appear to be inconsistent with the principles embodied in Article 1105 and with contemporary standards of national and international law concerning governmental liability for contractual performance."[69] Also, the tribunals in *SGS v. Philippines*[70] and *Noble Ventures*[71] suggested that the fair and equitable treatment provision covers the breach of a contractual obligation.

Other tribunals limited the scope of the fair and equitable treatment provision to contractual breaches resulting out of the use of sovereign power or of a discriminatory treatment. In *Consortium RFCC v. Morocco,*[72] the tribunal held that an alleged contractual breach can only amount to a violation of the fair and equitable treatment provision if the breach is based on an activity beyond that of an ordinary contracting party.[73]

In *Waste Management v. Mexico,*[74] the tribunal noted that even the persistent non-payment of debts by a municipality would not equate a violation of article 1105 NAFTA, "provided that it does not amount to an outright and unjustified repudiation of the transaction and provided that some remedy is open to the creditor to address the problem."[75] The tribunal continued to state that in the case at hand, the contractual failure to pay could be explained, albeit not excused, by the financial crisis and that there was no evidence that it was motivated by prejudice.

The tribunal in *Impregilo v. Pakistan* argued similarly as in *Consortium RFCC* when explaining under which circumstances a breach of contract amounted to a breach of an international obligation: "In order that the alleged breach of contract may constitute a violation of the BIT, it must be the result of behavior going beyond that which an ordinary contracting party could adopt.

---

67. DOLZER & SCHREUER, *supra* note 32, at 140-41.

68. Mondev International Ltd. v. United States of America, Award of the Tribunal, ICSID Case No. ARB(AF)/99/2 (Oct. 11, 2002).

69. *Id.* at para. 134.

70. *SGS v. Philippines*, Decision of the Tribunal on Objections to Jurisdiction, *supra* note 13, at para. 162.

71. *Noble Ventures*, Award, *supra* note 17, at para. 182.

72. Consortium R.F.C.C. v. Kingdom of Morocco, Award of the Tribunal, ICSID Case No. ARB/00/6 (Dec. 22, 2003).

73. *Id.* at para. 51.

74. Waste Management, Inc. v. United Mexican States (Number 2), Award of the Tribunal, ICSID Case No. ARB(AF)/00/3 (Apr. 30, 2004).

75. *Id.* at para. 115.

Only the State in the exercise of its sovereign authority ("*puissance publique*"), and not as a contracting party, may breach the obligations assumed under the BIT."[76] The tribunal went on to declare that the breach of the fair and equitable treatment provision required the use of "*puissance publique*."[77]

Most recently, *Bayindir v. Pakistan* explicitly followed the approach of *RFCC*, *Waste Management* and *Impregilo* by stating that "the Claimant must establish a breach different in nature from a simple contract violation, in other words one which the State commits in the exercise of its sovereign power."[78] The tribunal noted thereby that it was aware of the circumstance that the tribunals in *Mondev*, *Noble Ventures* and *SGS v. Philippines* have been less demanding.

Tribunals appear thus to agree that a breach of contract may amount to a violation of the fair and equitable treatment provision. There is, however, no uniformity yet on the question whether the latter will only be violated if the contractual breach is the result of the use of sovereign power or of a discriminatory behavior.[79]

E. Expropriation

It is generally accepted that expropriation may affect not only tangible property but also a broad range of intangible assets of economic value to the investor, such as contractual rights.[80] Whether expropriation, including indirect expropriation, extends to contractual rights, depends primarily on the wording of the investment treaty. For instance, in the ECT, the first sentence of article 13 reads as follows:

> EXPROPRIATION
> (1) Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "Expropriation") except where such Expropriation is:
> (a) for a purpose which is in the public interest;
> (b) not discriminatory;
> (c) carried out under due process of law; and
> (d) accompanied by the payment of prompt, adequate and effective compensation.[81]

---

76. Impregilo S.p.A. v. Islamic Republic of Pakistan, Decision on Jurisdiction, ICSID Case No. ARB/03/3, para. 260 (Apr. 22, 2005) (citations omitted).

77. *Id.* at para. 266.

78. Bayindir Insaat Turizm Ticaret VE Sanay A.S. v. Islamic Republic of Pakistan, Award of the Tribunal, ICSID Case No. ARB/03/29, para. 180 (Aug. 27, 2009).

79. *See also* DOLZER & SCHREUER, *supra* note 32, at 142.

80. August Reinisch, *Expropriation*, *in* MUCHLINSKI, *supra* note 8, at 410. *See also* MATTHEW WEINIGER ET AL., INTERNATIONAL INVESTMENT ARBITRATION §§ 8.116 – 8.118 (2007).

81. Energy Charter Treaty of 1994 [hereinafter ECT], Dec. 17, 1994, 1994 O.J. (L 380) 13.

Investment is, in relevant parts, defined in article 1(6) ECT as:

> (6) 'Investment' means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:
> (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;
> (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;
> (c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;
> (d) Intellectual Property;
> (e) Returns;
> (f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.[82]

Under the ECT, it is thus clear that contractual rights can be the object of expropriation. In addition to the protection provided in investment treaties, there is however a widespread understanding that intangible rights are also under customary international law protected from expropriation measures.[83]

If contractual rights are protected from expropriation, the question arises as how to differentiate between an ordinary breach of contract and a breach of contract which amounts to an expropriation. In a dispute about the amount owed under a contract, the tribunal in *SGS v. Philippines* took the position that refusal of payment of a debt did not itself constitute an expropriation.[84] In essence, the tribunal appeared to be of the opinion that the threshold for an expropriation was only met if the contract was breached by use of a sovereign act, such as a law or a decree, or if the investor could not seek remedy for the breach.

In *Waste Management II,*[85] the tribunal was confronted with the question whether "a persistent and serious breach of a contract by a State organ can constitute expropriation of the right in question, or at least conduct tantamount to expropriation of that right, for the purposes of Article 1110."[86] The tribunal

82. ECT art. 1(6).

83. Reinisch, *supra* note 80, at 411.

84. *SGS v. Philippines*, *supra* note 13, at para. 161 ("In the Tribunal's view, on the material presented by the Claimant no case of expropriation has been raised. Whatever debt the Philippines may owe to SGS still exists; whatever right to interest for late payment SGS had it still has. There has been no law or decree enacted by the Philippines attempting to expropriate or annul the debt, nor any action tantamount to an expropriation. The Tribunal is assured that the limitation period for proceedings to recover the debt before the Philippine courts under Article 12 has not expired. A mere refusal to pay a debt is not an expropriation of property, at least where remedies exist in respect of such a refusal. A fortiori a refusal to pay is not an expropriation where there is an unresolved dispute as to the amount payable.")

85. *Waste Management*, *supra* note 74.

86. *Id.* at para. 165.

found that a distinction must be made between mere failure or refusal to comply with a contract and conduct which crosses the threshold of taking and expropriation.[87] The tribunal noted that "[n]on-compliance by a government with contractual obligations is not the same thing as, or equivalent or tantamount to, an expropriation."[88] "Rather," the tribunal found, "it is necessary to show an effective repudiation of the right, unredressed by any remedies available to the Claimant, which has the effect of preventing its exercise entirely or to a substantial extent."[89] Finally, the tribunal concluded that "[a] failing enterprise is not expropriated just because debts are not paid or other contractual obligations are not fulfilled. The position may be different if the available legal avenues for redress are blocked or are evidently futile in the face of governmental intransigence."[90] In sum, the tribunal seemed to hold that a contractual breach may only then amount to a violation of article 1110 NAFTA if the breach is based on a sovereign act, such as a legislative decree, or if the investor has no possibility to seek redress for the breach before a court.

The tribunal in *Azurix*[91] drew the similar conclusion that "contractual breaches by a State party or one of its instrumentalities would not normally constitute expropriation . . . a State or its instrumentalities may perform a contract badly, but this will not result in a breach of treaty provisions, 'unless it be proved that the state or its emanation has gone beyond its role as a mere party to the contract, and has exercised the specific functions of a sovereign.'"[92]

As can be inferred from the cited case law, tribunals agree that a mere failure to comply with a contractual obligation does not constitute expropriation. However, in all three cases, tribunals shared the view that a breach of contract which was the result of use of sovereign power, such as a decree annulling the contractual rights, may amount to an expropriation. Both tribunals in *Waste Management II* and *SGS v. Philippines* furthermore suggested that an ordinary breach of contract may constitute an expropriation if the investor is unable to

87. *Id.* at para. 174 ("The mere non-performance of a contractual obligation is not to be equated with a taking of property, nor (unless accompanied by other elements) is it tantamount to expropriation. Any private party can fail to perform its contracts, whereas nationalization and expropriation are inherently governmental acts, as is envisaged by the use of the term 'measure' in Article 1110(1). [...] [T]he normal response by an investor faced with a breach of contract by its governmental counter-party (the breach not taking the form of an exercise of governmental prerogative, such as a legislative decree) is to sue in the appropriate court to remedy the breach. It is only where such access is legally or practically foreclosed that the breach could amount to an definitive denial of the right (i.e., the effective taking of the chose in action) and the protection of Article 1110 be called into play.").

88. *Id.* at para. 175.

89. *Id.* at para. 175.

90. *Id.* at para. 177.

91. Azurix v. Argentine Republic, Award, ICSID Case No. ARB/01/12 (July 14, 2006).

92. *Id.* at para. 315 (citing *Consortium R.F.C.C.*, *supra* note 73, at para. 65) (citations omitted).

seek redress before court.

Thus, if a state-owned entity breaches its contractual obligation by using methods unavailable to a regular contracting party, compensation may be owed under the expropriation clause in the investment treaty. It may be noted that the passage cited from *Azurix* explicitly mentions that the expropriation provision also finds application if a state instrumentality breaches its obligation in exercise of its governmental authority.

Compensation under the expropriation clause may also be owed if a state-owned entity merely engages in an ordinary breach of contract, but the investor is unable to seek redress before a court. In this scenario, however, the decisive conduct under international law is not the breach of contract but the denial of justice. Such conduct will be attributed to the state under article 4 and not 5 of the ILC Articles.

F. Umbrella Clause

A typical version of a contemporary umbrella clause is article 10(1) ECT: "Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party."[93] For purposes of this analysis, the umbrella clause raises mainly two questions: first, do the ILC Articles find application to the umbrella clause, and second, which type of obligations does the umbrella clause cover.

1. Applicability of the ILC Articles to the Umbrella Clause

In section III.C, the general applicability of the ILC Articles to investor-state disputes has been discussed. Here, the more specific issue shall be addressed of whether the ILC Articles can be used to determine the state's responsibility under the umbrella clause for the breach of contract committed by one of its entities. The debate can be illustrated with the umbrella clause as formulated in the ECT which reads: "Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party."[94] The relevant question here is whether the "it" in the umbrella clause only refers to the state itself or whether it also includes state-owned entities whose conduct is attributable under article 5 of the ILC Articles. This debate is aptly described as the "it"-problem in legal writing.[95]

Arbitral tribunals gave different answers to this question. In *Impregilo SpA v. Islamic Republic of Pakistan*, the arbitral tribunal was of the opinion that the international law rules of attribution are not applicable when an independent

93. ECT art. 10(1).

94. ECT art. 10(1).

95. *See* Hobér, *supra* note 17, at 567-82.

entity breaches a municipal contract. The tribunal argued that "a clear distinction exists between the responsibility of a State for the conduct of an entity that violates international law (e.g., a breach of Treaty), and the responsibility of a State for the conduct of an entity that breaches a municipal law contract (i.e., Impregilo's Contract Claims)."[96] According to the tribunal, the international law rules on state responsibility and attribution apply to the former, but not to the latter.[97]

A different approach was taken by the tribunal in *Noble Ventures*. The tribunal first established that based on article 5 of the ILC Articles, the acts of the Romanian state-owned entities allegedly in violation of the BIT between the United States and Romania were attributable to Romania.[98] The tribunal then continued to state that where acts of an entity are to be attributed to the state for the purpose of applying an umbrella clause, "breaches of a contract into which the State has entered are capable of constituting a breach of international law by virtue of the breach of the umbrella clause."[99] The tribunal concluded that the agreements entered into by the state-owned entities were concluded on behalf of Romania and were therefore attributable to Romania for the purpose of the umbrella clause.[100] In contrast to the finding in *Impregilo*, the tribunal in *Noble Ventures* did apply the ILC Articles to determine whether the contracts concluded by the state-owned entities were covered by the umbrella clause.

A similar approach was taken in *Eureko*. In this case, the tribunal established in a first step that under the ILC Articles, the contract entered into by the Minister of the State Treasury was attributable to the Republic of Poland.[101] In a second step, the tribunal found that Poland breached its contractual obligations and thereby violated the umbrella clause.[102] It is thus clear that the tribunal applied the ILC Articles in order to assess the scope of the umbrella clause.[103]

In the recent case *AMTO v. Ukraine*[104], the tribunal concluded that the state-owned entity was not a state organ[105] and that the relevant act, the non-payment of contractual debts, did not involve an exercise of sovereign

96. *Impregilo*, *supra* note 76, at para. 210.

97. *Id.*

98. *Noble Ventures*, *supra* note 17, at paras. 70, 80.

99. *Id.* at para. 85.

100. *Id.* at para. 86.

101. The tribunal primarily relies on article 4 of the ILC Articles but mentions article 5 and 8 as well. *Eureko*, *supra* note 28, paras. 127-34.

102. *Id.* at paras. 244-60.

103. *See* Hobér, *supra* note 17, at 580.

104. *AMTO*, *supra* note 46.

105. *Id.* at para. 101.

authority[106] and was not made on the instructions of, or under the direction or control of Ukraine.[107] The non-payment of contractual debts was therefore not attributable to the state under the ILC Articles. When the tribunal thereafter turned to the alleged breach of the umbrella clause of the ECT, it could thus simply note that "in the present case the contractual obligations have been undertaken by a separate legal entity, and so the umbrella clause has no direct application."[108] Since the tribunal found that the conduct in question could already as a general matter not be attributed to Ukraine, it did not have to address the question whether the "it" in the umbrella clause included state-owned entities whose conduct was attributable to the state under article 5 of the ILC Articles.

It is not self-evident whether the ILC Articles can be used to determine the state's responsibility under the umbrella clause for the breach of contract committed by one of its entities. The umbrella clause imposes the duty on the state to observe obligations into which it has entered. As has been shown in section IV.B, the ILC Articles can only be used to attribute conduct which constitutes a breach of an international obligation. The conclusion of the contract itself, however, is not attributable. It could thus be argued that since the undertaking of the obligation cannot be attributed, the attribution of the subsequent breach becomes meaningless.[109] This line of argument would lead to the conclusion that the breach of contract entered into by a state-owned entity is not covered by the umbrella clause. Such reading is however not fully convincing since this rather formalistic approach ignores the rationale both of the umbrella clause and of the ILC Articles. As a result, such construction would allow the state to avoid its responsibility by simply delegating its power to private entities. This, however, is exactly what the ILC Articles seek to prevent.[110]

2. *Obligations Which are Covered by an Umbrella Clause*

In an investor-state dispute, the investor is likely to take the position that an umbrella clause transforms every contractual claim of an investor against the state to a treaty dispute. The respondent state, however, will typically advocate

106. *Id.* at para. 107.

107. *Id.* at para 108.

108. *Id.* at para. 110.

109. *See* Gallus, *supra* note 60, at 165-67.

110. *See* Hobér, *supra* note 17, at 549, 582; see also Wälde, *supra* note 65, at 226 (arriving at the same conclusion: "It may well be that in contract law terms the Impregilo contract was not signed with the government of Pakistan, but with WAPDA. But if WAPDA's conduct can be attributed to Pakistan – on lines that have been applied in *Maffezini v. Spain*, *Salini v. Morocco* (jurisdictional award), and *Nykomb v. Latvia*, - then there could be, on the basis of an umbrella clause, a assurance by Pakistan to respect that commitment.").

a much narrower reading of the clause. The state is at least expected to argue that purely commercial contracts are not covered by the umbrella clause.[111]

Tribunals interpreted the umbrella clause differently. In *SGS v. Pakistan*,[112] the investor argued that the umbrella clause in BIT between Switzerland and Pakistan "says that each time you violate a provision of the contract . . . you also violate norms of international law, you violate the treaty by the same token"[113] and that it "elevate[s] breaches of contract as breaches of a treaty."[114] The tribunal, however, construed the umbrella clause much narrower. It only found that the provision could imply a commitment to appropriately implement the obligation consumed towards the investor and that the provision might be violated if the state impeded the investor to prosecute its claims before an international arbitration tribunal or if the state refused to go to such arbitration at all.[115] This decision was widely criticized. Wälde, for instance, characterized such an interpretation as a soft-law, zero- effectiveness reading.[116]

A broader interpretation was given to the umbrella clause in the Swiss-Philippines BIT, article X(2), in *SGS v. Philippines*.[117] The tribunal found that "if commitments made by the State towards specific investments do involve binding obligations or commitments under the applicable law, it seems entirely consistent with the object and purpose of the BIT to hold that they are incorporated and brought within the framework of the BIT by Article X(2)"[118] and that "Article X(2) makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments."[119] The tribunal was however criticized by some commentators for referring the investor for the contractual claims to the domestic courts of the Philippines because the investment agreement contained an exclusive choice of forum clause. A party, the tribunal reasoned, should not be allowed to rely on a contract as the basis of its claim when the contract itself refers that claim exclusively to another forum.[120]

---

111. Wälde, *supra* note 65, at 213-14.

112. *SGS v. Pakistan*, *supra* note 54.

113. *Id.* at para. 99.

114. *Id.*

115. *Id.* at para. 172.

116. Wälde, *supra* note 65, at 220; see also James Crawford, *Treaty and Contract in Investment Arbitration*, *in* 24 ARBITRATION INT'L 351, 367 (2008) ("The first [position] effectively deprives the umbrella clause of any content, contrary to the principle of *effet utile* and to the apparent intent of the drafters.")

117. *SGS v. Philippines*, *supra* note 13.

118. *Id.* at para. 117.

119. *Id.* at para. 128.

120. *Id.* at para. 154. For critiques, see DOLZER & SCHREUER, *supra* note 32, at 156; and Wälde, *supra* note 65, at 221-22.

In *Eureko*,[121] the tribunal found that in light of the ordinary meaning, the context and the object and purpose of the umbrella clause in the BIT between the United States and Poland, article 3.5, every contractual obligation was protected:

> The plain meaning—the 'ordinary meaning'—of a provision prescribing that a State 'shall observe any obligations it may have entered into 'with regard to certain foreign investments is not obscure. The phrase, 'shall observe' is imperative and categorical. 'Any' obligations is capacious; it means not only obligations of a certain type, but 'any' – that is to say, all – obligations entered into with regard to investments of investors of the other Contracting Party. [. . .] The context of Article 3.5 is a Treaty whose object and purpose is 'the encouragement and reciprocal protection of investment,' a treaty which contains specific provisions designed to accomplish that end, of which Article 3.5 is one. It is a cardinal rule of the interpretation of the treaties that each and every operative clause of a treaty is to be interpreted as meaningful rather than meaningless. It is equally well established in the jurisprudence of international law, particularly that of the Permanent Court of Justice, that treaties, and hence their clauses, are to be interpreted so as to render them effective rather than ineffective.[122]

The tribunal in *Noble Ventures* rendered a decision on the meaning of the umbrella clause in the BIT between the United States and Romania, article II (2)(c), reading: "Each Party shall observe any obligation it may have entered into with regard to investments." The tribunal first held that the wording of this provision was different from the clauses in *SGS v. Pakistan*, *SGS v. Philippines* and *Salini v. Jordan* for which reason article II (2)(c) had to be interpreted regardless of the other cases.[123] The tribunal continued to note that the wording[124] and the purpose[125] of article II (2)(c) supported the interpretation that article II (2)(c) referred to investment contracts. However, since the tribunal found that Romania was not in breach of the contract, it did not need to answer whether the umbrella clause covered every contractual breach and thus left the question open.[126]

---

121. *Eureko*, *supra* note 27.

122. *Id.* at para. 246-48.

123. *Noble Ventures*, *supra* note 17, at para 50.

124. *Id.* at para. 51.

125. *Id.* at para. 52 ("An interpretation to the contrary would deprive the investor of any internationally secured legal remedy in respect of investment contracts that it has entered into with the host State. While it is not the purpose of investment treaties *per se* to remedy such problems, a clause that is readily capable of being interpreted in this way and which would otherwise be deprived of practical applicability is naturally to be understood as protecting investors also with regard to contracts with the host State generally in so far as the contract was entered into with regard to an investment.").

126. *Id.* at para. 61 ("[I]t is unnecessary for the Tribunal to express any definitive conclusion as to whether therefore, despite the consequences of the exceptional nature of umbrella clauses, [...], Art. II(2)(c) of the BIT perfectly assimilates to breach of the BIT *any* breach by the host State of *any* contractual obligation as determined by its municipal law *or* whether the expression 'any obligation',

In *El Paso v. Argentina*,[127] the tribunal explicitly rejected an interpretation according to which every contractual breach would be protected by the umbrella clause. The tribunal rather was of the opinion that a distinction must be made between the state acting as a merchant and the state acting as a sovereign. It concluded that the umbrella clause in the BIT between the United States and Argentina which prescribed that "[e]ach Party shall observe any obligations it may have entered into with regard to investments" "will not extend the Treaty protection for breaches of an ordinary commercial contract entered into by the State or a State-owned entity, but will cover additional investment protections such contractually agreed by the State as a sovereign—such as a stabilization clause—inserted in an investment agreement."[128] It comes as little surprise that the tribunal in *Pan American v. Argentina* rendered an almost identical decision on the scope of the umbrella clause in the BIT between the United States and Argentina since the tribunal comprised two arbitrators who had acted already as arbitrators in *El Paso* and since the decision was rendered only a few months later.[129]

The approach taken by the tribunals in *El Paso* and *Pan American* was not followed in *Siemens v. Argentina*. The umbrella clause in the BIT between Germany and Argentina, article 7(2), read "[e]ach Contracting Party shall observe any other obligation it has assumed with regard to investments by nationals or companies of the other Contracting Party in its territory." The tribunal considered that article 7(2) "has the meaning that its terms express, namely, that failure to meet obligations undertaken by one of the Treaty parties in respect to any particular investment is converted by this clause into a breach of the Treaty."[130] It continued that no distinctions should be made with regard to the nature of the investment agreement.[131]

As can be seen from the collection of decisions on the umbrella clause,

---

despite its apparent breadth, must be understood to be subject to some limitation in the light of the nature and objects of the BIT.").

127. El Paso Energy Int'l Co. (U.S.) v. Argentine Republic, Decision on Jurisdiction, ICSID Case No. ARB/03/15, para. 52 (Apr. 27, 2006).

128. *Id.* at para. 81.

129. Pan Am. Energy LLC (U.S.) v. Argentine Republic, Decision on Preliminary Objections, ICSID Case No. ARB/03/13, para. 109 (July 27, 2006).

130. Siemens AG v. Argentina, Award, ICSID Case No. ARB/02/8, para. 204 (Feb. 6, 2007).

131. *Id.* at para. 206 ("The Tribunal does not subscribe to the view of the Respondent that investment agreements should be distinguished from concession agreements of an administrative nature. Such distinction has no basis in Article 7(2) of the Treaty which refers to 'any obligations', or in the definition of 'investment' in the Treaty. Any agreement related to an investment that qualifies as such under the Treaty would be part of the obligations covered under the umbrella clause. The Tribunal does not find significant, for purposes of the ordinary meaning of this clause, that it does not refer to 'specific' investments. The term 'investment' in the sense of the Treaty, linked as it is to 'any obligations', would cover any binding commitment entered into by Argentina in respect of such investment.")

tribunals have given the umbrella clause a wide range of meaning. On one end of the spectrum is the construction under which the provision is practically without any practical effect, as in *SGS v. Pakistan*. On the other end is the interpretation according to which every breach of a contractual obligation amounts to a violation of the umbrella clause, as in *Eureko*. The cases in between all have in common that the tribunals agreed that the umbrella clause will protect at least certain contractual breaches. While in *Noble Ventures* and *SGS v. Philippines* the tribunals did not spell out where exactly the line should be drawn, if at all, the tribunals in *El Paso* and *Pan American* held that only contracts in which the state acted as a sovereign will fall under the protection of the umbrella clause.

The diversity of opinions can only partially be explained with the different wording of the respective umbrella clause.[132] The tribunals which gave the umbrella clause a more restrictive meaning were mainly motivated by the concern that a far-reaching interpretation would transform even the most minor contract claim into a treaty claim[133] and would render other provisions such as the "fair and equitable treatment" or "full protection and security" clause useless.[134] On the other hand, the tribunals which gave the umbrella clause a broader meaning basically countered these arguments by stating that the umbrella clause "means what i[t] says."[135]

If conduct can be attributed to the state under the functional test of article 5 of the ILC Articles, the threshold established in *El Paso* and *Pan American* according to which only contracts with a sovereign character are covered by the umbrella clause becomes redundant. It is difficult to imagine how a tribunal could find that the state-owned entity acted with governmental authority in its role as a contractual partner to an investment agreement, and then deny that the contract is of governmental nature. Wälde thus rightly points out that "the rules and indicators used to attribute the conduct of such 'entities' to the state are analogous—possibly identical—to the indicators to distinguish mainly commercial from significantly governmental disputes."[136] The relevant question thus only becomes whether one agrees with the tribunal in *SGS v. Pakistan* that the umbrella clause is basically a "soft law" provision. Currently,

---

132. The tribunals in *El Paso* and *Pan American* in fact rejected the argument that umbrella clauses should be interpreted differently based on variations of their drafting: "This tribunal is not convinced that the clauses analysed so far really should receive different interpretations." *El Paso Energy*, *supra* note 127, at para. 70; *Pan American Energy*, *supra* note 129, at para. 99.

133. *El Paso Energy*, *supra* note 127, at para. 82; *Pan Am. Energy*, *supra* note 129, at para. 110.

134. *El Paso Energy*, *supra* note 127, at para. 76; *Pan Am. Energy*, *supra* note 129, at para. 105.

135. *SGS v. Philippines*, *supra* note 13, at para. 119. *See also Siemens v. Argentina*, *supra* note 130, at para. 204, and DOLZER & SCHREUER, *supra* note 32, at 161.

136. Wälde, *supra* note 65, at 229.

this interpretation appears to be quite isolated.

V.
RESPONSIBILITY UNDER THE ECT

Until now, general observations have been made with regard to the responsibility of the state for the breach of contracts entered into by their entities. These insights are insofar very valuable since most investment treaties share the same basic principles.[137] However, investment treaties are not identical and may vary quite substantially with regard to the formulations they employ. Thus, each case must be decided separately based on the applicable investment treaty. This may well be illustrated with the ECT, arguably the most important legal instrument governing international energy markets. The rest of this section will examine the responsibility of a state for contractual breaches of its entities under the regime of the ECT.

The ECT contains all three investment protection provisions mentioned in section IV: Article 10(1) ECT includes both the obligation to provide fair and equitable treatment and the umbrella clause and article 13 ECT provides protection from expropriation. For the purpose of this analysis, article 22 ECT in general and article 22(1) ECT in particular deserve special attention. Article 22 ECT is placed in Part IV of the ECT and has as its heading "State and Privileged Enterprises"; its first paragraph reads as follows:

> Each Contracting Party shall ensure that any state enterprise which it maintains or establishes shall conduct its activities in relation to the sale or provision of goods and services in its Area in a manner consistent with the Contracting Party's obligations under Part III of this Treaty.[138]

When assessing state liability under international law, article 26(1) ECT must also be taken into consideration. This provision stipulates:

> Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.[139]

When an investor sues a state for the breach of contract entered into by a state-owned entity, two specific questions are likely to arise under the ECT: first, the relation between article 22(1) ECT and article 26 ECT, and second, the relation between article 22(1) ECT and the ILC Articles.

---

137. *See* WEINIGER ET AL., *supra* note 80, at para 2.05.

138. ECT art. 22(1).

139. ECT art. 26(1).

A. Relation Between Article 22(1) ECT and Article 26 ECT

An investor who claims that a state-owned entity breached a contractual obligation might base its claim against the state amongst others on article 22(1) ECT. The respondent state could, however, counter that the investor is not entitled to bring claim under article 22(1) ECT since article 26 ECT limits the jurisdiction of the tribunal to alleged breaches of an obligation under Part III of the ECT.

The relation between those two provisions was brought up in *Nykomb v. Latvia*.[140] The investor asserted that the alleged non-compliance of a contractual obligation by a state-owned entity was, inter alia, in breach of the umbrella clause (article 10(1) last sentence ECT) and the obligation to provide fair and equitable treatment (article 10(1) ECT) and constituted measures having an effect equivalent to expropriation (article 13 ECT). The investor reasoned that the failure to comply with the contract had to be attributed to the state under the ILC Articles. However, the investor also relied on article 22 ECT:

> In addition [the attribution] is also operated by operation of Art. 22 (1, 3 and 4) of the Treaty. We believe Art. 22 to be a special attribution norm for the primary obligations contained in part III of the Treaty, but whatever the legal argument about this, customary international law rules are fully sufficient for attribution and Art. 22 (1, 3 and 4) merely reinforce, by direct effect or by an indirect interpretative support, the attribution. Using a very old and in civil law established concept, Art 22 is clearly 'accessory' ('*akzessorisch*', '*accessorisk*'), to the 'primary' obligations in Part III of the Treaty.[141]

The respondent state, on the other hand, advocated a restrictive reading of article 22(1) ECT by referring to the explicit limitation of the arbitration clause in article 26 ECT to alleged breaches of an obligation under Part III. The tribunal took the following position:

> Article 26 further requires that the claims must be based on alleged breaches of the Republic's obligations under Part III of the Treaty.
> As summarized above, the Claimant alleges that all its claims against the Republic are based on breaches of provisions in Articles 10 and 13, which are contained in Part III of the Treaty.
> The Claimant has also referred to parts of Article 22. The Respondent has objected to the Tribunal's jurisdiction on the ground that Article 22 is placed in Part IV of the Treaty. The Arbitral Tribunal notes, however, that the Claimant has stated that the provisions Article 22 referred to do not give rise to any separate claim, but are rather invoked as provisions which clarify the scope and contents of other treaty provisions, among them the provisions in Part III that the Claimant relies on as bases for its claims. The Tribunal finds that the interpretation and application of the relevant Articles of the Treaty, Articles 10 and 13, are best considered under the merits part of this award, and that the references to Article

140. Nykomb Synergetics Technology Holding AB v. Latvia, Award (Arbitration Inst. of the Stockholm Chamber of Commerce, Dec. 16, 2003).

141. *Id.* at para 5.

> 22 cannot as such be dismissed as inadmissible in the form the references are relied on.[142]

In the merits part, the tribunal concluded that "in the circumstances of this case, the Republic must be considered responsible for [the state-owned entity's] actions under the rules of attribution in international law. [. . .] The Tribunal will add that for this finding it is not necessary to rely on the supplemental rule in Article 22(1) of the Treaty contended by the Claimant (see section IV.C.1 below)."[143] The tribunal made thus clear that it based its decision to attribute the conduct of the state-owned entity to Latvia on customary international law and not on article 22(1) ECT. For this reason, the tribunal did not need to clarify the relation between article 22(1) ECT and 26 ECT.

Hobér criticized that the tribunal "could have made a trailblazing decision on Article 22(1) and its role for Article 26(1)," but that it "preferred, however, to avoid such a thorny dispute."[144] Some conclusions, however, can be drawn from the decision. The investor did not claim an independent breach of article 22(1) ECT. Based on this argument, the tribunal affirmed its jurisdiction ("the references to Article 22 cannot as such be dismissed as inadmissible in the form the references are relied on"). It can therefore be noted that while the tribunal might have declined its jurisdiction if the investor had raised a claim for an independent breach of article 22(1) ECT, it appears that it regarded itself, as a general matter, competent to decide a claim in which article 22(1) ECT was solely used to "clarify the scope and contents of other treaty provisions." That the tribunal did ultimately not rest its decision on article 22(1) ECT does not change the fact that the tribunal did not dismiss the claim based on procedural considerations.

This finding is convincing. Given the wording of article 26(1) ECT, a tribunal indeed lacks jurisdiction to hear a claim based on an independent breach of article 22(1) ECT.[145] The tribunal should however affirm its jurisdiction if the investor only relies on article 22(1) ECT in terms of an attribution norm. Such reference to article 22(1) ECT does not impose a new obligation on the state but rather clarifies the scope of the primary obligations contained in Part III. The precise meaning of article 22(1) ECT will be looked at in the next section.

---

142. *Id.* at para 8.

143. *Id.* at para 31.

144. Hobér, *supra* note 17, at 283.

145. It may however be noted that in *Petrobart Limited v. Kyrgyz Republic*, Award, Arb. No. 126/2003, at para. 29 (Arbitration Inst. of the Stockholm Chamber of Commerce, March 29, 2005), the tribunal did not dismiss an independent claim for breach of article 22 ECT based on procedural but on substantive grounds.

B. Relation Between Article 22(1) and the ILC Articles

The ILC Articles have a residual character.[146] This is made clear in article 55 of the ILC Articles:

> *Article 55. Lex specialis*
>
> These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.[147]

Article 55 of the ILC Articles can play an important role when the responsibility of the state for acts of state-owned entities is assessed. In *United Parcel Service of America v. Government of Canada*,[148] the tribunal concluded that article 1502(3)(a)[149] and 1503(2)[150] NAFTA, provisions which address the responsibility of the state for monopolies and state-owned entities, provided for a *lex specialis* regime which precluded the application of article 4 or 5 of the ILC Articles.[151]

An investor could assert that article 22(1) ECT is a special norm dealing with the responsibility of the state for the conduct of its entities whose scope is wider than that of article 5 or 8 of the ILC Articles. The investor could support his argumentation by referring to the broad wording of article 22(1) ECT which speaks of "any" state enterprise and not, for instance, of an "enterprise empowered with governmental authority" as does article 5 of the ILC Articles. In order to strengthen its argument, the investor could compare the wording of this provision with the formulation of article 22(3) ECT which limits the state's

---

146. ILC Articles with commentaries, *supra* note 20, at 139.

147. ILC Articles, art. 55.

148. United Parcel Service v. Canada, NAFTA, Award on the Merits (UNCITRAL 2007).

149. Article 1502(3)(a) NAFTA reads,

> [e]ach Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any privately owned monopoly that it designates and any government monopoly that it maintains or designates:
>
> (a) acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such a monopoly exercises any regulatory, administrative or other governmental authority that the Party has delegated to it in connection with the monopoly good or service, such as the power to grant import or export licenses, approve commercial transactions or impose quotas, fees or other charges...

150. Article 1503(2) NAFTA stipulates,

> [e]ach Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party's obligations under Chapters Eleven (Investment) and Fourteen (Financial Services) wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges.

151. *Id.* at paras. 57-63.

responsibility to entities "with regulatory, administrative or other governmental authority" or with the formulation provided in article 1503(2) NAFTA, which includes the passage "wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it." Moreover, the investor could point out that article 22(1) ECT only refers to state enterprises which the state "maintains or establishes"; the provision does not require that the state enterprise acts "on the instructions of, or under the direct control of" the state as does article 8 of the ILC Articles. Hence, the argument would continue, an investor may bring a claim if a state-owned entity breaches a contractual obligation,[152] provided that such entity is engaged in the sale or provision of goods or services, and irrespective of whether the entity is empowered with governmental authority or acted under the control of the state.

The respondent state might agree with the argument outlined above, insofar as it might also submit that article 22(1) ECT is a special norm which displaces article 5 or 8 of the ILC Articles. However, since article 22(1) ECT was not placed in Part III of the ECT, so the argument continues, the tribunal would have no jurisdiction to hear such a claim. The respondent could therefore argue that under the regime of the ECT, the investor has no actionable claim against the state for an act committed by a state-owned entity that is inconsistent with the ECT. Such line of argument would combine the *lex specialis* reading of article 22(1) ECT with the procedural objection raised by Latvia in *Nykomb*. In the alternative, the state could argue that article 22(1) ECT reduces the responsibility of the state from a "full attribution-standard," as under the displaced ILC Articles, to a "due diligence-standard" because this provision only requires the state to ensure the compliance of its entities.

In *Nykomb*, the tribunal attributed the acts of the Latvian state-owned entity under "the rules of attribution in international law" and added that for its finding, it was not necessary "to rely on the supplemental rule in Article 22(1) of the Treaty contended by the Claimant."[153] Based on this reasoning, it can be concluded that the tribunal in *Nykomb* clearly did not regard article 22 ECT as a *lex specialis* which displaces the general rules of attribution as reflected in the ILC Articles.

In *Petrobart*, the tribunal applied 22(1) ECT without making any reference to the attribution provisions in the ILC Articles.[154] The tribunal did not inquire

152. Such claim could, for instance, be based on the breach of the umbrella clause in conjunction with article 22(1) ECT.

153. *Nykomb*, *supra* note 140, at para. 4.2.

154. *Petrobart*, *supra* note 145, para. 77 ("According to Article 22(1) of the Treaty, each Contracting Party shall ensure that any state enterprise which it maintains or establishes shall conduct its activities in relation to the sale or provision of goods and services in its Area in a manner consistent with the Contracting Party's obligations under Part III of the Treaty. KGM was a state enterprise maintained and established by the Kyrgyz Republic. Article 22(1) thus placed certain obligations on the Republic in regard to KGM's conduct of its business activities. However, the

whether KGM, the state-owned entity, was empowered with governmental authority, but rather appears to have solely relied on the "maintained or established" precondition provided for in article 22(1) ECT when finding that the Kyrgyz Republic bore responsibility for the acts of KGM. It could, however, be argued that the tribunal might have forgone such inquiry because it dismissed the claim anyway. Furthermore, the governmental nature of KGM seemed rather obvious since it was "created for the purpose of rationalization of the use of the state-owned infrastructure for oil, as well as natural and liquid gas product supply."[155]

In *AMTO*, the tribunal applied both the international principles as reflected in the ILC Articles[156] and article 22(1) ECT[157] when assessing whether Ukraine was responsible for the conduct of a state-owned entity. The tribunal did therefore obviously not consider article 22(1) ECT as a special norm which displaces the ILC Articles, but rather regarded article 22(1) ECT as an additional ground on which state responsibility for the conduct of a state-owned entity can be established. The tribunal gave article 22(1) ECT (in conjunction with the umbrella clause) however a quite narrow meaning:

> The Tribunal considers that Article 22 does not go so far as to impose liability on the State in the event that a state-owned legal entity does not discharge its contractual obligations in relation to an 'Investment', as in a subsidiary of the foreign investor. Rather, it imposes on the state a general obligation to 'ensure' that state-owned entities conduct activities which, in general terms of governance, management and organization, make them capable of observing the obligations specified under Part III of the ECT. It does not constitute an obligation of the state to assume liability for any failing of a state-owned legal entity to discharge a commercial debt in a given instance.[158]

Under *AMTO*, a state can thus become responsible for the conduct of a state-owned entity when the preconditions of article 4, 5 or 8 of the ILC Articles are met and, as an alternative legal ground, when the state fails to ensure that the entities it maintains or establishes are provided with a structure ("governance, management and organization") which enables them to fulfill the obligations listed in Part III of the ECT.

Neither in *Nykomb* nor in *AMTO* did the tribunal find that article 22(1) ECT has to be construed as a *lex specialis* which displaces the ILC Articles. The tribunal in *Petrobart* only assessed the state's responsibility under article 22(1) ECT and did not address the attribution provisions in the ILC Articles. Given the lack of any discussion on the relation between the ILC Articles and

---

Arbitral Tribunal cannot find it established that the Republic failed to ensure that KGM conducted its business in a manner consistent with Part III of the Treaty.")

155. *Id.* at para. 5.

156. *AMTO*, *supra* note 46, at paras. 101-102.

157. *Id.* at paras. 111-112.

158. *Id.* at para. 112.

article 22(1) ECT, it seems reasonable, however, to conclude that the *Petrobart* tribunal did not intend to suggest that the latter provision supersedes the ILC Articles.

It would not be convincing to construe article 22(1) ECT as a special norm which displaces the ILC Articles. The ILC Articles strike a delicate balance between opposing interests which should not be easily disturbed. To read that article 22(1) ECT imposes responsibility on the state for the violation of obligations listed in Part III of the ECT of every entity it maintains or establishes (provided that it engages in the sale or provision of goods and services), would give this provision a very powerful meaning which is not sufficiently reflected in its wording.[159] The fact that the provision is placed under the heading "Miscellaneous Provisions" in Part IV further points to a more restrictive reading of article 22(1) ECT since it appears unlikely that a provision with such impact would be placed under such ambiguous and unspecific heading. A narrower reading of article 22(1) ECT is also supported by the conclusion drawn in section V.A: If article 22(1) ECT is not understood as imposing an independent obligation on the state but rather as merely clarifying the scope of the primary obligations placed in Part III, then it appears more appropriate to construe its scope reluctantly.

It is however also not convincing to read article 22(1) ECT as replacing the "full attribution-standard" of the ILC Articles with a mere "due diligence-standard" based on the argument that the state only has to ensure compliance. Such construction of the term "shall ensure" appears doubtful. In treaty language, "shall" usually refers to a hard-law obligation in contrast to the soft-law term "should."[160] Furthermore, the verb "to ensure" rather suggests that a certain conduct is guaranteed.[161] Finally, it may be noted that in view of the purpose of the ECT as an instrument of investment protection, it is not plausible to assume that article 22(1) ECT was introduced with the intention to limit the rights of investors.[162] Hence, in light of the rather ambiguous language of the

159. It can, however, be noted that the effect of such a wide construction would be limited by a restrictive interpretation of the international obligations. If, for instance, the tribunal were to find that only obligations of a governmental nature are covered by the umbrella clause, the state could obviously not be held responsible for contractual breaches of a purely commercial state-owned entity.

160. Thomas Wälde, *Legal Opinion*, *in* 2 TRANSNAT'L DISP. MGMT. 5, para. 87, *available at* http://ita.law.uvic.ca/documents/waeldeopinion.pdf.

161. *Id.*

162. *See id.* at para. 96. A similar argument, though under the regime of NAFTA, was brought forward by the investor in UPS. In its Reply, it argued that "[in] recognition of the unique dangers posed by monopolies and state enterprises to the purposes of NAFTA, Chapter 15 reinforces state responsibility under Chapter 11," and pointed out that "Canada essentially argues that the Chapter 15 provisions, which are designed to enhance state responsibility, actually reduce that responsibility." *UPS v. Canada*, *supra* note 148, Investor's Reply (Merits Phase), Public Version, 15 August 2005, paras. 476, 477.

provision and the overall goal of the ECT, it is unlikely to assume that article 22(1) ECT is meant to replace international customary law as reflected in the ILC Articles.[163]

For the reasons stated above, it appears more convincing to read article 22(1) ECT as merely underlining the responsibility of the state for the conduct of its entities in accordance with the existing international customary law. This view seems to be shared by eminent legal writers. Wälde, for instance, thoroughly analyzed the meaning of article 22(1) ECT in a legal opinion rendered in *Nykomb*:

> The conclusion is therefore that the Treaty does not materially modify established principles of state responsibility for state enterprises, but merely clarifies and confirms that a state can not [sic] escape from liability if it delegates the problematic conduct to a semi-autonomous entity it controls and owns. The Treaty's solution supports a more extensive view of state responsibility for state enterprises rather than a more restrictive view – as is consistent with the overall approach of the Treaty. The principal obligation is contained in part III. Art. 22 (1) makes explicit reference to this—limitative—list of disciplines. Art. 22 is merely a clarificatory attribution provision.[164]

Böckstiegel also seems to agree that article 22(1) ECT does not displace the ILC Articles, but rather, "particularly for the subject of state responsibility, customary international law has always been a primary source of substantive law, and this will continue to be so for the ECT."[165] Böckstiegel supports his statement by referring to article 26(6) ECT which provides that a tribunal "shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law."[166]

The tribunal's finding in *AMTO* is in line with the conclusion reached here insofar as it did not construe article 22(1) ECT as a norm replacing the ILC Articles, but the tribunal went a step further by interpreting article 22(1) ECT as an additional ground on which responsibility of the state can be established based on the conduct of a state-owned entity. Under the interpretation of the tribunal, this additional legal basis has, however, a rather limited scope since article 22(1) ECT merely "imposes on the state a general obligation to 'ensure' that state-owned entities conduct activities which, in general terms of governance, management and organization, make them capable of observing the obligations specified under Part III of the ECT."[167] Such construction

---

163. *See also* the convincing position of the investor in UPS, according to which "[i]n the absence of any expressly stated intention of the Parties to limit their international responsibility, such a limitation should not be presumed" *UPS v. Canada*, Investor's Reply (Merits Phase), *supra* note 148, at para. 478.

164. *Id.* at para. 93.

165. Böckstiegel, *supra* note 24, at 259.

166. *Id.*

167. *AMTO*, *supra* note 46, at para. 112.

resembles article 1503(2) NAFTA where the responsibility of the state for any state enterprise that it maintains or establishes is limited to "regulatory control, administrative supervision or the application of other measures." Despite the rather narrow scope of article 22(1) ECT under such construction, one might still ask whether such interpretation would not give the provision an independent meaning for which the arbitral tribunal had no jurisdiction in view of article 26(1) ECT.

VI.
CONCLUSION

In order to establish the responsibility of a state for the breach of contract committed by one of its entities, two preconditions must be fulfilled. As a first precondition, a state can only be held responsible if the state-owned entity was empowered with governmental authority and if it acted in such capacity when breaching the contract.[168] If an entity exercises both governmental and commercial functions, such as SODIGA in *Maffezini*, it must thus be analyzed in which role it concluded and performed the agreement. Only if it acted in its sovereign capacity can the breach be attributed to the state. As a second precondition, the contractual breach must amount to a violation of international law. Such a violation occurs, for instance, if the breach constitutes a violation of the obligation to provide fair and equitable treatment, to observe obligations entered into by the state or if the breach amounts to an expropriation.

Tribunals seem to agree that a breach of contract may amount to a violation of the fair and equitable treatment provision. It is however not quite clear whether this obligation will only be violated if the breach of contract is the result of the use of sovereign power or of a discriminatory behavior (see *Consortium RFCC*, *Waste Management*, *Impregilo*). There is case law which suggests that the threshold might be lower (see *Mondev*, *SGS v. Philippines*, *Noble Ventures*).

Even less uniformity exists on the question under which circumstances the umbrella clause will be violated (compare, for instance, the discrepancy between *SGS v. Pakistan* and *Eureko*). It is submitted in this article that if it can be established that the entity acted in governmental capacity when it performed the contract and that it failed to honor its contractual obligation, the state can be held responsible for a violation of the umbrella clause.

Tribunals agree however that the mere failure to comply with the contract does not constitute an expropriation. It appears that the state's responsibility under the expropriation clause will only arise if a state-owned entity breaches its

168. Note that this article focuses on article 5 of the ILC Articles. Conduct of a state-owned entity may, alternatively, be attributed if the state-owned entity constitutes a state organ in the sense of article 4 of the ILC Articles or if the entity acted on the instructions of, or under the direction or control of, the state in the sense of article 8 of the ILC Articles.

contractual obligation by using methods unavailable to a regular contracting party or if the investor is unable to seek redress before a court (see *SGS v. Philippines*, *Waste Management II*, *Azurix*).

Investment treaties may include provisions which explicitly address the responsibility of the state for conduct of its entities. Based on observations made with regard to the ECT, it is suggested here that if these provisions do not employ clear and unambiguous language, they should not be construed as displacing the international customary law on attribution as reflected in the ILC Articles.

Berkeley Journal of International Law

Volume 28 | Issue 1 Article 6

2010

Square Peg in a Round Hole: Government Contractor Battlefield Tort Liability and the Political Question Doctrine

Chris Jenks

Square Peg in a Round Hole: Government Contractor Battlefield Tort Liability and the Political Question Doctrine

Chris Jenks*

I.
INTRODUCTION

As the United States military's involvement in Iraq and Afghanistan enters its seventh and ninth year respectively, there are as many or possibly more contract employees than uniformed service members in the two combat theatres.[1] This reliance on contractors is nothing new; George Washington's

---

* Lieutenant Colonel, U.S. Army Judge Advocate General's (JAG) Corps. LL.M. with distinction, Georgetown University Law School (2009); LL.M., The Judge Advocate General's Legal Center and School (2006); J.D., University of Arizona (2001); B.S., United States Military Academy (1992). Currently assigned as the Chief of the International Law Branch, the Office of Tthe Judge Advocate General, Rosslyn, VA. Relevant previous assignments include Deputy Chief, Senior Litigation Attorney, and Tort Litigation Attorney, U.S. Army Litigation Division, Arlington, VA (2006-2008) and General Counsel and Chief Prosecuting Attorney, Operation Iraqi Freedom, Mosul, Iraq (2004-2005); Member of the Bars of Arizona and the United States Supreme Court. The views expressed in this Article are those of the author and not the JAG Corps, the United States Army, or the Department of Defense. Special thanks to Colonel (retired) Rich Hatch, former Chief of the Army's Litigation Division, and Professor Jim Schoettler, Georgetown University Law School, for their assistance.

1. Reinforcing the adage that "there are lies, damn lies, and statistics," statistics on both contract and military personnel involved in the conflicts in Iraq and Afghanistan widely vary. *See* MARK TWAIN, CHAPTERS FROM MY AUTOBIOGRAPHY 186 (1907), *available at* http://www.gutenberg.org/ebooks/19987. While Twain attributes the phrase to Disraeli, the exact origins are unclear. The Congressional Budget Office reported in August 2008 that "as of early 2008, at least 190,000 contractor personnel, including subcontractors, were working on U.S. funded contracts in the Iraq theatre." CONG. BUDGET OFFICE, CONTRACTORS' SUPPORT OF U.S. OPERATIONS IN IRAQ, 1 (2008) [hereinafter CBO]. In October 2008, the Government Accounting Office reported that as of January 2008, the Department of Defense alone employed 200,111 contract personnel in Iraq and Afghanistan. GOV'T ACCOUNTABILITY OFFICE, GAO-09-19, CONTINGENCY CONTRACTING DOD, STATE AND USAID CONTRACTS AND CONTRACTOR PERSONNEL IN IRAQ AND AFGHANISTAN, 25 (2008) [hereinafter GAO]. For discussion of the variations in reported military personnel numbers and the different methods used to calculate troop strength *see* CONG. RESEARCH SERVICE, RL33110, THE COST OF IRAQ, AFGHANISTAN AND OTHER

Continental Army utilized contractors.[2] Yet, while not new, the current utilization of contractors is both quantitatively[3] and qualitatively[4] different than in previous military operations. In odd contrast to the seeming embrace of contractors, according to a November 2009 report, the U.S. Government does not know how many contractors it employs in Iraq and Afghanistan.[5] Possibly even more striking, the U.S. Government is not tracking the number of contract employees wounded or killed in Iraq and Afghanistan.[6]

This incongruous combination of necessity and apathy arguably defines, at least in part, the relationship between the United States government and the contractors it employs. It also serves as backdrop for a host of civil lawsuits filed against those contractors stemming from work done at the behest of the U.S. government.[7] These lawsuits stem from alleged wrongs committed in both Iraq and Afghanistan, and have been filed by plaintiffs ranging from former detainees[8] suing contract interrogators and interpreters, to contract employees[9]

GLOBAL WAR ON TERROR OPERATIONS SINCE 9/11, 36-37 (2008) [hereinafter CRS].

2. *See* Stephen M. Blizzard & Marsha Kwolek, *Increasing Reliance of Contractors on the Battlefield: How Do We Keep From Crossing the Line?*, A.F. J. LOGISTICS 142,144-145 (2004) (noting that "General George Washington's Continental Army relied on civilians for transportation, carpentry, engineering, food, and medical services").

3. In terms of the quantitative difference, the Congressional Budget Office reports that the current ratio of contractor to military personnel in Iraq is "at least 2.5 times higher than the ratio during any other major U.S. conflict...." CBO, *supra* note 1, at 1. The budget office report provides an informative table which lists an estimated ratio of contractor to military personnel. *Id.* at 13 (citing William W. Epley, *Civilian Support of Field Armies*, 22 ARMY LOGISTICIAN 30 (1990). *See also* Steven Zamparelli, *Contractors on the Battlefield: What Have We Signed Up For?*, 23 A.F. J. LOGISTICS 11 (1999) [hereinafter Zamparelli]; DEP'T OF DEFENSE, DEPARTMENT OF DEFENSE *REPORT ON DOD PROGRAM FOR PLANNING, MANAGING, AND ACCOUNTING FOR CONTRACTOR SERVICES AND CONTRACTOR PERSONNEL DURING CONTINGENCY OPERATIONS* 12 (2007).

4. In terms of the qualitative difference, see JOINT CHIEFS OF STAFF, JOINT PUB. 4-0, DOCTRINE FOR LOGISTICAL SUPPORT OF JOINT OPERATIONS V-1 (2008) [hereinafter JOINT PUB. 4-0] (describing DoD's increasing reliance on contractors to perform a wide range of functions and tasks); U.S. DEP'T OF ARMY, FIELD MANUAL 3-100.21, CONTRACTORS ON THE BATTLEFIELD 1-2 (2003) ("When considering contractor support, it should be understood that it is more than just logistics; it spans the spectrum of combat support (CS) and combat service support (CSS) functions.").

5. GOV'T ACCOUNTABILITY OFFICE, GAO-10-187 CONTINGENCY CONTRACTING FURTHER IMPROVEMENTS NEEDED IN AGENCY TRACKING OF CONTRACTOR PERSONNEL AND CONTRACTS IN IRAQ AND AFGHANISTAN, (2009) [hereinafter GAO contractor tracking] (describing the reporting by USAID, DoS and DoD of contractors in Iraq and Afghanistan as incomplete and unreliable).

6. GAO, *supra* note 1, at 27-28, 33, and 38. *See* Steven Schooner, *Remember Them, Too: Don't Contractors Count When We Calculate The Costs of War?*, WASH. POST, May 25, 2009, at A21.

7. *See generally*, Cedric Ryngaert, *Litigating Abuses Committed by Private Military Companies*, 19 EUR. J. INT'L L. 1035 (2008).

8. Suits involving former detainees claiming to have been tortured by contract employees while detained in Iraq include: Ibrahim v. Titan & CACI (*Ibrahim I*), 391 F. Supp. 2d 10 (D.D.C. 2005); Saleh v. Titan & CACI, 436 F. Supp 2d 55 (D.D.C. 2006) ; Al-Quraishi v. Nakhla, 8:08-cv-01696-PJM (D. Md. June 30, 2008) (PACER); and Al-Shimari v. CACI, 1:08-cv-00827-GBL-JFA

suing contractors following insurgent attacks, to U.S. service members[10] suing contractors after vehicle and airplane crashes. The majority of the lawsuits involve tort claims which on their face do not seem to implicate complicated constitutional issues.[11] But, in at least seventeen cases brought against military contractors thus far, the defendants have raised just such issues by asserting the political question doctrine as a defense.[12]

(E.D. Va. June 30, 2008) (PACER).

9. Contractor employee suits include: Smith v. Halliburton, No. 06-0462, 2006 WL 2521326 (S.D. Tex. Aug. 30, 2006) (estate of a contract employee filed suit after a suicide bomber detonated a suicide vest in a Kellogg, Brown & Root (KBR) operated dining facility on a U.S. military base in Iraq); Woodson v. Halliburton, No. H-06-2107, 2006 WL 2796228 (S.D. Tex. Sept. 28, 2006) (suit filed by former KBR employee stemming from an insurgent act on a supply convoy in which plaintiff was a driver); Fischer v. Halliburton, 454 F. Supp. 2d 637 (S.D. Tex. 2005); Lane v. Halliburton, No. 06-1971, 2006 WL 2796249 (S.D. Tex. Sept. 26, 2006); and Smith-Idol v. Halliburton, No. 06-1168, 2006 WL 2927685 (S.D. Tex. Oct. 11, 2006) (plaintiffs or their family members were among 18 drivers killed, missing, or injured following an April 2004 attack on a fuel convoy in Iraq).

10. Service member suits include: McMahon v. Presidential Airways, 502 F.3d 1331 (9th Cir. 2007) (suit by the estates of three U.S. service members killed when the contractor-operated plane in which they were passengers crashed during a November 2004 flight in Afghanistan); Harris v. KBR, 2:08-cv-00563 (W.D. Penn. Apr. 22, 2008) (PACER) (wrongful death suit by the survivors of a U.S. Army Staff Sergeant electrocuted in January 2008 while showering at a facility in Iraq for which KBR was allegedly responsible for maintaining); Baragona v. Kuwait Gulf Link Transport Co., No.1:05-cv-1267-WSD, 2007 WL 4125734 (N.D. Ga. Nov. 5, 2007) (wrongful death suit filed by the survivors of a U.S. Army officer killed when his military vehicle was struck by a Kuwaiti Gulf Link Transport Company vehicle in May 2005); Bucklin v. Halliburton, 4:07-cv-01522 (S.D. Tex. May 7, 2007) (PACER) (wrongful death suit by the estate of Army Corporal killed in May 2005 by a cable being used to pull a stuck KBR vehicle); Monroe v. Erinys, 4:07-cv-03528 (S.D. Tex. Oct. 10, 2007) (PACER) (wrongful death suit by the father of a U.S. Army NCO killed when his vehicle was struck by one driven by a British private security company); Carmichael v. KBR (*Carmichael I*), 450 F. Supp. 2d 1373 (N.D. Ala. 2006) (guardian of U.S. Army Sergeant filed suit for injuries he suffered while performing security duty for a KBR fuel tanker which overturned); Lessin v. KBR, CIVA-H-05-01853, 2006 WL 3940556 (S.D. Tex. June 12, 2006) (suit by U.S. Army soldier injured by a KBR vehicle); Potts v. DynCorp Int'l, 465 F. Supp. 2d 1245 (M.D. Ala. 2006) (suit by U.S. Army Soldier injured when a vehicle driven a contractor flipped over); Whitaker v. KBR, 444 F. Supp. 2d 1277 (M.D. Ga. 2006) (suit by family of Army Soldier who fell into and drowned in the Tigris river in Iraq in April 2004 following a traffic accident involving KBR); and Webster v. Halliburton, 4:05-cv-03030 (S.D. Tex. Aug. 26, 2005) (PACER) (wrongful death suit by the estate of Army non-commissioned officer killed when his military vehicles was struck by a KBR vehicle in Iraq). *See also* Ben Davidson, *Liability on the Battlefield: Adjudicating Tort Suits Brought by Soldiers Against Military Contractors*, 37 PUB. CONT. L.J. 803 (2008).

11. Which is not to suggest that a constitutional issue is *per se* required for the application of the political question doctrine. Indeed, as Professor Henkin states, "presumably, courts may, or must abstain on a 'political question' in any kind of case, not only where constitutional issues are raised." LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 145 (2nd ed. 1996).

12. The seventeen cases are: *Al-Quraishi,* 8:08-cv-01696-PJM (PACER); *Al-Shimari*, 1:08-cv-00827-GBL-JFA (PACER); *Saleh*, 436 F. Supp 2d 55; *Ibrahim I*, 391 F. Supp. 2d 10; *Smith*, 2006 WL 2521326; *Fischer*, 454 F. Supp. 2d 637; *Lane*, 2006 WL 2396249; *Smith-Idol*, 2006 WL 2927685; *Woodson*, 2006 WL 2796228; *McMahon*, 502 F.3d 1331; *Harris*, 2:08-cv-00563 (PACER); *Bucklin*, 4:07-cv-01522 (PACER); *Carmichael I*, 450 F. Supp. 2d 1373; *Lessin*, 2006 WL 3940556; *Potts*, 465 F. Supp. 2d 1245; *Whitaker*, 444 F. Supp. 2d 1277; and *Webster*, 4:05-cv-03030

The doctrine, which traces back to *Marbury v. Madison*,[13] "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the executive branch."[14] Despite the political question doctrine's longevity, over time, the doctrine has been subject to various interpretations and been inconsistently applied, yielding more confusion than clarity.[15] There have even been periods in which commentators questioned whether the doctrine still existed.[16]

While the present use of the doctrine proves its existence, its confused application in the contractor cases analyzed in this Article raises questions concerning the appropriateness of applying the doctrine in battlefield-related contractor tort litigation. The fundamental aim of the political question doctrine is to address whether the judiciary should review *government* action or decisions. And yet, private contractors are the ones asserting the defense in cases where the government is not a named party and has yet to intervene or submit an amicus brief.[17] Seen in this light, the confused application of the doctrine to the contractor cases analyzed in this Article, and the correspondingly inconsistent decisions which follow are to be expected. But, more importantly, the application of the political question doctrine in these cases raises fundamental questions about the appropriateness of applying the doctrine in battlefield-related contractor tort litigation altogether—questions this Article seeks to address.

This Article examines the use of the political question doctrine as a defense

---

(PACER).

13. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

14. Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 230 (1986).

15. Justice Brennan, author of the seminal *Baker v. Carr* opinion, acknowledged that the political question doctrine was comprised of "attributes which, in various settings, diverge, combine, appear, and disappear in seeming disorderliness." Baker v. Carr, 369 U.S. 186, 210 (1962).

16. *See, e.g.*, Louis Henkin, *Is There a Political Question Doctrine?*, 85 YALE L.J. 597 (1976); Linda Sandstrom Simard, *Standing Alone: Do We Still Need a Political Question Doctrine?*, 100 DICK. L. REV. 303 (1996). *But see* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 142, 143-44 (2nd ed. 1994) (questioning the existence of the political question doctrine but ultimately acknowledging its existence while labeling it "the most confusing of the justiciability doctrines" and critiquing the doctrine's name and the varying definitions assigned it by the Supreme Court, as well as "the Court's failure to articulate useful criteria for deciding what subject matter presents a nonjusticiable political question"); CHARLES WRIGHT, THE LAW OF FEDERAL COURTS 74-75 (4th ed. 1983) (claiming that "[n]o branch of the law of justiciability is in such disarray as the doctrine of the 'political question,'" that "there is no workable definition of characteristics that distinguish political questions from justiciable questions," and the doctrine is "more amenable to description by infinite itemization than by generalization").

17. *See* Joanna E. Herman & Jae Hong Lee, *The Political Question Doctrine: A Potential Weapon For Military Contractors*, SKYWRITINGS Spring 2008 at 18 (emphasis added); David Kasanow & Lisa M. Norrett, *Defending Battlefield Contractors in Tort Suits: A Survey of Available Legal Theories* (Jan. 24 2008) (unpublished practitioner's note, on file with author).

in tort litigation against government contractors stemming from the conflicts in Iraq and Afghanistan. In the next section, the origins and evolution of the political question doctrine are reviewed as well as the difficulties that result when the doctrine is applied to the military. Section three explores, through a series of case comparisons, how those difficulties manifest themselves in the varied analyses and outcomes in recent contractor litigation. The fourth section considers the government's role in creating some of the confusion involved in wartime contractor tort liability jurisprudence where it has considered the political question doctrine and explores the ramifications of the government's conspicuous silence concerning the same. In the final section, confusion from the inconsistent application of the political question doctrine is assessed and a methodology is proposed in the hopes of bringing greater clarity and consistency to future rulings. Ultimately, the Article concludes that, absent changes in the government's attitude toward the litigation and a more rigorous analytical approach by the judiciary, the confusion surrounding the political question doctrine and the inconsistency of its application will only increase.

II.
THE POLITICAL QUESTION DOCTRINE

A. Origin and Evolution

The political question doctrine dates back to 1803 and Chief Justice John Marshall's defining opinion in *Marbury v. Madison*, which established the doctrine of constitutional judicial review in the United States.[18] Chief Justice Marshall explained that it is "emphatically the province and duty of the judicial department to say what the law is."[19] In *Marbury*, Justice Marshall outlined the delicate balance "that for every violation of a vested right, there should be a legal remedy" but that "not all disputes are susceptible to judicial resolution."[20] Stated more plainly, Marshall explained that "[q]uestions, in their nature political, or which are by the constitution and laws, submitted to the executive, can never be made in this court."[21] Under this construct, some *government* actions are political acts that are not examinable in a court of justice.[22] To what extent and under what circumstances the conduct of military contractors equates to or implicates the government action Marshall spoke of is a central issue in the present day litigation.

In the early twentieth century, the Supreme Court reframed Marshall's

18. *See Marbury*, 5 U.S. (1 Cranch) at 137.
19. *Id.* at 177.
20. Curtis A. Bradley & Jack L. Goldsmith, FOREIGN RELATIONS LAW 47 (2006).
21. *Marbury*, 5 U.S. (1 Cranch) at 165-166.
22. *Id.* at 164-165 (emphasis added).

formulation in *Oetjen v. Cent. Leather Co.*, stating that "[t]he conduct of the foreign relations of our government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." [23] Yet, in so doing, the Court failed to define the parameters of government "conduct." By 1950, the Court considered the limitations on judicial review of the executive branch deploying the military, as raised in *Johnson v. Eisentrager*.[24] Here, the Court provided some insight on at least this realm of government conduct. The Court held that "[c]ertainly it is not the function of the Judiciary to entertain private litigation – even by a citizen—which challenges the legality, the wisdom, the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region."

The Court signaled its willingness to reexamine what sorts of government action were appropriate subjects of judicial review in 1961 in a case that legal scholars consider the cornerstone of modern interpretation and application of the political question doctrine,[25] *Baker v. Carr*.[26] In *Baker*, the Court reaffirmed Marshall's 1806 characterization of itself as "the ultimate interpreter of the Constitution" and again assigned itself responsibility for the "delicate exercise of constitutional interpretation."[27] The Court explained that this amounted to "[d]eciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed."[28]

To the already complex task of determining where, and to what degree, the Constitution has committed a matter to another branch of government, the Court outlined an additional challenge that the political doctrine question analysis

23. Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918).

24. *Eisentrager* addressed whether German nationals captured and tried by military commission in China by the U.S. Army after the end of World War II were entitled to file a writ of *habeas corpus* petition in a U.S. court. While the case focused on the applicability of the writ, one of the German national petitioners' arguments was that the presence of the U.S. military in China was unconstitutional. 339 U.S. 763, 789 (1950).

25. *See* J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97, 105-06 (1988) (discussing the dominance of *Baker v. Carr* in judicial analysis of the political question doctrine in federal courts); Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*. 80 N.C. L. REV. 1203, 1206-13 (2001) (analyzing the "doctrinalization" of the political question doctrine through the lens of the doctrine's lead case, Baker v. Carr); WEST'S ENCYCLOPEDIA OF AMERICAN LAW 450 (2nd ed. 2005) (referring to *Baker v. Carr* as a "landmark" case due to its influence over redistricting issues, but also because it created the analytical framework that continues to govern political question disputes).

26. *Baker* dealt with an equal protection claim stemming from a state legislative apportionment system for state representatives. 369 U.S. 186 (1962).

27. *Id.* at 211.

28. *Id.*

poses. The Court stated that "not only does resolution of [foreign relations] issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand a single-voiced statement of the Government's views."[29] While the Court insisted that the judiciary retained a role, on a pragmatic level the Court failed to define the parameters of that role. In turning away from the idea, espoused by *Oetjen*[30] and *Eisentrager*,[31] that judicial review of foreign policy matters was inappropriate, the Court in *Baker* announced that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[32]

In *Baker*, the Supreme Court acknowledged that "[m]uch confusion results from the capacity of the political question label to obscure the need for case-by-case inquiry"[33] while stressing that determining whether or not the issues raised by a case fell beyond judicial cognizance nevertheless required a discriminating case-specific analysis.[34] In *Baker*, the Court attempted to define the parameters for cases and controversies the judiciary would, and would not, examine.[35] The Court listed "several formulations," which "vary slightly according to the setting in which the questions that arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers."[36] The *Baker* formulations are:

> [1] [A] textually demonstrable constitutional commitment of the issues to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for non judicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestionable adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[37]

---

29. *Id.*

30. *See Oetjen*, 246 U.S. at 297.

31. *See* Johnson v. Eisentrager, 339 U.S. 763 (1950).

32. *Baker*, 369 U.S. at 211.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 217.

37. *Id.* More recently, the Court described the six *Baker* "formulations" as "six independent tests." Vieth v. Jubelirer, 541 U.S. 267, 277 (2004). Accordingly, hereinafter they are referred to as tests. Additionally, while the *Baker* Court merely listed the tests, the *Vieth* Court, while maintaining the same order as in *Baker*, numbered the tests and explained that "[t]hese tests are probably listed in descending order of both importance and certainty." *Id.* at 278. This approach was arguably the logical result of how the Court had previously considered and weighted the tests. For example, in *Powell v. McCormack*, the Court conducted an extensive analysis of the first test and then consolidated the analysis of the remaining five tests in two paragraphs. 395 U.S. 486, 548-549

The *Baker* framework envisioned "a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action."[38] Whether or not one of these tests is "inextricable" from the case determines whether dismissal on the basis of the political question doctrine is appropriate. The plain meaning of inextricable refers to whether the elements of a claim can or cannot be disentangled from issues committed to or decision making by one of the branches of government. As discussed later, each side has inherent incentives to either avoid or implicate such issues or decision making. It follows that this should reinforce the importance of the government weighing in on whether a political question is involved, but the case history demonstrates that this has not come to pass.

The Court discarded the possibility of resolving political question cases through "semantic cataloguing,"[39] yet it reached its decision in *Baker* by "analyz[ing] representative cases and infer[ring] from them the analytical threads that make up the political question doctrine."[40] However, notwithstanding the Court's efforts to articulate a distinction, the difference between the prohibited semantic cataloging and a permissible inference from analytical threads is illusory. Indeed a judicial inquiry to identify representative cases is cataloging, "semantic" or otherwise. For the Supreme Court to caution lower courts from relying on cataloging while encouraging its functional equivalent, styled as "analytical threads," creates a false, confusing, and unhelpful distinction. Given this inherent contradiction in *Baker,* it should not come as a surprise that, in subsequent cases, the Court found analytical threads that do lend themselves to cataloguing, further confusing the judiciary in the process.[41]

Although most cases involving foreign affairs defy clean application of the *Baker* tests, *Baker* remains the starting point for assessing the application of the political question doctrine to the executive branch's employment of the military.[42] A review of the political question doctrine as applied in *Gilligan v.*

(1969). Notwithstanding the number and labeling of the tests as independent, discrete analysis of an individual test seems unlikely. *See* Nixon v. United States, 506 U.S. 224, 228-29 (1993) (explaining the connection between what is now referred to as the first and second *Baker* tests).

38. *Baker*, 369 U.S. at 211-212.

39. *Id.*

40. *Id.* at 211.

41. *See, e.g.*, Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 230 (1986) (determining that interpretation of statutes involving foreign affairs is a justiciability question); Goldwater v. Carter, 444 U.S. 996 (1979) (concluding that a challenge to the President's unilateral termination of a treaty presents a political question).

42. *See* Gilligan v. Morgan, 413 U.S. 1, 11 (1973) (stating that just because [the political question] doctrine has been held inapplicable to certain carefully delineated situations, it is no reason

Morgan, a case involving military functions, sets the stage for understanding the increased difficulty and resulting confusion when the doctrine is applied to cases involving military functions contracted out by the government in Iraq and Afghanistan.

B. Gilligan v. Morgan: Political Question Doctrine Applied to Military Functions

There is little in the way of a discernible pattern to how courts at all levels interpret and apply the *Baker* tests. The Supreme Court case *Gilligan v. Morgan* illustrates the difficulties that political question cases dealing with the military present. *Gilligan* stemmed from an incident at Kent State University where members of the Ohio National Guard wounded and killed several students in 1970.[43] The Court in *Gilligan* reviewed a challenge to military readiness decisions made by the Ohio National Guard.[44]

Initially, the district court dismissed the case for failing to state a claim upon which relief could be granted, but the U.S. Court of Appeals for the Sixth Circuit reversed and remanded the case to the district court to answer the question of whether there was a pattern of training, weaponry and/or orders within the Ohio National Guard which made the use of lethal force at Kent State inevitable.[45] The Supreme Court, in turn, addressed the appropriateness of judicial involvement with the issues underlying both this question and the request for injunctive relief which sought to limit the Governor's use of the National Guard.[46] The Supreme Court cited with approval to Judge Calebrezzi's dissent from the Sixth Circuit's ruling.[47] In his dissent, Judge Calebrezzi explained how the Baker tests precluded judicial regulation of National Guard training and equipment:

> I believe that the congressional and executive authority to prescribe and regulate the training and weaponry of the National Guard, as set forth above, *clearly precludes any form of judicial regulation of the same matters*. I can envision no form of judicial relief which, if directed at the training and weaponry of the National Guard, would not involve a serious conflict with a "'coordinate political department; . . . a lack of judicially discoverable and manageable standards for resolving [the question]; . . . the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; . . . the impossibility of a court's undertaking independent resolution without expressing lack of the

for federal courts to assume its demise"); Davis v. Bandemer, 478 U.S. 109, 123-27 (1986) (reviewing the Baker formulations and reaffirming the Court's commitment to *Baker* while "declining Justice O'Connor's implicit invitation to rethink [the *Baker*] approach").

43. *See Gilligan*, 413 U.S. at 11.

44. *Id.* at 10.

45. *Id.*

46. *See id.*

47. *Id.* at 8.

> respect due coordinate branches of government; . . . an unusual need for unquestioning adherence to a political decision already made; [and] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.' . . ." *Any such relief*, whether it prescribed standards of training and weaponry or simply ordered compliance with the standards set by Congress and/or the Executive, *would necessarily draw the courts into a nonjusticiable political question, over which we have no jurisdiction.*[48]

Based on this reasoning, one possible interpretation of *Gilligan* is that it provides guidance on the parameters and limitations of judicial review of the military.[49] Yet another interpretation of *Gilligan*, suggested by the Court in a later case, makes determinant whether the plaintiffs were requesting injunctive relief from ongoing or future conduct or damages for injury arising from past conduct. Where the plaintiffs sought injunctive relief, including in *Gilligan*, the Court heard the case and applied the political question doctrine, reversing the Sixth Circuit for not dismissing *Gilligan*.[50] In contrast, a year later, the Supreme Court again reversed the Sixth Circuit, this time in *Scheuer*, for dismissing a damages suit against the governor of Ohio and the head of the Ohio National Guard arising out of the Kent State shootings.[51] In *Gilligan*, the court noted that

> [T]his is not a case in which damages are sought for injuries sustained during the tragic occurrence at Kent State. Nor is it an action seeking a restraining order against some specified and imminently threatened unlawful action. Rather, it is a broad call on judicial power to assume continuing regulatory jurisdiction over the activities of the Ohio National Guard. This far-reaching demand for relief presents important questions of justiciability.[52]

One means of reconciling these decisions is to assert that the Court was

---

48. *Id.* (emphasis in original).

49. In the Court's words,

> "[i]t would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability. It is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system; the majority opinion of the Court of Appeals failed to give appropriate weight to this separation of powers."

Id. at 10-11 (emphasis in original).

50. *Id.* at 5.

51. Scheuer v. Rhodes, 416 U.S. 232 (1974), *abrogated by* Harlow v. Fitzgerald, 457 U.S. 800 (1982), but on other grounds.

52. *Gilligan*, 413 U.S. at 5.

more inclined to invoke the political question doctrine in *Gilligan* because injunctive relief against the military would require greater judicial intrusion into essential military functions. Yet, even where the requested relief is limited to monetary damages, as in *Scheuer*, the district court would seem to be on almost equally unsteady footing in hearing a case to recover damages for injuries suffered stemming from scenarios implicating the military. In either case, the judiciary would deprive the executive and legislative branches of the "ultimate authority" in areas textually committed to those branches by the Constitution.

A court focusing on the distinction between injunctive and monetary relief established in *Gilligan* and *Scheuer* would seem to be following the edict in *Baker* "to analyze representative cases and to infer from them the analytical threads" as a way to determine the applicability of the political question doctrine.[53] However, this arguably false, or at least superficial, dichotomy between forms of relief only serves to mask the difficulties courts face in trying to identify real analytical threads from cases involving military functions.

These difficulties are readily apparent in recent litigation involving U.S. government contractors working in Iraq and Afghanistan. Understandably, courts seem to struggle with the applicability of the political question doctrine to the expanding role of contractors in battlefield or quasi-battlefield environments. Specifically, courts vary in their ability to reduce the cases down to the specific military decision, or decisions the defendant contractor claims warrant the application of the political question doctrine and whether those military decisions implicate at least a cause, if not the proximate cause, of the plaintiff's tort case. Before discussing a proposed methodology which may bring some clarity and consistency to future cases, the disparate results currently witnessed in the courts and stemming from variations in the level and type of judicial analysis warrant discussion, as does the government's role in muddying the doctrinal waters.

III.
CURRENT CONTRACTOR LITIGATION INVOLVING POLITICAL QUESTION

A. Contract Interrogators vs. Contractor Interpreters[54]

1. Saleh and Ibrahim

Variations in the level and type of judicial analysis exist in two related and eventually consolidated cases, *Saleh* and *Ibrahim*. These cases typify suits filed by former Iraqi detainees against contract interrogators and interpreters who, in

53. *Baker*, 369 U.S. at 211 (1962).

54. In addition to the two cases chosen as examples, the reader may also wish to consider Al-Shimari v. CACI, No. No. 08-0827, 2009 U.S. Dist. LEXIS 29995, (E.D.Va. Mar. 18, 2009) and Al-Quraishi v. Nakhla, 8:08-cv-01696-PJM (D. Md. June 30, 2008) (PACER).

their defense, have turned to the political question doctrine.[55] In both cases, the plaintiffs allege that CACI, a government contractor that provided interrogators, and Titan, a government contractor that provided interpreters, unlawfully tortured the plaintiffs while they were detained in Iraq.[56] The real significance of the cases is not the political question doctrine analysis the courts conducted but that which they failed to do[57] in not considering the relationship of interrogation as a uniquely governmental function to the textual commitment prong of the *Baker* tests.

The two cases are also emblematic of the enhanced difficulty in applying the political question doctrine to contractors providing wartime related services. Notably, the courts are often called upon to evaluate the federal government's interests, here the military intelligence derived from battlefield interrogations and possible conflicts with those interests, despite receiving minimal input from the government itself. Indeed, minimal input overstates the U.S. Government's role in the interrogator and contractor litigation thus far. As is discussed more fully in Section IV of this Article, although these cases are directly related to the U.S. military's ability to function in Iraq and Afghanistan, the U.S. Government has yet to file a single amicus brief in them.

Ultimately, different levels of the court system dismissed the *Saleh* and *Ibrahim* suits.[58] The analysis used by the district court in dismissing the suit against the contract interpreters but not the contract interrogators is striking. The court determined that "treatment of prisoners during wartime undoubtedly implicates uniquely federal interests."[59] Nonetheless, the court dismissed the suit against the interpreters but not the interrogators even though the nexus to treatment of prisoners is obviously much stronger as concerns the latter.

In terms of the *Baker* analysis, interpreting may not be a function that immediately suggests an issue committed to the executive branch. However, the

---

55. *See* Saleh v. Titan & CACI, 436 F. Supp. 2d 55 (D.D.C. 2006); and Ibrahim v. Titan & CACI (*Ibrahim I*), 391 F. Supp. 2d 10 (D.D.C. 2005).

56. *See Saleh*, 436 F. Supp. 2d 55; *Ibrahim I*, 391 F. Supp. 2d 10.

57. Nor does the record supply any evidence that the contractor interrogator defendants raised the issue.

58. The district court dismissed the claims against the contract interpreters, finding that the combat activities exception to the Federal Tort Claims Act preempted the plaintiff's state tort claims. Ibrahim v. Titan, 556 F. Supp. 2d 1 (D. D.C. 2007). The district court held that the contract interpreters, unlike the contract interrogators, were under the exclusive control of the government. That the government was more closely supervising contract interpreters as opposed to the interrogators seems itself problematic. Interrogators by definition are in closer, indeed physical contact with detainees, and as discussed *infra*, interrogation is in an inherently governmental function. The United States Court of Appeals for the District of Columbia Circuit affirmed the dismissal of the claims against the interpreters but reversed the district court on the interrogators, dismissing the claims against them as well. Saleh v. Titan Corp., 580 F.3d 1 (D.C. Cir. 2009).

59. The word "treatment" would seem to apply more to the CACI interrogators than the Titan interpreters. *Ibrahim I*, 391 F. Supp. 2d. at 18.

litigation thus far has overlooked the fact that interrogation of suspected wartime enemies is an inherently governmental function which is committed to the executive branch and yet contracted out to a non-governmental entity.

2. *Interrogation as an Inherently Governmental Function*

In the lawsuits by former detainees against contract interrogators, no mention appears to have been made that the government's use of contract interrogators violates the determination the Army made in 2000 that "the gathering and analysis'' of tactical intelligence is considered "an inherently governmental function barred from private sector performance.''[60] In 2003, the White House's Office of Management and Budget (OMB) reinforced the Army's determination by including in its reissued federal policy for competition for commercial activities the requirement that all governmental agencies shall "perform inherently governmental activities with government personnel."[61]

In 2004, the U.S. Army acknowledged both its use of contract interrogators in Iraq and that this use violated the Army's 2000 policy determination.[62] The DoD has since issued instructions that detail under what circumstances contract interrogators may be used.[63] Eventually, Congress also took a position on this

---

60. Memorandum from the Assistant Secretary for the Army for Manpower and Reserve Affairs to the Deputy Chief of Staff for the Army for Intelligence (Dec. 26, 2000), *available at* http://projects.publicintegrity.org/docs/wow/25-d_Intelligence.pdf (stating that "[a]t the tactical level, the intelligence function under the operational control of the Army performed by military in the operating forces is an inherently Governmental function barred from private sector performance." and "gathering and analysis of [tactical] intelligence...requires the exercise of substantial discretion in applying Government authority because intelligence at the tactical level is integral to the application of combat power by the sovereign authority."). The policy outlined in the memo did not just prohibit contract interrogators at the tactical level, but also "at the operational and strategic level, the intelligence function (less support) performed by military personnel and Federal civilian employees is a non-inherently government function that should exempted from private sector performance on the basis of risk to national security from relying on contractors to perform this function." *Id.*

61. Executive Office of the President, Office of Management and Budget, CIRCULAR NO. A-76 (Revised) (May 29, 2003). *See* Joel Brinkley, *The Reach of War: Intelligence Collection; Army Policy Bars Interrogations by Private Contractors*, N.Y. TIMES, June 12, 2004, http://query.nytimes.com/gst/fullpage.html?res=9E0DE3D81230F931A25755C0A9629C8B63&sec=&spon=&pagewanted=all.

62. Brinkley, *supra* note 61. While not revoking the 2000 policy determination, Army officials in Iraq claimed that they ''retain the right to make exceptions" and that ''in light of 9/11 and the war on terror, the world is a different place than it was when that was written in 2000." *Id. See also*, David Isenberg, *Dogs of War: Inherently Governmental?,* UPI.COM, May 9, 2008, http://www.njscvva.org/Armed%20Forces%20News%20PDFs/200805/2008%2005%2009%20-%20Dogs%20of%20War.pdf.

63. U.S. DEPT'T OF DEFENSE, INSTR. 1100.22, GUIDANCE FOR DETERMINING WORKFORCE MIX (7 Sep. 2006) [hereinafter DODI]. The DODI provides that if interrogations are to be "performed in hostile areas where security necessary for DoD civilian performance cannot be provided" then the interrogation position is considered a function which "cannot be legally

question in an interim version of 2009 National Defense Authorization Act (NDAA) which banned the use of contract interrogators in combat zones.[64] This led to the Executive Office of the President issuing a statement that

> [T]he Administration strongly objects to requirements that would prevent the Department of Defense from conducting lawful interrogations in the most effective manner by restricting the process solely to government personnel; in some cases, a contract interrogator may possess the best combination of skills to obtain the needed information. Such a provision would unduly limit the United States' ability to obtain intelligence needed to protect Americans from attack.[65]

Congress subsequently agreed to an amendment to the NDAA that changed the prohibition against the use of contract interrogators to a non-binding "sense of Congress."[66] By the summer of 2009, the DoD had issued an interim final

---

contracted and shall be designated for performance by government personnel." DODI at ¶ 6.1.2 and Enclosure 2 ¶ E 2.1.6.2. But "in areas where adequate security is available and is expected to continue, properly trained and cleared contractors may be used to draft interrogation plans for government approval and conduct government approved interrogations." Enclosure 2, ¶ 2.1.6.2. The DODI claims that "[r]esponsibility for [detainee] handling as well as decisions concerning how they are treated cannot be transferred to private sector contractors who are beyond the reach of government controls." *Id.* at ¶ 2.1.6. Given that the government has criminal jurisdiction over contractors both through the Military Extraterritorial Jurisdiction Act (18 U.S.C. § 3261) and more recently, the Uniform Code of Justice (10 U.S.C. §802(a)(10)), it does not seem that contractors are beyond the reach of government controls. Although presumably not the intent, given that such controls exist, the DODI would seem to allow private sector contractors to be responsible for detainee handling and treatment. Where the DODI at least attempts to restrict the use of contract interrogators due to battlefield interrogation's inherently government function status, the DODI states that "properly trained and cleared contractors may be used as linguists, interpreters, report writers, etc...." *Id.* at ¶ 2.1.6.2.

64. S. 3001, 110th Cong. § 1036 (2008) (as reported by the S. Comm. On Armed Services, May 12, 2008); H.R. 5658 § 1077, 110th Cong. The bill required that, by one year after the enactment of the FY 2009 NDAA:

> The DOD manpower mix criteria [discussed in the DODI, *supra* note 62, at ¶ 6.1] and the [Federal Acquisition Regulation] be revised to provide that: (1) the interrogation of prisoners of war and other detainees is an inherently governmental function that cannot be transferred to private contractors who are beyond the reach of controls applicable to government personnel; and (2) properly trained and cleared contractors may be used as linguists, interpreters, report writers, and information technology technicians if their work is properly reviewed by appropriate government personnel.

65. Executive Office of the President, Statement of Administration Policy S.3001-National Defense Authorization Act for FY 2009 (Sep. 9, 2008), http://www.fas.org/irp/news/2008/09/wh090908.pdf (last visited Dec. 28, 2009).

66. National Defense Authorization Act for Fiscal Year 2009, PUB. L. NO. 100-417 § 1057 (2008). The sense of Congress is titled "Interrogation of Detainees by Contractor Personnel" and states that:

> It is the sense of Congress that— (1) the interrogation of enemy prisoners of war, civilian internees, retained persons, other detainees, terrorists, and criminals when captured, transferred, confined, or detained during or in the aftermath of hostilities is an inherently governmental function and cannot appropriately be transferred to private sector contractors; (2) not later than one year after the date of the enactment of this Act, the Secretary of Defense should develop the resources needed to ensure that interrogations described in paragraph (1) can be conducted by government personnel

rule that purported to "procedurally close existing gaps in the oversight of Private Security Contractors, ensur[ing] compliance with laws and regulations pertaining to Inherently Governmental functions . . ."[67] However, this rule is limited to contractors performing private security functions, which the rule defines as engaging in guarding of "personnel, facilities, designated sites, or property" and "any other activity for which personnel are required to carry weapons for the performance of their duties."[68] The DoD's efforts did not appear to satisfy Congress, which renewed its efforts to bar the use of contractors in interrogating detainees, this time through language in the 2010 NDAA.[69] This, in turn, prompted similar opposition from the White House, despite the change in Presidential administrations which occurred between the 2009 and 2010 NDAA versions.[70]

The Army's determination that interrogation is an inherently governmental function, at a minimum for the time period at issue in the litigation, would seem to aid the contract interrogators' political question doctrine argument. In fact, the Army's determination coupled with the White House's OMB policy should have been considered under *Baker* as "textual commitment" of interrogation to the executive branch. That the Army violated its own determination and thereby triggered Congressional involvement only strengthens the argument for the doctrine's applicability. Specifically, the contract interrogators would appear to be able to argue that for the judiciary to speak on an issue which both the executive and legislative branches have spoken would constitute the "lack of respect due coordinate branches of government," which *Baker* cautioned courts to avoid.[71] Additionally, for the courts to address the use of contract interrogators when the executive branch has said one thing (while doing

---

and not by private sector contractors; and (3) properly trained and cleared contractors may appropriately be used as linguists, interpreters, report writers, information technology technicians, and other employees filling ancillary positions, if the private sector contractors are subject to the same rules, procedures, policies, and laws pertaining to detainee operations and interrogations that govern the execution of these positions by government personnel.

67. Summary, Private Security Contractors (PSCs) Operating in Contingency Operations, 74 FED. REG. 136 (July 17, 2009) (to be codified at 32 C.F.R. pt. 159).

68. *Id.* at §159.3.

69. Karen DeYoung, *Administration Bridles at Bar on Contractors*, WASH. POST., July 16, 2009, at A2 (referring to a provision in the 2010 defense funding bill which would list interrogation as an inherently governmental function and quoting one of provisions supporters, Senator Carl Levin, as saying that interrogations "cannot be transferred to contractor personnel.").

70. *Id.* (quoting the White House as expressing "serious concerns" about Congress' attempt to bar the use of contract interrogators which, according to one administration official "could prevent U.S. Forces from conducting lawful interrogations in the most effective manner). Interestingly, the provision provides an exception for the use of contract interpreters which prompted an administration official to state than any distinction between contract interpreters and contract interrogators is "artificial." *Id.*

71. *Baker*, 369 U.S. at 217 (1962).

another) and Congress has also spoken would embody the "multifarious pronouncements by various departments on one question," which *Baker* forbids.[72]

B. Insurgent Attacks Compared to Vehicle and Aircraft Crashes

The strained application of the political question doctrine to wartime contractor activities is perhaps most glaring when cases involving insurgent attacks against contractors are compared to cases involving contractor vehicle and aircraft crashes in Iraq and Afghanistan. Similar to the interpreter/interrogator cases, the comparative outcomes in the insurgent attack and vehicle/aircraft crash cases often appear counterintuitive and inconsistent.

1. Insurgent Attacks

The *Fisher*, *Lane*, and *Smith-Idol* line of federal cases from Texas provide contrasting views regarding the application of the political question doctrine to contractor employee suits stemming from insurgent attacks.[73] The plaintiffs in each of these cases were former truck drivers (or their representatives) who worked for Kellogg Brown and Root (KBR) in Iraq and were injured or killed when insurgents attacked their logistics convoys in April, 2004.[74] KBR operated the convoys pursuant to a contract with the Army to provide essential services and personnel to support its military operations in Iraq.[75]

The plaintiffs in each suit claimed that during KBR's efforts to hire drivers, it committed fraud and deceit by intentionally misrepresenting the dangers in Iraq.[76] The plaintiffs also alleged that KBR had control over when, where, and how to deploy the logistics convoys, and the negligent manner in which it did so led to their physical injuries and/or death.[77]

---

72. *Id.*

73. At the district court level, *see* Fischer v. Halliburton, 454 F. Supp. 2d 637 (S.D. Tex. 2005); Lane v. Halliburton, No. H-06-1971, 2006 WL 2396249 (S.D. Tex. Sept. 26, 2006); and Smith-Idol v. Halliburton, No. H-06-1168, 2006 WL 2927685 (S.D. Tex. Oct. 11, 2006). At the appellate level, *see* Lane v. Halliburton (*Lane Appeal*), 529 F.3d 548 (5th Cir. 2008), the consolidated appeal. Although not part of the *Fisher*, *Lane*, and *Smith-Idol* series, *Woodson* involved "significantly similar" facts, arguments, and evidence, the difference essentially being that the plaintiff was injured by an insurgent attack of a Halliburton logistics convoy on a different date and at a different location in Iraq. Woodson v. Halliburton, No. H-06-2107 2006 WL 2796228 (S.D. Tex. Sept. 28, 2006) (accordingly, the district court dismissed *Woodson* on the same political question grounds as in *Fisher*, *Lane*, and *Smith Idol*).

74. Fischer v. Halliburton, 454 F. Supp. 2d 637 (S.D. Tex. 2005); Lane v. Halliburton, No.06-1971, 2006 WL 2396249 (S.D. Tex. Sept. 26, 2006); Smith-Idol v. Halliburton, No. 06-1168, 2006 WL 2927685 (S.D. Tex. Oct. 11, 2006).

75. *Fisher*, 454 F. Supp. 2d at 638.

76. *Id.* at 639; *Lane*, 2006 WL 2396249, at *1; *Smith-Idol*, 2006 WL 2927685, at *1.

77. *Fisher*, 454 F. Supp. 2d at 639.

The defendants moved to dismiss the plaintiffs' claims on, among other grounds, the political question doctrine. KBR argued that the Army, not KBR, controlled the deployment and protection of logistics convoys and that those decisions that KBR did make in this regard were "so interwoven with Army decisions, the court lacks jurisdiction . . .under the political question doctrine."[78] The plaintiffs replied that the political question doctrine did not apply because their complaint "involves claims by civilians, not military personnel, questions [KBR's] actions as civilian contractors, not the Army's execution of a mission. . ." and alleged that [KBR], not the Army, directed the convoys in question, "making inquiry into military decisions and rules of engagement unnecessary."[79]

The district court dismissed all three cases on political question grounds, finding that the nature of the suit implicated three of the *Baker* tests.[80] The court stated that *Baker* requires a determination of "whether a political question will arise during the course of the trial, not whether it is evident from the face of

---

78. *Id.* Specifically, KBR argued that:

> The Complaint necessarily raises issues regarding the conduct of military operations during armed conflict that are committed to the discretion of the political branches of government. Further, no judicially manageable standards exist to evaluate the propriety of the issues here, including: whether the military adequately considered security concerns and supply needs when it planned, scheduled, and deployed the fuel supply convoy; whether it assigned force protection sufficient to deal with potential threats along the convoy route it selected; whether it properly evaluated the level of threats present on that route; and whether it properly trained, prepared, and equipped the military personnel providing force protection to the convoy.

Motion to Dismiss at 36, Lane v. Halliburton, No. H-06-1971 (S.D. Tex. Sept. 26, 2006); Motion to Dismiss at 29-30, Smith-Idol v. Halliburton, No. H-06-1168 (S.D.Tex. Oct. 11, 2006). The motion to dismiss in *Fisher* was sealed.

79. *Fisher*, 454 F. Supp. 2d at 641. The plaintiffs argued that the very language of the LOGCAP contract required KBR to "manage and direct their own convoys." *Id.* at 642. As well, they quoted from an Army publication entitled "Contractors on the Battlefield" to support the proposition that military "[c]ommanders do not have direct control over contractors or their employees (employees are not the same as government employees); only contractors manage, supervise, and give directions to their employees." *Id.*

80. *Id.* at 639-44. Under the first *Baker* test, textual constitutional commitment to a coordinate branch, the court held that "it cannot try a case set on a battlefield during war-time without an impermissible intrusion into powers expressly granted to the Executive by the Constitution." *Id.* at 641. The court also found the second *Baker* test, lack of judicially discoverable and manageable standards "equally implicated." *Id.* While the plaintiffs contended that their focus was on KBR's actions and not those of the Army, the court held it would "inexorably be drawn" to distinguish and examine decisions by both KBR and the Army, a task for which the judiciary lacks "discoverable and meaningful standards." *Id.* at 644. Applying the third test, nonjudicial policy determination and lack of respect, the court contended that plaintiffs ask it to determine why the convoy attack happened. *Id.* at 641-44. To answer this question would require, in the judges' estimation, delving into the wisdom of using contractors on the battlefield at all as well as using them on the specific convoys at issue. *Id.* at 644. The court labeled attempts to resolve the issue as tantamount to examining the policies of the Executive Branch during wartime, "a step the court declines to take." *Id.*

the complaint."[81] It claimed that "[e]ven if KBR had authority to deploy or recall convoys, the court would still need to determine whether the Army could or should have countermanded that order."[82] In the end, the court concluded that it would have to substitute its judgment for that of the Army to be able to hear the case.[83]

In response to the lower court's ruling, the plaintiffs appealed to the Fifth Circuit and attempted to frame the issue as a damages claim by civilian truck drivers employed by a private contractor that was "providing non-combat logistical support services in Iraq."[84] They claimed that "the conflict in Iraq happens to be a politically charged matter, but that does not make this case nonjusticiable under the political question doctrine."[85] Furthermore, the appellants contended that the district court "simply saw Iraq and stopped."[86]

In contrast, KBR asked the appellate court "[w]hether [a]ppellants' damages suits, if adjudicated, would require the district court to second-guess U.S. military policies and decisions that resulted in the convoy incidents involved in these appeals and relate to the conduct of the ongoing war in Iraq, and thus are barred by the political question doctrine."[87] They argued that "the *Baker* [tests] demonstrate that adjudication of appellant's claims would require resolution of non-justiciable political questions."[88] Political questions were, KBR alleged, inherent in both the fraud and tort claims and "could not be avoided."[89] Moreover, they stressed that the "appellants' claims must be

---

81. *Id.* at 641 (quoting Occidental of Umm Al Qaywayn v. Certain Cargo of Petroleum (*Occidental*), 577 F.2d 1196, 1202 (5th Cir. 1978)).

82. *Id.* at 643. The court added that that "[t]he evidence shows overwhelmingly that the Army was an integral part of any decision to deploy and protect convoys." *Id.*

83. *Id.* The court listed examples of areas in which it believed it would have to impermissibly substitute its judgment for that of the Army, including "determining what intelligence the Army gave to KBR about the route, whether that intelligence was sufficient, what forces were deployed with the convoys, whether they were sufficient, and whether they performed properly." *Id.*

84. Appellants' Brief at 2, Lane v. Halliburton, 529 F.3d 548 (5th Cir. 2008) (No. 06-0874).

85. *Id.* at 21.

86. *Id.*

87. Appellees' Brief at 1, *Lane*, 529 F.3d 548.

88. *Id.* at 32. KBR essentially repeated their arguments from the district court that:

> [1] [T]he Constitution textually commits to the political branches consideration of the military, national security, and foreign policy decisions and issues that adjudication of appellants claims would entail;
>
> [2]There are no judicially discoverable manageable standards for resolving the military, national security, and foreign affairs decisions and issues that adjudication of appellants claims would require; and
>
> [3] [A]djudication of appellant's claims would require policy determinations that exceed judicial discretion and demonstrate lack of respect for the political branches.

Id. at 32-47.

89. *Id.* at 36, 42.

analyzed as they would be tried, not as they are pleaded, to determine whether they present political questions."[90]

Answering these arguments, the Fifth Circuit

> [A]cknowledge[d] that the [p]laintiffs' claims are set against the backdrop of United States military action in Iraq. Thus, these cases are at the very least in sight of an arena in which the political question doctrine has served one of its most important and traditional functions – precluding judicial review of the decisions made by the Executive during war time.[91]

The court noted that the days in which "the Supreme Court would categorically remove disputes implicating the "conduct of foreign relations" from judicial purview"[92] were long past and referenced the *Baker* court's admonition that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[93]

Moreover, the appellate court disagreed with the lower court's application of the *Baker* tests. According to the Fifth Circuit, "the first *Baker* [test] is primarily concerned with direct actions taken by a coordinate branch of the federal government." KBR, by invoking the textual commitment test, therefore faced a "double burden."[94] Under this burden, "[f]irst, [KBR] must demonstrate that the claims against it will require reexamination of a decision *by the military*. Then it must demonstrate the military decision at issue is . . . insulated from judicial review."[95] With little to no explanation of how KBR failed to meet that double burden, the court then claimed that "there is no textual commitment to the coordinate branches of the authority to adjudicate the merits of the Plaintiff's claims against KBR for breach of its duties."[96]

The court was more sympathetic to the district court's analysis of the

---

90. *Id.* at 28. The Fifth Circuit supports the appellee's position in this regard. *See* Occidental of Umm Al Qaywayn v. Certain Cargo of Petroleum, 577 F.2d 1196, 1202 (5th Cir. 1978)) (stating that the court considers the complaint "as it would be tried, to determine whether a political question will emerge").

91. *Lane*, 529 F.3d at 558.

92. *Id.* (citing Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918)).

93. *Id.* (citing Baker v. Carr, 369 U.S. 186, 211 (1962)).

94. *Id.* at 560 (citing McMahon v. Presidential Airways, 502 F.3d 1331, 1359 (9th Cir. 2007)).

95. *Id.* at 560 (quoting *McMahon,* 502 F.3d at 1359-60) (emphasis in original).

96. *Id.* The Court of Appeals claimed that it would be an "extraordinary occasion, indeed, when the political branches delve into matters of tort-based compensation" citing the September 11 Victim Compensation Fund as one such occasion. *Id.* The Court made this point in support of its claim that there is "no textual commitment to the coordinate branches of the authority to adjudicate the merits of the Plaintiffs' claims against KBR." Yet, the U.S. Army Claims Service adjudicated the merits of Mr. Saleh's tort claim. A military investigation concluded that Mr. Saleh was not interrogated or abused, but should not have been at Abu Ghraib in the first place. As a result, the Army awarded Saleh $5000 for his unnecessary internment at Abu Ghraib. Saleh v. Titan Corp., 580 F.3d 1, 3 (D.C. Cir. 2009). As a result, the executive branch's involvement in tort-based compensation may not be that out of the ordinary, rendering the Fifth Circuit's reliance on that point for its political question doctrine analysis misplaced.

second *Baker* test, lack of judicially manageable standards.[97] It claimed that this test was "arguably the most critical factor" in *Lane* "because at least some of the considerations would drag a court into a consideration of what constituted adequate force protection for the convoys."[98] The court stated that the district court may have to "adjust traditional tort standards to account for the 'less than hospitable environment' in which KBR operated" but that in of itself is not a justiciability issue under *Baker*.[99]

And, finally, the court made relatively short work of the district court's determination that under the third *Baker* test the claims would "necessarily entail a judicial pronouncement as to the wisdom of the military's use of civilian contractors in a war zone."[100] In the Fifth Circuit's view, the district court would be "asked to judge KBR's policies and actions, not those of the military or executive branch."[101] Indeed, the court surmised that "the application of traditional tort standards may permit the district court to navigate through this politically significant *case* without confronting a political *question*."[102]

Ultimately, the court was not persuaded that the political question doctrine applied and, thus, concluded that the judiciary could properly hear the plaintiffs' claims.[103] However, in remanding the case, the court explained that it did not "mean to indicate the district court is bound to continue its efforts to extricate the [p]laintiff's claims from the military decision indefinitely."[104]

That insurgent attacks on U.S. logistics convoys in Iraq did not, at least in *Lane*, result in the application of the political question doctrine may be surprising to some.[105] According to the doctrine, courts should be more likely

---

97. *Lane*, 529 F.3d at 556. In a footnote to its analysis of the second *Baker* test, the court stated that the plaintiffs' claims did not "directly challenge any government or Executive action" and were "far enough removed from the type of textual commitment envisioned by *Baker* and its progeny to shift [the court's] primary analysis to the second factor." *Id.*

98. *Id.*

99. *Id.* at 563 (referring to *McMahon*, 502 F.3d at 1363-64).

100. *Id.* (referring to *McMahon*, 502 F.3d at 1364).

101. Lane v. Halliburton (*Lane Appeal*), 529 F.3d 548, 563 (5th Cir. 2008).

102. *Id.* (emphasis in original).

103. Since the cases returned to the district court in July 2007, there have been over 200 hundred additional docket entries, although the nature of the filings is unclear as most are sealed. *See* docket entries dated between July 7, 2007 and the present, Fisher v. Halliburton, 454 F. Supp. 2d 637 (S.D. Tex. 2005) (No. H-05-1731). Presumably Halliburton has, or will, renew its motion to dismiss on political question grounds, so the cases may return to the Fifth Circuit.

104. *Lane Appeal*, 529 F.3d at 556.

105. *But see* Smith v. Halliburton, No. H-06-0462, 2006 WL 2521326 (S.D. Tex. Aug. 30, 2006) (holding that the political question doctrine prevented the court from hearing a case brought by the representatives of a KBR employee killed when a suicide bomber detonated an explosive in a dining facility on a U.S. military base in Iraq). The court determined that the military and not KBR was responsible for security or force protection functions: "were the case to proceed, this court would have to second-guess the decisions of the United States military, even though the suit is ostensibly against only military contractors." *Id.*

to dismiss a case on political question grounds if they believe that the military is in actual control of the specific contractor actions relevant to an element of the tort suit. In practice, however, the outcome of the political question analysis appears to depend on the decision making level the court considers when assessing the suit. If assessing the suit at a macro decision making level, the foreign affairs and Commander-in-Chief powers of the executive branch inherent in the decision to invade Iraq and to rely on contractors would be relevant. At the other end of the spectrum, at the micro decision making level, the inquiry would focus on whether the government or the contractor controlled a logistics convoy's movement from point A to point B and under what conditions it did so. As the following cases demonstrate, while the micro level approach brings the specificity and detail the macro view lacks, trying to parse out the level and type of control over a logistics convoy as a way to determine the applicability of the political question yields outcomes no more coherent or predictable.

2. *Convoy Accidents*

In *Whitaker*[106] and *Carmichael*,[107] Georgia district courts found that the political question doctrine precluded them from considering the military's level of control over convoy operations in Iraq. Yet, in neither decision did the courts link the military's control to a cause of the accident, proximate or otherwise. It is also not clear what specific unreviewable military decision the courts believed were inextricably linked to the cases. Here again, the judiciary's lack of analytical clarity on these points further complicates the application of the doctrine.

a. *Whitaker*

In *Whitaker*, a U.S. Army Soldier was killed in Iraq in April 2004 while escorting a KBR logistics convoy.[108] After a KBR vehicle drove off a bridge, Private First Class Whitaker stopped his vehicle which was then struck by the KBR vehicle following it, knocking Whitaker's vehicle near the edge of the bridge.[109] While trying to escape this precarious position, Whitaker fell off the bridge and drowned.[110] Whitaker's parents filed suit, labeling the case a "garden variety road wreck" for which they claimed judicially discoverable and

106. Whitaker v. KBR, 444 F. Supp. 2d 1277 (M.D. Ga. 2006).

107. Carmichael v. KBR (*Carmichael I*), 450 F. Supp. 2d 1373 (N.D. Ala. 2006), *aff'd*, Carmichael v. KBR (*Carmichael Appeal*), 572 F.3d 1271 (9th Cir. 2009). While this section refers to aspects of the Carmichael appeal, the focus is on the district court's analysis.

108. *Carmichael Appeal*, 572 F.3d at 1278.

109. *Id.*

110. *Id.*

manageable standards existed.[111]

In reply, KBR moved to dismiss on political question grounds.[112] The U.S. District Court for the Middle District of Georgia granted KBR's motion, holding that the convoy operation was "planned by the military, which determined the placement of vehicles in the convoy, the speed of the convoy, and the distance between vehicles in the convoy."[113] The court stated that the circumstances, while involving no insurgent activity, were dramatically different "from driving on an interstate highway or country road" in the United States and that "[t]he question here is not just what a reasonable driver would do—it is what a reasonable driver in a combat zone, subject to military regulations and orders, would do."[114]

In spite of the court's clear rejection of the claim, it never explained exactly how the circumstances differed from a "garden variety road wreck," nor did it discuss how PFC Whitaker being subject to military regulations and orders related to his particular accident. Similarly, while all of Iraq may generally be considered a combat zone, unless Whitaker or others in the convoy took different actions on the Iraqi bridge than they would have in comparatively safe Kuwait or even the United States, then just being in a combat zone bears little on causation. The court's reliance on the fact that the military planned the convoy also seems misplaced, unless the manner in which the military planned the convoy was a significant factor in the first vehicle going off the bridge, PFC Whitaker's decision to stop his vehicle, or the vehicle behind PFC Whitaker's striking his.

b. Carmichael

In May 2004, Sergeant (SGT) Keith Carmichael was a military escort and passenger in a KBR tractor-trailer in Iraq when a contractor employee lost control of the vehicle and plummeted into a ravine.[115] Carmichael suffered severe injuries and his wife filed suit against KBR on his behalf.[116] The District Court for the Northern District of Georgia initially denied a motion to dismiss

111. *Id.* at 1282.

112. *See* Whitaker v. KBR, 444 F. Supp. 2d 1277 (M.D. Ga. 2006).

113. *Id.* at 1282.

114. *Id.* The district court likened the political question analysis in *Whitaker* to a suit filed by Turkish sailors after missiles fired by a U.S. ship during a training exercise injured them. As in *Whitaker*, the court found that there were no judicially discoverable and manageable standards, that a decision on the merits would require the court to make policy decisions "of a kind appropriately reserved for military discretion," and that "adjudicating the case would express a lack of respect for the political branches of the government." *Id.* at 1280-81 (quoting Aktepe v. United States, 105 F.3d 1400, 1403 (11th Cir. 1997)).

115. *Carmichael I*, 450 F. Supp. 2d at 1374.

116. *Id.*

on political question grounds, stating its disagreement with *Whitaker's* reasoning.[117] Yet, after two years of discovery, the court dismissed the case on essentially the same grounds, providing no more clarity than the court did in *Whitaker*.[118] While the plaintiffs presented evidence that "the convoy was a non-combat operation and that each individual driver retained discretion to vary his speed or course within the convoy to operate his vehicle safely,"[119] the court was persuaded by KBR's evidence that:

> [T]he army did in fact control every aspect of the organization, planning and execution of the convoy in question. The KBR drivers were trained according to military standards, the military convoy commander retained responsibility for inspecting both drivers and their equipment before commencing the convoy, and the route and speed of the convoy were set by the military and not by the civilian drivers. Therefore, the conduct of the military and its handling of supply convoys used to support military operations would necessarily be questioned were this case allowed to go forward.[120]

When the court originally denied KBR's motion, its inquiry focused on the actions of the KBR employee driving the tractor-trailer Carmichael occupied.[121] Specifically, the court hypothesized that "it is conceivable that at the time of the accident [the contractor employee] was driving the truck within the speed limit set by the military yet in a manner that was negligent in some other respect."[122] The court did not revisit its own hypothesis when later dismissing the case despite evidence the plaintiffs presented concerning individual driver options on speed and course and the fact that only Carmichael's vehicle veered into a ravine. The court itself initially claimed that "[i]f there is no showing that resolution of a survivor's negligence claims would require the [c]ourt's reexamination of any decision made by the U.S. military, the case presents no political question, and therefore the [c]ourt has jurisdiction over the case."[123] In later dismissing the case, the court failed to state what military decision the court would have to examine to resolve the inquiry concerning a vehicle driving off the road.[124] Though the military makes numerous decisions and the incident happened in Iraq, unless those decisions and the *situs* of the incident influence the tort elements in some way, they do not seem legally relevant and certainly

---

117. *Id.* at 1377. In its initial ruling, the court stated that it respectfully disagreed with, and would not follow, the middle district's ruling in *Whitaker*. *Id.*

118. Carmichael v. KBR (*Carmichael II*), 564 F.Supp.2d 1363 (N.D. Ga. 2008).

119. *Id.* at 1368.

120. *Id.*

121. *Id.* at 1376.

122. *Id.*

123. *Id.* at 1367.

124. The Eleventh Circuit decision is similarly imprecise. Neither court ever links any aspect of the road conditions to the accident, and insurgent activity was not involved. Instead, the court discusses how those "difficult military conditions" required "delicately-calibrated decisions based on military judgment, experience, and intelligence-gathering." *Id.*

not dispositive of a justiciability issue such as the political question doctrine.[125]

c. Potts

Indeed, in *Potts*, where combat circumstances in Iraq played a role in the accident, the court found that the political question doctrine did not apply. Mr. Potts, a contract employee who worked for Worldwide Network Services, Inc., filed suit[126] against Dyncorp for injuries he suffered as a result of a car accident while a passenger of a Dyncorp driver in Iraq.[127] Traveling at a high rate of speed, the driver swerved to avoid what he thought may be an improvised explosive device (IED).[128] The vehicle flipped, burst into flames, and severely injured Potts.[129] After Potts filed suit, the court denied Dyncorp's attempt to amend its answer to assert the political question doctrine, holding that "Dyncorp mischaracterizes the issue by implying that the court would have to assess United States military or State Department policies to determine whether Dyncorp was negligent."[130] The court claimed that the plaintiffs correctly summarized the case as involving a "civilian contract to provide non-military security services to non-military personnel for the purpose of delivering non-military supplies."[131] It was, therefore, "able to assess whether the private contractor was negligent or wanton, even when performing services in a war zone. The fact that the car accident at issue occurred in a war zone does not automatically result in a lack of judicially discoverable and manageable standards for resolving the issue."[132]

The court's focus in *Potts* on the macro level of Dyncorp's contract with the government dictated the outcome of the political question analysis. That focus came at the expense of considering the specific cause of the accident, an attempt to avoid what was feared to be an IED. Where there is a nexus between

125. The plaintiff-appellants unsuccessfully made a similar argument to the Eleventh Circuit in *Carmichael*. They alleged that Mr. Irvin's was the only vehicle in a 15 vehicle convoy that crashed, suggesting negligence by Irvin and not a treacherous roadway. *Carmichael Appeal*, 572 F.3d 1271, 1278, 1285 (9th Cir. 2009). The court labeled this argument "much too facile." *Id.* The plaintiff-appellants also argued that Mr. Irvin was "responsible for steering the vehicle and controlling its speed" which the court deemed "little more than a play on the words 'control' and 'responsibility.'" *Id.* at 1284.

126. Potts v. DynCorp Int'l, 465 F. Supp. 2d 1245 (M.D. Ala. 2006).

127. *See id.* Dyncorp operated in Iraq pursuant to a contract with the U.S. government for an "oil for food" project. *Id.* at 1248.

128. For general information on IEDs, *see* CONGRESSIONAL RESEARCH SERVICE, Pub. No. RS22330, IMPROVISED EXPLOSIVE DEVICES (IEDS) IN IRAQ AND AFGHANISTAN: EFFECTS AND COUNTERMEASURES (2006).

129. *Potts*, 465 F. Supp. 2d at 1248.

130. *Id.* at 1250.

131. *Id.*

132. *Id.* at 1253.

the proximate cause of a tort action and a uniquely combat operation circumstance like IEDs, the potential for the political question doctrine to apply should exist, but, as discussed above, the court in *Potts* thought otherwise. Without suggesting that the court ignore Dyncorp's contract with the government, justice may have been better served by focusing on how and from whom Dyncorp drivers learned of IED threats and received training on how to respond. Such evidence, or lack thereof, would be more directly relevant and more helpful to the trier of fact. For example, evidence that the military did, or did not, brief Dyncorp drivers about the IED threat or provided counter IED driving training would influence whether the military would be implicated in the judicial determination as to whether the driver's response and reaction to what he thought was an IED were reasonable. As it stands, it remains unclear just how the court will develop judicial standards to evaluate the threat of IEDs, determine whether the driver's belief that the object in the road was an IED, and evaluate if his subsequent reactions were reasonable.

3. The Real Inquiry

Not all courts have shared these struggles in applying the political question doctrine to wartime contractor tort litigation that have been presented above. In *Lessin*[133] and *McMahon*,[134] both a district and an appellate court provide useful examples of how to resolve political question disputes involving government contractors with greater analytical rigor and clarity.

The *Lessin* case concerns a U.S. Army soldier injured while providing a military escort to a KBR logistics convoy in Iraq.[135] While en route from Iraq to Kuwait, one of KBR's trucks stopped due to a malfunctioning loading ramp.[136] When Lessin attempted to help the driver of the truck, the ramp struck him in the head, severely injuring him as a result.[137] Lessin filed suit against KBR, which moved to dismiss the complaint based on the political question doctrine.[138]

---

133. Lessin v. KBR, No. H-05-01853, 2006 WL 3940556 (S.D. Tex. June 12, 2006).

134. McMahon v. Presidential Airways, 502 F.3d 1331 (9th Cir. 2007). Interestingly, the court that decided *McMahon* is the same court that later decided *Carmichael*, the Eleventh Circuit. Nonetheless, the two cases are difficult to reconcile. Both involve crashes, in *McMahon* of an airplane in Afghanistan and in *Carmichael* a vehicle in Iraq, which seem to lack a nexus to combat operations. In *McMahon*, the Eleventh Circuit held that the political question doctrine did not apply, but in *Carmichael* it found that it did. One distinction that may have informed the court's decision was the record before the court when it heard the cases. *McMahon* reached the court of appeals with minimal information while *Carmichael* arrived after several years of discovery.

135. *Lessin*, 2006 WL 3940556, at *1.

136. *Id.*

137. *Id.*

138. *Id.* at *2. KBR argued that the case involved the first four *Baker* tests. *Id.* at *3. Under the first *Baker* test, KBR asserted that Lessin's claims "necessarily involve issues committed to the

The court disagreed, holding that KBR failed to demonstrate that "military decision-making or policy would be a necessary inquiry, inseparable from the claims asserted."[139] Instead, the court determined that Lessin's claims of KBR's negligence were "not certain to implicate such topics, or any others that are committed to the political branches. The incident at issue in this case was, essentially, a traffic accident, involving a commercial truck alleged to have been negligently maintained, as well as a civilian truck driver who was allegedly negligent in operating the truck and insufficiently trained."[140]

In similar fashion, the Eleventh Circuit in *McMahon* distinguished the defendant's assertion of the political question doctrine's applicability from the plaintiffs' claims and the evidence required to prove those claims.[141] On November 27, 2004, a contractor owned and operated airplane crashed into the side of a mountain in Afghanistan killing all aboard, including three active duty members of the U.S. Army.[142] Relatives of the soldiers filed a wrongful death suit against the contractor, Presidential Airways.[143] In turn, Presidential Airways filed a motion to dismiss the suit based on the political question doctrine arguing that "were this lawsuit to proceed, [the district court] would inevitably be asked to resolve a number of military 'policy choices and value determinations,'" such as why the DoD specified, among other things, the aircraft type, the aircraft equipment, and the pilot qualifications and approved

executive branch, including military decision-making and the conduct of military operations." *Id.* KBR argued that "because Lessin was injured while attempting to assist the malfunctioning convoy truck, adjudicating Plaintiffs' claims will require an inquiry into whether Lessin was trained properly on civilian equipment, whether he complied with applicable military regulations and directives regarding civilian contractor convoys, and whether these military regulations were adequate to prevent his injury." *Id.* KBR attempted to bolster its argument that the Plaintiffs' allegations would involve military decision making by claiming that following an investigation of Lessin's injury, the military purportedly developed new procedures limiting military personnel from assisting civilian convoys. *Id.* For the second *Baker* test, KBR contended that Lessin's claims were not susceptible to resolution by judicially discoverable standards. *Id.* at 3-4. KBR's argument of how the second *Baker* test applied was that the court was unable to develop standards to access the reasonableness of the military's judgment in "permitting the civilian truck at issue to be a part of the military convoy... for the military to stop the convoy in a combat zone to attempt to repair the truck, whether it was appropriate for Lessin to assist in the truck's repair, and whether the military exercised an appropriate level of maintenance over the truck." *Id.* KBR concluded its political question argument by arguing that the third and fourth *Baker* tests were also implicated as the case, in KBR's view, would "require the Court to undertake an initial policy decision concerning the interaction between military personnel and civilian contractors in a combat zone, and to express a lack of respect due to the coordinate branches of government that oversee such war efforts." *Id.* at 4.

139. *Id.* The court acknowledged that where the military's strategy, decision-making, or orders are necessarily bound up with the claims asserted in a case, the political question doctrine is implicated, and the case is inappropriate for judicial inquiry. *Id.*

140. *Id.* at 4-5.

141. McMahon v. Presidential Airways, 502 F.3d 1331 (9th Cir. 2007).

142. *Id.* at 1336.

143. *Id.*

the route structures of the acknowledged DoD mission. . ."[144] Presidential claimed that these are "military choices and value determinations that are 'constitutionally committed for resolution to the legislative or executive branches.'"[145]

The district court denied the motion and Presidential filed an interlocutory appeal with the Eleventh Circuit.[146] At this point, the only evidence before both courts was the complaint, the contract between Presidential and DoD to provide air transport, and the statement of work for that contract.[147] The court of appeals affirmed the lower court's judgment, ruling that Presidential did not even satisfy the threshold requirement of the first *Baker* factor – a demonstration that the case would "require examination of any decision *made by the military*."[148] While the court acknowledged that "[t]he military chose the start and the end points of the flights, and when the flights would be flown. . . [i]t was not evident" the court continued "that [the plaintiffs'] allegations relate to any of these discrete areas of military responsibility."[149]

Presidential, the Eleventh Circuit held, "also failed to show that the case will require the application of judicially unmanageable standards."[150] The court conceded that "flying over Afghanistan during wartime is different from flying over Kansas on a sunny day," but added "that does not render the suit non justiciable."[151] In the court's view, "[a]s in any tort suit involving a plane crash,

144. Motion to Dismiss at 19, McMahon v. Presidential Airways, No. 05-1002, (M.D. Fla. Dec. 15, 2005). While the Eleventh Circuit was not persuaded by Presidential Airways' argument in *McMahon*, the court accepted what seems a similar argument in *Carmichael* when dealing with the military's role in convoy operations. *See Carmichael Appeal*, 572 F.3d 1271 (9th Cir. 2009).

145. Motion to Dismiss at 19, McMahon v. Presidential Airways, No. 05-1002 (M.D. Fla. Dec. 15, 2005).

146. McMahon v. Presidential Airways at 1336.

147. *Id.* at 1360. On appeal, Presidential unsuccessfully argued that in addition to the complaint, contract and statement of work, the court should also consider declarations from Presidential employees that "tended to demonstrate that the military made certain decisions with respect to the operation of the flight on the day in question." *Id.* As discussed in footnote 134, *supra*, the limited amount of information before the court in *McMahon* may be how to reconcile its ruling which followed with the subsequent *Carmichael* decision.

148. *Id.* (emphasis in original).

149. *Id.* at 1361.

150. *Id.* at 1363.

151. *Id.* at 1364. The court seemed to change its characterization of the relevance of Afghanistan to the crash in *McMahon*. In *Carmichael*, the Eleventh Circuit referred to the flight in *McMahon* as "more or less a routine airplane flight" and that the fact that the crash took place over Afghanistan during wartime "was incidental." *Carmichael Appeal*, 572 F.3d 1271, 1290-91 (9th Cir. 2009). In *Carmichael*, the court attempted to distinguish *McMahon* on the grounds that military activities in Afghanistan were not related to the accident, while the convoy operation to deliver fuel in *Carmichael* was "utterly central" to the military. *Id.* at 1291. While delivering fuel is undoubtedly important, the aircraft in *McMahon* was transporting three service members, including a Lieutenant Colonel and a Chief Warrant Officer, in Afghanistan. *McMahon I*, 502 F.3d at 1336. Movement of military members on the battlefield would seem to be either "utterly central" to, if not a military

the court will simply have to determine whether the choices made were negligent."[152]

Other courts have not had the same success as *Lessin* and *McMahon* in identifying the proper decision making level at which to evaluate whether a suit implicates the political question doctrine. Adjudicating the political question doctrine in wartime contractor litigation is daunting—courts must apply a loosely defined doctrine to situations arising from two complex U.S. led wars in which contractors play a much greater role in proportional numbers and functional diversity than ever before. Further complicating matters, litigants each pursue their own agendas with plaintiffs couching complaints as little more than the "red car/blue car" traffic accident of law school torts, and defendants claiming that judges who would hear cases like these overstep constitutional bounds and intrude on the executive branch. Changes in how the government views and employs contractors, and its conspicuous absence from the litigation in which contractors have asserted the political question doctrine, make the challenge courts face greater still.

IV.
THE GOVERNMENT'S ROLE IN CREATING CONFUSION (OR AT LEAST NOT HELPING TO CLARIFY)

A. Changes in How the Government Views Contractors

According to the Congressional Research Service, "[n]ot since the 17th century has there been such a reliance on private military actors to accomplish tasks directly affecting the success of military engagements. Private contractors are now so firmly embedded in intervention, peacekeeping, and occupation that this trend has arguably reached the point of no return."[153] Others refer to contractors as a "fourth branch of government"[154] and "quasi agencies" of the

activity outright.

152. *McMahon I*, 502 F.3d at 1364 (9th Cir. 2007). Yet, as noted earlier, the court was unwilling to follow that approach in *Carmichael*.

153. CRS, *supra* note 1, at 2 (quoting Fred Schreier & Marina Caparini, *Privatizing Security: Law, Practice and Governance of Private Military and Security Companies*, Geneva Center for the Democratic Control of Armed Forces, 1 (March 2005)). *See* Zamparelli, *supra* note 3, at 9 (stating that "[n]ever has there been such a reliance on nonmilitary members to accomplish tasks directly affecting the tactical successes of an engagement."). *See generally*, P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY (2003) (detailing the evolution of the military service industry and privatization of warfare).

154. Scott Shane & Ron Nixon, *U.S. Contractors Becoming a Fourth Branch of Government*, INT'L HERALD TRIBUNE, Feb. 4, 2007, *available at* http://www.iht.com/articles/2007/02/04/america/web.0204contract.php. Shane and Nixon contend that the government's "reflexive answer to almost every problem" is to "hire another contractor" and that "the most successful contractors are not necessarily those doing the best work, but those who have mastered the special skill of selling to Uncle Sam." *Id.*

federal government.[155]

The Joint Chiefs of Staff attribute DoD's increased reliance on contractors to a host of factors, including:

> reductions in the size of military forces (especially in the combat support and combat service support areas), increases in operations tempo and missions undertaken by the military, increased complexity and sophistication of weapon systems, and a continued push to gain efficiencies and reduce costs through the outsourcing or privatizing of commercially adaptable functions.[156]

This increased reliance has rendered contractor support to the DoD a "core logistic capability" which provides a military commander the "ability to synchronize and integrate both the delivery of service, agency, and other government organization contract support."[157] Despite this recognition of contractor importance, according to a descriptively titled GAO report, DoD plans do not adequately address contractors.[158] The GAO found that while DoD relies on contractors "to supply a wide variety of services," DoD and the military services "could not quantify the totality of support that contractors provide to deployed forces around the world."[159]

The government's relationship with contractors appears erratic. It values and increasingly relies on contractors,[160] including them and their functions in military doctrine manuals, yet it does not adequately plan for contractors and does not track when contractors are wounded or killed.[161] In some instances, the government does not even know how many contractors it employs.[162] Further complicating questions of tort liability and the applicability of the political question doctrine, the government has changed how it views contracts.[163] Moreover, it remains conspicuously absent from litigation over tort

---

155. Singer, *supra* note 153. According to Singer, "[w]e've created huge behemoths that are doing 90 or 95 percent of their business with the government....[t]hey're not really companies, they're quasi agencies." *Id.* at 6. Yet Singer refers to the use of Brown and Root to provide logistics for U.S. military forces deployed in and around Kosovo instead of calling up 9,000 reservists as "one of the quiet triumphs of the war in Kosovo." *Id.*

156. JOINT PUB. 4-0, *supra* note 4.

157. *Id.*

158. GEN. ACCT. OFFICE, PUB. NO. GAO-03-695, MILITARY OPERATIONS: CONTRACTORS PROVIDE VITAL SERVICES TO DEPLOYED FORCES BUT ARE NOT ADEQUATELY ADDRESSED IN DOD PLANS 1 (2003).

159. *Id.*

160. *But see* Cam Simpson & Christopher Conkey, *Obama Aims to Reduce Reliance on Contractors*, WALL ST. J., Feb. 22, 2009, *available at* http://online.wsj.com/article/SB123578119096998007.html (reporting that through a budget blueprint President Obama seeks to roll back "Washington's dependence on private sector contractors" but also noting that "the lack of specifics [in the blueprint] suggests the difficulty of the task").

161. GAO, *supra* note 1, at 27-28, 33, and 38. *See* Schooner, *supra* note 5.

162. GAO contractor tracking, *supra* note 5.

163. As discussed earlier, the government employs contractors to perform the inherently governmental function of interrogation and several lawsuits against contract interrogators are

claims arising from contract performance, which only obfuscates its relationship with contractors and the resulting judicial inquiry into their potential liability.

B. Changes to How the Government Views Contracts

Largely absent from cases thus far is any discussion of the U.S. government's shift to performance-based acquisition, which changed how the executive branch views and structures the contracts underlying the litigation.[164] Performance-based acquisition is "a technique for structuring all aspects of an acquisition around the purpose and outcome desired as opposed to the process by which the work is to be performed."[165] The concept is not new, having been around since the 1990s.[166] The 2001 NDAA established a preference for performance-based contracts.[167] The preference is now a requirement under the Federal Acquisition Regulations[168] and a separate approval process is required if an acquisition for services is not performance-based.[169]

Performance-based acquisition would seem to aid at least the framework by which some of the plaintiffs attempt to argue their case, while undermining the contractor defendants' arguments. In an acquisition for logistics services, which form the basis for the convoy related litigation previously discussed, the government's focus is now required to be on purpose and outcome, and not, as contractors argue, on dictating or controlling specific details of logistic convoy operations.

---

ongoing. *See supra* Part III.A.

164. The U.S. Court of Appeals for the D.C. Circuit did discuss performance based contracting in *Saleh*, but not in the context of the political question doctrine. *See* Saleh v. Titan Corp., 580 F.3d 1 (D.C. Cir. 2009).

165. The term performance based acquisition replaced the term performance based contracting. *See* General Services Administration, Performance-Based Acquisition, http://www.gsa.gov /Portal/gsa/ep/contentView.do?contentType=GSA_OVERVIEW&contentId=15922 [hereinafter Performance Based Acquisition].

166. *Id.*

167. THE FLOYD D. SPENCE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2001, Pub. L. No. 106-398, § 821 (2001).

168. *See* 48 C.F.R. § 37.000 (2009) (requiring "the use of performance-based acquisitions for services to the maximum extent practicable and prescribing policies and procedures for use of performance-based acquisition methods").

169. *See* 48 C.F.R.§ 7.105(b)(4) (requiring that a written acquisition plan "[p]rovide rationale if a performance based acquisition will not be used or if a performance-based acquisition for services is contemplated on other than a firm fixed- price basis"); U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. § 237.170-2 (2009) (describing the required approval process to acquire services through a non performance-based contract); U.S. DEP'T OF ARMY, ARMY FEDERAL ACQUISITION REG. SUPP. pt. 5137.590-1 (2007) (stating that the Army acquisition team will "focus on the importance of developing and maintaining sound acquisition strategies to ensure services are properly planned, based upon clear, performance-based requirements and acquired by sound business practices").

C. Conspicuous Silence

Despite the important role contractors play in today's military, in the host of contractor related litigation where the government is not a party and the political question doctrine has been raised, there is not a single reported case of the government intervening or submitting an amicus curiae brief to the court. The closest the government seems to have come was in *Lane*, discussed above.[170] During the pendency of the appeal in *Lane*, the Department of Justice (DoJ) filed a motion requesting an extension of time to file an amicus curiae brief.[171] Having received the requested extension, the following month the DoJ filed a letter with the Fifth Circuit "advising that an amicus brief will not be filed."[172]

The fact that the United States is not a party to the litigation does not, in itself, preclude the application of the political question doctrine by the court.[173] But what, if anything, may a court permissibly infer from the government's lack of involvement in a case in which a defense contractor is asserting the political question doctrine as a defense? Answering that question requires consideration of the political question doctrine beyond battlefield contractor litigation. Courts have also given mixed signals in this broader category of cases. For example, the Ninth Circuit held that silence by the government is a neutral factor[174] while the Third and Eleventh Circuits have held that courts may make inferences based on the government's silence in cases involving the political question doctrine.[175]

The Ninth Circuit, in *Alperin v. Vatican Bank*, considered a suit against the Vatican Bank stemming from World War II claims issue.[176] The court noted

---

170. Lane v. Halliburton, No. 06-1971, 2006 WL 2796249 (S.D. Tex. Sept. 26, 2006).

171. *See* docket entry dated May 24, 2007, Lane v. Halliburton, 529 F.3d 548 (5th Cir. 2008) (requesting extension to file an amicus brief). The published opinion lists the United States as amicus curiae.

172. *See id.* (approving extension); docket entry dated June 12, 2007, Lane v. Halliburton, 529 F.3d 548 (5th Cir. 2008) (reflecting notice by the government that it would not be submitting a brief).

173. *See* U.S. v. Munoz-Flores, 495 U.S. 385, 394 (1990) (stating that the identity of the parties is immaterial to the presence of the political question doctrine in a particular case).

174. Alperin v. Vatican Bank, 410 F.3d 532, 556 (9th Cir. 2005). *See* Assicurazioni Generali S.p.A. Holocaust Insurance Litigation, 340 F. Supp 2d 494, 506 (S.D.N.Y. 2004) (stating that "the Government's decision to intervene, or not, in a particular case relating to foreign affairs, and what form its intervention should take were it to do so, is informed by a variety of intricate diplomatic and political consideration that make this sort of inferential reasoning by a courts a perilous enterprise").

175. *See* Gross v. German Foundation Industrial Initiative, 456 F.3d 363 (3rd Cir. 2006); McMahon v. Presidential Airways, 502 F.3d 1331 (9th Cir. 2007). The U.S. Court of Appeals for the D.C. Circuit discussed that the government had not chosen to intervene in Saleh or file an amicus brief, but not as related to the political question doctrine. Saleh v. Titan Corp., 580 F.3d 1, 10 (D.C. Cir. 2009).

176. *Alperin*, 410 F.3d at 556.

that "[a]lthough the political question doctrine often lurks in the shadow of cases," the doctrine is "infrequently addressed head on."[177] Nonetheless, the court found that the political question barred part of the suit.[178] Much like its practice in the contractor litigation, the United States did not intervene or inform the court of the government's view as to whether the political question doctrine should apply in *Alperin*. The court addressed this lack of involvement in stating that "[i]t is unclear, however, how courts should construe executive silence. We are not mind readers. And, thus, we cannot discern whether the State Department's decision not to intervene is an implicit endorsement, an objection, or simple indifference. At best this silence is a neutral factor."[179]

In the Third Circuit, *Gross v. German Foundation Industrial Initiative* involved a foundation seeking additional funds to pay victims of Nazi era wrongs.[180] The United States was not a party to the litigation, and its correspondence to the court stated that it did not have a position as to the justiciability of the case.[181] The Third Circuit also noted that the United States could have intervened in the case or petitioned the court to participate as amicus curiae, but did not.[182] In the end, the court determined that the political question doctrine did not apply, at least in part, "[b]ecause the United States Executive has declined to take a take a formal position on the justiciability of this case. . ."[183]

The *McMahon* case is even more instructive on this point, as it involved allegations of wartime contractor liability and the court was even more direct in its assessment of the government's silence.[184] In upholding the district court's denial of Presidential Airways' motion to dismiss on political question grounds, the Eleventh Circuit stated that "[w]e note that to this point, the United States has not intervened in the instant case, despite an invitation to do so . . . The apparent lack of interest from the United States to this point fortifies our conclusion that the case does not yet present a political question."[185]

The absence of U.S. involvement in cases involving the political question doctrine is even more striking when compared with U.S. involvement with

177. *Id.* at 538.

178. *Id.* at 537.

179. *Id.* at 556.

180. *Gross*, 456 F.3d at 363.

181. *Id.* at 384-95.

182. *Id.* at 385.

183. *Id.* at 363. The Third Circuit reversed the trial court decision that the political question doctrine applied.

184. McMahon v. Presidential Airways, 502 F.3d 1331, 1365 (9th Cir. 2007).

185. *Id.* This suggests that the Eleventh Circuit's view on drawing inferences requires not just government silence, but silence following an express judicial invitation to comment.

another doctrine which also involves justiciability, the act of state doctrine.[186] In these cases, the government developed "the Bernstein Letter" whereby the DoS informs the court if the executive branch believes that the act of state doctrine applies to pending litigation.[187]

So why hasn't the government made its views known in significant battlefield-related tort litigation wherein contractors have asserted the political question doctrine in an attempt to preclude a court from hearing the case? One likely possibility is that by expressing its view on the applicability of the political question doctrine in a given case the executive branch would favor one side of the litigation over the other. This is an outcome which, particularly when U.S. service members are suing contractors, the government may wish to avoid.[188] For other plaintiff categories, the government likely does not want to involve itself in litigation between private contractors. Likewise, it would be problematic for the executive branch to submit a position to the court on the applicability of the doctrine to suits by persons it was responsible for detaining at Abu Ghraib. Moreover, if the executive branch's position were that the doctrine does not apply, then it would increase the chances of successful litigation success against companies with which it has billions of dollars of contracts and upon which its continued operation depends. On the other hand, if the executive branch's position is that the doctrine does apply, the case against the contractor might be dismissed, but, at least as regards the Abu Ghraib plaintiffs, it might also result in the executive branch having to explain to at least two treaty bodies whether the required remedy exists for former detainees who allege torture.[189]

In not submitting a position to the courts on contractor litigation involving the political question doctrine, the government may avoid initial offense to one party but almost ensures offense to both in the end. Also, somewhat counterintuitively, by remaining silent on the applicability of the political question doctrine, the government likely creates more work for itself, not less.[190] Without the government's input, courts inefficiently grapple with the

186. ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION THIRD EDITION 529 (2006) (referring to Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatshcappij, 210 F.2d 375 (2d Cir. 1954)).

187. *Id.*

188. *Id.*

189. *See* Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment, art. 14(1), Dec. 10, 1984, 1465 U.N.T.S. 85, 113; S. Treaty Doc. No. 100-20 (1988); 23 I.L.M. 1027 (1984) (requiring "that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation"); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20, 6 I.L.M. 368 (1967) (requiring "that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity").

190. There is also the possibility that by not submitting a statement to the court in cases in

competing characterizations of how the executive branch is or is not implicated by the questions the case presents. Furthermore, regardless of which way the court rules on the political question doctrine, either or both sides will likely attempt to engage the government by seeking declarations and trying to subpoena testimony and documents from it. In this way, the government will likely become involved, even when it does not submit its views to the court, jeopardizing both the efficiency of the process and control over its involvement. It seems reasonable to conclude that the lack of government involvement has played a role in the inconsistent application of the political question doctrine to wartime contractor litigation and that this, in turn, increases the chances that the Supreme Court will hear an appeal and provide guidance on the doctrine—an outcome the government may also want to avoid. If avoiding Supreme Court intervention is the government's goal, then not appearing in any of the cases and remaining silent on executive's view would not seem to further that goal. Indeed, the chance that the political question doctrine may return to the Supreme Court through a government contractor battlefield related tort case seems increasingly likely.[191]

V.
INCONSISTENT APPLICATION, RESULTING CONFUSION, AND THE WAY AHEAD

The situation in Iraq has improved in the past year. Iraq now assumes responsibility for detainees and convoys are rarely attacked.[192] This might lead

---

which the political question doctrine should apply, the government may end up reimbursing the contractor defendants for their litigation costs under some contract structures. In suits by service members, this would be an odd result as service members are generally precluded from suing the government in tort. There seems little functional difference between a service member suing the government directly as opposed to suing and recovering from a contractor, who in turn is reimbursed by the government. *See* FAR § 52.228-7(c), which provides for a contractor to be reimbursed for "liabilities" arising out of the performance of the contractor, including for death and bodily injury. *But see* Risk/Liability to Third Parties/Indemnification, 73 FED. REG. 62 (Mar. 31, 2008) (to be codified at 48 C.F.R. pt. 252.225-7040(b)(2) (referencing contractor concern for the availability of indemnification and stating that contractors are accountable for the negligent or willful actions of their employees, including subcontractors. In the Federal Register, the government reiterates the view that under performance based contracting, the government "does not, in fact, exercise specific control over the actions and decisions of the contractor").

191. As of this Article, the Fifth Circuit in *Fisher* found the doctrine did not apply to a convoy attacked by insurgents while the Eleventh Circuit in *Carmichael* found that the doctrine did apply in a vehicle crash. In similar fashion, the Court of Appeals for the D.C. Circuit dismissed the *Saleh* interrogator cases (although not expressly on political question doctrine grounds) while a district court within the Fourth Circuit has ruled that the doctrine does not preclude the *Al-Shimari* interrogator cases.

192. However, as the situation in Iraq has improved it has deteriorated in Afghanistan. As the United States shifts its attention and the focus of its total military force to Afghanistan, it will be interesting to see if there is a corresponding spike in lawsuits filed against contractors. This raises the question of how much the intensity (or lack thereof) of combat operations weighs in the judicial

one to question whether the cases arising from the treatment of detainees or the conduct of convoys in Iraq have any enduring significance, if the underlying incidents which generated the litigation are not likely to be repeated. However, interrogating detainees and driving logistics convoys are just two manifestations of a broader phenomena—the United States military's extensive reliance on private contractors and the occurrence of tort incidents that inevitably result, whether between contractors and local nationals, U.S. service members, or other contractors.[193]

As courts attempt to distinguish contractor tort cases involving the political question doctrine from each other, the resulting jurisprudence promises problems for both present and future litigants. One theory explaining this is that the current difficulty flows from *Baker v. Carr*, the lead case establishing the tests for applying the political question doctrine.[194] The *Baker* tests have proven an unsteady foundation for political question doctrine jurisprudence. Courts have wrestled with the Supreme Court's requirement to avoid "semantic cataloguing"[195] yet "analyze representative cases and to infer from them the analytical threads that make up the political question doctrine."[196] The current political question doctrine decisions in battlefield contractor litigation are the analytical threads upon which future decisions may unfortunately attempt to rely. Some might argue that, even if the *Baker* tests were useful when announced, the real cause of the current difficulty is the unique collision of the conflicts in Iraq and Afghanistan and the burgeoning use of contractors in roles traditionally reserved for the government; a collision which neither the political question doctrine nor the judiciary appear well-equipped to handle.

Issues of justiciability are a contradiction of sorts, as courts must consider detailed aspects of a case just to determine whether the court may permissibly

---

calculus. In any case, it seems clear that type of litigation treated here is not likely to disappear any time soon.

193. In demonstration of the inevitability of future litigation and perhaps the start of the next wave of contractor litigation involving the political question doctrine, *see* Complaint, Harris v. KBR, No. 08-0563 (W.D. Penn. Apr. 22, 2008), a suit filed by the parents of Staff Sergeant (SSG) Ryan Maseth, a U.S. Army Special Forces Soldier, or "Green Beret," electrocuted in Iraq while in the shower of a building allegedly maintained by KBR. At least 18 U.S. service members have been electrocuted in Iraq, the total number of injured and killed in Iraq and Afghanistan is likely higher. *See* Scott Bronstein & Abbie Boudreau, *Sources: Contractor for military committed serious violations*, CNN.com, Nov. 24, 2008, http://www.cnn.com/2008/US/11/24/soldiers.electrocuted/index.html. *See also* Kimberly Hefling, *State Dep't contractor electrocuted,* Associated Press, Sep. 8. 2009, *available at* http://www.google.com/hostednews/ap/article/ALeqM5htvFRJgKa3fGet485w0NBH1e3KeQD9AJGRO00. (detailing the September 2009 electrocution of a DoS contractor in Baghdad, Iraq).

194. Professor Chemerinksy has labeled the *Baker v. Carr* criteria "useless" and impossible to apply to determine which cases present political questions. CHEMERINSKY, *supra* note 16, at 143-145.

195. *Baker,* 369 U.S. at 217.

196. *Id.* at 211.

consider the case.[197] Even so, similar cases should yield similar, not widely disparate, outcomes. The fundamental questions remain: when should the political question doctrine apply to wartime contractor tort litigation? How does one balance the fact that incidents occur as a direct result of or in the shadow of combat operations with the recognition that "[t]he Constitution's allocation of war powers to the President and Congress does not exclude the courts from every dispute that can arguably be connected to 'combat?'"[198]

It would be wise for the government to acknowledge the inevitability of litigation resulting from the sheer number of contractors it currently employs and the functions they perform. More importantly, the government should recognize that by not involving itself in the litigation, it creates more work and expense for the judiciary and sacrifices the opportunity to influence the litigation and, thereby, prevent not only inconsistent case results but their unintended and unforeseen consequences over time.

For their part, courts should recognize that the terms combat and wartime are little more than labels that add little to the legal analysis in and of themselves.[199] Several of the "wartime" convoy accidents do not involve any relevant wartime condition—vehicles run into each other or off the road the world over. Similarly, analysis which focuses exclusively on operational control would seem to logically lead to the application of the political question doctrine to convoy accidents not only in Iraq but also in non-war zones, including domestic operations on U.S. soil. This extrapolation not only demonstrates that the operational control test can be a red herring, but also that applying the test without linking that control to decisions and causes relevant to the incident is unproductive and often results in confusing and inconsistent outcomes. Finally, courts should also take cognizance of the analytical pitfalls associated with both the macro and micro level approach to assessing the facts of these contractor liability cases.

If the application of the political question doctrine to wartime contractor tort liability is so unwieldy, is there an alternative? One commentator has suggested revising and possibly expanding the Defense Base Act (DBA).[200] The DBA provides workers' compensation protection to civilian employees working outside the United States on U.S. military bases or under a contract with the U.S.

---

197. That the U.S. requires only notice pleading makes justicability determinations that much harder.

198. *Ibrahim I*, 391 F. Supp. 2d at 15 (citing Hamdi v. Rumsfeld, 542 U.S. 507, 526-35 (2004)).

199. Such terms leave doubt as to when, where, and for how long a state of "wartime" exists. Assigning a "wartime" label leads to these inquiries which are of little utility absent some nexus between the wartime condition and the incident.

200. 42 U.S.C. §§ 1651-1654 (2006). For a discussion on the Act's revision and expansion, *see* Jeremy Joseph, *Striking the Balance: Domestic Tort Liability for Private Security Contractors*, 5 GEO. J.L. & PUB. POL'Y 691, 718 (2007) (recommending that the Defense Base Act should be the sole remedy for private security companies' negligence towards their employees).

government for public works or for national defense.[201] However, even with this approach, significant changes would be required for the DBA to address the categories of plaintiffs and causes of action, including intentional tort claims, addressed in this Article.[202] Additionally, the NDAA may limit future problems as it restricts security contractors from performing inherently governmental functions in an area of combat operations.

This author suggests an alternative methodological approach to these cases wherein the court would seek to determine: (1) whether the suit arises from actions taken by a contractor in war zone, defined as geographic locations where U.S. service members are eligible for "imminent danger pay"; (2) whether the U.S. military controlled the actions taken by the contractor either directly or through contract requirements; and (3) how the military operational control, decision making, or actions are relevant to, or a cause of, the incident at issue. The first prong of the analysis is a threshold inquiry designed to focus the inquiry on what "wartime" condition makes a fact in issue for the litigation more or less likely. The second prong moves past abstract Constitutional arguments to the specifics of whether there is governmental conduct relevant to the litigation. The final prong is designed to identify where on the causation spectrum that conduct or control lies and whether the political question doctrine should apply. Where the court determines the government's role to be an attenuated cause or no cause at all, the doctrine would not apply. However, as characterization of the government's role moves along the spectrum toward direct cause, or in the easiest application of the methodology, the proximate cause, the doctrine would apply.

The benefit of this proposed methodology is that it would provide courts a tether to a more finite analytical framework while amidst the amorphous *Baker v. Carr* tests. Courts applying such a framework would glean true analytical threads, relevant to the disposition of the case at bar and helpful to instilling a modicum of predictability in how the judiciary approaches whether the political question doctrine applies to a wartime related contractor tort suit. This, in turn, would lead to more consistent outcomes, which better inform prospective litigants as to the viability of their claim or defense. In the end, the likely outcome of these developments being fewer suits filed and quicker out of court resolution of those which are.

---

201. Department of Labor Office of Workers Compensation Programs, *available at* http://www.dol.gov/esa/owcp/dlhwc/lsdba.htm (last visited Jan. 22, 2010).

202. *See Lane Appeal*, *supra* note 101, at 556. (outlining KBR's arguments that both the DBA and the political question doctrine bar Plaintiff's suit). In the case of KBR's DBA argument, neither the district or Fifth Circuit courts addressed this question in their decisions. Appellant Reply Brief at 2, Lane v. Halliburton, 529 F.3d. 548 (5th Cir. 2008) (No. 06-20874) (arguing that the DBA provides contractors a defense to contract based theories of liability, but not those based in torts).

VI.
CONCLUSION

The purpose of this Article is not to argue for or against the applicability of the political question doctrine, in general or in any particular case. Instead, it seeks to shed light on the inherent difficulties courts face in applying a confusing justiciability doctrine, the political question doctrine, to wartime contractor tort litigation and to draw attention to difficulties enhanced by the government's diverse use of contractors and lack of involvement in the litigation which follows. This Article seeks to identify and separate those judicial approaches and methods of analysis which cloud the issue from those which clarify. In so doing, the Article proposes a new framework for considering these cases which, although not exhaustively discussed, the author believes provides a starting point for drawing out the elusive analytical threads that might prove be helpful in future cases.

Berkeley Journal of International Law

Volume 28 | Issue 1 Article 7

2010

The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases

Manoj Mate

The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases

Manoj Mate*

I. INTRODUCTION

The modern constitutions of the United States and India, while constructed and forged in two distinct and very unique political and cultural settings, share one important common context—both countries drafted and adopted their respective political instruments after successful independence movements that secured political separation from the British "Raj." Adding one small wrinkle to the story, the American constitutional republic followed a brief (and unsuccessful) interlude of American confederation that highlighted the need for strong central government power in the form of a federal republic with a strong national government. Despite these common historical threads of colonial-revolutionary lineage, the Indian experience also differs in one critical respect—the formation of the Indian Constitution occurred in the context of the political chaos, fragmentation and disorder that resulted from the partition of the former British colony into Hindu India and Muslim Pakistan.[1]

In both of these former British colonies, the Supreme Courts developed doctrines of due process and jurisprudential traditions of activism that expanded

* B.A., M.A., Ph.D. (forthcoming, 2010), University of California, Berkeley, J.D. Harvard Law School. Earlier versions of this Article were presented at the Annual Meeting of the Midwest Political Science Association in April 2006, and the Berkeley South Asian Politics Colloquia in Spring 2007. I am grateful to Martin Shapiro, Gordon Silverstein, Gary Jacobsohn, and Cornell Clayton for their comments, suggestions, and insights on earlier drafts of this article. This Article also benefited from meetings with Justice P.N. Bhagwati, Justice V.R. Krishna Iyer, Upendra Baxi, Rajeev Dhavan, T.R. Andhyarujina, Raju Ramachandran, and other leading jurists and scholars of Indian law during field research I conducted in New Delhi in 2006 and 2007.

1. For the definitive history of the framing of the Indian Constitution, *see* GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION (1966).

the scope of fundamental rights. The puzzle this Article seeks to explain is the emergence of due process jurisprudence in the Indian context in the late 1970s, despite the deliberate *omission* of a "due process" clause from Article 21 of the Indian Constitution by its framers, the Constituent Assembly. Various scholars consider the development of due process as a subset of the larger push toward more expansive interpretive approaches in the Indian Supreme Court.[2]

How did the Indian Supreme Court overcome the lack of a due process clause, a prolix Constitution designed to limit the power of the Court and a legacy of positivism and parliamentary sovereignty inherited from British rule to develop a doctrine of due process? As previous scholars have noted, the Constituent Assembly designed the Indian Court to be a relatively weak institution in a system in which the parliament and the executive were supreme,[3] and most justices of the Court in its early years operated in the British traditions of legal positivism and deference to Parliament.[4]

Leading scholarship on Indian law highlights the significant shift from a more formal, positivist interpretive approach to the Indian Constitution, exemplified by the Court's decision in *Gopalan v. State of Madras* (1950), to the more expansive approach adopted by the Indian Court in *Maneka Gandhi v. Union of India* (1978) in which the court adopted an activist approach to interpreting the fundamental rights and effectively created new doctrines of due process and nonarbitrariness.[5] What the literature highlighted as groundbreaking in *Maneka Gandhi* was the court's recognition of "an implied substantive component to the term "liberty" in Article 21 that provides broad protection of individual freedom against unreasonable or arbitrary curtailment."[6]

However, this Article analyzes how the Court's use of foreign precedent underwent a fundamental transformation in a line of cases preceding *Maneka*, which helps to account for the development of substantive due process in the

2. *See, e.g.*, UPENDRA BAXI, THE INDIAN SUPREME COURT AND POLITICS 122-23, 209 (1980); *see* S.P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS (2002).

3. *See* SATHE, *supra* note 2; Robert F. Moog, *Activism on the Indian Supreme Court*, 82 JUDICATURE 124, 125 (1988). Moog references Rajeev Dhavan, who observed that the Constituent Assembly, which framed the Constitution of India, wanted "an independent, but relatively harmless judiciary" that was subservient to parliament and the executive. Moog also cites to the Constituent Assembly debates, in which Prime Minister Jawarhalal Nehru argued that: "No Supreme Court and no judiciary can stand in judgment over the sovereign will of Parliament representing the will of the entire community. If we go wrong here and there it can point it out, but in the ultimate analysis, where the future of the community is concerned, no judiciary can come in the way. And if it comes in the way, ultimately the whole Constitution is a creature of Parliament."

4. Burt Neuborne, *The Supreme Court of India*, 1 INT J CONSTITUTIONAL LAW 476, 480 (2003).

5. *See* Andhyarujina, *infra* note 7 and accompanying text; *see* Neuborne, *supra* note 4, at 480.

6. Neuborne, *supra* note 4, at 480.

specific area of preventive detention and personal liberty. Thus, the *Maneka Gandhi* decision cannot be understood as a sudden, synoptic change. Rather, I contend that the move toward substantive due process was a gradual one, in which universalist approaches gradually overcame particularist ones, through close analysis of a series of key decisions involving personal liberty: *Gopalan v. State of Madras* (1950), *Kharak Singh v. State of Punjab* (1964), *Govind v. State of Madhya Pradesh (1975)*, and *Maneka Gandhi v. Union of India* (1978).

This Article specifically examines how the Indian Supreme Court used U.S. and foreign precedent in its interpretation of the right to life and liberty contained in Article 21 of the Indian Constitution, examining the role of judicial borrowing in the Court's move toward more expansive, substantive interpretive approaches.[7] It then considers several explanatory factors that help shed light on this shift in the Court, including: an emphasis on "borrowing" of American and other foreign legal precedents and norms, institutional changes in the Court, and direct American influence in the development of Indian law, changes in the education, training and background of judges, and finally the changed political environment and context of the post-Emergency period (1977-1979) in India.

This Article proceeds as follows: Part II elaborates on the research puzzle in greater detail and then examines the historical context within which this puzzle emerged. Part III examines different strands of comparative constitutionalism and public law literature. Part IV analyzes a series of Indian cases in the area of personal liberty and preventive detention to develop a greater understanding of how processes of transnational "borrowing" of legal norms work and how borrowing interacts with judicial discourse and institutions to change legal norms. Part V further elaborates the incentive structure for judicial use of foreign precedent and suggests a theoretical framework for explaining the transformation in the use of borrowing in India.

II.
THE HISTORICAL CONTEXT: LIMITING THE SCOPE OF THE FUNDAMENTAL RIGHTS

The Indian Constitution balances the social-aspirational vision of the

7. This Article does not analyze the Court's jurisprudence involving the fundamental right to property contained in Article 31. During the original drafting of the Indian Constitution, the Congress Party-dominated Constituent Assembly of India decided not to provide due process protections related to the right to property, and deleted the term "just compensation" from Article 31 so as to make compensation issues nonjusticiable. This reflected the socialist Congress party's desire to enact redistributive land reform policies without judicial intervention. Notwithstanding the enactment of two amendments by Parliament to eliminate the justiciability of compensation, the Indian Court later ruled that compensation was justiciable and that such amounts could be reviewed in accordance with principles set forth by the Court. *See* T.R Andhyarujina, *The Evolution of Due Process of Law*, *in* SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA (B.N. Kirpal et al. eds., 2000).

framers, as set forth in the Directive Principles, against the Fundamental Rights, a set of negative rights or limits on government power.[8] The former articulates the "humanitarian socialist precepts. . ." at the heart ". . .of the Indian social revolution," though these principles were originally designated as nonjusticiable.[9] The Fundamental Rights, in contrast, set forth explicit, justiciable negative rights and was modeled in great part on the American Bill of Rights.[10]

In drafting the Indian Constitution, the Constituent Assembly established a Supreme Court with the power of judicial review, broad appellate jurisdiction over the state High Courts and original jurisdiction based on Article 32, which allows for direct suits in the Supreme Court to enforce the Fundamental Rights provisions[11] and empowers the Court to issue writs to enforce these rights.[12] But the Constituent Assembly also placed important limits on the Court's power in the area of property rights and personal liberty by not providing for a due process clause provision for either the property and compensation provisions (Article 31), or in the provisions for life and personal liberty (Article 21).

In addition, the Constituent Assembly appeared to subordinate key provisions within the fundamental rights to larger social goals of preserving order and morality. For example, Article 19, which provides for protections of the freedom of speech and expression, the right to assembly peaceably and without arms, the right to form associations or unions, and the right to move

8. This Article does not analyze the Court's jurisprudence involving the fundamental right to property contained in Article 31. During the original drafting of the Indian Constitution, the Congress Party-dominated Constituent Assembly of India decided not to provide due process protections related to the right to property, and deleted the term "just compensation" from Article 31 so as to make compensation issues nonjusticiable. This reflected the socialist Congress party's desire to enact redistributive land reform policies without judicial intervention. Notwithstanding the enactment of two amendments by Parliament to eliminate the justiciability of compensation, the Indian Court later ruled that compensation was justiciable and that such amounts could be reviewed in accordance with principles set forth by the Court. *See* State of West Bengal v. Bela Banerjee (1954) SCR 558; State of West Bengal v. Subodh Gopal A.I.R. 1954 S.C. 92; Dwarkadas Srinivas v. Sholapur Spinning & Weaving Co., A.I.R. 1954 SC. 119 (1954); see T.R Andhyarujina, *The Evolution of Due Process of Law, in* SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA (B.N. Kirpal et al. eds., 2000).

9. *See* AUSTIN, *supra* note 1, at 75.

10. *Id.* at 55.

11. *See* INDIA CONST. arts 13-31.

12. Article 32 of Indian Constitution provides, in relevant part:

> Remedies for enforcement of rights conferred by this Part.—(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
>
> (2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus, mandamus,* prohibition, *quo warranto* and *certiorari,* whichever may be appropriate, for the enforcement of any of the rights conferred by this Part. INDIA CONST. art. 32.

freely throughout India, also contains "provisos" which allow the Government to restrict those rights. Thus Article 19(2), the proviso applying to the freedom of speech and expression, delineates that:

> (2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

It is important to note here that the particular structure of Article 19 reflected the framers desire for a constitution modeled on the Irish, not the U.S. Constitution.[13]

Unlike the American system, which was predicated on horizontal separation of powers with separate coordinate legislative, executive and judicial branches, India's constitutional system was rooted in the traditions of British parliamentary sovereignty and legal positivism. Thus, the emergence of a strong Supreme Court challenging parliamentary legislation via substantive due process was unlikely given this traditional historical context. But aside from the historical legacy of British rule and legal positivism, two specific historical factors directly influenced the Constituent Assembly to explicitly omit a due process clause in the section on Fundamental Rights. The first was the influence of United States Supreme Court Justice Felix Frankfurter on Constitutional Adviser B.N. Rau, who traveled to Britain, Ireland, the United States and Canada in 1947 to meet with jurists regarding the drafting and framing of the Indian Constitution.[14] The second factor was the tumultuous and chaotic period of communal violence that gripped Northern India as a result of the partition of Muslim Pakistan from Hindu India, which led the framers of the Indian Constitution to remove the due process clause from their draft constitution for the protection of individual liberty.

---

13. *See* AUSTIN, *supra* note 1, at 69. According to A.K. Ayyar, one of the key members of the Rights sub-committee, the Constituent Assembly was faced with a choice between the American approach, in which the scope of very general provisions for civil rights and liberties were effectively broadened or constricted by judges, or the "proviso" approach employed in the Irish Constitution and ultimately recommend in the Karachi Resolution, wherein rights would be defined and precisely limited, thus "compendiously seeking to incorporate the effects of the American decisions."

14. *Id.* at 103.

A. *Frankfurter's Legacy: The Evils of Substantive Economic Due Process*[15]

The Constituent Assembly of India originally included a due process clause in the Fundamental Rights provisions associated with preventive detention and individual liberty in the initial draft version adopted and published in October of 1947.[16] At this point, a majority of members of the Constituent Assembly favored inclusion of a due process clause, because it would provide procedural safeguards against detention of individuals without cause by the government. However, Rau had succeeded in qualifying the phrase liberty with the word "personal," effectively limiting the scope of this clause as applying to individual liberties, and not property rights.[17] After this draft version was published, Rau embarked upon a multi-nation trip to the United States, Canada, and Ireland to meet with jurists, constitutional scholars, and other statesmen. In the United States, Rau met with American Supreme Court Justice Felix Frankfurter, a student of Harvard Law professor James Bradley Thayer, whose writings about the pitfalls of due process as weakening the democratic process had already impressed Rau prior to the visit.[18] In his meeting with Rau, Frankfurter indicated that he believed that the power of judicial review implied in the due process clause was both undemocratic and burdensome to the judiciary, because it empowered judges to invalidate legislation enacted by democratic majorities.[19]

Frankfurter's opposition to inclusion of a due process clause in India reflected the opposition among New Deal liberals in the United States to substantive *economic* due process and the infusion of property rights into the Due Process Clause of the 14th Amendment.In fact, Justice Frankfurter and Judge Learned Hand argued that the United States Supreme Court should exercise judicial restraint and refrain from reading *both* economic and non-economic substantive individual rights into the due process clause. However, other liberal justices during the New Deal and Warren Court eras believed in

15. In the period between independence (1947) and 1956, the framers of the Constituent Assembly and early leaders of India's first constitutional government in 1950 effectively took the right to property out of the courts, putting it solely within the control of Parliament. While this Article focuses on Article 21 and due process as it relates to individual liberty (civil liberties), the framers and early government leaders also removed due process from the fundamental rights provisions for property contained in Article 31.

16. India formally and officially declared its independence from the British empire on August 15, 1947.

17. AUSTIN, *supra* note 1, at 103.

18. *Id.* Austin notes that in Rau's book CONSTITUTIONAL PRECEDENTS, Rau expressed that Thayer and other scholars had highlighted "the dangers of attempting to find in the Supreme Court—instead of in the lessons of experience—a safeguard against the mistakes of the representatives of the people." B.N. Rau, CONSTITUTIONAL PRECEDENTS 23, Third Series (1946). *See also* FELIX FRANKFURTER, FELIX FRANKFURTER REMINISCES 299-301 (1960).

19. *See* AUSTIN, *supra* note 1, at 103.

infusing substantive non-economic individual rights into due process. The Court gradually incorporated many rights through the "incorporation doctrine," through which the various rights contained in the Bill of Rights were read into the 14th Amendment. The United States Supreme Court developed what Robert McCloskey came to refer to as the "double standard" or the "preferred position doctrine" with respect to due process, favoring substantive due process in substantive individual rights, but not economic rights cases.[20]

Frankfurter's advice to Rau and his impact on the framing of the Indian Constitution and development of constitutional law in India represented a curious historical accident in comparative constitutional history. In advising Rau and the Constituent Assembly to eliminate a due process from the Constitution, Frankfurter effectively exported to post-Independence India ideas from an older jurisprudential debate in the United States regarding the problematic nature of substantive *economic* due process, in an era where Indian judges were attempting to broaden the scope of noneconomic individual rights.

Frankfurter had a lasting impression on Rau, who upon his return to India, became a forceful proponent for removing the due process clause, ultimately convincing the Drafting Committee to reconsider the language of draft Article 15 (now Article 21) in January 1948.[21] In these meetings Rau apparently was able to convince Ayyar, the crucial swing vote on the committee, of the potential pitfalls associated with substantive interpretation of due process, which Frankfurter had discussed extensively with Rau.[22] Ayyar, in ultimately upholding the new position on the floor of the Assembly in December 1948, supported removing the due process clause on the grounds that substantive due process could "impede social legislation."[23] With the switch in Ayyar's vote, the Drafting Committee endorsed Rau's new preferred language—replacing the due process clause with the phrase "according to the procedure established by law,"[24] which was apparently borrowed from the Japanese Constitution. Critics alleged, however, that the Japanese version had provided for separate guarantee of certain fundamental rights potentially endangered by the omission of a due

---

20. Robert McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial, Supreme Court Review*, 1962 SUP. CT. REV. 34, 34-62 (1962).

21. Rau had also proposed an amendment to his version of the Draft Constitution "designed to secure that when a law is made by the State in the discharge of one of the fundamental duties imposed upon it by the Constitution and happens to conflict with one of the fundamental rights guaranteed to the individual, the former should prevail over the latter; in other words, the general right should prevail over the individual right." RAU, *supra* note 18, at 23.

22. AUSTIN, *supra* note 1, at 104.

23. *Id.* at 106 (citing to the proceedings of the Advisory Committee meeting of April 21, 1947).

24. *Id.* at 104-05. The new version of then Article 15 thus reads: "No person shall be deprived of his life or personal liberty except according to the procedure established by law." This version ultimately was adopted into the final version of the Constitution adopted by the Assembly, and became Article 21 in the Indian Constitution. *Id.*

process clause.[25] The new Article 15 was finally adopted on December 13, 1948, without a due process clause, precipitating a national outcry from political leaders, national and state bar associations, and significant opposition within the Assembly itself.

B. Preventive Detention, Communal Violence, and the Elimination of Due Process

Another significant factor that influenced Ayyar's change of position and the swing toward removing due process was the rise of communal violence and instability in North India that resulted from British partition into Hindu India and Muslim Pakistan. Opponents of due process thus believed that preventive detention policies, without constitutional guarantees for due process, provided the best check on the communal violence that was gripping India at that point, which had only further intensified following Gandhi's assassination on January 30, 1948.[26]

Preventive detention practices were a legacy of British colonial rule in India. The British had used preventive detention laws to detain potential saboteurs or insurgents, without trial and with minimal procedural safeguards. After the Constituent Assembly decided to eliminate due process from Article 15 (now Article 21) of the Constitution, outside pressure from groups including the Indian Law Review of Calcutta and the Calcutta Bar pressured Assembly members to amend Article 15 in an attempt to reinstate some minimal procedural safeguards for individual liberty in preventive detention cases.[27] The result of this pressure was the introduction of a new Article 15A by Ambedkar, which proposed to require that arrested persons be brought "before a magistrate within twenty-four hours of his arrest, informed of the nature of the accusation, and detained further only on the authority of the magistrate."[28] However, these provisions in Article 15A did not apply to detainees under preventive detention legislation passed by Parliament, which could effectively detain individuals for up to three months without any procedural safeguards; after three months, specific procedural safeguards had to be complied with to allow continued detention. These standards included the requirement that an Advisory Board

25. These rights included the right not to be detained except for adequate cause, the right to be immediately informed of charges underpinning detention, the right to counsel, the right to an immediate hearing in court, and the right to be secure against "entry, search, etc., except on a warrant." *See id.* at 105; 7 CONSTITUENT ASSEM. DEBS. 20, 844-45; KENPŌ, arts. 32, 34, 35.

26. AUSTIN, *supra* note 1, at 104.

27. *Id.* at 109. Amendments 52, 53, and 54 of Consolidated List of 5 May 1949; Orders of the Day, 5 May 1949, cited in AUSTIN, *supra* note 1, at 109. The amendments listed were introduced by Z.H. Lari, Mohammed Tahir, and T.D. Bhargava. The amendments proposed numerous safeguards, including prohibiting detention without adequate cause, as well as providing for the speedy and public trial of all detainees.

28. AUSTIN, *supra* note 1, at 109.

composed of judges find sufficient cause for continued detention.[29] Ultimately, however, the government succeeded in amending Article 15A to all but remove judicial interference with executive detention.

Thus, the removal of a due process clause was indicative of a larger orientation of the framers of the Indian constitution toward restricting substantive modes of judicial review to enforce limits on the Government's power, particularly in the area of preventive detention and property rights. The uniquely chaotic and fractious political and social context within which the members of the Constituent Assembly drafted the Indian Constitution had a lasting impact in the Indian Constitution's approach to balancing government power against individual rights. Indeed, the American Constitution fundamentally differs from the Indian in that the American Constitution is animated by and premised on a concern with placing limits on national power through horizontal and vertical separation of powers and the addition of a Bill of Rights. In contrast to this conception of "limited government," this paper contends that the historical realities of social upheaval and chaos had an indelible impact on the Indian Constitution's approach to balancing government power against individual rights—one that differed markedly from the American one in its rejection of the conception of a "limited government." Indeed, the Indian constitution in its final adopted form, lays out a "strong government" system modeled on the strong parliamentary model of the British system, combined with some elements of "limited government" embodied in the incorporation of a Fundamental Rights section comparable to the Bill of Rights in the U.S. However, the removal of a due process clause and other amendments greatly weakened the power of the Court early on, at least in its ability to challenge governmental actions involving fundamental rights.

C. The Fundamental Rights and Directive Principles

In order to contextualize the substantive due process puzzle, it is essential to set forth the textual and historical context within which substantive due process emerged, contained in the provisions for Fundamental Rights and Directive Principles that lie at the heart of the Indian Constitution. Essentially, the Indian Constitution includes both the social-aspirational vision of the Directive Principles, one of positive rights, against the Fundamental Rights, a set of negative rights or limits on government power. The former articulates the "humanitarian socialist precepts. . ." at the heart ". . .of the Indian social revolution."[30] The Fundamental Rights, in contrast, set forth explicit, justiciable negative rights, and was modeled in great part on the American Bill of Rights.[31]

---

29. *Id.* at 110.
30. *Id.* at 75.
31. *Id.* at 55.

A demand for both positive rights and negative rights had been central to the impetus for founding the Indian National Congress (the "Congress party"), stemming from a desire among Indians for the same rights enjoyed by their British rulers.[32] The Congress party was comprised of the political leaders who had led India's independence movement from the British, and it remained the single dominant political party that controlled the Central Government of India until the late 1980s, when rival parties emerged as the Congress party grew weaker. A set of Indian pre-independence documents, which largely paralleled the American Declaration of Independence's demand for rights included: the Constitution of India Bill of 1895, the Commonwealth of India Bill of 1925, the Nehru Report of 1828, the Karachi Resolution of 1931, and the Sapru Report of 1945. The Constitution of India Bill set forth a "variety of rights including those of free speech, imprisonment only by competent authority, and of free state education."[33] In addition, "a series of Congress resolutions adopted between 1917 and 1919" called for civil rights and equal status with the British citizens.[34] The Commonwealth of India Bill of 1925, authored by Annie Besant, a freedom fighter and social reformer, set forth seven provisions for fundamental rights, stating that individual liberty, freedom of conscience, free expression of opinion, free assembly, and equality before the law were to be guaranteed.[35] Ultimately, the Fundamental Rights contained in the Indian Constitution were in large part derived from the third document in this series—the Fundamental Rights of the Nehru Report, a product of the Forty-Third Annual Session of the Indian National Congress prior to independence in 1928.[36] The Nehru Report's exposition of Fundamental Rights was based heavily on those "included in the American and post-war European constitutions" and drew explicitly on language contained in the aforementioned Commonwealth of India Bill.[37]

Interestingly, the Karachi Resolution, adopted by a session of Congress in March 1931, extended the sphere of rights from purely negative rights to an articulation of positive obligations to provide the masses "with the economic and social conditions in which their negative rights would have actual meaning."[38] The Congress thus adopted the "Resolution on Fundamental Rights and Economic and Social Change, which was both a declaration of rights and a humanitarian socialist manifesto."[39] The principles adopted here would

32. *Id.* at 52-53.

33. *Id.* at 53. *See also* THE CONSTITUTION OF INDIA, (1895): Shiva Rao, Select Documents, I.

34. AUSTIN, *supra note* 1, at 52-53.

35. *Id.* at 54.

36. *Id.*

37. *Id.* at 55.

38. *Id.* at 54-55.

39. *Id.* at 55.

eventually form the basis for the Directive Principles ultimately adopted by the Constituent Assembly. Finally, the last important document adopted before 1947 was the Sapru Report of 1945, which helped outline a set of fundamental rights that were mainly concerned with the problem of "placating minority fears." The report's key contribution to the evolution of rights jurisprudence was a fundamental distinction between "justiciable" and "nonjusticiable" rights.[40]

In contrast to the United States Constitution, however, the Indian Constitution was also shaped and influenced by a distinctly socialist ideology and worldview that had been championed by Nehru and other leaders of the Congress party. This ideology is reflected in the inclusion of the social-aspirational directive principles, the inclusion of limitations on the right to property contained in Article 31, and the removal of due process protections for the right of property.[41]

The attempt by the framers of the Indian Constitution to restrict the scope of Article 21 also reflected the legacy of British colonial rule in India, with its tradition of parliamentary sovereignty and the chaos and violence that engulfed India following the partition of the nation into India and Pakistan. In terms of constitutional limitations, then, the framers of the Indian Constitution removed due process from Article 21 in order to prevent judges from adopting more substantive approaches to due process that would allow for greater judicial intervention in Central government policymaking. In the landmark decision *Gopalan v. State of Madras* (1950), the Indian Supreme Court examined these constitutional and historical-contextualist limitations on due process in adopting a relatively formalist reading of the text of Article 21. *Gopalan* involved a challenge to the Preventive Detention Act of 1950 by a detainee who alleged that the Act violated his fundamental rights pursuant to Articles 13, 19, 21, and 22.The Court in *Gopalan* adopted a restrictive interpretation of Article 21 and the other fundamental rights based on the majority's analysis of original and historical intent.

III.
THEORETICAL PERSPECTIVES ON JUDICIAL BORROWING FROM COMPARATIVE CONSTITUTIONALISM

In terms of a theoretical framework, this Article examines the development of substantive due process in light of three main strands of literature in the area of comparative constitutionalism. First, this Article looks at the literature on the growing importance of transnational borrowing of legal norms and precedents. Second, this Article examines the literature on "strategic" contexts within which

40. *Id.* at 57-58.

41. *See supra* note 6.

courts operate. Finally, the Article considers institutional approaches toward understanding the development of substantive due process.

Public law scholars increasingly have focused greater attention on explaining the phenomenon of transnational "borrowing" of foreign precedents, especially in light of the recent borrowing trends beginning to surface in American law. Justice Anthony Kennedy's use of foreign precedents from the European Court of Human Rights in the majority opinion in *Lawrence v. Texas*[42], precipitated quite a fervent response not only from Justice Antonin Scalia in dissent, but from academic and legal scholars.[43] Kennedy's use of foreign precedent in *Lawrence* to support implying and extending the privacy right to encompass personal intimate relations for homosexuals, is particularly ironic in the context of this paper's research puzzle, given that it was the Indian courts who crafted a new substantive due process doctrine protecting privacy and liberty based largely on American precedents in the 1960s and 1970s. The ongoing debate over the proper use of foreign precedent in the United States even resurfaced recently during the Senate confirmation hearing of Justice Sonia Sotomayor, who outlined a cautious, yet flexible approach to the use of foreign precedent and law in her testimony. Sotomayor struck a delicate balance in suggesting that while foreign law cannot serve as binding precedent, it may offer comparative guidance to judges. Responding to a question from Senator John Cornyn, Sotomayor argued that "[f]oreign law cannot be used as a holding or a precedent, or to bind or to influence the outcome of a legal decision interpreting the constitution or American Law."[44] But later, the justice suggested that the consideration of foreign law as a comparative guide is acceptable, observing that "in my experience, when I've seen other judges cite to foreign law, they're not using it to drive the conclusion. They're using it just to point something out about a comparison between American and foreign law. But they're not using it in the sense of compelling a result."[45]

A. Universalist versus Particularist Conceptions of Constitutional Identity

In his article *The Permeability of Constitutional Borders*, Jacobsohn highlighted the fundamental theoretical tension between Justice Scalia and those who support his view of "legal particularism," and those advocates for judicial borrowing who favor "universalist" approaches, which seek to achieve "transcendent norms of constitutionalism."[46] Jacobsohn argued that the gap

42. 539 U.S. 558 (2003).

43. Jacobsohn, *infra* note 46, at 1767-1770.

44. Adam Liptak, *Analysis: Sotomayor on Foreign Law*, N.Y. TIMES, July 17, 2009, *available at* http://thecaucus.blogs.nytimes.com/2009/07/17/analysis-sotomayor-on-foreign-law.

45. *Id.*

46. Gary L. Jacobsohn, *The Permeability of Constitutional Borders*, 82 TEX. L. REV. 1763 (2004).

between the aspirations of a society and the actual constitutional rules in place result in a "disharmonic jurisprudential context." Disharmony between these aspirational norms, and the status quo, creates incentives, opportunities, and costs for looking abroad for foreign precedents that may assist in closing this gap.[47] Jacobsohn observed that the Constituent Assembly forged a "disharmonic constitution" which sought to radically transform Indian society by ameliorating social, economic, and political inequality. Although he used "thick description" to examine borrowing in Indian cases dealing with religion and secularism, and the basic structure doctrine first espoused in the *Kesavananda* decision,[48] he did not examine the Court's use of borrowing in the context of substantive due process. It is in this area that this Article seeks to make a contribution to the literature by examining and analyzing how the Indian Court has used foreign precedent, especially American and British precedent and law to develop its substantive due process doctrine.

Jacobsohn also identified two main critiques of transnational borrowing of foreign precedents by judges: a "cultural" objection and a "juridical" objection. The cultural objection is based on the idea that use of foreign precedents and legal norms can undermine and interfere with indigenous political and cultural ideas, values, theories and norms that constitute a particular body politic.[49] The juridical objection relates to the role of judges and courts from a democratic theory perspective: these critics posit that justices use foreign precedents "in order to legitimate outcomes that would otherwise be defeated if confined to domestic sources."[50] These two types of objections nicely capture one of the main problems that legal particularists highlight—the "problem of translation," which refers to "the difficulty in assigning legal significance to critical terms and concepts whose meaning is culturally determined."[51]

Two additional critiques are worth noting here. First, critics of borrowing point to difficulties in transplanting a "discourse of rights" in new contexts. Jacobsohn cited the work of Mary Ann Glendon, who has written on the deleterious impact on the American body politic of an "impoverished" discourse of rights that tends to focus on overbroad interpretation and an absolutist vision of rights. According to Glendon, this works to harm and undermine communitarian aspirations by reconfiguring political discourse with an emphasis

47. *Id.* at 1767.

48. For discussion of the early development of the basic structure doctrine in India, *see* Raju Ramachandran, *The Supreme Court and the Basic Structure Doctrine*, *in* SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 110 (B.N. Kirpal et al. eds., 2000); *See also* SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE (2009).

49. Jacobsohn, *supra* note 46, at 1814.

50. *Id* at 1816.

51. *Id.* at 1810 n.222, citing Frederick Schauer, *Free Speech and the Cultural Contingency of Constitutional Categories*, 14 CARDOZO L. REV. 865, 879 (1993).

on absolute individualism, at the expense of social, community, and group norms and values.[52]

A second additional critique that appears to flow out of the cultural and juridical objections is the idea that there is a "liberal bias" inherent in judicial borrowing. Scholars such as Robert Bork maintain that constitutional borrowing, at least in the United States, has become a prime strategy of the "liberal wing of Court."[53] Thus, Jacobsohn noted that critics (including Bork) argue that justices use foreign precedents to escape the constraints of both textualism and original intent.[54] Furthermore, Jacobsohn suggested that a broader theoretical implication of the "liberal bias" flows out of E.E. Schattschneider's work in American politics. Schattschneider wrote that, "the most important strategy of politics is concerned with the scope of conflict."[55] Thus, "all efforts to expand or contract the scope of conflict . . . have a bias attached to them, with socialization of conflict associated with liberal causes and with privatization as a defense of the status quo."[56] Jacobsohn's extension of Schattschneider's model to judicial borrowing suggests that borrowing has an anti-status quo bias, and is primarily used to upset the status quo.

This Article examines the transnational borrowing of foreign precedent that characterized the Indian Supreme Court's substantive due process jurisprudence between 1950 and 1978, focusing on how American legal precedents and norms seeped into Indian legal doctrine and discourse. It seeks to contextualize this discussion within the larger particularist-universalist tension identified by Jacobsohn, as well as the cultural and juridical objections raised by those concerned with borrowing.

B. A Third Way to Borrow? The Contextualist Approach

In navigating the pathway between both universalist and particularist theories or approaches, Jacobsohn counsels against the use of foreign legal precedents or sources by judges without proper and careful attention to the unique and particular national and cultural context in which they are being applied, warning against the "pitfalls of failing to situate the universal in the particular in the course of seeking guidance from abroad."[57]I refer to Jacobsohn's description of this ideal-type approach herein after as

52. Jacobsohn, *supra* note 46, citing MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

53. *Id.* at 1813 n. 232, citing Robert H. Bork, *Whose Constitution Is It Anyway?*, NAT'L REV., Dec. 8, 2003.

54. *Id.* at 1812-1813.

55. *Id.* at 1813, citing E.E. SCHATTSCHNEIDER, THE SEMI-SOVEREIGN PEOPLE (1960).

56. *Id.* at 1813.

57. *Id.* at 1768.

"contextualism"—the practice of situating universal legal norms as captured in foreign precedents within the particular context of a country's unique national identity, political context, and cultural condition.

In contrast to Jacobsohn's contextualist conception of judicial borrowing, Sujit Choudhry suggests a more protectionist alternative: a "middle range" conception between universalism and particularism, which he calls a "dialogical" approach. Choudhry argues that judicial actors examine foreign legal sources as a foil of sorts to help clarify their understanding of their own legal system.[58] In examining the Indian Supreme Court's encounter with foreign legal sources in landmark cases on privacy and preventive detention, I suggest that one finds shades of both contextualist and dialogical interpretive modes in the justices' written opinions.

This Article examines the transnational level of borrowing of "norms" that characterizes the Indian Supreme Court's substantive due process jurisprudence between 1950 and 1978, by focusing on how American legal precedents and norms seeped into Indian legal doctrine and discourse. It seeks to contextualize this discussion within the larger particularist-universalist tension identified by Jacobsohn, as well as the cultural and juridical objections raised by those concerned with borrowing. By examining the use of foreign legal sources in Indian substantive due process cases dealing with preventive detention and personal liberty, this paper seeks to apply Jacobsohn's idea of the "disharmonic jurisprudential context."[59] This Article thus seeks to make a contribution to the literature by building on the work of Jacobsohn through a study of the development of substantive due process in India, and by testing the applicability of Jacobsohn's theoretical framework through an empirical analysis of Indian Court's use of foreign legal sources. This Article thus attempts to build on the work of Jacobsohn and Choudhry in offering a dynamic explanatory approach that helps account for the evolution and change in the Supreme Court's use of foreign legal sources over time in its due process jurisprudence.

C. An Institutionalist Perspective: Judicial Receptiveness to the Use of Foreign Precedent

Writing a little over two decades ago about the Indian Supreme Court, legal scholar Mark Galanter was struck by the formalistic style of the Court, observing that Indian judges "expatiate on the inherent meaning of words; they elicit definitive answers from textual passages; they portray themselves as controlled by inexorable rules of procedure and precedent."[60] He went on to

58. Sujit Choudhry, *Globalization in Search of a Justification*, 74 IND.L.J. 819, 835-36 (1999).

59. Jacobsohn, *supra* note 46, at 1767.

60. MARC GALANTER, COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA 483 (1985).

note that for judges in the Indian system, "making choices is a matter of professional knowledge and skill rather than of personal values or political commitments."[61] Another scholar of the Indian court writing at about the same time, George Gadbois, critiqued Indian legal culture for its "procedural nitpicking," "hair splitting legalisms," excessive adherence to "literal interpretation" and its "concern for form, not policy or substance."[62] However, while both scholars' depictions were largely accurate in the time they were writing, they would not be entirely accurate in describing the modern court post-1978, given the substantive due process revolution in the Indian Supreme Court.

I argue here that the institutionalist approach can help explain changes in the Court's receptivity to using foreign precedent in judicial decisions, as well as the broader shift toward greater activism in fundamental rights cases. Institutionalist models of public law posit that institutions play a critical role in shaping both the development of the preferences of political actors, as well as in the "constitution of a normative order."[63] Judges' approaches to particular cases or controversies can thus be shaped by their experience on the court.[64] Furthermore, some "historical-institutionalist" scholars adopt an even broader conception of institutions, suggesting that institutions include not just the "formal rules and norms of rational choice institutionalism, but also cognitive structures, habits of thought, routines, and traditions of political discourse.[65]

Broadly speaking, this Article suggests a synthesis of these multiple theoretical approaches. Specifically, Jacobsohn suggested that the "disharmonic jurisprudential context" of a nation, that is the gap between societal aspirations and the actual or "real" rules and constitutional constraints that comprise the status quo, will help structure the "incentives, opportunities, and costs inhering in the practice of looking abroad for interpretive inspiration."[66] In addition, I argue in this Article that any theoretical analysis of the use of foreign precedent by judges in India must also account for institutional changes in legal education, training and the socialization of judges, as well as broader changes in the political system that may affect or shape judges' worldviews and perspectives. As illustrated in Part V, these factors can help account for a shift in the Court's use of foreign precedent in developing a due process jurisprudence.

---

61. *Id.* at 484.

62. *Id.* at 484, citing George H. Gadbois Jr., *Indian Supreme Court Judges: A Portrait*, 3 LAW & SOC'Y REV. 317-336 (Nov. 1968-Feb. 1969).

63. Keith Whittington, *Once More Unto the Breach: PostBehaviorialist Approaches to Judicial Politics*, LAW & SOCIAL INQUIRY 601, 615 (2000).

64. *Id.* at 615.

65. THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS 30 (Howard Gilman & Cornell Clayton eds., 1999).

66. Jacobsohn, *supra* note 46, at 1767.

IV.
THE PATH FROM *GOPALAN* TO *MANEKA GANDHI*: FOREIGN PRECEDENT AND THE PATH TO DUE PROCESS

A. Gopalan v. State of Madras (1950)

Gopalan v. State of Madras was a significant decision because it represented the first case in which the Court meaningfully examined and interpreted key Fundamental Rights provisions of the Constitution, including Articles 19 and 21.[67] The key issue raised in *Gopalan*, through a petition for habeas corpus, was whether several provisions of the Preventive Detention Act of 1950, under which Gopalan was detained, violated his fundamental rights pursuant to Articles 13, 19, 21, and 22. In order to decide this issue the various judges in the majority of this early case each consider alternative interpretive approaches for determining the scope of the term "personal liberty" contained in Article 21, and whether the preventive detention statute impermissibly infringed on the petitioner's freedom of movement under Articles 19 and 21. Writing for the majority, Chief Justice Kania effectively restricted the scope of fundamental rights by reading the fundamental rights in isolation and separately from Article 21 (the "procedure established by law" provision), and Article 22, which provided guidelines for preventive detention.[68] Interestingly, the *Gopalan* decision was noteworthy for its use and consideration of foreign precedent, especially British and American cases, in ultimately concluding that Article 21 did not provide for an expansive source of fundamental rights through personal liberty.

An examination of the various opinions in *Gopalan* illustrates how the first justices of the Indian Supreme Court used foreign precedent as an interpretive tool in their respective analyses of original intent. For example, Chief Justice Kania compared the term "procedure established by law" in Article 21 to the due process clause contained in the 5th and 14th Amendments, to demonstrate the exceptionalism of the design of the Indian Constitution vis-à-vis its American counterpart:

> No extrinsic aid is needed to interpret the words of Article 21, which in my opinion, are not ambiguous. Normally read, and without thinking of other

67. Gopalan v. State of Madras, 1950 S.C.R. 88 (1950).

68. *See id.* I am aware that some Judges have expressed a strong dislike for the expression "natural justice" on the ground that it is too vague and elastic, but where there are well-known principles with no vagueness about them, which all systems of law have respected and recognized, they cannot be discarded merely because they are in the ultimate analysis found to be based on natural justice. That the expression "natural justice" is not unknown to our law is apparent from the fact that the Privy Council has in many criminal appeals from this country laid down that it shall exercise its power of interference with the course of criminal justice in this country when there has been a breach of principles of natural justice or departure from the requirements of justice.

> Constitutions, the expression "procedure established by law" must mean procedure prescribed by the law of the State.If the Indian Constitution wanted to preserve to every person the protection given by the due process clause of the American Constitution there was nothing to prevent the Assembly from adopting the phrase, or if they wanted to limit the same to procedure only, to adopt that expression with only the word "procedural" prefixed to "law."

Kania here relied on both an analysis of original intent and textualism to restrictively interpret Article 21. Furthermore, Kania in his opinion argued that the framers exclusion of the term "due process" in Article 21 was also aimed at preventing the courts from engaging in substantive due process analysis in determining the reasonableness of the level of process provided by the legislature:

> The word "due" in the expression "due process of law" in the American Constitution is interpreted to mean "just," according to the opinion of the Supreme Court of U.S.A. That word imparts jurisdiction to the Courts to pronounce what is "due" from otherwise, according to law. The deliberate omission of the word "due" from article 21 lends strength to the contention that the justiciable aspect of "law", i.e., to consider whether it is reasonable or not by the Court, does not form part of the Indian Constitution. The omission of the word "due",the limitation imposed by the word "procedure" and the insertion of the word "established" thus brings out more clearly the idea of legislative prescription in the expression used in article 21. By adopting the phrase "procedure established by law" the Constitution gave the legislature the final word to determine the law.[69]

Here, Kania uses both original intent and textual analysis to support a narrow view of Article 21, and the limited role of courts vis-à-vis Parliament envisioned by the framers who drafted that Article.[70]

Furthermore, Kania's opinion also examined the historical record, including the drafting of other constitutions for interpretative guidance. In examining the framing of the Indian Constitution, Kania references the framing of the Irish and Japanese Constitutions, to marshal evidence for the assertion that Article 21 was not intended to incorporate principles of natural law or justice, but rather was intended to have been construed in a much more limited fashion in accordance with British precedent. Specifically he observed that in an Irish decision, the Irish courts construed "due course of law" in a much more limited fashion.[71] Kania also noted that the term "procedure established by law" was derived directly from the Japanese constitution, which was framed by

69. *Gopalan*, *supra* note 67, at 108.

70. *Id.* In fact, Kania used decisions from Australia, England, and the U.S. as guidelines for proper use of original intent, invoking these precedents to support the idea that while it is improper to consider the opinions of individual members of the Constituent Assembly in the framing debates, limited use of such opinions is allowed to ascertain whether a particular phrase or provision was up for "consideration at all or not."

71. *Id.*

American jurists.[72] This connection suggests a caveat or corollary to Jacobsohn's analysis of borrowing —borrowing is not just used by those who seek to challenge the status quo on such issues as fundamental rights. Rather, both sides of an interpretive approach may use borrowing when there is a debate over an ambiguous area of law.

Justice Mukherjea's concurring opinion in *Gopalan* went beyond Chief Justice Kania's opinion in its recounting of the history of the development of substantive due process in England and in the United States. Murkherjea leveraged foreign precedent to support a restrictive reading of Article 21. First, he cited British scholars like Dicey (who is held out to be an expert on the subject of "personal liberty") who wrote that the term personal liberty specifically means "a personal right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification," and "not mere freedom to move to any part of the Indian territory."[73] Second, Mukherjea recognized a textual distinction in the phrase "personal liberty," arguing that the inclusion of the modifier "personal" suggests that the phrase specifically refers to "freedom from physical restraint of person by incarceration or otherwise."[74] According to Mukherjea, the term "personal liberty" must be read far more restrictively than the manner in which the United States Supreme Court interpreted the term "liberty" in the 5th and 14th Amendments to the United States Constitution.[75] Third, Mukherjea examined the Irish and City of Danzig Constitutions to support a non-structural reading of Articles 19 and Article 21.

In contrast to the majority, Justice Fazl Ali's dissenting opinion adopted a much more expansive interpretation of the phrase "procedure established by law" in Article 21. Whereas the majority read Articles 19, 21 and 22 as being separate, Justice Fazl Ali argued for a broad, structural reading of the Constitution whereby the fundamental rights contained in Article 19 are read in conjunction with Articles 21 and 22, which provide, respectively, for procedure established by law and for specific procedures for preventive detention. Additionally, Justice Fazl Ali's decision cited primarily to British and American, but also German (the city of Danzig) precedents to support a much broader reading of the term "personal liberty" in Article 21 of the Indian Constitution as encompassing the freedom to move and travel that is recognized in Article 19(1)(d):

> There is however no authoritative opinion available to support the view that this freedom is anything different from what is otherwise called personal liberty. The problem of construction in regard to this particular right in the Constitution of

72. *Id.* at 262.

73. *Id.*

74. *Id.*

75. *Id.*

> Danzig is the same as in our Constitution. Such being the general position, I am confirmed in my view that the juristic conception that personal liberty and freedom of movement connote the same thing is the correct and true conception, and the words used in article 19 (1) (d) must be construed according to this *universally accepted legal conception* (Italics added).[76]

Justice Fazl Ali's opinion thus endorsed a "universalistic" legal norm by marshalling various foreign precedents for support. In this respect, his dissent was far ahead of its time, since the majority of justices, both on this decision, and on the judiciary writ large, subscribed to a much more particularistic approach toward interpreting Article 21. The traditional view adhered closely to original and historical intent, and only used foreign precedent to support this very limited conception, both through comparing India to the Japanese constitution on which it was modeled, and to the American model which was very different.

In addition to recognizing a broad conception of personal liberty, Justice Fazl Ali's dissent broadly construed the provision "procedure established by law" in Article 21 to encompass higher principles of natural law and justice, and not just statutory law. While Justice Fazl Ali's opinion acknowledged that the framers of the Indian constitution intended to incorporate the same language as the Japanese Constitution (which was framed by Americans), and thus encompass more of a "procedural due process" conception, he still cited to American, British, and other foreign precedent to support a much more expansive view of due process.[77] This interpretation was based on Fazl Ali's reliance on principles of natural justice in interpreting Article 21. In his opinion, Fazl Ali highlights how in a series of U.S. decisions, the U.S. Supreme Court

---

76. *Id.* at 151. Article 19(1)(d) recognizes the right to "move freely throughout the territory of India." However, Article 19(5) allows the State to impose "reasonable restrictions" on this right. *See infra* note 131. It is worth noting here that while Fazl Ali recognized that the right to freedom of movement in Article 19(1)(d) was a part of personal liberty, he went on to hold that laws (such as the Preventive Detention Act) infringing upon this right would have to be tested for reasonableness under Article 19(5), and not under the higher standard of scrutiny associated with substantive due process.

77. *Gopalan*, *supra* note 67, at 160-163. *See* EDWARD MCWHINNEY, SUPREME COURTS AND JUDICIAL LAW-MAKING: CONSTITUTIONAL TRIBUNALS 95-96 (1986). In terms of the development of due process doctrine in the Indian Supreme Court, a brief discussion about the distinction between procedural due process (which focuses on the adequacy of the level of process provided by the State to an individual) and substantive due process (which recognizes that certain substantive rights are also protected by due process and that laws that violate or infringe upon these rights must be held invalid) is necessary. Fazl Ali's conception of procedural due process in *Gopalan* should be distinguished from the conception of substantive due process embraced by the Court in the dissenting opinion in *Kharak Singh*, and the majority opinions in *Satwant Singh Sawnhey* (1967) and *Maneka Gandhi (*1978). In *Sawhney* and *Maneka Gandhi*, the Court effectively recognized that the term "liberty" in Article 21 had a substantive component through which certain substantive rights could be read into the provision. In addition, the Court in *Maneka Gandhi* went much further than *Sawhney* in creating a doctrine of "nonarbitrariness" based on an activist interpretation of Article 14, which allowed the Court to review all state laws and actions for their unreasonableness. *See* ANDHYARUJINA, *infra* note 135, at 32-34.

recognized that the word "law" does not exclude certain fundamental principles of justice "which inhere in every civilized system of law." Drawing on British and American legal sources, Fazl Ali argued for incorporating procedural due process into Article 21, guided by principles of natural law and justice, in accordance with universal, transnational legal norms.[78]

B. Kharak Singh v. State of Punjab (1964)

In *Kharak Singh v. State of Uttar Pradesh*,[79] the court considered the constitutionality of five provisions of an Uttar Pradesh State Regulation 236, which delineated procedures for nighttime "domiciliary visits" and police surveillance of a suspect's home. Writing for the majority, Justice Ayyangar held that the domiciliary visits provision violated Article 21 of the Indian Constitution, because, based on American case *Wolf v. Colorado*, "an unauthorised intrusion into a person's home and the disturbance caused to him thereby, is as it were the violation of a common law right of a man—an ultimate essential of ordered liberty, if not of the very concept of civilization."[80]

While adopting a broad interpretation of liberty, the majority's holding seemed to be based on a procedural due process rationale: "cl. (b) of Regulation 236 is plainly violative of Art. 21' and as there is no 'law' on which the same could be justified it must be struck down as unconstitutional."[81] However, the four judge majority upheld the rest of Regulation 236's provisions, including those authorizing police surveillance of a suspect's home at night, on the ground that that there was no implied right of privacy in the constitution: "the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right."[82] The majority went on to note that when a fundamental right such as the right to free movement or personal liberty is implicated, "that only can constitute an infringement which is both direct as well as tangible and it could not be that under these freedoms the Constitution-makers intended to protect or protected mere personal sensitiveness."[83] Here, the majority adopted a restrictive conception of liberty that only extended to direct infringement of the freedom of movement, and refused to recognize the existence of a right to privacy. As a result, the Court only invalidated the domiciliary provision of Regulation 236, on the grounds that domiciliary visits constituted a direct infringement of liberty

78. *Gopalan*, *supra* note 67, at 160-163.

79. Kharak Singh v. State of Punjab, 1964 S.C.R. 332, 349.

80. *Id.* at 349.

81. *Id.*

82. *Id.* at 351.

83. *Id.* at 341.

in Article 21.

What is interesting in this case is the use of American substantive due process opinions or precedents in both the majority and dissenting opinions. Both opinions extracted language out of U.S. Supreme Court Justice Stephen Field's *dissenting* opinion[84] in the U.S. decision *Munn v. Illinois*, an early economic regulation of property rights decision, in which the majority actually upheld state regulation fixing the price of storage rates for grain elevators and requiring licensing for such facilities, on the ground that the property at issue "was affected with a public interest."[85] Justice Field's dissent in *Munn*, was one of the first decisions in American constitutional history to articulate a conception of substantive due process whereby courts must closely review legislation exercised pursuant to states' police powers where that legislation impinges upon a fundamental right such as the right to property.[86] While the majority in *Kharak Singh* relies on the *Munn* decision to support a broader conception of the term "personal liberty" than presented in the *Gopalan* decision, the majority follows the same understanding and construction of the term "procedure established by law" in Article 21 as did the majority in *Gopalan*. Both majorities refused to recognize that this provision means "due process" and requires notice, opportunity to be heard, a right to an impartial tribunal, and regularized procedures, in addition to allowing for consideration of principles of natural law and justice.[87]

Unlike the majority in *Singh*, Justice Subba Rao, joined by Justice Shah, argued that all of the provisions of Regulation 236, including those involving police surveillance, were unconstitutional as violative of Article 19(1)(d)[88] and Article 21. In his dissent, Subba Rao began with a substantive-due-process-based argument:

Therefore, the petitioner's fundamental right, if any, has to be judged on

---

84. This highlights an interesting trend in the use of foreign precedent by the Indian Court. Based on the author's analysis of a large number of landmark decisions, both majority opinions and dissents of foreign jurisdictions can carry equal weight in the Indian court, as justices merely pull out arguments and language out of opinions to support their own, irrespective of the binding nature of the precedent in the U.S.

85. Munn v. Illinois, 94 U.S. 113 (1876).

86. Edward S. Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 643, 653 (1909); Howard Jay Graham, *Justice Field and the Fourteenth Amendment*, 52 YALE L.J. 851, 843 (1941).

87. *See* SHAILJA CHANDER, JUSTICE V.R. KRISHNA IYER ON FUNDAMENTAL RIGHTS AND DIRECTIVE PRINCIPLES (1992).

88. Article 19 of the Indian Constitution stipulates that:

1) All citizens shall have the right -

(a) to freedom of speech and expression; (b) to assemble peaceably and without arms;

(c) to form associations or unions; (d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India; [and] (g) to practice any profession, or to carry on any occupation, trade or business.

> the basis that there is no such law. To state it differently, what fundamental right of the petitioner has been infringed by the acts of the police? If he has any fundamental right which has been infringed by such acts, he would be entitled to a relief straight away, for the State could not justify it on the basis *of any law* made by the appropriate Legislature or the rules made thereunder.[89] (italics added)

Perhaps more noteworthy was Subba Rao's willingness to imply or infer a right of privacy out of personal liberty: "It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security." [90] He also noted that "[i]n the last resort, a person's house, where he lives with his family, is his 'castle': it is his rampart against encroachment on his personal liberty."[91] In further articulating a definition of liberty, Subba Rao cited to the same citation used by the majority from Field's dissent in *Munn*, in which Field defined the term "life" as

> Something more than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any organ of the body through which the soul communicates with the outer world.[92]

Additionally, Justice Subba Rao's dissent also made reference to two other decisions— *Wolf v. Colorado*,[93] a case dealing with the permissibility of using illegally seized evidence in state courts under the Fourth and Fourteenth Amendment, and *Bolling v. Sharpe*,[94] in which the U.S. Supreme Court ruled that segregating students by race in public schools in the District of Columbia constituted a denial of due process under the Fifth Amendment. The use of language from these opinions to support a particular understanding of the term "personal liberty" is quite different from traditional American use of precedent, given that in both cases, the particular language referenced by Subba Rao was either not central to the Court's decision itself[95] (as in *Wolf*), or used in a

---

89. *Kharak Singh, supra* note 79, at 352.

90. *Id.* at 359.

91. *Id.*

92. *Id.* at 357 (Subba Rao, J., dissenting.). In later cases that followed *Maneka Gandhi*, the Court often used the *Munn* dissent citation from *Kharak Singh* to support substantive due process for privacy and autonomy (*see, e.g.,* Sunil Batra v. Delhi Administration, 1979 S.C.R. (1) 392 (1979)). This illustrates how American precedent, even dissents, can become embedded in Indian cases effectively becoming controlling precedent in a new context.

93. 338 U.S. 25 (1949).

94. Bolling v. Sharpe, 347 U.S. 497 (1954).

95. Justice Frankfurter made the argument cited by Subba Rao as a side-note in ruling that the propriety of such invasions are a different question from the issue of how to enforce such rights, including through exclusionary evidentiary rules Justice Frankfurter wrote in *Wolf*:

> The security of one's privacy against arbitrary intrusion by the police—which is at the

context that was completely different from the issue at hand in *Kharak Singh* (as in *Bolling*). Justice Subba Rao used Chief Justice Earl Warren's definition of the term "liberty" in *Bolling*, which "is not confined to mere freedom from bodily restraint. Liberty under the law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective."[96]

Additionally, Subba Rao's dissent also located authority for substantive review of legislation in Article 19(2).[97] Subba Rao thus held that all parts of Regulation 236 are unconstitutional as they violate fundamental rights in Articles 19 and an expansive conception of liberty in Article 21:

> If physical restraints on a person's movements affect his personal liberty, physical encroachments on his private life would affect it in a larger degree. Indeed, nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy. We would, therefore, define the right of personal liberty in Art. 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures.

Subba Rao here observed that the term personal liberty must be interpreted broadly to encompass both direct and indirect infringements on personal freedom and privacy. By recognizing that privacy was a subset of liberty, Subba Rao's dissent marked a significant break from the majority's restrictive conception of liberty in Article 21, and from earlier precedent. Subba Rao's dissent thus helped to lay the foundation for the Court's decisions in *Satwant Singh Sawhney* (1967), and *Maneka Gandhi* (1978). In both decisions, the Court embraced and built on Subba Rao's activist approach in expanding the

---

> core of the Fourth Amendment—is basic to a free society. It is therefore implicit in the concept of ordered liberty, and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and basic constitutional documents of English-speaking peoples.

One might go as far as arguing that these references are often in dicta in American cases. *Wolf*, 338 U.S. at 28.

96. *Bolling*, 347 U.S. at 500.

97. Article 19(2) stipulates that:

> Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

Justice William Douglas observed that the "reasonableness" requirement in Article 19 conferred on Indian courts similar powers to the American courts in reviewing laws regulating property rights. *See* JUSTICE WILLIAM O. DOUGLAS, WE THE JUDGES: STUDIES IN AMERICAN AND INDIAN CONSTITUTIONAL LAW FROM MARSHALL TO MUKHERJEA 297 (1956).

scope of personal liberty in Article 21.

C. Satwant Singh Sawhney v. Union of India (1967)

Just three years after his dissent in the *Kharak Singh* decision, Chief Justice Subba Rao' dissenting position in *Kharak Singh* effectively became the majority opinion in *Satwant Singh Sawhney,* a case dealing with a decision by the Indian Government to withdraw passport and travel privileges from an import/export businessman. In impounding Sawhney's passport the Ministry of External Affairs alleged that Sawhney had violated conditions of the import license that had been granted to him by the Indian government, was under investigation for offences under the Export and Import Control Act, and was likely to flee India to avoid trial. Sawhney challenged the action on the grounds that it infringed upon his fundamental rights under both Article 21 and Article 14 of the Constitution. In a 3-2 decision, the majority (which included Chief Justice Subba Rao, Justice C.A. Vaidalingam, and Justice J.M. Shelat), invalidated the Government's withdrawal and impoundment of Sawhney's passport on the grounds that such actions violated both Articles 14 and 21.[98]

Chief Justice Subba Rao's majority opinion in *Sawhney* marked a turning point in the Court's use of foreign precedent in this area of law – for the first time, the Court was able to author a majority decision and binding precedent in the area of personal liberty that built and relied on foreign precedents dealing with substantive due process. Moreover, Chief Justice Subba Rao used a combination of American precedents, along with the opinions in *Kharak Singh*, to rule that the term "personal liberty" is as broad in India as the term "liberty" is in the 5th Amendment of the U.S. Constitution.

Subba Rao leveraged foreign precedent to support two key legal arguments. First, he invoked two U.S. Supreme Court decisions dealing with passports and the right to travel, *Kent v. Dulles*, 357 U.S. 116 (1958), and *Aptheker v. Secretary of State*, to support the proposition that "in America the right to travel is considered to be an integral part of personal liberty."[99] His decision also notes that the United States Supreme Court, in *Kent v. Dulles*, effectively affirmed "that the right to travel is a part of the liberty of which the citizen cannot be deprived without due process of law under the Fifth Amendment." Subba Rao also relied on an article in the Yale Law Journal to support this larger point of the right to travel as part of a conception of personal liberty, and cites to the Magna Carta, Blackstone's Common Law, and other British precedent to

98. Satwant Singh Sawhney v. Ramanathan, 3 S.C.R. 525 (1967). Subba Rao ruled that the Government's actions were arbitrary and therefore violated Article 14, which contains the right of equality and equal protection. According to Subba Rao, the right to equality in Article 14 was a corollary to the rule of law, which forbids arbitrary government actions. In many ways, this holding was an early precursor to the doctrine of nonarbitrariness that was created in *Maneka Gandhi*.

99. *Id.* at 540.

support the same claim.[100]

To drive home his point, Subba Rao relied on both the majority and dissenting opinions in *Kharak Singh* to demonstrate that the term liberty encompassed the same scope of rights in India as it did under the U.S. Constitution: "It is true that in Article 21 as contrasted with the 4th and 14th Amendments in the U.S., the word 'liberty' is qualified by the word 'personal' and therefore its content is narrower. But the qualifying adjective has been employed in order to avoid overlapping between those element or incidents of 'liberty' like freedom of speech or freedom of movement etc., already dealt within Article 19(1) and the 'liberty' guaranteed by Article 21. . ."

Subba Rao thus concluded that the Court's decision in *Kharak Singh*:

> . . .is a clear authority for the position that "liberty" in our Constitution bears the same comprehensive meaning as is given to the expression "liberty" by the 5th and 14th Amendments to the U.S. constitution and the expression "personal liberty" in Article 21 takes in the right of locomotion and to travel abroad, but the right to move throughout the territories of India is no covered by it inasmuch as its specially provided in Article 19.[101]

Chief Justice Subba Rao thus skillfully incorporated Justice Field's definitions of "life" and "liberty" into the stream of majority doctrine in *Satwant Singh Sawhney* by relying on his own dissenting opinion (albeit a dissenting one) as well as the majority opinion in the *Kharak Singh* decision, to affirm in *Satwant Singh Sawhney* that Article 21's provision for "personal liberty" is an expansive one that includes the right to travel abroad.

Writing in dissent, Justice M. Hidayatullah (joined by Justice R.S. Bachawat), voted to uphold the Government's impoundment of Sawhney's passport. Hidayatullah advanced a particularist argument that criticized Subba Rao's majority opinion for relying on American legal precedents, instead of Indian law, to establish a right of travel based on an expansive reading of the term liberty in Article 21. The dissent was also critical of the majority for treating Subba Rao's dissenting opinion in *Kharak Singh* as controlling precedent.

D. Govind v. State of Madhya Pradesh (1975)

In *Govind v. State of Madhya Pradesh*,[102] the Court considered the constitutionality of certain Madhya Pradesh Police Regulations, which provided for similar police surveillance and domiciliary visits as those at issue in *Kharak Singh*. Writing for a unanimous panel, Justice K.K. Mathew upheld the regulations and refused to read a fundamental right to privacy into the

100. *Id.* at 536-537.

101. *Id.* at 526.

102. Govind v. State of Madhya Pradesh, 3 S.C.R. 946 (1975).

constitution. Mathew's decision took account of the litany of substantive due process cases decided by the United States Supreme Court dealing with privacy and autonomy between 1965 and 1975. He analyzed such landmark decisions as *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that a state law criminalizing the use of contraceptives was unconstitutional on the grounds that it interfered with the fundamental right of privacy of married couples) and *Roe v. Wade*, 410 U.S. 113 (1973) (holding that a limited right to abortion is encompassed within an implied right of privacy, which must be balanced against competing state interests in protecting the life of the child).[103] Mathew's extraordinary opinion is novel not only in its description of how the American justices in these decisions inferred a right of privacy emanating out of the "penumbras" of various amendments in the Bill of Rights, but in its extensive citation to and use of American law review articles by Justice Brandeis and Charles Warren ("The Right to Privacy"), John Hart Ely ("The Wages of Crying Wolf: A Comment on Roe v. Wade"), and Milton R. Konvitz ("Privacy and the Law: A Philosophical Prelude"), among others.

However, after summarizing this literature and the development of an implied right to privacy in the United States, Mathew then argued that even if the fundamental rights in Article 19 and 21 may have "penumbras" which imply a fundamental right to privacy, this does not necessarily require holding that the police surveillance regulations at issue in *Govind* were unconstitutional, for several reasons. First, he held that "the right to privacy in any event will necessarily have to go through a process of case-by-case development," and that as a consequence, the right to privacy cannot be characterized as an absolute right.[104] Second, employing Article 8 of the European Convention on Human Rights, Mathew ruled that even if privacy is deemed to be an implied fundamental right flowing out of the penumbras within Article 19, "that fundamental right must be subject to restriction on the basis of compelling public interest" [105] and because the regulations at issue have "the force of law" there is no violation of Article 21 given that it stipulates that no person shall be deprived of life or personal liberty except by "procedure established by law."[106]

The *Govind* decision was thus problematic in that it recognized the idea of penumbras and implied fundamental rights, but then refused to accord those rights the same constitutional protection (and the corresponding level of scrutiny applied to regulations restricting the right).[107] In effect, the result was to apply

103. *Id.* at 951-955.

104. *Id.* at 954-55.

105. *Id.* at 956.

106. *Id.* at 955-56.

107. However, one could posit that *Govind* is actually consistent with Douglas's decision in *Griswold*. The penumbras of liberties and rights that Douglas refers to in *Griswold* are based on a structural-historical intent view of constitutional interpretation—that is, we look at the various

a lower level of scrutiny in which the presence of a regulation that serves some compelling public interest is constitutional even if it restricts a fundamental right. Thus, *Govind* applied the same restricted view of Article 19 and Article 21 as the *Kharak Singh* majority, and effectively rejected the development of substantive due process in privacy and autonomy cases in the U.S., adopting much more of native, particularist view of the law. However, one might also recognize that *Govind* indeed borrowed from the structuralist approach toward interpreting the Constitution from the US—but because of structural differences, the Court could not reach the same outcomes as Justice Douglas did in *Griswold.*

E. Maneka Gandhi v. Union of India (1978)

The post-Emergency era was a critical transition period in Indian politics. Prime Minister Indira Gandhi's declaration of Emergency rule in 1975 was a direct response to an Allahabad state court's conviction of Gandhi for election fraud, and to the ensuing national agitation by leaders in the political opposition calling for her ouster. During the Emergency, Gandhi imprisoned prominent political opponents using the Maintenance of Internal Security Act, and also restricted civil liberties and the freedom of press. Gandhi's Emergency regime sought to restrict the activities of the political opposition through the enactment of the Maintenance of Internal Security Act, and restricted fundamental rights and curbed the power of the Indian Supreme Court by enacting a series of constitutional amendments: the 38th, 39th, 40th, and 42nd amendments. The 42nd Amendment was arguably the most controversial of the four amendments. The amendment fortified Central government power by authorizing the government to dissolve state governments under certain conditions, and attacked judicial power, by barring judicial review of the 1971 elections (including Gandhi's), overturning the Court's landmark decision in *Kesavananda* by stripping the Court's power to review the validity of constitutional amendments, and requiring two-thirds majorities of Court benches to invalidate statutes. In addition, the amendment barred the Supreme Court from reviewing the validity of state laws (and state courts from reviewing the validity of central laws); stipulated that implementation of the Directive Principles would take precedence over enforcement of the Fundamental Rights; mandated seven-judge benches for cases dealing with constitutional issues; and stipulated that certain types of anti-national activities would not be protected by Article 19's provisions for free speech and expression.[108]

---

amendments in the Bill of Rights to infer whether there are larger structural goals, such as protecting privacy, out of the penumbras of these rights. Similarly, it could argued that the justices decided *Govind* correctly and consistently with *Griswold*, given that it is much more difficult to infer such penumbras in the analogous provisions of the Indian Constitution.

108. *See* Neuborne, *supra* note 4, at 494-495.

In the election of 1977, the Congress Party was defeated for the first time in post-independence Indian history, by the Janata Party coalition. The mandate of the elections was a clear one: the Indian electorate had rejected the excesses of Indira Gandhi's Emergency regime.[109] The Janata Party coalition had campaigned on an agenda calling for the lifting of the Emergency and repeal of the draconian MISA; rescinding of the constitutional amendments enacted by the Emergency regime; and the restoration of democracy, fundamental freedoms, and constitutionalism.[110] During the Emergency, the Indian Supreme Court had acquiesced to the regime's suspension of democratic rule and fundamental rights, including the suspension of habeas corpus for detainees under the Maintenance of Internal Security Act,[111] and to the regime's attacks on the Court's jurisdiction and power. Moreover, the Supreme Court upheld the regime's suspension of habeas corpus and preventive detention regime in the *Shiv Kant Shukla* and *Bhanudas* decisions.[112]

Fundamental rights emerged as a salient issue in the post-Emergency era, as the Janata regime moved to restore democratic rule and judicial power by repealing the anti-democratic constitutional amendments passed by the Emergency regime. The Janata Party regime was a coalition of conservative "old guard" Congress (O) faction that had opposed Gandhi, the Hindu-right Jana Sangh party, the pro-business (and constitutionalist) Swatantra Party, the Samyukta Socialist Party (led by Jayaprakash Narayan), and the Bharitya Lok Dal.[113] This diverse coalition of parties came together with the express purpose of defeating Gandhi and ending the Emergency, and restoring constitutional democracy and fundamental rights.[114] By passing the 43rd and 44th Amendments, the Janata government repealed most of the provisions of the Emergency amendments.[115]

---

109. *See* GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION, 391-94 (1999).

110. *Id.*

111. *See* A.D.M. Jabalpur v. Shivkant Shukla, A.I.R. 1976 S.C. 1207 (Supreme Court upheld Government's suspension of habeas corpus under MISA, and ruled that no individual had locus standing to file a writ petition under Article 226 [for habeas corpus or any other writ or order] to challenge the legality of an order of detention on the grounds of illegality or mala fides); *see also* Union of India v. Bhanudas, A.I.R. 1977 S.C. 1027 (Supreme Court ruled that it could not examine whether conditions of detention were in compliance with prison legislation and legal and constitutional requirements during a period of Emergency rule).

112. A.D.M. Jabalpur v. Shiv Kant Shukla [1976] A.I.R. S.C. 1207; Union of India et. al. v. Bhanudas Krishna Gawde et. al., [1977] A.I.R. 1027.

113. In a significant development, the Janata coalition also succeeded in gaining the support of the Communist Party of India (Marxist) (CPI-M) and other leftist parties in the 1977 campaign, which had been reluctant to join the Janata coalition of parties because of its ties to the Hindu right and conservative elements.

114. MADHU LIMAYE, JANATA PARTY EXPERIMENT: AN INSIDER ACCOUNT OF OPPOSITION POLITICS 216 (1994).

115. The one exception was the Janata regime's failure to repeal Sections 4 and 55 of the 42nd Amendment, a result of intense opposition in the Rajya Sabha (the upper house of the Parliament),

In addition, the Janata government launched investigations into alleged crimes and abuses of rights committed by the Emergency regime, and established special courts to prosecute offences committed by political officials under that regime.[116] The national media also began extensively covering abuses of human rights and repression of civil liberties in this period, in contrast to its coverage during the Emergency period, which had been heavily restricted by government censorship.[117] In this crucial period of political transition, the Janata regime faced a Court that had been entirely shaped by appointments under Indira Gandhi, from 1966 to 1977.[118] Unlike the Nehru regime, Gandhi's regime did not defer to the Chief Justice of India in appointment matters, or to the seniority convention that had previously determined selection of Chief Justices.[119] Instead, Gandhi's regime politicized the appointment process by selecting justices perceived to be committed to supporting the social-egalitarian and populist agenda of her government.[120] During this period, the Indian Supreme Court played a critical role in adjudicating key cases related to the Janata regime's efforts to restore constitutional rights and judicial power, and in that regime's efforts to investigate, prosecute and punish leaders of the Emergency regime.[121]

The Court launched a new activist approach to interpreting the fundamental rights in *Maneka Gandhi v. Union of India* (1978),[122] the first major decision of the Supreme Court involving personal liberty in the post-Emergency period.[123] In this case, Maneka Gandhi, the daughter-in-law of Indira Gandhi, challenged

---

which remained under the control of the Congress party during the Janata interlude of 1977-1979. Ultimately, the Court itself invalidated these provisions in Minerva Mills v. Union of India, A.I.R. 1980 S.C. 1789.

116. *See* Baxi, *supra* note 2, at 122-123, 209.

117. *See* Upendra Baxi, *Taking Suffering Taking Suffering Seriously—Social Action Litigation in the Supreme Court of India*, *in* N. THIRUCHELVAM AND R. COOMARASWAMY, THE ROLE OF THE JUDICIARY IN PLURAL SOCIETIES 32 (1987).

118. In March 1977, the senior leadership of the Court was headed by Chief Justice M.H. Beg, and Justice Y.V. Chandrachud (appointed in 1972), Justice P.N. Bhagwati (1973) and Justice V.R. Krishna Iyer (1973), and Justice P.K. Goswami-all Gandhi appointees.

119. Although the Indian Constitution had established an appointment mechanism in which the Prime Minister and Cabinet had the primary responsibility for making appointments after consultation with the Chief Justice and other Supreme Court and high court judges, there was some ambiguity as to the exact role and influence of the Chief Justice and other judges and government officials in this process. As a result, under the Nehru Congress regime (1950-1966), the Government largely deferred to the Chief Justice in appointment of justices to the Court in light of existing conventions. See AUSTIN, *supra* note 1, at 125.

120. In an interview with Austin, Justice Reddy, a member of the *Kesavananda* majority, suggested that Gandhi started packing the Court in 1971 with the goal of overturning the Court's earlier pro-property rights decision in *Golak Nath*. *See* AUSTIN, *supra* note 1, at 269.

121. *See* Baxi, *supra* note 117; *see* AUSTIN, *supra* note 1, at 409-411.

122. (1978) 2 SCR 621.

123. *See* Baxi, *supra* note 2, at 151.

the seizure of her passport by the Janata Government under the Passports Act of 1967.[124] Gandhi challenged the seizure on the grounds that the action violated Articles 14 and 21 of the Constitution by not providing notice or a hearing prior to the impoundment of her passport. The External Ministry of the Janata Government had impounded Ms. Gandhi's passport, partly because the government feared Gandhi was planning to leave the country to avoid giving testimony to the ongoing investigation into alleged crimes committed by her husband Sanjay.

In doctrinal terms, the *Maneka Gandhi* decision was ground-breaking, in that a six judge majority (with one dissent) voted to broaden the scope of Article 21,[125] the right to equality in Article 14,[126] and the seven "fundamental freedoms" in Article 19.[127]

Maneka turned away from the more legalistic approach that held the field since the Court's decision in *Gopalan v. State of Madras* (1950).[128] Writing the lead majority opinion, Justice P.N. Bhagwati held that the Court should "expand the reach and ambit of the fundamental rights rather than to attenuate their meaning and content by a process of judicial construction."[129] The Court broke with the *Gopalan* approach in broadly interpreting the terms "life" and "personal liberty" in Articles 19[130] and 21, building on its earlier decisions in *Kharak*

---

124. The Act had been reformed following an earlier challenge in *Sawhney v. Union of India* (1967), in which the Court held that the right to travel was a part of the "personal liberty" guaranteed under Article 21, and consequently that it could only be limited by a law that provided for adequate procedures under the law, and not under the exercise of unlimited executive discretion.

125. Article 21 provides as follows: Protection of Life and Personal Liberty--"No person shall be deprived of life or personal liberty except according to procedure established by law."

126. Article 14 reads as follows: "Equality before law.-The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

127. Article 19 (1) provides as follows:

Protection of certain rights regarding freedom of speech ,etc.—

(1) All citizens shall have the right –

(a) to freedom of speech and expression;

(b) to assembly peaceable and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India; and

(f) *to acquire, hold, and dispose of private property* (repealed by 44th Amendment)

(g) to practice any profession, or to carry on any occupation, trade or business.

128. Six of the seven justices, including Justice Bhagwati, upheld the Passport Act and the government's order, in light of the government's willingness to provide Gandhi with a hearing. Justice Beg ruled that the Act and order should have been invalidated. Only Justice Kailasam dissented with respect to the Court's activist overruling of *Gopalan*.

129. Maneka Gandhi v. Union of India, (1978) 1 SCC 248, 670.

130. Article 19(1) provides as follows:

19. Protection of certain rights regarding freedom of speech, etc.—

Singh and *Satwant Singh Sawnhey*, in holding that the right to travel outside the country was part of personal liberty. Bhagwati argued that, "[t]he expression 'personal liberty' in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19."[131]

Second, the majority in *Maneka* read an expansive conception of due process into Article 21 of the Constitution (which the Court refused to do in *Gopalan*). The majority held that any procedures implicating the rights to life and liberty in Article 21 must be "right and just and fair and not arbitrary, fanciful or oppressive" to pass Article 21 scrutiny.[132] Bhagwati broke from earlier doctrine in holding that principles of natural justice must be read into Article 21 of the Constitution and require that a petitioner be afforded with reasons a hearing in passport revocation matters.[133] Invoking a familiar technique in Indian constitutional law, Bhagwati interpreted Section 10(c)(3) of the Act expansively to uphold it, and held that the Act implies just and fair procedures that comply with the dictates of natural justice. Third, the majority overturned *Gopalan* in ruling that laws that restrict personal liberty would have to pass scrutiny not only under Article 21's requirement of procedural due process, but also under Article 19 (personal freedoms), and Article 14 (nonarbitrariness). As a result, laws or regulations restricting personal liberty must also satisfy the "reasonableness" standard set forth in Article 19.[134]

---

(1) All citizens shall have the right—

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India; and...

(g) to practice any profession, or to carry on any occupation, trade or business.

(2) Nothing in sub-clause (*a*) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

(Clauses 3 through 6 are similar to clause 2 but apply to 19(1)(b-g)).

131. *Maneka Gandhi* at 670.

132. *Id.* at 673.

133. *Id.* at 680-681.

134. Article 19, after setting forth protections for various individual freedoms in 19(1), then introduces several limiting clauses allowing the state to limit each of those rights by imposing reasonable restrictions in clauses 2 through 6. For example, Article 19(3) states: Nothing in sub-clause (*b*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of

In adopting an expansive, structural approach to interpreting the Constitution, the Court effectively created a higher mode of judicial scrutiny, in the form of a new doctrine of nonarbitrariness, based on Article 14 and 21.[135] To support that approach, Bhagwati's leading opinion, building on his own concurring opinion in an earlier case, *E.P. Royappa v. Tamil Nadu* (1974),[136] developed an expansive view of equality in Article 14:[137]

> We must reiterate here what we pointed out in *E.P. Royappa v. State of Tamil Nadu* namely, that "from a positivistic point of view, equality is antithetical to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14.[138]

In this passage, Justice Bhagwati masterfully conjured up a new source of judicial power—a new doctrine of nonarbitrariness that empowered the Court to scrutinize key aspects of governance and policy-making, and rein in government illegality.[139] In perhaps one of the most famous passages in Indian constitutional law, Bhagwati references Justice Holmes in articulating the doctrine of nonarbitrariness:

> The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness, pervades Article 14 like a *brooding omnipresence* and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied.[140]

The Court's decision in *Maneka Gandhi* was groundbreaking in that it effectively incorporated a due process requirement into Article 21, and also held that the procedures contemplated by Article 21 must also satisfy the requirement

---

India or public order, *reasonable restrictions* on the exercise of the right conferred by the said sub-clause (italics added).

135. *See* T.R. ANDHYARUJINA, JUDICIAL ACTIVISM AND CONSTITUTIONAL DEMOCRACY 30 (1992).

136. E.P. Royappa v. Tamil Nadu (1974) (dismissing writ petition of officer the Indian Administrative Services (IAS) challenging an order of transfer to lesser position as violative of Article 14, on the grounds that no mala fides could be established). Bhagwati's opinion in *Royappa* was a concurring opinion, which differed from the majority opinion in that it invoked the "new dimension" of Article 14, rather than the mala fides rationale relied upon by the majority.

137. Article 14 reads as follows:

> 14. Equality before law.—The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

138. *Maneka Gandhi* at 283, citing E.P. Royappa v. State of Tamil Nadu, (1974) 4 S.C.C. 3 at 38-39. *See* ANDHYARUJINA, *supra* note 7, at 30-32 (arguing that arbitrariness is "not necessarily opposed to equality").

139. *See* ANDHYARUJINA, *supra* note 7, at 30.

140. *Id.*

of nonarbitrariness mandated under the Court's expansive interpretation of Article 14.

The majority opinions use of foreign precedent was noteworthy in that each articulated different approaches toward interpreting Article 21, including different methods for using foreign precedent. Justices Bhagwati and V.R. Krishna Iyer were more receptive to incorporating American precedent into their opinions, while Justice Chandrachud expresses some hesitation on this point, noting the crucial differences between the 5th and 14th Amendment in the United States, and Article 21 in the Indian Constitution. It is also worth noting that Bhagwati's majority opinion did not rely on the substantive due process precedents in the U.S. that established a fundamental right to privacy and expansive conception of liberty—namely *Griswold* and its progeny.

Justice P.N. Bhagwati's majority opinion is revolutionary to the extent it actually weaves together the particularist, indigenous conception of Indian law, with the universalist legal aspirations of foreign precedents and transnational norms.[141] The opinion begins by noting that the fundamental rights provisions in Part III of the constitution "represent the basic values cherished by the people of this country since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to its fullest extent."[142] However, although Bhagwati used foreign precedent sparingly, he did hold that the Court should build on the more expansive conceptions of personal liberty offered in the majority and dissenting opinions from *Kharak Singh*, and that the Court should aim to "expand the reach and ambit of the fundamental rights rather than to attenuate their meaning and content by a process of judicial construction."[143]

Maneka Gandhi thus relied indirectly on American precedent in two critical respects. First, the court accepts the broad and expansive interpretation of personal liberty in Article 21 employed in *Kharak Singh*, which relied on Justice Field's broad definitions of life and liberty in the 5th Amendment, and in *Satwant Singh Sawnhey*, in which the Court relied on Field's *Munn* dissent, as incorporated in *Kharak Singh*, to find that Article 21 encompasses a right to travel abroad, and "consequently no person can be deprived of this right except according to procedure prescribe by law."[144] In fact, Bhagwati's decision explicitly recognizes that Subba Rao's approach to interpreting Article 21 in his *Kharak Singh* dissent is now controlling:

In Kharak Singh's case the majority of this Court held that 'personal liberty' is

141. It should be noted here that the decision relies on American decisions, including Kent v. Dulles, 375 U.S. 116 (1958), and Apthekar v. Sec. of State, 378 U.S. 500 (1964), in developing the argument that a fundamental right to travel exists in the Indian constitution.

142. *Maneka Gandhi* at 752.

143. *Id.* at 670.

144. *Id.* at 671.

> used in the Article as a compendious term to include within itself all varieties of rights which go to make up the personal liberties of man other than those dealt with in several clauses of Article19(1). The minority however took the view that the expression personal liberty is a comprehensive one and the right to move freely is an attribute of personal liberty. The minority observed that it was not right to exclude any attribute of personal liberty from the scope and ambit of Art. 21 on the ground that it was covered by Art. 19(1). . .The minority view was upheld as correct and it was pointed out that it would not be right to read the expression 'personal liberty' in Art. 21 in a narrow and restricted sense so as to exclude those attributes of personal liberty which are specifically dealt with in Art. 19(1).[145]

Second, Bhagwati's opinion relied on three U.S. Supreme Court decisions—*Kent v. Dulles, Aptheker v. United States,* and *Zemel v. Rusk*—to reject using a "penumbra" approach to reading in peripheral rights into Article 19. Although his opinion in *Maneka Gandhi* advanced a broad conception of personal liberty, Bhagwati was careful to note that the right to travel abroad was rooted in Article 21's provision for personal liberty and not through a structural reading of Article 19.[146] Bhagwati thus advanced a similar line of reasoning as Justice Mathew in the *Govind* decision, in rejecting a penumbra-based approach to individual rights. This last distinction is a critical one, as it demonstrates that the substantive basis of the right to travel in *Maneka Gandhi* has its genealogical roots in an earlier set of American precedents in the area of substantive due process—namely, Justice Field's broad conception of life and liberty in his dissenting opinion in *Munn*. The Court's approach here resembles the opinions of Justices Harlan and White in the *Griswold* decision.

Perhaps the greatest doctrinal leap in Bhagwati's opinion is the development of a new "nonarbitrariness" standard based on an activist reinterpretation of Article 14's guarantee of equality. As Bhagwati noted:

> We must reiterate here what was pointed out by the majority in *E.P. Royappa v. State of Tamil Nadu* . . . namely, that "from a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. When an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14. . . . The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14.[147]

---

145. *Id.* at 669.

146. Bhagwati mainly relies upon a series of U.S. decisions, including Kent v. Dulles, 357 U.S. 116 (1958) and Aptheker v. Sec. of State, 378 U.S. 500 (1964) for the proposition that the right to travel cannot be read into Article 19 merely because it is a "peripheral" right to the core rights enumerated in Article 19(1)(a) or Article 19(1)(g) protecting the rights to freedom of expression.

147. *Maneka Gandhi* at 673.

Bhagwati in his earlier opinion in *Royappa* based this broadened interpretation of equality, and construction of a new doctrine of nonarbitrariness contained in Article 14, on the larger egalitarian ethos that animates the Indian Constitution, in addition to universalist notions of reasonableness and the rule of rule of law.

Justice V.R. Krishna Iyer's opinion arguably went the furthest in relying on foreign precedent and international legal norms, and was remarkable in its use of almost literary prose, citation and reference to eclectic sources.[148] Krishna Iyer also explicitly adopts an interpretive mode that takes account of foreign precedents and universal norms so as to bring Indian constitutional norms in line with universal, transcendent norms of constitutionalism, the rule of law, and protection of human rights. In his opinion, Iyer made reference to changes in "global awareness," and how the right to travel is a universally recognized one that is part of the personal liberty guaranteed in Article 21.

In contrast to Bhagwati's and Krishna Iyer's decision, Justice Chandrachud was more cautious in relying on foreign precedent—particularly U.S. Supreme Court decisions—in his concurring majority opinion. In responding to Bhagwati's opinion, Chandrachud observed that the lack of a due process clause in the Indian Constitution required that the Court adopt a more restrained approach:

> Brother Bhagwati has, on this aspect considered at length certain American decisions like *Kent v. Dulles, Aptheker v. Secretary of State, and Zemel v. Rusk* and illuminating though his analysis is, I am inclined to think that the presence of the due process clause in the Fifth and Fourteenth Amendments of the American Constitution makes significant difference to the approach of American judges to the definition and evaluation of constitutional guarantees. The content which has been meaningfully and imaginatively poured into "due process of law" may, in my view, constitute an important point of distinction between the American Constitution and ours which studiously avoided the use of that expression . . . Our Constitution too strides in its majesty but, may it be remembered, without the due process clause."

The Court's decision in *Maneka Gandhi v. Union of India* was a groundbreaking one in that it reversed the restricted view of the Gopalan majority of the terms "personal liberty" and "procedure established by law" in Article 21, in holding that the right to travel was part of the broad ambit of liberty, and that regulations restricting that right were subject to judicial scrutiny and invalidation where those regulations were held to be arbitrary and unreasonable.[149] The court overturned and invalidated regulations under the Passport Act of 1967, on the grounds that the seizure of petitioner's passport was arbitrary and unreasonable and infringed on her fundamental right of travel.

---

148. The opinion weaves together the work of Plato in his Dialogues, Rudyard Kipling's poetry, the Magna Carta, excerpts from Chief Justice Earl Warren's biography, as well as excerpts from the European Convention on Human Rights and the Universal Declaration of Human Rights.

149. Neuborne, *supra* note 4, at 500.

Maneka Gandhi thus incorporated substantive due process into Article 21.

The majority opinions' use of borrowing are noteworthy in that they do not use the substantive due process precedents in the U.S. that established a fundamental right to privacy and expansive conception of liberty—namely *Griswold* and its progeny, nor do these opinions cite to *Munn*, *Lochner*, or any of the economic substantive due process cases dealing with "liberty" that were referenced in *Gopalan*, *Kharak Singh*, and *Govind*. Instead, the majority opinions focus mainly on foreign and Indian laws and regulations regarding the right to travel, and in rather unprecedented fashion weave together foreign precedents in this area with indigenous, Indian legal and historical precedents in this area. My analysis here focuses on the opinions of Justices P.N. Bhagwati, who penned the majority opinion in this case, and Justice V.R. Krishna Iyer.

Justice P.N. Bhagwati's majority opinion is revolutionary to the extent it actually weaves together the particularist, indigenous conception of Indian law, with the universalist legal aspirations of foreign precedents and transnational norms. Bhagwati's opinion begins by noting that the fundamental rights provisions in Part III of the constitution "represent the basic values cherished by the people of this country since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to its fullest extent."[150] However, although Bhagwati uses foreign precedent sparingly, the opinion goes on to rule that the Court should build on the more expansive conceptions of personal liberty offered in the majority and dissenting opinions from *Kharak Singh*, and that the Court should aim to "expand the reach and ambit of the fundamental rights rather than to attenuate their meaning and content by a process of judicial construction."[151] The opinion thus implicitly relies on the use of foreign precedent in Subba Rao's dissent in *Kharak Singh*, which is ultimately validated in *Maneka Gandhi*. Additionally, Bhagwati contends that the personal liberty in Article 21 is not mutually exclusive of the rights in Article 19, and thus both should be read together in concert.[152]

In particular, Justice V.R. Krishna Iyer's opinion is remarkable and novel in its use of almost literary prose, citation and reference to eclectic sources,[153] and rich historical description. Krishna Iyer also explicitly supports an interpretive mode that takes account of foreign precedents and universal norms

150. *Maneka Gandhi* at 627.

151. *Id.* at 628.

152. *Id.* Bhagwati's opinion also builds on several cases, including the Bank Nationalization Case (R.C. Cooper v. Union of India, A.I.R. 1970 S.C. 564 (1970)), in which the court developed a test of "reasonableness" in scrutinizing regulations impinging upon fundamental rights.

153. The opinion weaves together the work of Plato in his Dialogues, Rudyard Kipling's poetry, the Magna Carta, excerpts from Chief Justice Earl Warren's biography, as well as referencing the European Convention on Human Rights, and the Universal Declaration Convention on Human Rights.

and seeks to bring Indian constitutional norms in line with the universal. His opinion refers to changes in "global awareness," and how the right to travel is a universally recognized one that is part of the personal liberty guaranteed in Article 21.

V.
UNDERSTANDING THE TRANSFORMATION IN THE USE OF FOREIGN PRECEDENT

The foregoing analysis of borrowing in Indian cases between 1950 and 1978 naturally yields two questions. First, how do we explain the transformation in the use of borrowing to support more expansive and substantive interpretive approaches in the area of personal liberty and preventive detention? Second, how does the Indian Supreme Court's use of borrowing help contribute to a larger understanding of borrowing by constitutional courts generally? In answering the first question, I consider several explanatory hypotheses for the "transformation" or change in the way foreign precedents were used by the Court to support expansive, substantive interpretive modes.

A. Americanization

One factor influencing the shift in the Court's increasing reliance on and greater receptivity to the use of U.S. precedents in the 1960s was the increasing influence of American law in India. A deep-seated and well-versed understanding of American law was imported in the 1950s and 1960s via the return of many Indian legal scholars, who had been educated at Harvard, Yale and a few other schools, to teach law at the prominent law colleges in India and "though a new burgeoning scholarship in legal academia which emphasized doctrinal and black letter law currents, emerged, its impact was limited and overshadowed by non-academic, practitioner-centered works."[154] In addition, the establishment of the Indian Law Institute (literally across the street from the Supreme Court), heavily funded by the Ford Foundation and other groups, was a critical development. The Institute was provided with the most extensive law library in the nation, and given copious funding to fund "new patterns of research" by its research staff; the Institute helped to advance American-style "black letter law in a much more respectable and systematic way."[155]

The result of these influences was that Indian judges gradually gained greater familiarity with U.S. legal doctrine in the 1960s. This is evidenced in the opinions of Chief Justice Subba Rao, who demonstrated a greater facility with U.S. doctrine than earlier justices of the Court. Supreme Court Advocate

154. Rajeev Dhavan, *Borrowed Ideas: On the Impact of American Scholarship on Indian Law*, 33 AM. J. COMP. L. 505, 514 (1985).

155. *Id.* at 518-519.

and Indian legal scholar Rajeev Dhavan suggested that Justice K. Subba Rao was one of the first Indian justices to use American precedent "imaginatively," noting that many citations in earlier decisions were used out of context: "American precedent rather than American legal doctrine was the relevant marketable commodity."[156] Thus, the shift toward greater reliance on U.S. foreign precedent in the Indian Court must be understood in the context of international borrowing from American law and American legal research methods, but also in light of the infusion of American legal "infrastructure" into India during this time period.

B. Universalism v. Particularism: The Legacy of British Colonial Rule

The *Gopalan* majority's rejection of British and U.S. precedents in the area of substantive due process may be properly understood as an early assertion of Indian particularism against the hegemony of British and American legal doctrine and ideals. But in many ways this particularist-universalist dichotomy was reflected of the complexity of the legacy of British colonial rule and legal institutions in India. Indeed, the *Gopalan* opinion was a critical decision that tested Indian justices, who had to negotiate between conflicting pressures and influences rooted in British traditions. On the one hand, the worldview of these justices was informed by a tradition of parliamentary supremacy in which courts were intended to play a relatively minor and subservient role, the tradition of positivist jurisprudence in England, and by the original intent of the framers of the Indian Constitution, who envisioned a Court that would not interfere with Parliament's power to enact policies that would effect a collectivist, socialist transformation.

At the same time, the justices on the *Gopalan* bench also served on high courts in the years leading up to independence and applied British common law doctrine that embraced principles of natural law and justice. Thus, Fazl Ali's acceptance of some variant of due process in *Gopalan* was based in part on a common law understanding of the term "natural justice" that predated independence in India.[157][158] Ultimately, Justice Subba Rao's groundbreaking decisions in *Kharak Singh* and *Satwant Singh Sawhney* marked a turning point in the Court's history, as Subba Rao steered the court toward the latter conception of British common law and doctrine. Like his predecessor Fazl Ali, Subba Rao employed both U.S. precedents, as well as British precedent and legal and constitutional history to support a broader, expansive understanding of liberty and due process. But Subba Rao's approach differed from Fazl Ali's in

156. *Id.* at 517.

157. *See* Gerald E. Beller, *Benevolent Illusions in a Developing Society: The Assertion of Supreme Court Authority in Democratic India*, 36 W. POL. Q. 513, 515-518 (1983).

158. *Gopalan, supra* note 67, at 89.

its reliance on 19th century American substantive due process opinions, such as *Munn v. Illinois*, to support a broader interpretation and understanding of the terms "life" and "liberty" in Article 21.

Finally, while Justice Bhagwati ultimately relied on Justice Subba Rao's dissent in *Kharak Singh* and majority opinion in *Satwant Singh Sawhney* in *Maneka Gandhi*, he also heavily relies on both a particularist conception of equality unique to the Indian Constitution's ethos, as well as universalist conceptions of reasonableness and the rule of law to construct a doctrine of "nonarbitrariness" in reviewing governmental actions to effectively replicate the concept of substantive due process. Bhagwati's opinion, then, reflects a careful balancing of both universalist and particularist norms. Indeed, Bhagwati goes so far as to *reject* U.S. precedents that suggest the use of penumbras in the interpretation of rights provisions.

C. *The Logic of Borrowing*

The Indian experience with judicial borrowing between 1950 and 1978, at least in the area of substantive due process and personal liberty/preventive detention, challenges the anti-status quo, liberal bias hypothesis suggested by the Schattschneider model (at least as extended by Jacobsohn into the realm of judicial borrowing).[159] Early on, justices in the majority opinions in *Gopalan* (and *Kharak Singh* to a lesser extent) cite to foreign precedents and scholarship, including American case law, to bolster and reinforce the particularist status quo, rejecting universalist norms of substantive due process and expansive "rights discourse." The early use of borrowing by Indian jurists suggests that in the initial stages of constitutional development, judges may be reluctant to use foreign precedents to bring in universal norms. In this sense, the early Indian jurists appeared to follow Glendon's approach which counseled and cautioned against destructive judicial "rights discourse," and suggested that foreign precedents can instead serve as a useful "foil" or mirror to help guide courts in understanding how to solve problems in a particularist context.[160] The early experience of Indian justices also supports Sujit Choudhry's conception of "dialogical interpretation," which refers to the use of "comparative jurisprudence [as] an important stimulus to self-reflection."[161]

The *Kharak Singh* and *Govind* decisions' use of precedent also suggests that the process of judicial borrowing can be a contentious one, and that the commitment to legal particularism may lead to often uneven and erratic use of foreign precedents and norms. The tussle between the *Kharak Singh* majority

159. Jacobsohn, *supra* note 46, at 1812-1813.

160. Jacobsohn, *supra* note 46, at 1811 (citing MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991)).

161. *Id.*

and Justice Subba Rao in dissent over the use of American precedents to support their competing particularist and universalist interpretations reflected broader tensions between formalist and emerging activist interpretive approaches to constitutional interpretation within the Court.Indeed, Justice Subba Rao was an early proponent of more expansive, "elastic" [162] interpretive approaches toward interpreting the constitution, in contrast to approaches that adhered more closely to original and historical intent.[163] The majority and dissenting opinions in *Kharak Singh* also used economic property rights decisions like *Munn* out of context. But once these precedents become embedded in case law, they can take on new life and meaning in a foreign context.[164]

The *Govind*'s decision's use of post-1965 American substantive due process cases in the area of individual privacy and autonomy, including *Griswold* and *Roe* is problematic and perhaps reflects Schauer's concerns about the problem of legal translation.[165] In particular, the Court's recognition of possible "penumbras" of rights, and then simultaneous rejection of a fundamental right to privacy and substantive due process, is particularly telling in the novel means by which the court asserts a particularist approach. The majority first argued that while there may be penumbras that imply rights such as privacy, these rights must go through a case-by-case process of adjudication before they can become "absolute" rights. This argument suggests that the

---

162. This is particularly evident in the Court's jurisprudence in the area of affirmative action and reservations, and in decisions dealing with the determination of which groups should be considered part of the "Other Backward Classes" that were entitled to particular government preferences and reservations in employment and education. According to Subba Rao,

> ...backward class is more comprehensive than the backward caste or community...The expression 'class' is wider...in expression than 'caste' or 'community;' it takes in, in addition to 'caste,' other groups based on language, race, religion, occupation, location, poverty, sex, etc. Caste is also a class; ...The expression 'backward class' is an elastic and changing concept. It takes in not only the classes existing before the Constitution but also those formed after the Constitution.

Speech delivered by Chief Justice Subba Rao, Jurists Seminar on Backward Classes, 1 Government of Karnataka 66, 67 (1975).

163. The "historic" view was advocated by Justice Hegde. According to this view, the term "class" contained in Article 15(4) and Article 340 must "refer to the existing organized sections of the society, and not any new groupings of individuals" (Speech delivered by Justice Hegde at Jurists Seminar on Backward Classes, Bangalore, September 1973, reprinted in 1 Government of Karnataka 65 app. 8 (1975), cited in GALANTER, *supra* note 60, at 205). Thus, the historic view adopted a highly restrictive reading of the term "backward class" rejecting the idea that the state could construct new backward classes based on various newly adopted criteria. *See* GALANTER, *supra* note 60, at 206.

164. In *Sunil Batra*, a 1978 decision dealing with personal liberty and the constitutionality of the Prisons Act of 1894, the court applied Subba Rao's use of Justice Field's dissent in *Munn* to support an expansive conception of personal liberty under Article 21. *See* Sunil Batra v. Delhi Adm., 1978 A.I.R. 1675 (1978).

165. *See* Jacobsohn, *supra* note 46, at 1810, n.222.

American precedents cannot be incorporated because they uniquely evolved and developed over time in a unique doctrinal context, and that a similar process would have to take place in the soil of Indian legal culture to fully develop absolute rights. Additionally, the text and history of Article 21's "procedure established by law" limits the Court from applying substantive due process, according to the Court. The *Govind* majority's response to foreign precedent thus suggests a "defensive strategy" against foreign precedents that justices may use to retain particularism in constitutional interpretation, and one that appears to echo the approach outlined by Judge Sotomayor's toward the use of foreign precedent and law in her recent testimony before the Senate during her confirmation hearing.

D. Rehabilitating Legitimacy: An Institutionalist Account of Activism in Maneka

Previous scholarship has suggested that the Court's decision in *Maneka* must also be understood in terms of broader changes in the political climate, and institutional forces within the Court. Leading scholars Upendra Baxi and S.P. Sathe both suggested that the Court's activism in *Maneka* was part of the Court's attempt to atone for its earlier acquiescence to the Emergency regime in cases like *Shiv Kant Shukla*.[166] In *Shukla*, the Indian Supreme Court upheld the Gandhi Emergency regime's suspension of access to the courts by political detainees (through habeas petitions), and overturned the decisions of several high courts granting such access.

Baxi argued that the Court's activism in *Maneka* was part of the Court's attempt to atone for its earlier acquiescence to the Emergency regime in cases like *Shiv Kant Shukla*. In *Shukla*, the Court upheld the Emergency regime's suspension of access to the courts by political detainees (through habeas petitions), and overturned the decisions of several high courts granting such access. Commenting on the Court's activist decision in *Maneka*, Baxi observed that:

> The Court thus is able to demonstrate that it is as committed to the high constitutional values as those who formed the new government and as the people who voted them into power in the extraordinary Sixth General Elections. The motivation for such demonstration must have been especially strong for the three justices who participated in the *Shiv Kant* decision: there is thus a certain contextual poignancy concerning the opinions of Justices Beg, Chandrachud and Bhagwati. Any assessment of *Maneka* which ignores this would be flawed to this extent."[167]

Sathe (2001) also agreed with Baxi in observing that the Court's activism in *Maneka Gandhi* was driven by the Court's desire to "atone" for its acquiescence

166. Baxi, *supra* note 117, at 36; Sathe, *supra* note 2, at 41.

167. Baxi, *supra* note 2, at 153.

to the excesses of the Emergency regime and rehabilitate the Court's legitimacy.[168]

In a later article, Baxi reiterated this argument, noting that the Court's activism in *Maneka* and other decisions was driven both by a desire to restore and enhance institutional legitimacy, and to respond to the broader political shift that had taken place following the election of the Janata regime in 1977. According to Baxi, the Court's activism was

> [P]artly an attempt to refurbish the image of the Court tarnished by a few Emergency decisions and also an attempt to seek new, historical bases of legitimation of judicial power. Partly, too the Court was responding, like all other dominant agencies of governance to the post-Emergency euphoria at the return of liberal democracy.[169]

Baxi's assessment of the Court's activism in *Maneka* also suggests that the judges in the *Maneka* majority were attuned to the changed political context following the elections of 1977. As noted earlier, the Janata party coalition had campaigned on a platform of restoring democracy, constitutionalism and fundamental rights, by repealing the draconian MISA law, repealing the anti-democratic amendments enacted by Gandhi's emergency regime. The justices in *Maneka* sought to build popular support through a new rights-based activism that mirrored the political agenda and values of the Janata regime, and also reflected the national electoral mandate of the 1977 elections.

VI.
CONCLUSION: TOWARD A THEORY OF BORROWING? GENERALIZING FROM THE INDIAN CASE

The analysis of the foregoing cases offers some insights into constructing a general theory of borrowing, at least in new developing constitutional regimes that emerge in an international order with older, established, and more developed constitutional systems. Early on, justices in constitutional courts in these new systems may be reluctant to use foreign precedents and international legal norms to undermine the particularist status quo of the constitutional order by adopting universal norms. In fact, the Indian case suggests that justices may use foreign precedents and norms to do just the opposite—to bolster and reinforce a particularist conception, as seen in *Gopalan* (and in *Kharak Singh* and *Govind*, though both seem to acknowledge a slight shift toward universal norms).

Building on Jacobsohn's model of a disharmonic context structuring the incentives, opportunities, and costs for judicial borrowing, this Article suggests that transformation in the use of foreign precedents and norms (toward

168. Sathe, *supra* note 2, at 50.

169. Baxi, *supra* note 117, at 36.

supporting universal aspirations) must be understood both in terms of the internal development of the Court, institutional changes including the increasing influence of U.S. precedent and law, the evolution in normative discourse among judges regarding interpretive approaches, and changes in the broader "political opportunity structure" for judicial activism.[170] Thus, the use of judicial borrowing, in the development of substantive due process in personal liberty cases in India, can be understood as occurring various phases: an initial "reinforcement" phase, in which foreign precedent is largely used to support the particularist status quo, a "contention" phase in which proponents of universalist norms and defenders of particularist norms battle over interpretive approaches and use of foreign precedent to support their conflicting, competing views of the constitution, and finally a "transformational" phase in which justices who support the use of borrowing in support of more transcendent, universal norms ultimately begin dominating judicial course and court majorities.[171]

Ultimately, a confluence of both institutional and political forces helped precipitate a transformation in the use of borrowing in the Indian system. The end of the Indian emergency in 1977 brought with it the end of authoritarian rule and a return to a democratic constitutional order in which a new party—the Janata coalition—helped restore the primacy of the Indian Constitution and the Indian Judiciary. This helped create a political opening for the transformed use of borrowing to support a new and expansive doctrine of substantive due process—an opening that emerged both out of a desire on the part of the Court to restore its legitimacy that may have been damaged in the *Shiv Kant Shukla* case,[172] and from a change to a political regime that was intent on restoring the Court's power and the primacy of the Constitution.

While this political opportunity may have been a necessary precondition to the development of substantive due process, this Article contends that it was not a sufficient one. Rather, it also required the development of a body of earlier precedent based on foreign norms and precedents, a shift in the normative

---

170. This concept implicitly builds on the work of political process theorists. *See* Doug McAdam et al., *Introduction: Opportunities, Mobilizing Structures, and Framing Processes – toward a Synthetic, Comparative Perspective on Social Movements*, *in* COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES, AND CULTURAL FRAMINGS 1, 1-20 (Doug McAdam, John D. McCarthy & Mayer N. Zald eds., 1996).

171. This proposed model for understanding borrowing is similar to Tom Ginsburg's delineation of strategic models of judicial review, according to which constitutional courts gradually expand power through cautious and strategic exercise of judicial review, moving from a low equilibrium to a high equilibrium of judicial review, in which a larger number of actors contest claims in a constitutional court, and in which the court's decisions are salient and obeyed. *See* TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003).

172. *See* Neuborne, *supra* note 4; S.P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS (2002).

discourse of legal interpretation, as well as a new "mold" of justices that were more willing to rely on and use foreign precedent and international legal norms to advance "universalist" conceptions of rights in developing a doctrine of substantive due process in personal liberty and preventive detention cases.

The foregoing analysis also suggests that borrowing must be understood as a dynamic process that unfolds over time. While it may be difficult to use borrowing to challenge "particular" institutional norms given the preeminence of original and historical intent approaches initially, later on, the "opportunity structure" for borrowing to advance universal norms may open up, as the "push" for such universal norms develops and intensifies, and as changes in training, education, and socialization of judges alters the way judges view and rely on foreign precedent. In particular, the impetus for overturning *Gopalan* in *Maneka Gandhi* reflected the broader post-Emergency political sentiment of a country recovering from two years of authoritarian rule.

Still, *Maneka Gandhi* also reflected gradual change in justices' conceptions of foreign precedent and due process generally. The *Govind* decision demonstrated that the "soil" of judicial activism may need to be properly "seeded" with earlier case law incorporating foreign precedents, which over time which can help develop into a critical mass or catalyst for subsequent decisions to use in overturning particularist conceptions of the law in favor of universal ones. Thus, foreign norms may need to become "embedded" (as in the *Kharak Singh* decision) and accepted by judges initially before they can be used to overturn indigenous, particularist norms.

However, Justice Subba Rao's dissent in *Kharak Singh*, suggests that the move toward substantive interpretation of the Constitution, through the use of borrowing, began well *before* the Emergency Rule period. Rather than view the emergence of substantive due process as a synoptic response to the Emergency, I contend that it must be conceptualized as a gradual evolution that occurred over time—one in which institutional experience and knowledge developed on a case-by case basis through particularized encounters with foreign precedent. In any case, it is clear that the *Maneka Gandhi* decision and the Court's earlier due process decisions, at least in doctrinal terms, cannot be understood simply and solely as a reaction to the Emergency alone, but as a product of the Court's encounter and interaction with the intricate and complex nuances of conceptions of personal liberty, individual rights, and due process in an international context. Indeed, it is this long historical experience that helps to account for how the Court went beyond the formalist aspirations of the framers, who sought to limit the power of the judiciary and provide for parliamentary supremacy, to develop a substantive approach to interpreting the Constitution that has gone beyond anything that B.N. Rau and Justice Frankfurter could possibly have envisioned in modern India.

Berkeley Journal of International Law

Volume 28 | Issue 1 Article 8

2010

Regional Minorities, Immigrants, and Migrants: The Reframing of Minority Language Rights in Europe

Stella Burch Elias

Regional Minorities, Immigrants, and Migrants: The Reframing of Minority Language Rights in Europe

Stella Burch Elias*

I.
INTRODUCTION

"An ivory tower should be built to protect the Basque people and their language, to ensure that this jewel does not disappear."[1]

"The task (for Turks) is to be good citizens in Germany, to learn German, to speak German in their families."[2]

The United Nations Year of Languages,[3] 2008, marked a significant milestone in the development of linguistic minorities'[4] rights in Europe. 2008

---

* Law Clerk to the Hon. Stephen Reinhardt. Yale Law School, J.D. 2009. I am extremely grateful to Judith Resnik, Reva Siegel, Mitchel Lasser, James Whitman, Adam Banks, and Jesse Townsend for their helpful comments on earlier drafts of this Article, as well as to Kate Heinzelman, Scott Anderson and the participants in the YJIL Works in Progress workshop series, and to Abbie VanSickle, Kate Apostolova, Ben Jones, and the editors of the Berkeley Journal of International Law for their terrific editing. Above all, thanks are due to Bram Elias for his very many contributions to this piece.

1. Niko Marr, Georgian writer and philosopher, (1865-1934), Rector of the University of Tbilisi, Minister of Culture in the Czar's Government.

2. Günther Beckstein, Governor of Bavaria, Interview with N24 Television, February 12, 2008.

3. *See* G.A. Res. 10592 U.N. DOC. A/RES/10592 (May 16, 2007); *see also* Press Release, *General Assembly Declares 2008 International Year of Languages, in Effort to Promote Unity in Diversity, Global Understanding*, *available at* http://www.un.org/News/Press/docs/2007/ga10592.doc.htm.

4. In this Article, the definition of "linguistic minority" will be that articulated by United Nations Special Rapporteur, Francesco Capotorti, in his 1991 Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, namely "a group that is numerically inferior to the rest of the population of a nation-state and whose members speak a language that is different from a language or languages spoken by the rest of the population." Francesco Capotorti, Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities at 16-26,

was the tenth anniversary of the entry into force of two key Council of Europe[5] treaties—the Framework Convention for the Protection of National Minorities[6] and the European Charter for Regional or Minority Languages[7]—as well as the tenth anniversary of the Organization for Security and Cooperation in Europe's[8] Oslo Recommendations Regarding the Linguistic Rights of National Minorities.[9] For over a decade, the Framework Convention, the Charter, and the

---

U.N. Doc. E/CN.4/Sub.2/384/Rev.1, U.N. Sales No. E.91.XIV.2 (1991); *see also* Adeno Addis, *Cultural Integrity and Political Unity: The Politics of Language in Multilingual States*, 33 ARIZ. ST. L.J. 719 (2001) ("members of this linguistic group show a sense of solidarity and a desire to preserve the language that gives them that common identity").

5. The Council of Europe, which was founded in 1949, seeks to develop throughout Europe common and democratic principles based on the European Convention on Human Rights and other reference texts on the protection of individuals. The Council has 47 member states, one applicant state (Belarus) and five observers, the Holy See, Canada, the United States, Japan, and Mexico. The main component parts of the Council of Europe are: the Committee of Ministers, the Organization's decision-making body, composed of the 47 Foreign Ministers of the member states or their Strasbourg-based deputies (ambassadors/permanent representatives); the Parliamentary Assembly, comprised of 636 members (318 representatives and 318 substitutes) from the 47 national parliaments; the Congress of Local and Regional Authorities composed of a Chamber of Local Authorities and a Chamber of Regions; and the Secretariat, headed by a Secretary General, elected by the Parliamentary Assembly. The Council of Europe should not be confused with the European Union (EU), although all of the member states of the EU are also members of the Council of Europe. *See* About the Council of Europe, *available at* http://www.coe.int/T/e/Com/about_coe/.

6. European Framework Convention for the Protection of National Minorities ETS No. 157: 2 IHRR 217 (Feb. 1, 1995). The text of the Convention does not define "national minority." Several parties, including Austria, Denmark, Estonia, Germany, Poland, Slovenia, Sweden, Switzerland, and The Former Yugoslav Republic of Macedonia, set out their own definition of "national minority" when they ratified the Convention. Many of these declarations exclude non-citizens and migrants from protection under the Convention, and some identify the specific groups to whom the Convention will apply. Liechtenstein, Luxembourg, and Malta are parties to the Convention, but each declared that there are no national minorities within their respective territories. *See generally*, United Nations Guide for Minorities, Pamphlet No. 8, The Council of Europe's Framework Convention for the Protection of National Minorities, *available at* http://www2.ohchr.org/english/issues/minorities/guide.htm.

7. European Charter for Regional and Minority Languages, ETS No. 148 (Nov. 5, 1992). In the Charter, "regional or minority languages" are defined as languages that are: "(i) traditionally used within a given territory of a State by nationals of that State who form a group numerically smaller than the rest of the State's population; and (ii) different from the official language(s) of that State; it does not include either dialects of the official language(s) of the State or the languages of migrants; "territory in which the regional or minority language is used" means the geographical area in which the said language is the mode of expression of a number of people justifying the adoption of the various protective and promotional measures provided for in this Charter; "non-territorial languages" means "languages used by nationals of the State which differ from the language or languages used by the rest of the State's population but which, although traditionally used within the territory of the State, cannot be identified with a particular area thereof." *Id.* art. 1.

8. The Organization for Security and Cooperation in Europe (OSCE) is the world's largest regional security organization. It has 56 member states in Europe, Asia and North America, and its mission is to "work . . . for early warning, conflict prevention, crisis management and post-conflict rehabilitation." Its Secretariat is based in Vienna and it currently has 19 missions and field offices throughout Europe and Central Asia. For a more detailed description of the mission and work of the OSCE, *see* Fact Sheet, *What is the OSCE?*, *available at* http://www.osce.org/item/35857.html.

9. The Oslo Recommendations Regarding the Linguistic Rights of National Minorities &

OSCE's Oslo Recommendations have fostered the preservation and promotion of "regional" minority languages (RM[10] languages)—languages, like Basque, that are considered to be "autochthonous" or indigenous to Europe.[11] European countries and European institutions, including the Council of Europe, the OSCE, and the European Union,[12] have devoted considerable resources to fulfilling their treaty obligations and promoting language diversity among linguistic majorities and RM language groups, and had a great deal of progress to celebrate during this anniversary year.[13]

Explanatory Note, *available at* http://www.osce.org/documents/hcnm/1998/02/2699_en.pdf.

10. Throughout this Article the shorthand "RM languages" is used to describe the languages spoken by regional minority groups comprised of the national minorities discussed in Part II (pp. 268-81) and transnational/cross-border minorities discussed in Part III (pp. 281-92).

11. UNESCO describes such languages as "the language of the people considered to be the original inhabitants of an area," according to UNESCO official language designations. *See* UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL REPORT ON LANGUAGES, THE USE OF VERNACULAR LANGUAGES IN EDUCATION (1953). There are thought to be at least eighty autochthonous languages in Europe, a figure that climbs to ninety-four when dialects are included. *See* official website of the EU Commissioner for Education, Culture and Multilingualism, "European Day of Languages 2006," http://europa.eu/languages/en/document/90/22. It is estimated that almost fifty million of Europe's four hundred and fifty million citizens speak an autochthonous European language other than the major language of the state in which they live. *See* European Commission, Booklet, Many Tongues, One Family: Languages in the European Union, 2004, *available at* http://ec.europa.eu/publications/booklets/ move/45/en.pdf; *See also* Francesco Palermo, *The Use of Minority Languages: Recent Developments in EC Law and Judgments of the ECJ*, 8 MAASTRICHT J. EURO. & COMP. L. 299 (2001) (describing how "one out of every eight citizens of the EU speaks a language other than the official one of his State"). The majority of these indigenous language communities are concentrated in Central and Eastern Europe, where linguistic groups crisscross national borders. In Hungary, for example, there are German, Armenian, Bulgarian, Croatian, Greek, Polish, Romanian, Ruthene, Serbian, Slovakian, and Ukrainian minorities, each speaking a different language. Hungarians themselves represent a minority in Romania, Slovakia, Ukraine, Croatia, Slovenia, and Austria.

12. The European Union is an economic and political partnership between 27 European nations. The three major organs of the EU are: the European Parliament, composed of 785 elected MEPs (Members of the European Parliament) representing the citizens of Europe; the Council of the European Union (formerly the Council of Ministers of the European Union), composed of ministers of EU nation states whose principal responsibilities are foreign policy, security policy and justice and freedom issues; and the European Commission, composed of 27 independent Commissioners (one from each member state) and approximately 24,000 civil servants charged with drafting proposals for new European laws, which it presents to the European Parliament and the Council, and managing the day-to-day business of implementing EU policies and spending EU funds. *See generally* Europa, *The EU at a Glance*, *available at* http://europa.eu/abc/index_en.htm.

13. Nation states' legislatures have passed statutes and developed constitutional provisions guaranteeing a range of rights to their national minorities. *See* Nancy C. Dorian, *Western Language Ideologies and Small-Language Prospects*, *in* ENDANGERED LANGUAGES: LANGUAGE LOSS AND COMMUNITY RESPONSE 3, 5 (Lenore A. Grenoble & Lindsay J. Whaley eds., 1998). EU institutions now operate in twenty-three official languages, including languages spoken by linguistic minorities. Speakers of Catalan, Galician and Basque can communicate with EU institutions in their own languages. *See* European Commission, Booklet, *Many Tongues, One Family: Languages in the European Union*, 2004, http://ec.europa.eu/publications/booklets/move/45/en.pdf. The EU's Charter of Fundamental Rights, refers expressly to the importance of linguistic diversity. Charter of Fundamental Rights of the European Union O.J. (C 364) 1 (Dec. 7, 2000) art. 22 ("The Union shall respect cultural, religious and linguistic diversity."). Both the EU and the Council of Europe have

2008 was, however, not only a language rights milestone for "regional" or linguistic minorities, but also a key year for the large communities of "immigrant" minority (hereinafter IM) language speakers that reside in Europe—such as Turkish speakers living in Germany.[14] 2008 was the first officially-designated European Year of Intercultural Dialogue, intended to promote the histories, cultures, and languages of IM communities. As these communities grow and flourish, European nations and institutions are becoming increasingly concerned with IM languages and have introduced a number of measures designed to promote the interests of IM language speakers—most often initiatives designed to facilitate the integration of IM language speakers into the linguistic mainstream.[15]

Legal scholars and advocates have long been engaged in a debate concerning the different forms of language "rights" available to RM and IM language groups in Europe. Scholars disagree vehemently about the appropriate definition of language "rights" and the significance of the competing interests in the articulation of those rights.[16] However, despite their many disagreements,

---

invested heavily during the past two decades in the European Bureau for Lesser Used Languages, *see* http://www.eblul.org/, and the MERCATOR European Research Centre on Multilingualism and Language Learning, *see* http://www.mercator-education.org/, both of which promote RM languages. According to Jan Figel, the EU's Commissioner for Education, Culture and Multilingualism, Europe's "cultural and linguistic diversity is a tremendous asset," and RM languages "must be safeguarded and promoted." *See* official website of EU Commissioner for Education Culture and Multilingualism, *supra* note 11. Although many aspects of language policy are the preserve of nation state members, the EU has nonetheless continually emphasized the importance of policies that take into account the needs of national minorities. *See generally* EUROPE AND THE POLITICS OF LANGUAGE: CITIZENS, MIGRANTS AND OUTSIDERS (Nic Craith Máiréad ed., 2006).

14. Immigrant minority languages are sometimes referred to as "community languages" by national governments and European institutions. The largest number of community languages in Europe can be found in the United Kingdom. Over 300 languages are currently spoken in London schools. Some of the most established of these are Bengali, Gujarati, Punjabi, Cantonese, Mandarin and Hokkien. *See* ENCYCLOPEDIA OF BILINGUALISM AND BILINGUAL EDUCATION (C. Baker. & S. Prys Jones eds., 1998).

15. A number of European nations have recently introduced language tests as a prerequisite for long-term residency or citizenship acquisition. *See, e.g.*, DILF (diplôme initial de langue française) website at http://www.ciep.fr/dilf, outlining the proposed contents of the French language test; *see also Turkey Slams German Immigration Law: Language Requirement "Against Human Rights,"* DER SPIEGEL, Apr. 5, 2007, *available at* http://www.spiegel.de/international/germany/0,1518,475839,00.html. Commentators in other nations have criticized "newcomers'" inability to integrate rapidly, blaming language barriers between immigrants and native populations. *See, e.g.*, Thomas Fuller, *Backlash in Europe: Foreign Workers Face Turning Tide*, INT'L HERALD TRIB., Oct. 25, 2002 ("integrating into Dutch society means 'speaking Dutch' . . . sometimes when [Germans] hear [Ukrainian immigrants] speaking Russian together, they'll say, 'Do you speak German? You should learn German.'").

16. Some scholars stress the importance of "language as resource" in determining access to, and distribution of, public resources, such as education, employment opportunities, healthcare, or transportation services. *See* Fernand de Varennes, *The Protection of Linguistic Minorities in Europe and Human Rights: Possible Solutions to Ethnic Conflicts?* 2 COLUM. J. EUR. L. 107 (1996). Others discuss the impact that "language parity" or "linguistic inequality" has upon participation in civic life, and the influence that language policy choices have upon the rights of the governed to engage fully with government. *See* Alexander Caviedes, *The Role of Language in Nation-Building within*

European language rights scholars concur on one point, namely that there is a fundamental inequality between the position of RM and IM language groups and speakers in Europe.[17] They draw this conclusion because, they argue, national and transnational legislation and case law have accorded members of RM groups a range of language rights that IM language speakers do not enjoy.[18] Scholars have debated whether this two-tier system of language rights is desirable, drawing differing conclusions,[19] but have not yet considered the

the European Union, 27 DIALECTICAL ANTHROPOLOGY 249 (2003) ("Language can become either an instrument of participation, access or deprivation, in that it can alter existing relationships of power between different groups within the polity."); *see also* Fernand de Varennes, *Language and Freedom of Expression in International Law*, 16 HUM. RTS. Q. 163, 179 (1994). Still others emphasize the importance of the right to language preservation, seeing language as "the quintessential cultural tool," the "glue" cementing the individual's interaction with family and society, and an integral part of communities' shared histories and ongoing societal relationships. *See* J.M. BALKIN, CULTURAL SOFTWARE: A THEORY OF IDEOLOGY 24 (1998). According to Will Kymlicka, "language and history . . . constitute [the] vocabulary" of societal culture, which is that which "provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres." WILL KYMLICKA, LIBERALISM, COMMUNITY AND CULTURE (1989). *See also* BENEDICT ANDERSON, IMAGINED COMMUNITIES (1983). This ongoing language rights discussion is also shaped by a debate among legal scholars regarding the balance struck by nation states and European institutions between "tolerance-oriented" and "promotion-oriented" language rights, *see* HEINZ KLOSS, THE AMERICAN BILINGUAL TRADITION (1977); between individual and communal linguistic freedoms, *see* Tove Skutnabb-Kangas, *The Politics of Language Standards*, working paper presented at TESOL meeting, Baltimore, (1994); between the freedom to use one's language and the freedom from being discriminated against for doing so, *see* Reynaldo Macías, *Language Choice and Human Rights in the United States*, *in* GEORGETOWN UNIVERSITY ROUND TABLE ON LANGUAGES AND LINGUISTICS, 86–101 (James Alatis Ed., 1979); between minority language groups' and individuals' "claims to something" and "claims against someone else," *see* Richard Ruiz, *Orientations in Language Planning*, 8 NABE J. 15–34 (1984).

17. *See generally* STEPHEN MAY, LANGUAGE AND MINORITY RIGHTS: ETHNICITY, NATIONALISM AND THE POLITICS OF LANGUAGE (2003).

18. This two-tier system is usually characterized as follows: RM language speakers are able to use their language as a resource—they are legally entitled to access education, employment opportunities, government services, and media in their own languages. *See* OSCE, Hague Recommendations Regarding the Education Rights of National Minorities (1996), *available at* http://www.osce.org/item/2931.html, Foundation on Inter-Ethnic Relations, Lund Recommendations on the Effective Participation of National Minorities in Public Life (Sep. 1999), *available at* http://www.osce.org/documents/hcnm/1999/09/2698_en.pdf. No such entitlement exists for IM language speakers. RM language speakers have been granted constitutional and treaty rights to political representation by speakers of their languages and are encouraged to communicate with governments in their own languages. Speakers of Catalan, Galician and Basque can also communicate with EU institutions in their own languages. *See* European Commission, Booklet, *Many Tongues, One Family: Languages in the European Union*, 2004, *available at* http://ec.europa.*eu*/publications/*booklets*/move/45/en.pdf. IM language speakers have been granted no equivalent constitutional rights. RM language speakers have been assured in national and international proclamations that the preservation of their languages, and thus their societies, cultures and histories, is of vital importance to the linguistic mainstream. No such assurances have been made to members of IM groups.

19. Some scholars argue that this two-tier approach is inevitable and not necessarily prejudicial to IM language speakers and groups. Will Kymlicka, for example, argues that a state of affairs in which newcomers/immigrants cannot demand the same linguistic rights as the members of

possibility that RM and IM language rights may actually be converging.

This Article argues that, contrary to scholars' standard interpretation of the distinct spheres occupied by RM and IM language groups, recent developments in ECJ jurisprudence and treaty bodies' interpretation of RM-oriented language laws are fundamentally redefining the rights of all linguistic minorities in Europe, including immigrant groups. The ECJ and treaty bodies have expanded rights originally conferred solely on RM groups to other minority language communities. As a consequence, this Article argues, speakers of IM languages may, in the future, be able to vindicate rights comparable—but not identical—to those enjoyed by RM language speakers by using the same legal instruments that were originally designed to protect RM language speakers' rights. This Article proposes that this reframing has occurred in four key stages, transforming a right to language preservation originally accorded RM language groups in the early 1990s into a right to linguistic diversity available to both RM and IM language speakers in 2009. This Article explores each of the four stages to demonstrate how and why this reframing in minority language rights in Europe is now taking place.

After this Introduction, the Article begins, in Part II, with the original formulation of minority language rights in Europe: the *right to preservation* accorded national minority language groups—a subset of RM language speakers—in nation state constitutions and statutes, and in Council of Europe treaties. This right to language preservation, as originally defined, was only available to these territorially-anchored groups—such as Basque speakers in Spain or Frisian speakers in the Netherlands—whose linguistic survival was dependent upon recognition of the minority language by the linguistic majority of the nation state in which their territory was located.[20]

Part III explores how these rights were subsequently expanded to another subset of RM language speakers—Yiddish speakers—a transnational linguistic minority whose language was equally in need of antiquarian safeguards, but who were located throughout Europe, rather than anchored to one specific territory.[21]

---

old and established minority linguistic groups is generally perceived to be just. *See* WILL KYMLICKA, LIBERALISM, COMMUNITY AND CULTURE (1989); WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 34 (1995). However, other scholars, such as Cristina Rodríguez, disagree with Kymlicka's sharp differentiation between the claims of "national" minorities and "migrant" minorities, arguing that there is no bright line between the claims of certain RM groups for recognition of their linguistic identity and the language rights claims of IM language speakers. Cristina M. Rodríguez, *Language and Participation*, 94 CAL. L. REV. 687 (2006).

20. Reliance upon this original iteration of European language rights led commentators to conclude that language rights in Europe are only available to territorially anchored RM groups, but such a view does not take into account the subsequent re-interpretation of these rights by European treaty bodies and the European Court of Justice (ECJ).

21. Yiddish can be described according to the "definitions" in the Charter for Regional and Minority Languages as a "non-territorial language," meaning a "language used by nationals of the State which differs from the language or languages used by the rest of the State's population but which, although traditionally used within the territory of the State, cannot be identified with a

Part III then shows how the same rights were also extended to speakers of another RM language, Romani. Like Yiddish speakers, Romani speakers are a dispersed linguistic community. Unlike Yiddish speakers, however, Romani speakers do not face language death.[22] In interpreting the Council of Europe's treaties in favor of the rights of Romani-speaking communities, this Article argues, treaty bodies redefined language rights as not merely preservationist, but also oriented towards the protection of the intrinsic identity of members of a given language group.[23] This *right to protection* was then extended by the OSCE, and by the Council of Europe treaty bodies, to another type of transnational language community: RM groups with cross-border "kin states," such as Swedish speakers in Finland or Danish speakers in Germany.[24] As with Romani, neither the Swedish nor the Danish language is likely to die out, but the cultures and the linguistic identities of these language communities were nonetheless deemed worthy of protection under law.[25]

Part IV of this Article explores the next step in this evolutionary process: the extension by the Council of Europe treaty bodies and the ECJ of the rights previously available to cross-border language groups with kin-states to European migrants. For example, laws previously applied to protect German speaking minority groups in Italy's South Tyrol were interpreted by the ECJ as conferring similar language rights on Austrian and German nationals traveling through Italy.[26] This Article argues that a *right to recognition* of the languages of all European migrants throughout the European Union has thus emerged through the intersection of the Council of Europe treaty bodies' expanded remit with the ECJ's interpretation of individuals' rights under EU law.

---

particular area thereof." European Charter for Regional and Minority Languages pt. I, art. 1(c), Nov. 5, 1992, Europ. T.S. 148.

22. Romani can also be defined as a "non-territorial language" according to the definitions section of the Charter for Regional and Minority Languages. European Charter for Regional and Minority Languages pt. I, art. 1(c), Nov. 5, 1992, Europ. T.S. No. 148.

23. *See, e.g.*, Advisory Committee on the Framework Convention for National Minorities, Report ACFC/INF/OP/I(2002)007 (Italy) (July 3, 2002), *available at* http://www.coe.int/t/dghl/monitoring/minoritie s/3_FCNMdocs/PDF_2nd_OP_Italy_en.pdf ("[t]he existing statutory provisions on the Roma, Sinti and Travellers adopted by several regions are clearly inadequate in that they are disparate, lack coherence and focus too much on social questions and immigration issues at the detriment of the promotion of their identity, including their language and culture").

24. There are about 300,000 Swedish-speaking Finns, or 5.6% of the population of Finland. Most Swedish speakers live in the coastal areas of Uusimaa, Turunmaa and Ostrobothnia. About 12,000 Swedish speakers (4%) live in entirely Finnish-language municipalities elsewhere in Finland. Åland is an entirely Swedish-speaking autonomous province with 26,000 inhabitants. *See* Euromosaic, Swedish in Finland, http://www.uoc.es/euromosaic/web/document/suec/an/e1/e1.html. The Danish language ("Dansk") is spoken in Germany by a Danish minority estimated to number between 15 and 40,000 people in South Schleswig. *See* Euromosaic, Danish in Germany, *available at* http://www.uoc.es/euromosaic/web/document/ danes/an/i1/i1.html.

25. *See* The Oslo Recommendations Regarding the Linguistic Rights of National Minorities & Explanatory Note, *available at* http://www.osce.org/documents/hcnm/1998/02/2699_en.pdf.

26. *See, e.g.*, Case C-274/96, Criminal Proceedings Against Bickel and Franz, 1998 E.C.R. I-7637 [ECJ].

This Article proposes that these three steps constitute a fundamental reorientation of language rights in Europe—from group-inhering, territorially-defined, preservationist, and RM-focused, to individual rights that are potentially available to all Europeans. This reorientation has laid the foundation for the fourth and final stage in the evolution of language rights: *the right to diversity* that is now beginning to be claimed by individual members of immigrant minority language groups. Part V of this Article argues that it is possible to discern in the Council of Europe Treaty bodies' decisions and ECJ jurisprudence the beginning of a trend toward according immigrant minority language speakers linguistic recognition similar to that accorded European migrants, and to extending to IM speakers language protections similar to those granted to transnational language minorities.[27] Consistent with this trend, in Part VI, the Article concludes that the treaty rights originally designed to ensure the preservation of national minority groups are now being reframed and may eventually have the potential to guarantee the linguistic diversity of all Europeans, immigrants included.

II.
NATIONAL MINORITIES AND THE RIGHT TO PRESERVATION

Linguistic identity has played a decisive role in the development of European nation states, and in the foundation and expansion of modern European institutions.[28] From the revolutions of the mid-nineteenth century[29] to the Treaty of Versailles[30] to the post-World War II establishment of pan-

27. *See* discussion *infra*. pp. 301-11

28. *See generally* ALEXANDER OSTROWER, LANGUAGE, LAW AND DIPLOMACY (1965).

29. The so-called *Nationalprinzip* (literally "nationality principle"), developed in nineteenth century Germany and based upon language and ethnicity as co-determinants of national identity, became the formative principle for the creation of new states throughout Central, Eastern, and Southeast Europe in the nineteenth and twentieth centuries. German Philosophers, such as Herder and Fichte, postulated the very existence of a German nation based on an idea that all persons who spoke the German language formed a German "*Volk*." *See generally* JOHANN GOTTLIEB FICHTE, REDEN AN DIE DEUTSCHE NATION [ADDRESSES TO THE GERMAN NATION] (1878); JOHANN GOTTFRIED HERDER, IDEEN ZUR PHILOSOPHIE DER GESCHICHTE DER MENSCHHEIT [OUTLINES OF A PHILOSOPHY OF THE HISTORY OF MAN] (1790). Until the mid-nineteenth century, modern-day Germany was fractured into a range of political entities, including small city-states such as Cologne and large kingdoms like Prussia. R.R. PALMER & JOEL COLTON, A HISTORY OF THE MODERN WORLD (6th ed. 1984). The common language was one of the catalysts for unification in 1871, and so Germany unified and solidified its territorial holdings by drawing together existing speakers of the same language. New states, such as Montenegro, Serbia, Romania, and Bulgaria emerged during the late nineteenth century based on criteria of collective identity, foremost among which was language. *See, e.g.*, JOHN MERRIMAN, 2 A HISTORY OF MODERN EUROPE: FROM THE RENAISSANCE TO THE PRESENT (2d ed. 1996).

30. The *Nationalprinzip* heavily influenced the victors of World War I when they redrew the map of Europe at the Treaty of Versailles. The new states which were formed—Czechoslovakia, Poland, Hungary, Estonia, Latvia, Lithuania, and the Kingdom of Serbs, Croats, and Slovenes (renamed Yugoslavia – literally "The Kingdom of Southern Slavs" in 1929)—expressed their right

European organizations,[31] concerns with language have been of paramount importance.[32] This is still the case today—among the twenty-seven member states of the European Union, one of the most consistently contentious issues is whether or not nations' official languages receive equal treatment from central European institutions.[33] However, despite European nations' longstanding preoccupation with linguistic identity, a unified European approach to minority language rights has only emerged recently, during the last twenty years.[34]

This unified approach has frequently been characterized by commentators as: (i) preservationist;[35] (ii) group-oriented, rather than individual-oriented;[36] and (iii) limited to territorially-defined language communities.[37] Such a characterization relies upon a narrow reading of European nations' constitutional and statutory provisions, and of the texts of Council of Europe and European Union treaties. This Article argues that this characterization accurately represents the original scope of minority language rights in Europe, but not their subsequent interpretation and expansion by courts and treaty

---

to self-determination in terms of ethnic and linguistic solidarity.

31. For example, the drafters of the Treaty of Rome, which established the European Economic Community, were acutely aware of the need to preserve some semblance of linguistic parity, and therefore political parity, when they conferred equal status on all national languages of the EU member states (with the exception of Irish and Luxembourgian) as working languages. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. I (Cmd. 5179-II).

32. *See generally* OSTROWER, *supra* note 28.

33. Settling on an agreed policy to adequately address the perceived hierarchy within official and unofficial European languages has been fraught with problems. *See generally* Rhona K. M. Smith, *Moving Towards Articulating Linguistic Rights-New Developments In Europe*, 8 MSU-DCL J. INT'L L. 437 (1999); European Ombudsman Press Release No. 6/2008, Ombudsman criticizes Commission for language discrimination in EU project, (May 27, 2008), *available at* http://www.ombudsman.europa.eu/press/ release.faces/en/240/html.bookmark.

34. *See* Frank R. Scott, *The Constitutional Protection of Linguistic Rights in Bilingual and Multilingual States*, 4 MAN. L. J. 243, 247 (1971) ("[E]very country that has a language problem attempts to solve it in its own way."). European lawmakers appear to have been reluctant, for a considerable period of time, to address concerns about language and language rights. For example, the European Convention on the Protection of Human Rights and Fundamental Freedoms of 1950 made no direct mention of a right to freely use any language of one's choosing. European Convention on Human Rights, Nov. 4, 1950, Europ. T.S. 5.

35. *See, e.g.*, STEPHEN MAY, LANGUAGE AND MINORITY RIGHTS: ETHNICITY, NATIONALISM AND THE POLITICS OF LANGUAGE (2003); WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 34 (1995).

36. Alexander Ostrower argues that European language rights discourse uses groups or "peoples" as the primary unit of analysis because of "circumstances peculiar to Europe," first and foremost of which is "its turbulent history." OSTROWER, *supra* note 28 at 667. *See also* Joseph Marko, *"United in Diversity?" Problems of State- and Nation-Building in Post-Conflict Situations: The Case of Bosnia-Herzegovina* in *Symposium, Accommodating Differences: The Present and Future of the Law of Diversity* 30, VT. L. REV. 431-937 (2006).

37. *See, e.g.*, Robert F. Weber, *Individual Rights and Group Rights in the European Community's Approach to Minority Languages,* 17 DUKE J. COMP. & INT'L L. 361, 371 (2007) ("For example, a French-speaking inhabitant of the Val d'Aosta can only make use of her language rights within the Val d'Aosta, and may not rely on those protections outside the region.").

bodies. Nonetheless, in order to fully understand how European language rights have evolved and changed in recent years, it is first essential to understand from whence they came: the right to preservation accorded national minority languages in nation states' constitutions and statutes and in pan-European treaties.

A. The Right to Language Preservation in Nation State Constitutions and Statutes

According to both the European Union and the Council of Europe, language rights issues are first and foremost the concern of individual nation states.[38] The following brief survey of national minorities' rights to language preservation therefore begins with examples of different iterations of that right found in nation states' constitutions and statutory provisions. These examples demonstrate the extent to which the right to minority language preservation was originally perceived of as applying only to territorially-defined linguistic groups. Excerpts from the Austrian, Hungarian, and Italian constitutions underscore the group inhering nature of the original grants of the right to language preservation, and excerpts from Italian, Spanish, Dutch and Portuguese laws illustrate the extent to which this right to language preservation was originally granted solely to groups with historical ties to a particular geographical region.[39]

---

38. For an analysis of the EU's attitude towards the rights of language minorities, see Francesco Palermo, *The Use of Minority Languages: Recent Developments in EC Law and Judgments of the ECJ*, 8 MAASTRICHT J. EURO. & COMP. L. 299 (2001). For an analysis of the Council of Europe's attitude towards minority rights, see Geoff Gilbert, *The Council of Europe and Minority Rights*, 18 HUM. RTS. Q. 160 (1996).

39. These countries' approaches to minority language rights are representative of almost all other European nations, with one exception: France. *See* Nancy C. Dorian, *Western Language Ideologies and Small-Language Prospects*, *in* ENDANGERED LANGUAGES: LANGUAGE LOSS AND COMMUNITY RESPONSE 3, 5 (Lenore A. Grenoble & Lindsay J. Whaley eds., 1998). France banned all regional languages during the revolutionary period, and since then, France has promoted one national language, French, as *the* instrument to define unified national identity. *See* CARLTON J. H. HAYES, NATIONALISM: A RELIGION 52-53 (1960); *see also* EUGEN WEBER, PEASANTS INTO FRENCHMEN: THE MODERNIZATION OF RURAL FRANCE, 1870-1914, 114 (1976). Only standard French could be used in the public sphere, including the legislature, the administrative authorities, and the judiciary. *See* Jörg Polakiewicz, *Die Rechtliche Stellung der Minderheiten in Frankreich* [The Legal Status of Minorities in France], in 1 DAS MINDERHEITENRECHT EUROPAEISCHER STAATEN [The Rights of Minorities in European Nations] 126, 155 (Jochen A. Frowein et al. eds., 1993). *See also* JOSEPH MARKO, AUTONOMIE UND INTEGRATION: RECHTSINSTITUTE DES NATIONALITAETENRECHTS IM FUNKTIONALEN VERGLEICH [Autonomy and Integration: A Functional Comparison of the Legal Institution of Nationality Laws] 248 (1995). When France became a signatory to the European Charter of Regional and Minority Languages, it declared that it had no linguistic minorities within its borders. This is, of course, untrue; Breton, Basque, German and Italian are languages that are spoken by sizeable "national" minorities, and France has a substantial immigrant population, drawn predominantly from its former colonies. The European Union (through the Charters and Framework Convention) and other member states (through their constitutional jurisprudence) have striven to recognize national minorities—reportedly in the name of both unity and diversity, and France has done the opposite—once again in the name of integration. France amended Article 2 of its Constitution in 1992 to declare that "[t]he language of

The language of the Austrian Constitution underscores the importance accorded by the state to the preservation of the languages of RM groups. Article 8, Paragraph 2 of the Austrian Constitution refers explicitly to the rights of language groups, rather than individual speakers:

> The Republic (the Federation, Länder and municipalities) is committed to its linguistic and cultural diversity, which has evolved in the course of time and finds its expression in the autochthonous ethnic groups. The language and culture, continued existence and protection of these ethnic groups shall be respected, safeguarded and promoted.[40]

The Austrian Constitution thus safeguards "indigenous" languages like Allemanisch, which is spoken in the Alpine district of Vorarlberg.[41] The choice of words used in Article 8, paragraph 2 is revealing: the Republic is only committed to languages that have "evolved in the course of time," and that are "autochthonous," i.e. "native" to the territory of Austria. The use of the word "safeguarded" is also telling—it implies that these languages are somehow endangered and need to be preserved. The minority language rights provisions in the Austrian Constitution may thus accurately be described as national minority-focused, group-oriented, and above all preservationist.

The Hungarian Constitution similarly grants language rights to specific national minority groups, recognizing "certain minorities as constituent nationalities and giv[ing] them certain self-government rights."[42] Those "constituent nationalities"—German, Armenian, Bulgarian, Croatian, Greek, Polish, Romanian, Ruthene, Serbian, Slovakian and Ukrainian—have, according to the Constitution and subsequent legislation, a sufficiently long-standing connection to Hungary to warrant the preservation of their language and culture.[43] In addition to constitutional protections for these national minority groups, the Hungarian Parliament also passed legislation authorizing the creation of a Parliamentary Commissioner for the Rights of National and Ethnic Minorities.[44] The Commissioner's portfolio includes enforcing the constitutionally established rights of national minorities to preserve their language and culture.[45] Conversely, the Hungarian Constitution confers no explicit language rights on minority groups left off the list of "constitutent

---

Republic is French." Fr. Const. art. 2, as amended by Constitutional Law No. 92-554 of June 25, 1992.

40. BUNDES-VERFASSUNGSGESETZ [B-VG] [Constitution] BGBI No. 1/1930, *as amended by* Bundesgesetz [BG] BGBI I No. 68/2000, art. 8, ¶ 2 (author's own translation).

41. For a detailed description of the origins, history and current reach of the Allemanisch language, *see* Allemanische Sprache, *available at* http://www.badische-seiten.de/alemannisch/ (in German).

42. Elena A. Baylis, *Minority Rights, Minority Wrongs*, 10 UCLA J. INT'L L. & FOREIGN AFF. 66 (2005).

43. *Id.*

44. *See* EDWARD H. LAWSON, MARY LOU BERTUCCI, LAURIE S. WISEBERG, ENCYCLOPEDIA OF HUMAN RIGHTS 737 (1996).

45. *Id.*

minorities," or on individual members of any minority group.[46] Minority language provisions in Hungary, like those in Austria, can thus be described as preservationist and the exclusive preserve of historically rooted national minority communities.[47]

The same description could equally be applied to the language rights regime in Italy, the nation with the greatest number of national minority language speakers in Europe.[48] Article 6 of the Italian Constitution of 1948 emphasizes the importance of "protecting linguistic minorities with appropriate norms."[49] However, despite this longstanding constitutional commitment, the first legislation designed to protect and preserve national minority groups was passed in 1999—over 50 years after the Constitution entered into force.[50] That legislation emphasizes the need to preserve the languages of specific groups—Albanian, Catalán, German, Greek, Slovene, Croat, French Provençal, Friulan, Ladin, Occitan, and Sardinian speakers—underscoring, once again, the fact that language rights in Europe traditionally inhered in specified groups, rather than in minority groups generally or in individual language speakers.[51] The Italian language rights regime also provides a clear example of the territorially-defined nature of early guarantees of RM language preservation.[52] The Italian

46. A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution of the Republic of Hungary]; unofficial English translation *available at* http://www.lectlaw.com/files/int05.htm.

47. For a discussion of the resurgence of ethno-linguistic identity in Central and Eastern Europe in the aftermath of the collapse of communism, see Michael Walzer, *Notes on the New Tribalism*, *in* POLITICAL RESTRUCTURING IN EUROPE: ETHICAL PERSPECTIVES 187 (Chris Brown ed., 1994); Adeno Addis, *Cultural Integrity And Political Unity: The Politics of Language in Multilingual States*, 33 ARIZ. ST. L.J. 719, 721 & n.4 (2001) (arguing that although "Michael Walzer once remarked, '[t]he tribes have returned.' . . . the truth is, they never left. The resurgence of ethnic and linguistic consciousness in the wake of the collapse of communism has forced the international community to start taking the issue of minorities seriously.").

48. An estimated 2.5 million people belong to at least 12 minority groups within Italy. Francesco Palermo, *The Italian Draft Bill on Linguistic Minorities*, *in* MINORITY RIGHTS IN EUROPE 55 (Snezana Trifunovska ed., 2001).

49. COSTITUZIONE [Constitution], art. 6 (Italy) (author's own translation).

50. Francesco Palermo, *The Italian Draft Bill on Linguistic Minorities*, *in* MINORITY RIGHTS IN EUROPE 55 (Snezana Trifunovska, ed. 2001).

51. *See* ANTONI MILIAN I MASSANA, DERECHOS LINGUÏSTICOS Y DERECHO FUNDAMENTAL A LA EDUACIÓN. UN ESTUDIO COMPARADO: ITALIA, BELGICA, SUIZA, CANADA, Y ESPAÑA [Linguistic Rights and the Fundamental Right to Education: A Comparative Study: Italy, Belgium, Switzerland, Canada and Spain] 134-37 (1994) ("to protect linguistic and cultural minorities means to protect designated *groups* of citizens").

52. This territorially-dependent interpretation of linguistic rights is not unique to minority language provisions, but also applied with regard to official languages. The Constitution of Belgium, for example, also anchors language rights to geographically defined linguistic groups. Belgium has three official languages: French, Flemish, and German, and each of Belgium's autonomous regions is governed in whichever language is the majority language in that particular region. According to the Constitution, language rights attach to a culturally and geographically determined community, not to individual members of those communities. This is illustrated clearly by the fact that individuals do not take their rights with them when crossing regional boundaries—French speakers have the right to receive all government services in French in the French-speaking

Constitution grants limited autonomous status to five regions of the country where linguistic minorities are found: Friuli-Venezia Giulia, Val d'Aosta, Trentino-Alto Adige, Sardinia, and Sicily.[53] The grant of rights that attach to minority speakers originates in legislation passed by the governments of each of these regions, and such rights are connected to the territory, not the residents, of the regions.[54]

Article 2 of the Spanish Constitution of 1978 similarly confers a "right to autonomy" upon the "nationalities and regions of which [Spain] is composed,"[55] and Article 3.2 grants the public authorities of those autonomous regions the right to use their own regional languages when communicating with their citizens.[56] Several of Spain's autonomous regions have followed the example set forth in the Constitution and promulgated their own normalization laws to promote the use of their region's minority language in all spheres of life, including education, public administration, and communication.[57] These laws make clear that, in accordance with the provisions of the Constitution, they are designed to preserve the linguistic heritage of the national minority groups

---

regions, but not in the Flemish-speaking territories. The Belgian Constitution establishes that Belgium's internal boundaries, and hence Belgium's territorially defined linguistic territories, cannot be altered except through an elaborate series of procedures under which the three national language groups hold specific voting and representation rights. The relevant Belgian constitutional provision reads: "The boundaries of the four linguistic regions may only be changed or corrected by a law passed by a majority of the votes cast in each linguistic group in each House, on condition that a majority of the members of each group is present and provided that the total number of votes in favour that are cast in the two linguistic groups is equal to at least two thirds of the votes cast." THE COORDINATED CONSTITUTION OF THE KINGDOM OF BELGIUM art. 4 (*quoted in* Vernon Van Dyke, *The Individual, the State, and Ethnic Communities in Political Theory, in* THE RIGHTS OF MINORITY CULTURES 31, 40 (Will Kymlicka ed., 1995)).

53. *See* Palermo, *supra* note 50.

54. Robert F. Weber, *Individual Rights and Group Rights in the European Community's Approach to Minority Languages,* 17 DUKE J. COMP. & INT'L L. 361, 371 (2007) ("For example, a French-speaking inhabitant of the Val d'Aosta can only make use of her language rights within the Val d'Aosta, and may not rely on those protections outside the region."). *See also* Palermo, *supra* note 50.

55. CONSTITUCIÓN [C.E.][Constitution], art. 2 (Spain) (author's own translation).

56. Article 3.1 of the Spanish Constitution recognizes that the state may legitimately impose a duty upon all of its nationals to learn the official language of the national government, Castilian, as a means of avoiding separatism or ghettoization and creating a common national unifying bond. But, Article 3.2 indicates that this does not exclude the possibility that other languages, such as Catalan, may be used by public authorities where it is reasonable to do so, especially where a large number of people are concentrated in the same region and share the same language.

> [3.1 El castellano es la lengua española oficial del Estado. Todos los Españoles tienen el deber de conocerla y el derecho a usarla.
>
> 3.2. Las demas lenguas españolas seran también oficiales en las respectivas Comunidades Autonomas de acuerdo con sus Estatutos.]

57. *See, e.g.*, Lei 1 de 7 de Enero, de Política Lingüística [Act No. 1, of 7th January 1988, on Linguistic Policy] (Generalitat of Catalonia), *available at* http://dialnet.unirioja.es/servlet/articulo?codigo=1983814.

traditionally resident in a particular geographical area.[58]

Longstanding territorial links also define the right to language preservation enjoyed by national minority language groups in a number of other European nations, ranging from the Netherlands to Portugal to the United Kingdom. Although there are no constitutional provisions that directly address the needs of different language groups in the Netherlands, the Dutch Parliament has promulgated a number of statutory provisions providing for the preservation of the Frisian language in Friesland.[59] The Portuguese government has enacted similar statutory measures for the Mirandés community, found in northern Portugal.[60] In the United Kingdom, the provisions of the Welsh Act of 1993[61] specifically limit the remit of the *Bwrdd yr Iaith Gymraeg*[62] to the territory of Wales.[63] In short, territoriality is a widespread marker of the boundaries of national minority language rights throughout Europe.

This brief survey of the language rights laws of Austria, Hungary, Italy, Spain, the Netherlands, Portugal, and the UK demonstrates that the traditional characterization of language rights in Europe as preservationist, group-inhering and territorially anchored accurately reflects the letter of the relevant national laws. A brief examination of the texts of the principal European treaties and initiatives that deal with national minority language rights reveals a very similar picture.

---

58. *Id.* Article 3 of the Spanish Constitution sets out the framework through which Spanish institutions manage multilingualism and provides that "[t]he wealth of Spain's different linguistic modalities is a cultural patrimony that will be the object of special respect and protection." CONSTITUCIÓN [C.E.] art. 3, § 3 (Spain) (author's own translation). Scholars have offered a number of theories to explain why the preservation of these territorially-defined language groups is such a priority for the Spanish government. One persuasive argument is that the emphasis on preserving the languages of these groups is an attempt to address the grievances of historically marginalized linguistic groups and relocate their histories and cultures firmly within the shared national imagination. This reading of the Spanish Constitution regards the special status accorded Spanish minority languages as "national heritage languages" as an acknowledgment of their place within the national canon, and as emblematic of the Spain's commitment to remedy historical marginalization of RM groups dating back to the nineteenth century and to Francisco Franco's repression of minority languages during his decades of rule in the twentieth century. *See* Charlotte Hoffmann, *Balancing Language Planning and Language Rights: Catalonia's Uneasy Juggling Act,* 21 J. OF MULTILINGUAL & MULTICULTURAL DEVELOPMENT 425, 439 (2000).

59. Including, *inter alia*, detailed rules on the use of Frisian in an administrative or judicial capacity; rules establishing the legal basis for changing toponymical names from Dutch into Frisian; provisions to encourage the use of Frisian in schools. Floris Van Laanen, *The Frisian Language in the Netherlands*, *in* MINORITY RIGHTS IN EUROPE 72 (Snezana Trifunovska ed., 2001).

60. *See* Lei n.7/99, Reconhecimento oficial de direitos linguísticos da comunidademirandesa, (Jan. 29, 1999); *see also* Despacho Normativo n. 35/99 (July 5, 1999) (implementing regulations to provide Mirandés education, including a limited grant of power to local institutions ("*entidades da comunidade*") to participate in the coordination of cultural and educational projects).

61. The Welsh Language Act, 1993 c.38. (Gr. Brit.).

62. Literally "The Welsh Language Board."

63. *See, e.g.*, §3.2(b) (provisions for "the conduct of public business and the administration of justice *in Wales*"); §3.2(c) (provisions for "the use of the Welsh language in . . . dealings with the public *in Wales*") (emphasis added).

B. The Right to Language Preservation in European Treaties and Initiatives

Two Council of Europe treaties, the Charter for Regional and Minority Languages[64] and Framework Convention for National Minorities,[65] and one European Union agreement, the Charter of Fundamental Rights of the European Union,[66] provide the transnational framework for minority language rights in Europe.[67] A close examination of the textual commitments of these treaties reinforces the argument that the original vision of minority language rights in Europe was preservationist, group-oriented, and only applicable to national minorities—i.e. territorially-defined RM communities.

In the late 1980s and early 1990s, complaints about threats to the continued existence of autochthonous languages in Europe were deemed to be a matter of "grave concern" by the Council of Europe.[68] The Council referred the matter to

64. European Charter for Regional and Minority Languages, Nov. 5, 1992, ETS No. 148.

65. European Framework Convention for the Protection of National Minorities, Feb. 1, 1995, ETS No. 157: 2 IHRR 217.

66. Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1 (Dec. 7, 2000).

67. The European Union had, traditionally, taken a less activist stance towards language rights than the Council of Europe, leaving the monitoring of treatment of linguistic minorities to the individual member states. *See* Palermo, *supra* note 11.

68. Scholars have advanced a number of different theories to explain why exactly the dwindling of RM populations in the early 1990s prompted the Council of Europe (and subsequently the EU) to promulgate treaties designed to preserve RM languages. One theory is that the specter of "language death" lead to a resurgence of interest in and commitment to language rights by nation state governments and European institutions. *See, e.g.*, MARK JANSE, *Introduction: Language Death and Language Maintenance: Problems and Prospects*, *in* LANGUAGE DEATH AND LANGUAGE MAINTENANCE (Mark Janse & Sijmen Tol eds., 2003) ("As much as linguicide and linguistic discrimination may add to language death, they are at the same time powerful forces in the reawakening of ethnic identity feelings among speakers of endangered minority languages. . . . Ethnic identity is often accompanied by an increased interest in language maintenance."). Language death is, of course, not a uniquely European concern. The Declaration on the Responsibilities of the Present Generations Towards Future Generations, a legally non-binding instrument, adopted on 12 November 1997 by the General Conference of UNESCO, states in Article 7: "With due respect for human rights and fundamental freedoms, the present generations should take care to preserve the cultural diversity of humankind. The present generations have the responsibility to identify, protect and safeguard the tangible and intangible cultural heritage and to transmit this common heritage to future generations." Records of the UNESCO General Conference, Paris, Fr., Oct. 21-Nov. 7, 1997, Declaration on the Responsibilities of the Present Generations Towards Future Generations, Vol. 1, Resolutions, 69-71. An alternative theory is that the fall of the Berlin Wall prompted linguistic majorities to revisit the collective guilt that they bore for their role in "their" RM groups' near extinction. *See, e.g.*, M.J. Azurmendi, E. Bacho & F. Zabaleta, *Reversing Language Shift: The Case of Basque*, *in* CAN THREATENED LANGUAGES BE SAVED? 234 (Joshua A. Fishman ed., 2001); M. Strubell, *Catalan a Decade Later*, *in* CAN THREATENED LANGUAGES BE SAVED? 260 (Joshua A. Fishman ed., 2001), to changing notions of the boundaries of nation states and nation states' responsibilities following greater European integration. For a discussion of shifting European conceptions of national and "European" identities and responsibilities see JOHN RAWLS, THE LAW OF PEOPLES 38-39 (1999); for a historical perspective, *see* Ernest Renan, *Qu'est-ce qu'une nation?*, [What is a nation?] Lecture at the Sorbonne (Mar. 11, 1882), *available at* http://www.bmlisieux.com/archives/nation01.htm.

the Standing Conference of Local and Regional Authorities of Europe,[69] which recommended the promulgation of a pan-European agreement to safeguard Europe's linguistic heritage.[70] The resultant treaty, the Charter for Regional or Minority Languages, was adopted under the auspices of the Council of Europe in 1992.[71] The language of the Charter, from the beginning of its Preamble:

> Considering that the aim of the Council of Europe is to achieve a greater unity between its members, particularly for the purpose of safeguarding and realising the ideals and principles which are their common heritage;
>
> Considering that the protection of the historical regional or minority languages of Europe, some of which are in danger of eventual extinction, contributes to the maintenance and development of Europe's cultural wealth and traditions;[72]

makes clear that the Charter was originally conceived to be preservationist, group oriented, and designed to safeguard the languages of national minorities—territorially-bounded RM communities.[73]

The Preamble to the Charter emphasizes that it is being promulgated to ensure the preservation of RM languages at risk of extinction.[74] Each of the articles of the Charter focuses exclusively on group, rather than individual rights, referring repeatedly to the need to preserve languages, rather than the need to assist language speakers, and conferring no explicit individual rights upon speakers of minority languages.[75] The Charter has a two-tier structure:

---

69. The Standing Conference of Local and Regional Authorities of Europe is the branch of the Council of Europe composed of representatives of local and regional government. *See* About the Council of Europe, *available at* http://www.coe.int/T/e/Com/about_coe/.

70. *See* Explanatory Report on the European Charter for Regional or Minority Languages, ETS 148, ¶5 ("Acting on these recommendations and resolutions, the Standing Conference of Local and Regional Authorities of Europe (CLRAE) decided to undertake the preparation of a European charter for regional or minority languages, by reason of the part which local and regional authorities must be expected to play in relation to languages and cultures at local and regional level.").

71. *See supra* note 64.

72. *Id.*

73. For example, in Part I, art. 2 entitled "Undertakings," the text states "Each Party undertakes to apply the provisions of Part II *to all the regional or minority languages* spoken within its territory" and refers repeatedly to "*each language* specified at the time of ratification." *Id.*

74. "[T]he protection of the historical regional or minority languages of Europe, some of which are in danger of eventual extinction, contributes to the maintenance and development of Europe's cultural wealth and traditions." *Id.* at Preamble. Article 1 of the Charter also explicitly limits its protections to RM communities, ruling out the broader application of the Charter's provisions to immigrant groups by stating that the term regional or minority languages "does not include the languages of migrants." European Charter for Regional or Minority Languages, ETS 148, Pt I, art. 1(a).

75. Language rights scholars have debated why exactly the Charter was drafted with such a clear emphasis upon group rights, given other European institutions' consistent emphasis on individual rights. One credible explanation is that the timing of the Charter determined its content and its group-rights orientation. The presentation of the final draft of the Charter occurred at the same time as the formation of new, post-Communist regimes in the Warsaw Pact nations of Eastern Europe. The Explanatory Memorandum to the Charter suggests that its drafters were particularly

there are a set of compulsory core principles applicable to any and all qualifying languages used in a state,[76] and a selection of more specific provisions—for

concerned by the challenges posed by national minorities to the fledgling governments of the new democracies. The Explanatory Memorandum states that the drafters hoped that the Charter might:

> [B]e expected to help, in a measured and realistic fashion, to assuage the problem of minorities whose language is their distinguishing feature, by enabling them to feel at ease in the state in which history has placed them. Far from reinforcing disintegrating tendencies, the enhancement of the possibility of use of regional or minority languages in the various spheres of life can only encourage the groups who speak them to put behind them the resentments of the past which prevented them from accepting their place in the country in which they live and in Europe as a whole.

This language strongly suggests that the drafters of the Charter were motivated to protect linguistic diversity primarily in order to prevent language-oriented secession. Perhaps this concern with maintaining the status quo is responsible for the drafters' consistent deference to nation states' own determinations about how far they should go to vindicate minority groups' language rights—leaving any radical policy decisions, and their consequences, firmly in the hands of the individual signatories. The Charter acknowledges nation states' discretion to formulate their own language policies, and establish their own linguistic hierarchies. The Charter suggests that the official majority language(s) and the regional or minority language(s) of a state should coexist in harmony, with each language having its "proper place." The place suggested in art. 1 of the charter is based upon the size of the numerical groups of speakers, and whether or not the language is afforded "official" status, thus, regional or minority languages are "(i) traditionally used within a given territory of a State by nationals of that State who form a group numerically smaller than the rest of the State's population; and (ii) different from the official language(s) of that State." The Charter, in tacit recognition of linguistic hierarchy, leaves it to the government of an individual member state to determine what those places may be. Art. 3(1) states "Each Contracting State shall specify in its instrument of ratification, acceptance or approval, each regional or minority language, or official language which is less widely used on the whole or part of its territory, to which the paragraphs chosen in accordance with Article 2, paragraph 2, shall apply." A Government may choose to acknowledge or not acknowledge any relevant languages within its jurisdiction. The U.K. for example, has not recognized Scots Gaelic as an official language, although there are regular BBC broadcasts and other state-sponsored activities to promote use of the language, and there is no provision within the Charter for judicial review of a Government's decision to include or exclude a language.

76. *Id.* at art. 7. (The language requires that states base their policies, legislation and practice on objectives and principles such as "the recognition of the regional or minority languages as an expression of cultural wealth; the respect of the geographical area of each regional or minority language in order to ensure that existing or new administrative divisions do not constitute an obstacle to the promotion of the regional or minority language in question; the need for resolute action to promote regional or minority languages in order to safeguard them; the facilitation and/or encouragement of the use of regional or minority languages, in speech and writing, in public and private life; the maintenance and development of links, in the fields covered by this Charter, between groups using a regional or minority language and other groups in the State employing a language used in identical or similar form, as well as the establishment of cultural relations with other groups in the State using different languages; the provision of appropriate forms and means for the teaching and study of regional or minority languages at all appropriate stages; the provision of facilities enabling non-speakers of a regional or minority language living in the area where it is used to learn it if they so desire; the promotion of study and research on regional or minority languages at universities or equivalent institutions; the promotion of appropriate types of transnational exchanges, in the fields covered by this Charter, for regional or minority languages used in identical or similar form in two or more States." The Parties also "undertake to eliminate, if they have not yet done so, any unjustified distinction, exclusion, restriction or preference relating to the use of a regional or minority language and intended to discourage or endanger the maintenance or development of it. The adoption of special measures in favour of regional or minority languages aimed at promoting

education,[77] judicial authorities,[78] administrative authorities and public services,[79] media,[80] cultural activities and facilities,[81] and economic and social life[82]—all intended to safeguard the regional or minority languages nominated by the state.[83] State signatories to the Charter must undertake to fulfill at least thirty-five of the specific provisions. The majority of the specific provisions comprise options of various degrees of stringency that allow states parties to comply with the level of protection and promotion deemed desirable or most convenient at the time of ratification.[84] Each of these specific provisions is described in the text as an appropriate means of preserving the languages of RM groups.[85]

Three years after the Charter for Regional or Minority Languages was drafted, the Council of Europe promulgated the Framework Convention for the Protection of National Minorities (hereinafter FCNM).[86] The FCNM contains six articles that promote the rights of members of national minority groups to the preservation of their languages: articles 5, 9, 10, 11, 12 and 14. Although each

equality between the users of these languages and the rest of the population or which take due account of their specific conditions is not considered to be an act of discrimination against the users of more widely-used languages." They also "undertake to promote, by appropriate measures, mutual understanding between all the linguistic groups of the country and in particular the inclusion of respect, understanding and tolerance in relation to regional or minority languages among the objectives of education and training provided within their countries and encouragement of the mass media to pursue the same objective." In so doing, the parties are required to "take into consideration the needs and wishes expressed by the groups which use such languages. They are encouraged to establish bodies, if necessary, for the purpose of advising the authorities on all matters pertaining to regional or minority languages.").

77. *Id.* at art. 8.

78. *Id.* at art. 9.

79. *Id.* at art. 10.

80. European Charter for Regional or Minority Languages, ETS 148, art. 11.

81. *Id.* at art. 12.

82. *Id.* at art. 13.

83. *Id.* at pt. III.

84. For example, Article 8 outlines a state's obligations with respect to education, on a sliding scale, ranging from making education (at any or all levels, from pre-school to higher) available in the language concerned to those students who so request, to making the education available in the language concerned for all. *Id.* at art. 8. However, a state's obligation to satisfy this Article is made contingent upon there being sufficient numbers of minority language speakers living within a certain geographic area to warrant the provision of linguistic education. *Id.* The onus is on the state to decide what numbers justify the provision of additional teaching facilities. Other options in the section include teaching the history and culture of the language and training teachers to implement the options agreed upon.

85. *Id.*

86. Framework Convention for the Protection of National Minorities, opened for signature Feb. 1, 1995, C.E.T.S. No. 157 (entered into force Feb. 1, 1998), *available at* http://conventions.coe.int/Treaty/EN/Treaties/Html/157.htm [hereinafter FCNM]. The Framework Convention is so designated because it is primarily a statement of principles rather than a detailed set of obligations. Supervision of compliance is done through a system of state reporting to the Committee of Ministers, assisted by an expert advisory committee.

of these provisions refers to the rights of "persons," the text makes clear that any rights those persons may have derive from their membership in specific national minority groups.[87]

The language rights articulated in the FCNM may therefore, like those contained in the Charter for Regional and Minority Languages, be characterized as preservationist, group oriented, and protectionist of territorially-rooted national minority communities as demonstrated by the individual textual commitments. Individual textual commitments demonstrate each of these characteristics. For example, Article 5 of the FCNM promotes preservation of essential elements of group identity, "namely religion, *language*, traditions and cultural heritage."[88] Article 9 is concerned with freedom of expression and group access to minority language media.[89] Article 10 underscores the importance of territoriality to national minority groups by stipulating that in areas traditionally belonging to, or inhabited by, substantial numbers of persons belonging to national minorities, administrative authorities shall endeavor to use the minority language in dealings with members of the national minorities, including, if necessary, occasions when members of national minorities are arrested.[90] Article 11 guarantees members of minority families the right to use national minority names.[91] Article 12 states that in territories inhabited by national minority groups, signatories shall, "take measures in the fields of education and research to foster knowledge of the culture, history, language and religion of their national minorities and of the majority,"[92] and Article 14 states that every person belonging to a national minority group has the right to learn his or her minority language, suggesting that, where possible, the state should ensure that persons belonging to minorities have adequate opportunities to do

87. The emphasis on group identity in both the FCNM and the Charter for Minority and Regional Languages has been interpreted by some scholars as an innovative departure from established European individual rights norms. *See* Daniela Caruso, *Limits of the Classic Method: Positive Action in the European Union After the new Equality Directives*, 44 HARV. INT'L L.J. 331 (2003). Others see this emphasis as a consequence of the invariably collective nature of language. *See* Denise G. Réaume, *The Group Right to Linguistic Security: Whose Right, What Duties? in* GROUP RIGHTS 118 (Judith Baker ed., 1994); Eibe Riedel, *Gruppenrechte und Kollektive Aspekte Individueller Menschenrechte, in* AKTUELLE PROBLEME DES MENSCHENRECHTSSCHUTZES. BERICHTE DER DEUTSCHEN GESELLSCHAFT FUER VOLKERRECHT [Current Problems in Minority Rights Protection. Report of the Germany Society for Human Rights] 33, 49, 59 (1994).

88. Framework Convention for the Protection of National Minorities, *supra* note 86, at art. 5 (emphasis added).

89. *Id.* at art. 9 ("The Parties undertake to recognise that the right to freedom of expression of every person belonging to a national minority includes freedom to hold opinions and to receive and impart information and ideas in the minority language, without interference by public authorities and regardless of frontiers. The Parties shall ensure, within the framework of their legal systems, that persons belonging to a national minority are not discriminated against in their access to the media.").

90. *Id.* at art. 10.

91. *Id.* at art. 11.

92. *Id.* at art. 12.

so.[93]

This group-based approach to language rights is also adopted by the Charter of Fundamental Rights of the European Union,[94] which is particularly noteworthy in a treaty that is overwhelmingly concerned with individual human rights. The Charter, proclaimed by the European Commission in December 2000, contains fifty-four separate articles, grouped into chapters entitled "Dignity," "Freedoms," "Equality," "Solidarity," "Citizens' Rights," and "Justice." Fifty-three of the fifty-four articles in the Charter address individual rights, and just one, Article 22 in the chapter entitled "Equality," addresses collective rights, including language rights: "The Union shall respect cultural, religious and *linguistic* diversity."[95] Unlike the two Council of Europe treaties, the Charter of Fundamental Rights does not specify what kind of linguistic diversity should be respected—the text of Article 22 is not explicitly limited to indigenous "European" languages, and there is no suggestion that preservation of linguistic heritage is the most important motivation for promoting linguistic diversity. Yet, even though the text of Article 22 is not expressly preservation-oriented, national minority language group advocates have seized upon the text of the Charter as inferring a grant of the right to linguistic preservation for territorially anchored national minority communities.[96]

As this brief review of their key provisions has shown, the language rights granted in the Charter for Regional and Minority Languages, the FCNM, and the Charter of Fundamental Rights, were originally understood to be preservationist, group-oriented, and available to territorially-defined national minority communities. This echoes the approach used in individual nation states' constitutional and statutory language rights provisions. However, while this characterization adequately describes the original, narrowly-focused grant of minority language rights embodied in the texts of constitutions, statutes and treaties, it does not fully or adequately describe their subsequent interpretation and reorientation by European courts and treaty bodies. This Article attempts to do just that, and continues in Part III by illustrating the ways in which the grants of language rights originally intended to preserve the languages of territorially-anchored national minority groups were subsequently reinterpreted to confer linguistic protections on members of transnational minorities.

---

93. *Id.* at art 14.

94. Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1 (Dec. 7, 2000).

95. *Id.*

96. National groups founded to protect RM language "heritage," such as the French Association International Pour la Défence des Langues et Cultures Menacées and the Italian Associazione per i Popoli Minacciati, as well as pan-European organizations such as the European Bureau for Lesser Used Languages, *see* http://www.eblul.org, and the MERCATOR European Research Centre on Multilingualism and Language Learning, all emphasize that RM language groups were granted rights under Article 22 of the EU's Charter of Fundamental Rights, as well as the Council of Europe's Charter for Regional and Minority Languages and FCNM.

III.
TRANSNATIONAL MINORITIES AND THE RIGHT TO PROTECTION

Although the texts of nation state constitutions and European treaties such as the Charter for Regional and Minority Languages and the Framework Convention for the Protection of National Minorities emphasize the rights national minority groups enjoy to the preservation of their linguistic heritage, these documents also refer—albeit less frequently—to the rights enjoyed by other RM language groups; linguistic minorities that are not anchored to a particular nation state's territory. These "transnational minorities" fall into two broad categories: (i) groups that are geographically dispersed throughout Europe, such as Yiddish or Romani speakers, and (ii) "cross-border" minority language communities, which share a language with the majority of the inhabitants of an adjoining nation, such as Hungarian speakers in Romania, or Swedish speakers in Finland.[97]

In the case of Yiddish, the Council of Europe treaty bodies' decisions underscore the importance of not merely language *preservation*, but also language protection. In the case of Romani and "cross border" minority languages—languages that are not endangered[98]—the treaty bodies' concern is entirely with the protection of the languages and language speakers from the hegemony of the linguistic majority. As the discussion below demonstrates, the rights granted to transnational minority language speakers play a crucial role in the reorientation of minority language rights in Europe away from a right to language survival, available only to territorially-anchored RM groups, and toward the right to protection of language speakers' continued connection with their pan-European language community (in the case of Yiddish and Romani speakers) or with the linguistic majority in their kin state (in the case of language communities with kin states).[99]

A. The Right to Preservation and Protection of Yiddish

Yiddish enjoys a special status under the Charter for Regional and Minority Languages and the Framework Convention for National Minorities. [100]

97. "Cross-border" regional minority communities also arguably include territorially anchored linguistic groups, such as the Basque in France and Spain, the Frisians in Germany and Denmark, and the Saami in northern Scandinavia whose "right to preservation" was discussed in Part II, *supra* pp. 268-81.

98. The Romani language is not in danger of extinction—the Roma constitute Europe's largest minority group. *See* Romani Rose, *Europe's Largest Minority—Roma and Sinti—Demand Equal Rights*, UN Chronicle, Vol. XLIII, No. 3 (2006), *available at* http://www.un.org/Pubs/chronicle/2006/webArticles/120106_rose.htm. The languages spoken by "cross border" minority groups are also not endangered—Swedish is spoken by Swedes in Sweden, Danish is spoken by Danes in Denmark, and Polish is spoken by Poles in German.

99. *See* discussion *infra* pp. 287-92.

100. Yiddish and Romani are described in the "definitions" section of the Charter for Regional

Although Yiddish speaking communities are not anchored to a particular territorial location, the Yiddish language has been spoken throughout Europe for centuries and is considered to be "indigenously" European.[101] Despite its longevity, the threat to the survival of the Yiddish language is acute. The near-annihilation of European Jewish communities during the holocaust, their persecution by Communist regimes, and the mass emigration of Yiddish speakers who survived World War II to Israel and the United States, almost led to the disappearance of the Yiddish language in Europe.[102] In 1939 there were over 8 million speakers of Yiddish in Central and Eastern Europe; today there are approximately 2 million Yiddish speakers worldwide, most of whom live in the United States or Israel and many of whom are elderly.[103]

It is therefore perhaps unsurprising that a number of states parties to European treaties have made firm textual commitments to the preservation of the Yiddish language. Despite their numerically small Yiddish-speaking communities, Finland, the Netherlands, Romania, Sweden, Switzerland, and Ukraine all made declarations when they signed the Charter for Regional and Minority Languages proclaiming that Yiddish was a protected national minority language in their countries under the terms of the Charter.[104] However, what is surprising is the extent to which textual commitments in these treaties to the preservation of the Yiddish language have been expansively interpreted by the treaty bodies, moving beyond the survival of the language to encompass the *protection* of the language speakers and promotion of the language itself.

The Committee of Experts on the Charter for Regional and Minority

---

and Minority languages as "non-territorial languages," meaning they are "languages used by nationals of the State which differ from the language or languages used by the rest of the State's population but which, although traditionally used within the territory of the State, cannot be identified with a particular area thereof."

101. The earliest documents in pre-Yiddish going back to the 12th century were glosses of Hebrew religious works. The language began to develop amid Gallo-Romanic High German dialects and took its Old Yiddish shape in the 14th century when the *Dukus Horant*, the Yiddish version of the German *Kudrunlied*, appears. The first printed book was the *Bovebukh* of 1507. The period of New Yiddish begins in the 18th century. Yiddish was the primary vernacular of European (Ashkenazi) Jewry for more than 600 years. Itself a remarkable fusion of Jewish culture with European forms of expression, it became the *lingua franca* and one of the principal vehicles of Ashkenazi civilization. Until the 19th century it was used in speech, literature and traditional Jewish education throughout Central and Eastern Europe. *See* Council of Europe Doc. 7489, Yiddish Culture (Feb. 12, 1996), Explanatory Memorandum, at 5, *available at* http://assembly.coe.int/Documents/WorkingDocs/doc96/edoc7489.htm.

102. *Id.*

103. It is estimated that in the late 1930s the numbers of native Yiddish speakers were well in excess of 11 million worldwide. Some 8 million were in Europe (3,3 million in Poland, 3 million in the Soviet Union, 800 000 in Romania, 250 000 in Hungary, 180 000 in Lithuania and others in England, France, Germany, Latvia, Belgium, Switzerland) and the rest in North and South America, South Africa and Australia. *Id.*

104. *See* Council of Europe, List of Declarations Made with Respect to Treaty No. 148, Charter for Regional or Minority Languages (status as of Oct. 27, 2008), *available at* http://ec.europa.eu/education/languages/archive/languages/langmin/files/charter_en.pdf.

Languages, tasked with overseeing signatories' compliance with their obligations under the Charter, has issued a number of advisory opinions regarding states parties' promotion of Yiddish.[105] Other European institutions have followed the treaty bodies' lead, seeking not just to preserve Yiddish but also to protect the rights to community of Yiddish speakers. For example, in 1995, three years after the draft of the Charter for Regional and Minority Languages was finalized (and two years before the Charter entered into force) the Council of Europe's Parliamentary Assembly convened a colloquy in Vilnius[106] to consider how best to protect the Yiddish language and culture from vanishing.[107] The colloquy considered Council of Europe Members' obligations under the Charter for Regional and Minority Languages, the Council's Parliamentary Assembly's Recommendation928 (1981) on the educational and cultural problems of minority languages and dialects in Europe,[108] Recommendation 1275 (1995) on the fight against racism, xenophobia, anti-Semitism and intolerance, and Resolution885 (1987) on the Jewish contribution to European culture, and concluded that European nations had an affirmative responsibility to both safeguard and promote Yiddish by: (i) establishing university chairs in Yiddish, (ii) establishing scholarships for Yiddish-speaking writers and artists to encourage them to produce more works, (iii) funding Yiddish theatre groups and printing presses, and (iv) providing financial assistance to Jewish cultural centers to produce materials in Yiddish.[109] The Parliamentary Assembly of the Council of Europe also recommended establishing a "laboratory for dispersed ethnic minorities," such as Yiddish speakers, specifically designed to protect the interests of transnational language groups without a kin-state.[110] These measures taken to

105. The Committee of Experts on the Charter has issued 35 evaluation reports, resulting in 30 Council of Europe Committee of Ministers recommendations. For all of the states that declare Yiddish to be a Charter-eligible language, the Committee of Experts issues regular updates on the progress made to preserve and protect the language. For example, in its first report on the Netherlands, the Committee undertook research into the prevalence of Yiddish in public life and noted that Yiddish was spoken in the home as a private language, and could be studied at the university of Amsterdam and similar institutions, but there was little wider public interest in the language, as yet.

106. Vilnius was selected for the colloquy because of its central role in Yiddish culture and history. Known as the "Lithuanian Jerusalem" in the nineteenth century, the book TEUDA BEISRAEL ("A testimony in Israel") by Isaak Baer Levinsohn, the unofficial "manifesto" of the Jewish Enlightenment in Eastern Europe was published in Yiddish in Vilnius in 1828. *See* Council of Europe Doc. 7489, Yiddish Culture, (Feb. 12, 1996).

107. The full minutes of the colloquy are available online, http://assembly.coe.int/Documents/WorkingDocs/doc96/EDOC7489AD.htm.

108. *Id.*

109. Parliamentary Assembly of the Council of Europe, Recommendation 1291 (1996).

110. The proposed mandate for the laboratory was (a) to promote the survival of minority cultures or their memory; (b) to carry out surveys of persons still speaking minority languages; (c) to record, collect and preserve their monuments and evidence of their language and folklore; (d) to publish basic documents (for example the unfinished lexicon of the Yiddish language); (e) to promote legislation to protect minority cultures against discrimination or annihilation. *Id.*

protect Yiddish demonstrate how European nation states and institutions were beginning to take steps to protect minority language that went beyond language preservation to encompass a broader protection of minority language speakers and promotion of minority languages.

B. The Right to Protection of Romani

European treaty bodies' decisions and European courts' jurisprudence relating to the Romani language provide further clear examples of the reorientation of language rights in Europe beyond mere language preservation toward language protection and promotion. The situation of the Romani language is similar in many ways to that of Yiddish: the Roma, like European Jews, have been described as a "dispersed ethnic minority;" Romani, like Yiddish, is an "indigenous" European language with a long and rich history;[111] Roma and Sinti[112] communities were decimated by the holocaust[113] and persecuted by the former Communist governments of Central and Eastern Europe. [114] However, there is one key difference between the situation of the Romani language and the Yiddish language: unlike Yiddish, the Romani language is not in danger of extinction.[115] There are an estimated 10 million Roma and Sinti in Europe today, making them the largest single indigenous

111. The Proto-Romani language is believed to have originated in Central India in approximately 500 BCE, the Early Romani language was spoken by minorities in the Byzantine Empire and was heavily influenced by Greek. In the late fourteenth century, Romani-speaking populations began to emigrate from the Balkans, settling in central and in western Europe during the fifteenth and early sixteenth centuries. Differences among the speech varieties of the various Romani populations emerged during this period, resulting in a split into dialect branches. The different internal developments in morphology, phonology, and lexicon were accompanied by the influences of various contact languages on the individual dialects, the most significant of those being Turkish, Romanian, Hungarian, German, and various Slavonic languages. The earliest attestations of Romani are usually in the form of groups of short sentences and wordlists, dating from between the mid-sixteenth and mid-seventeenth centuries. These sources represent dialects from western Europe, southern Europe, and the Balkans. *See* YARON MATRAS, ROMANI: A LINGUISTIC INTRODUCTION (2002); PETER BAKKER AND HRISTO KYUCHUKOV, WHAT IS THE ROMANI LANGUAGE? (2000).

112. The difference between Roma and Sinti is often described as a difference of self-identification. Since the twelfth century C.E., the Sinti have differentiated themselves from other Roma, through cultural traditions and dialect. The term "Sinti" is used most frequently in Germany, the term "Manush" is often used in France, the term "Polske Roma" in Poland and the term "Kale" in Spain. *See* E Romani Historija, 1.1 Roma and Sinti, *available at* http://www.romahistory.com/ro/1.htm.

113. At least 250,000 Roma were exterminated during the Holocaust, but exact figures are unavailable. *See Roma Mark Holocaust at Auschwitz*, BBC NEWS, Aug. 2, 2004, *available at* http://news.bbc.co.uk/2/hi/europe/3527024.stm.

114. For an overview of the history of the Roma and Sinti and the challenges facing European Roma and Sinti communities, *see* OSCE Office for Democratic Institutions and Human Rights, Roma and Sinti, *available at* http://www.osce.org/odihr/18148.html.

115. Although some commentators believe that the Roma's abandonment of their peripatetic lifestyles and settlement in one location has fractured the Roma's own sense of collective identity, *See* István Pogány, *Minority Rights and the Roma of Central and Eastern Europe*, 6 HUM. RTS. L. REV. 1 (2006).

minority language group in Europe.[116] Thus, the rights regime that has developed with regard to the Romani language is not preservationist—survival of the language is not at issue—rather it is protectionist, designed to protect and promote the interest of language speakers that have suffered discrimination and marginalization by the ethnic and linguistic majorities in the countries in which they live.[117]

Austria, the Czech Republic, Finland, Germany, Hungary, Montenegro, the Netherlands, Norway, Poland, Romania, Serbia, Slovakia, Slovenia, and Sweden all identify Romani as a minority language under the Charter for Regional and Minority Languages.[118] Each of these nations has made a commitment to protect the Romani language and groups of Romani speakers who are found within their territory. Similarly, Germany, Slovenia, Sweden, and the Former Yugoslav Republic of Macedonia declared that the Roma (and in Germany's case, also the Sinti) were protected minorities under the FCNM.[119] The Committee of Experts on the Charter for Regional and Minority Languages has taken a particular interest in the protection of the Romani language. For those state parties that recognize Romani as a minority language under the Charter,[120] the Committee of Experts has undertaken a searching review of the provisions in place to provide educational, judicial, administrative, and social services in Romani for Roma communities.[121] For example, in the Committee's first monitoring cycle report on Germany, issued in 2002, the Committee identified an urgent need to train and employ a cadre of Romani speaking teachers and social service providers.[122] In its next monitoring cycle report, issued in 2006, the Committee criticized the lack of progress towards this goal, and set clear objectives for the German authorities to meet before the next monitoring

116. *See* European Commission Publication, *The Situation of Roma in an Enlarged European Union* (2004), *available at* http://ec.europa.eu/social/main.jsp?catId=518&langId=en; Romani Rose, *Europe's Largest Minority—Roma and Sinti—Demand Equal Rights*, UN Chronicle, Vol. XLIII, No. 3 (2006), *available at* http://www.un.org/Pubs/chronicle/2006/webArticles/120106_rose.htm.

117. *Id. See also* Marnie Lloydd & Alexander H.E. Morawa, *European Ctr. for Minority Issues, Ombudspersons and Minority Rights: A Sketch* 2-3, *available at* http://www.ecmi.de/doc/ombudsman/download/Background%20Paper.pdf; Linda C. Reif, *The Promotion of International Human Rights Law by the Office of the Ombudsman*, *in* THE INTERNATIONAL OMBUDSMAN ANTHOLOGY: SELECTED WRITINGS FROM THE INTERNATIONAL OMBUDSMAN INSTITUTE 272, 273-74, 288-91 (Linda C. Reif ed., 1999).

118. *See* Council of Europe, List of Declarations Made with Respect to Treaty No. 148, Charter for Regional or Minority Languages (status as of Oct. 27, 2008), *available at* http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=148&CM=1&DF=&CL=ENG&VL=1.

119. *Id.*

120. Namely, the Czech Republic, Finland, Germany, Hungary, Montenegro, the Netherlands, Norway, Romania, Serbia, Slovakia, Slovenia, Sweden.

121. *See, e.g.*, Council of Europe, Charter for Regional or Minority Languages, Reports or Recommendations, Committee of Experts' Evaluation Report, Germany (Dec. 4, 2002), *available at* http://www.coe.int/t/dg4/education/minlang/Report/default_en.asp.

122. *Id.*

cycle.[123] Furthermore, in each of its advisory opinions on provisions for speakers of Romani, the Committee simultaneously acknowledged that the text of the Charter limits states' obligations to Romani, because it is a "non-territorial" language in most states,[124] but nonetheless made suggestions for the provision of services to Romani-speaking communities in line with those mandated for "territorial" languages. The Committee of Experts has even taken the unprecedented step of expanding its remit with regard to Romani beyond the states that recognize Romani as a minority language under the Charter to states that *do not* list Romani as a minority language and has *sua sponte* issued recommendations for its inclusion as a "non-territorial language by certain states."[125]

The Advisory Committee for the FCNM has taken a similarly active stance in its monitorng of state parties' obligations towards Romani speakers and strongly advocating the protection and promotion (rather than mere preservation) of the Romani language. In its 2002 opinion on Germany, the Advisory Committee urged the German authorities to "consider how to set up much more appropriate structures by which the Roma/Sinti can be regularly consulted in all parts of the Federal State on matters concerning them."[126] In its opinion on Italy of the same year, the Advisory Committee went further and declared that the existing national laws and local ordinances afforded the Roma and Sinti language communities inadequate protections, declaring that these communities should enjoy, *inter alia*, the right to access government services,[127] education,[128] and media[129] in their own languages. Romani language rights and

123. Council of Europe, Charter for Regional or Minority Languages, Reports or Recommendations, Committee of Experts' Evaluation Report, Germany (Mar. 1, 2006), *available at* http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/regional_or_minority_languages/2_Monitoring/Monitoring_table.asp#TopOfPage. (noting also the need for Sinti speaking teachers and social workers in Hamburg).

124. The exception is Hesse in Germany where Romani is granted full protections under Parts II and III of the Charter for Regional and Minority Languages.

125. For example, the Committee's 2003 report on the United Kingdom noted that: In the initial periodical report, there is no mention of non-territorial languages. The Committee of Experts has been informed, during the "on-the-spot" visit, of users of Roma languages residing within the UK. The Committee of Experts has not been in a position at this stage to investigate this further. It encourages the UK authorities to deal with this issue in the next report. Council of Europe, Charter for Regional or Minority Languages, Reports or Recommendations, Committee of Experts' Evaluation Report, United Kingdom (Aug. 29, 2003), *available at* http://www.coe.int/t/dg4/education/minlang/Report/default_en.asp.

126. Advisory Committee on the Framework Convention for the Protection of National Minorities, Report ACFC/INF/OP/I(2002)008, ¶ 66 (Germany) (Sep. 12, 2002).

127. Advisory Committee on the Framework Convention for the Protection of National Minorities, Report ACFC/INF/OP/I(2002)007, ¶ 51 (Italy) (Sept. 14, 2001) (noting that the Roma "have no scope for using their native language in dealings with the administrative authorities" and recommending that "the Italian authorities, in consultation with the Roma, should seek to identify their needs in the matter and if appropriate consider establishing the requisite legal basis and/or arrangements for meeting these needs.").

128. *Id.* ¶ 60 ("Roma do not have the opportunity to learn their language under the Italian

the protection of Roma and Sinti linguistic identity were also at the forefront of the Advisory Committee's opinion on Spain, in which it stated that it welcomed "the debate that is taking place in Spain regarding the role that language could play in the cultural identity and self-confidence of Roma."[130]

The increased emphasis by both treaty bodies on nation states' treatment of the Roma, and on the protection of the languages of Roma and Sinti communities, has influenced the incorporation of clauses protecting the Romani language into national statutes[131] and international agreements concerning the human rights of the Roma.[132] The European Union now considers the protection of the Romani language to be an integral part of the protection of the Roma and Sinti peoples from persecution and discrimination.[133]

C. *The Right to Protection of Language Groups with "Kin-States"*

The trend towards minority language protection (rather than preservation) is also evident in European treaty bodies' and courts' findings with regard to a further type of linguistic minority: minority language groups with "kin states." Many European language communities straddle national borders, including Swedish speakers in Finland,[134] Finnish speakers in Sweden,[135] German

education system. . . . the Government [should] ascertain the extent to which the current position of the Roma language in the Italian education system meets the demands of persons belonging to this community.").

129. *Id.* ¶ 47 (noting that the Roma "do not receive any broadcast in their language or specifically intended for them, or any financial support for their newspapers" and recommending that "the Italian authorities, in consultation with the Roma, should seek to define their needs in this respect and if appropriate consider making the necessary arrangements to meet these needs.").

130. Advisory Committee on the Framework Convention for the Protection of National Minorities, Report ACFC/OP/II(2007)001, (Spain) (Apr. 2, 2008) ("According to the information received by the Advisory Committee, there is a growing interest among some Roma in the preservation of *caló*. *Caló*, which is reportedly spoken less and less by new generations of Roma, has been described as a hybrid language composed of isolated Romani words using the grammar of local Spanish languages (Castilian, Catalan, Basque, etc.). Certain Roma are also interested in the introduction of a novel, standardized form of Romani. The Advisory Committee welcomes the fact that research on this issue is envisaged as one of the competences of the new Institute of Roma Culture to be established in Spain.").

131. *See, e.g.*, Race Relations Act, 2000, 34 (Eng.).

132. *See, e.g.*, OSCE Permanent Council Decision No. 566, ACTION PLAN ON IMPROVING THE SITUATION OF ROMA AND SINTI WITHIN THE OSCE AREA, Nov. 27, 2003, at 18 ("Facilitate access to justice for Roma and Sinti people through measures such as legal aid and the provision of information in the Romani language.").

133. *See* European Commission Publication, *The Situation of Roma in an Enlarged European Union*, at 21 (2004), *available at* http://ec.europa.eu/social/main.jsp?catId=518&langId=en (highlighting the importance of "[p]roviding adequately for cultural education about Roma – including Romani language, history and culture – for both Romani and non-Romani."); *see also* Recommendation of the Committee of Ministers to Member States on the Education of Roma and Travellers in Europe, June 17, 2009, CM/Rec(2009)4.

134. *See* Kristian Myntti, *National Minorities and Minority Legislation in Finland*, *in* THE PROTECTION OF ETHNIC AND LINGUISTIC MINORITIES IN EUROPE 79 (John Packer & Kristian Myntti

speakers in Belgium,[136] Danish speakers in Germany,[137] German speakers in Denmark,[138] Slovene speakers in Austria,[139] and Serbian speakers in Romania,[140] amongst many others.[141] The languages spoken by these linguistic minority communities are not endangered—Swedish is spoken by Swedes in Sweden, Danish is spoken by Danes in Denmark, and Polish is spoken by Poles in Poland—and so the language rights accorded cross-border linguistic communities should properly be understood as a right to language community protection, rather than a right to linguistic preservation.

The protection of the languages of cross-border linguistic groups is not a recent phenomenon. In the aftermath of World War II, many European nations entered into bilateral language rights agreements with one another, to protect groups of "their" people who were stranded in another nation's sovereign territory once national borders had been redrawn.[142] However, in the 1990s, the entry into force of the Charter for Regional and Minority Languages and the Framework Convention for National Minorities, as well as the promulgation of the Charter of Fundamental Rights of the European Union led to renewed emphasis on the protection of cross-border RM groups' rights to use their languages.[143] In the late 1990s, in the wake of the passage of these treaties, advocates for cross-border language communities with kin states began to argue that the provisions of the Charter for Regional and Minority Languages and the

---

eds., 1997).

135. *See* Euromosaic, Finnish in Sweden (Tornedalen), *available at* http://www.uoc.es/euromosaic/web/document /fines/an/i1/i1.html.

136. *See* Bruce Donaldson, *The German-Speaking Minority of Belgium*, *in* GERMAN MINORITIES IN EUROPE: ETHNIC IDENTITY AND CULTURAL BELONGING 33 (Stefan Wolff ed., 2000).

137. *See* Euromosaic, Danish in Germany, *available at* http://www.uoc.es/euromosaic/web/document/danes/an /i1/i1.html.

138. *See* Karen Margrethe Pedersen, *A National Minority with a Transethnic Identity—the German Minority in Denmark*, *in* GERMAN MINORITIES IN EUROPE: ETHNIC IDENTITY AND CULTURAL BELONGING 15 (Stefan Wolff ed., 2000).

139. *See* Tom Priestly, *Maintenance of Slovene in Carinthia (Austria): Grounds for Guarded Optimism?* 45 CANADIAN SLAVONIC PAPERS 95 (2003).

140. *See* Peter Jordan, *Romania*, *in* LINGUISTIC MINORITIES IN CENTRAL AND EASTERN EUROPE 189, 202 (Christina Bratt Paulston & Donald Peckham eds., 1998).

141. *See* Languages of Europe: Euromosaic Study, *available at* http://ec.europa.eu/education/languages/languages-of-europe/doc145_en.htm.

142. For example, an Austrian-Italian annex to the Peace Treaty with Italy required Italy to protect the linguistic rights of a German minority population in the South Tyrol; a 1977 treaty between Italy and Yugoslavia concerned with the language rights of ethnic troops in Trieste. *See generally* John Quigley, *Towards International Norms on Linguistic Rights: The Russian-Romanian Controversy in Moldova*, 10 CONN. J. INT'L L. 69, 86 (1994).

143. Basque, Frisian, and Saami were among the languages protected. The Basque are found in France and Spain, the Frisians who are found in Germany and Denmark, and the Saami are found in Finland and Sweden. *See generally* Francois Grin & Tom Moring, Report of European Bureau for Lesser Used Languages & European Center for Minority Issues, Support For Minority Languages in Europe, European Commission Contract No. 2000-1288/001–001 EDU-MLCEV (May 15, 2002), ec.europa.eu/education/languages/pdf/doc639_en.pdf.

FCNM should also be applied to protect their language groups.[144]

This activism had two distinct consequences. The first consequence was the ratification in 1998 by the OSCE of the Oslo Recommendations Regarding the Linguistic Rights of National Minorities. These Recommendations were specifically focused on the need to protect the languages of "persons belonging to national/ethnic groups who constitute the numerical majority in one State but the numerical minority in another (usually neighbouring) State."[145] The second consequence was a series of decisions by the treaty bodies established to monitor the implementation of the Charter for Regional and Minority Languages and the Framework Convention for National Minorities in favor of the protection of minority language communities with kin states.[146]

Opinions issued by the Advisory Committee established to monitor implementation of the FCNM provide examples of the shift away from mere *preservation* of national minority languages towards the *protection* of the rights to language usage by linguistic minorities with cross-border kin-states.[147] To date, the Advisory Committee has issued 76 opinions, in three cycles, leading to 65 resolutions by the Committee of Ministers.[148] The first reporting cycle ran from 2000 to 2006, and the second and third cycles (which are still ongoing) began in 2006.[149] In the first cycle of reporting, the Advisory Committee's reports began to consider the degree to which the provisions of the Charter had

144. The Charter for Regional and Minority Languages had, for example, recommended Transfrontier Exchanges under article 14, designed to promote exchanges between minority groups on either side of a border, e.g. Basques in France and Spain, but not to promote exchanges between a minority group in one state and the majority group in an adjacent kin state.

145. The Oslo Recommendations Regarding the Linguistic Rights of National Minorities, approved by the Organization for Security and Cooperation in Europe (OSCE) in Oslo, February 1998.

146. *See* discussion *infra* pp. 287-92.

147. The monitoring mechanism of the Framework Convention for National Minorities is based on Articles 24-26 of the FCNM, European Framework Convention for the Protection of National Minorities ETS No. 157: 2 IHRR 217 (Feb. 1, 1995), and Council Resolution 97/10 of 17 Sep. 1997, RESCMN (1997) 10. The evaluation of the adequacy of the implementation of the Framework Convention by its 39 states parties (Albania, Armenia, Austria, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, Germany, Georgia, Hungary, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Malta, Moldova, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, "the former Yugoslav Republic of Macedonia," Ukraine and the United Kingdom. Belgium, Greece, Iceland and Luxembourg are signatories to the Framework Convention) is carried out by the Committee of Ministers, assisted by an Advisory Committee of 18 independent and impartial experts appointed by the Committee of Ministers. *See* Council of Europe Activities in the Field of Protection of National Minorities, Overview of Activities, updated Aug. 24, 2006, *available at* http://docs.google.com/viewer?a=v&q=cache:aqPKjv4SW2oJ:www.coe.int/T/E/human_rights/minorities/1._GENERAL_PRESENTATION/PDF_Overview_en.pdf+Council+of+Europe+Activities+in+the+Field+of+Protection+of+National+Minorities,+Overview+of+Activities,+updated+August+24,+2006&hl=en&gl=us&sig=AHIEtbRMVHtKqKiLJiUBZqRN3mLHBMihFQ.

148. *See* http://www.coe.int/t/dghl/monitoring/minorities/default_en.asp.

149. The most recent report was published on July 22, 2009 (3d cycle report for Slovak Republic).

been implemented with regard to minority groups with kin-states.

The Advisory Committee's first report on Austria in 2002, for example, addressed the need to preserve "national" minority languages and dialects, such as Allemanisch, and then highlighted the challenges facing the national and *Länder* governments' fulfillment of their obligations under the FCNM to protect the linguistic autonomy of the Slovenian cross-border minority in Styria[150] and the Hungarian and Croat cross-border minorities in Burgenland.[151] Similarly, the Advisory Committee's first report on Germany reviewed Germany's fulfillment of its Convention obligations to preserve the Sorbian and Frisian languages, noting that there were serious shortcomings in Germany's efforts to fulfill its treaty obligations thus far, and also declaring that Germany had additional obligations to protect the rights of the Danish-speaking communities living along the border with Denmark.[152]

The ratification of the OSCE's Recommendations, combined with the treaty-bodies' broad interpretation of the Charter for Regional and Minority Languages and FCNM to encompass protections for transnational language minorities, marked a significant departure from previous international law governing the protection and recognition of transnational language minorities with kin states.[153] No other international treaty bestows such far-reaching protections for cross-border communities with kin states.[154] The two UN treaties that address minority language rights—the International Covenant of Civil and Political Rights[155] (hereinafter ICCPR) and the Convention on the Rights of the Child[156]—do not reach concerns unique to transnational

150. Advisory Committee on the Framework Convention for the Protection of National Minorities, Report ACFC/INF/OP/I(2002)009 (Austria) (May 16, 2002) at 3, *available at* http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/Table_en.asp#Austria (noting that "there remains a need for considerably more determined measures from the authorities to help this community to preserve its identity, notably in the field of media and participation in public life.").

151. *Id.* at 15 (observing that the "authorities of Burgenland . . . have stated that they would be willing to put up new signs in municipalities where national minorities represent more than 10% of the population, which should be the case of the Croats and Hungarians.").

152. Advisory Committee on the Framework Convention for the Protection of National Minorities, Report ACFC/INF/OP/I(2002)008, (Germany) (March 1, 2002) *available at* http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/Table_en.asp#Germany. The Advisory Committee also applied the same standards in its 2001 review of Denmark's treatment of the German speaking minority living on the other side of the border. Advisory Committee on the Framework Convention for the Protection of National Minorities, Report ACFC/INF/OP/I(2001)005, (Denmark) (Sept. 22, 2000), *available at* http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/Table_en.asp#Denmark.

153. *See generally* Kay Hailbronner, *The Legal Status of Population Groups in a Multinational State Under Public International Law*, 20 ISRAEL Y.B. ON HUM. RTS. 127 (1990).

154. *See* Lauri Mälksoo, *Language Rights in International Law: Why the Phoenix is still in the Ashes*, 12 FLA. J. INT'L L. 431 (2000).

155. Covenant of Civil and Political Rights Art. 27, Dec. 16, 1966, 999 U.N.T.S. 171.

156. G.A. Res. 44/25 U.N. DOC. A/RES/44/25 (Dec. 12, 1989). On the drafting process of Article 27, *see, e.g.*, MARC J. BOSSUYT, GUIDE TO THE "TRAVAUX PREPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 493 (1987).

minorities, such as the provision of opportunities for cultural exchange with kin state communities.[157] Indeed, with regard to both transnational *and* territorially bounded minority language groups, the Charter for Regional and Minority Languages, the FCNM and the OSCE Recommendations mark a point of significant departure in terms of the treatment of minority language groups.[158] In contrast with the ICCPR and the Convention on the Rights of the Child—which appear to be oriented towards "negative" rights prohibiting interference with members of linguistic minorities' use of their native language, rather than placing an affirmative obligation on governments to provide services[159]—the

157. Article 27 of the ICCPR does not offer any definition of the different kinds of language minorities that might be subject to the Covenant, it merely provides that individuals belonging to a minority "shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." Covenant of Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, art. 27.

158. Giorgio Malinverni, *Le projet de Convention pour la protection des minorités élaboré par la Commission européenne pour la démocratie par le droit*, [The Project of the Convention for the Protection of Minorities Developed by the European Commission for Democracy through Law) 3 REVUE UNIVERSELLE DES DROITS DE L'HOMME [Universal Review of Human Rights] 157, 161 (1991). (Il s'agit là d'un droit particulièrement important pour les minorités, si elles veulent promouvoir et renforcer leurs caractéristiques communes. Le droit consacré par cet écrit concerne tout d'abord les minorités dispersées sur le territoire d'un ou de plusieurs États. Il est en outre destiné à s'appliquer aux nombreuses minorités établies près des frontières et qui présentent les mêmes caractéristiques ethniques, religieuses ou linguistiques que la population des États voisins. Pour elles, le droit d'entretenir des contacts avec les populations limitrophes, y compris en se déplaçant dans ces États, revêt une importance particulière.).

159. Scholars and practitioners are divided in their interpretation of the guarantees of Article 27. *See generally* RENATE OXENKNECHT, DER SCHUTZ ETHNISCHER, RELIGIOSER UND SPRACHLICHER MINDERHEITEN IN ART. 27 DES INTERNATIONALEN PAKTES ÜBER BÜRGERLICHE UND POLITISCHE RECHTE VOM 16. DEZEMBER 1966 [The Protection of Ethnic, Religious and Linguistic Minorities in Art. 27 of the International Covenant on Civil and Political Rights of December 16, 1966] 136-87 (1988); Kay Hailbronner, *The Legal Status of Population Groups in a Multinational State Under Public International Law*, 20 ISRAEL Y.B. ON HUM. RTS. 127, 143-46 (1990); SYMEON KARAGIANNIS, LA PROTECTION DES LANGUES MINORITAIRES AU TITRE DE L'ARTICLE 27 DU PACTE INTERNATIONAL RELATIF AUX DROITS CIVILS ET POLITIQUES, REVUE TRIMESTRIELLE DES DROITS DE L'HOMME [The Protection of Minority Languages under Article 27 of the ICCPR, Quarterly Review of Human Rights] 195 (1994). A minority of commentators conclude that the provision obligates states to provide "positive" rights for linguistic and other protected minorities—i.e. states must provide the means to ensure the survival and maintenance of their characteristics through appropriate financial assistance and a legal framework for institutions and activities vital to the minorities' interests. *See* Karl Joseph Partsch, *Discrimination Against Individuals and Groups*, 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1079, 1082 (Rudolph Bernhardt ed., 1992). However, the majority of commentators reject this "positive" interpretation, and conceive of Article 27 firmly within the framing of "negative" rights – i.e. non-interference of the state in private community activities tied in with language, religious or cultural usage. *See* De Varennes, *supra* note 16. This majority viewpoint appears to have prevailed within the United Nations. Although the United Nations Human Rights Committee has never had to explicitly address the extent of the rights guaranteed by Article 27, its decisions indirectly confirm the non-interference nature of the provision as a minimal measure of protection of minorities. For a review of the committee's views on Article 27, *see* GAETANO PENTASSUGIJA, MINORITIES IN INTERNATIONAL LAW 97-111 (2002). In the three decisions where the Committee agreed to consider Article 27 submissions, Kitok v. Sweden, Communication No. 197/1985, Hum. Rts. Comm., U.N. GAOR, 43rd Sess., Supp. No. 40, at 221, U.N. DOC. A/43 (1988), Lovelace v. Canada Hum. Rts. Comm., Selected

Charter, the FCNM and the OSCE Recommendations all underscore that speakers of minority languages have "positive" rights to the provision of services by national governments and European institutions. This shift from "negative" to "positive" rights is also indicative of the shift away from a right to language preservation—in accordance with which minority language speakers should be left alone by the linguistic majority and allowed to survive—toward language protection and active promotion. The right to protection accorded transnational linguistic minorities—Yiddish and Romani speakers, as well as groups with cross-border kin-states—thus clearly demonstrates movement away from the traditional view of the European language rights regime discussed in Part II of this Article—i.e. as (i) antiquarian and preservationist, and (ii) only available to members of territorially bounded linguistic groups. The only element of the traditional characterization of European language rights that still appears entirely valid in light of the European treaty bodies' approach to transnational linguistic minorities is that the vision of language rights as group-inhering. However, as the discussion in Part IV below shows, recent developments in ECJ jurisprudence and treaty bodies' findings with regard to European migrants have also rendered that characterization increasingly outdated.

IV.
EUROPEAN MIGRANTS AND THE RIGHT TO RECOGNITION

This Article has, thus far, charted the evolution of language rights laws in Europe over the past twenty years, from the original right to preservation of RM language groups articulated in national constitutional and statutory provisions, the Council of Europe's Charter for Regional and Minority Languages, and the Framework Convention for National Minorities,[160] through the right to protection of transnational minority languages that was delineated in the

Decisions Under the Optional Protocol, 2nd-16th Sess. at 83, U.N. DOC. NO. CCPR/C/OP/1 (1985), and Ominayak v. Canada, Hum. Rts. Comm., 45th Sess., Supp. No. 40, Vol. II, Annex IX(A), U.N. DOC. A/45/40 (1990), it concluded that government actions had been wrong because they *interfered* in the cultural life or language use of indigenous peoples constituting linguistic or ethnic minorities. "In Kitok v. Sweden, reindeer herding and a decision regarding the right of residence within a minority community both came within the purview of Article 27, not as rights granted by the Swedish state but as examples of state intervention in a minority member's cultural life. In Lovelace v. Canada, the Canadian government was similarly involved in restricting a person from contacts and ties with her community. And in Ominayak v. Canada, government legislation and policies interfered with traditional economic and social activities so intimately tied to culture that they amounted to a denial of the right to enjoy that culture." De Varennes, *supra* note 16. Similar "negative rights" obligations to those articulated in Article 27 have also been confirmed in the UN Convention on the Rights of the Child. G.A. Res. 44/25 U.N. DOC. A/RES/44/25 (Dec. 12, 1989). The Convention requires that the education of a child be directed towards the "development of respect for ... his or her own cultural identity, language and values." According to the Convention, a child who is a member of a minority group "shall not be denied the right, in community with other members of his or her group ... to use his or her own language." *Id.* at art. 30.

160. *See* discussion, *supra* pp. 281-92.

OSCE's Oslo Recommendations and in the Council of Europe treaty bodies' first monitoring cycle reports.[161] The fourth Part of this Article considers the third stage in the evolution of language rights—the recognition of the language needs and language competencies of European migrants. This Part argues that European migrant workers and students have played a unique role in the reorientation of minority language rights in Europe, away from the concept of rights that was prevalent in the early 1990s— i.e. of language rights as rights that were only available to territorially-anchored RM communities, that were preservationist in nature, and that were applicable to groups rather than individual language speakers—toward a notion of language rights as human rights, available to all individual Europeans. This Part of the Article will explore how, in recent years, treaty bodies, national courts, and the European Court of Justice have expanded the grant of language rights to migrants. First, the Article will discuss the Committee of Experts on the Charter for Regional and Minority languages and Advisory Committee on the Framework Convention on National Minorities, and their recent inclusion of migrants' rights in their reports. Second, the Article will discuss the jurisprudence of the European Court of Justice, which has begun to respond to complaints from European migrants who constitute, essentially, a linguistic minority of one—such as a German-speaking truck driver in Italy[162] or a Dutch-speaking teacher in Ireland[163]—by drawing upon the precedent established with regard to transnational minority groups and minority groups with kin states.[164]

The treaty bodies and the Court both appear to be developing a remarkably expansive reading of the Council of Europe's Charters and other pan-European grants of human rights.[165] This fundamental shift and expansion of linguistic rights has thus far been under-explored by scholars, who have not yet considered the treaty bodies' decisions and have only discussed the ECJ case law with reference to the treatment of RM language groups, thereby failing to consider the transformative potential with respect to migrants', and ultimately immigrants' language rights.[166] In contrast, this Article argues, the case law and treaty body decisions relating to European migrants are the key to understanding how language rights in Europe are being transformed, and why that transformation may ultimately benefit members of immigrant minority language groups.

161. *See* discussion *supra* pp. 281-92.

162. *See* Case C-274/96, Criminal Proceedings Against Bickel and Franz, 1998 E.C.R. I-7637.

163. *See* Case 378/87, *Groener*, 1989 ECR I-3967.

164. Discussed *supra* pp. 281-84.

165. *See* discussion *infra* pp. 292-301.

166. *See, e.g.*, Palermo, *supra* note 11.

A. The Right to Recognition of Migrants' Languages in Treaty Bodies' Decisions

The right of every European citizen to move and reside freely within the territory of the Member States is enshrined in the Charter of Fundamental Rights of the European Union,[167] and in the European Parliament and Council Directive 2004/38/EC on the right of EU citizens and their family members to move and reside freely within the territory of the member states.[168] According to the European Commission's Directorate of Justice and Home Affairs: "The right to free movement means that every EU citizen is entitled to travel freely around the Member States of the European Union and to settle anywhere within its territory."[169] Originally envisaged as a means to ensure that a mobile workforce would be available to power the single market, the right to free movement extends not merely to workers but to all categories of citizens and their dependents, including students and those who are no longer economically active.[170] Today, a significant number of Europeans live and work in another member state and the number of citizens from new member states living and working abroad looks set to increase further during the next ten years.[171] The European populace's increased mobility has led the European Parliament to pass new laws granting nationals of EU member states Union-wide recognition of educational and professional qualifications,[172] as well as the right to join trade unions,[173] and to draw equivalent social security and other benefits for which

167. 2000 O.J. c 364/01.

168. Amending Regulation No. 1612/68 on freedom of movement for workers within the Community.

169. *See* "Free Movement Within the EU, A Fundamental Right," *available at* http://ec.europa.eu/justice_home /fsj/freetravel/fsj_freetravel_intro_en.htm.

170. *Id.*

171. Of the original fifteen EU countries, only the UK, Ireland and Sweden did not impose a "transitional" ban on nationals of the 10 members states that acceded to the Union in 2004 seeking employment in their countries, and only Sweden held its labor market open for Bulgarian and Romanian nationals when their countries joined the EU in 2007. Nevertheless, despite these restrictions, a significant number of European Nationals currently live, study, and/or work in other member states, and that number appears set to increase sharply once the "transitional" prohibition on the employment of migrant workers from the new member states is lifted in 2011. Eurobarometer survey data show that at present 4% of the population of the EU live in another member state and approximately 22% of the EU population has ever lived in another European region or country. *See* European Foundation for the Improvement of Living and Working Conditions, *Mobility in Europe: Analysis of the 2005 Eurobarometer Survey on Geographical and Labour Market Mobility* (2006), *available at* http://www.eurofound.europa.eu/ pubdocs/2006/59/en/1/ef0659en.pdf. According to Eurobarometer, 7% of Poland's population expects to move to another EU country in the next five years. Poland has a population of circa 40 million people, so such an exodus would be both statistically and numerically significant.

172. *See* Directive 89/48/EEC and supplemented by Directive 92/51/EEC, as amended by Directive 2001/19/EC governing recognition of professional qualifications; *see also* http://ec.europa.eu/education/at-a-glance/about141_en.htm for information on recognition of educational qualifications in other member states.

173. *See* Article 25 of the Constitution of the European Trade Union Confederation, *available*

they are ordinarily eligible in their own nation in any other EU country;[174] however, neither the text of the Charter for Regional and Minority Languages nor the text of the Framework Convention for National Minorities contains provisions for the language rights of migrants.

Indeed, the text of the Charter for Regional and Minority Languages, as mentioned *supra*, emphatically excludes migrants' languages from its protections, explaining in Article I, "Definitions," that the term regional or minority languages "does not include either dialects of the official language(s) of the State or the languages of migrants,"[175] and the Committee of Experts is further bound by state parties' own definitions of which language groups should be defined as "regional" or "minority" languages.[176] Nonetheless, in their second monitoring cycle opinions the Committee of Experts began to make recommendations on behalf of migrants.[177]

In common with the Committee of Experts on the Charter, the Advisory Committee on the FCNM has also taken a number of steps to recognize the language rights of European migrants in its second monitoring cycle opinions. For example, in its second opinion on Austria, the Committee highlighted the need to fund and develop schooling in Czech, Slovak, and Hungarian for migrant communities living in Vienna.[178] In the same opinion the Committee also highlighted the need for the provision of government services in Polish for the increasingly large group of Polish migrants who had settled in Vienna after

---

at http://www.etuc.org/IMG/pdf_CES-Statuts_CES-Uk_def-3.pdf.

174. *See, e.g.*, Directgov, Factsheet, *Benefits for Britons Living Abroad in the EEA*, *available at* http://www.direct.gov.uk/en/BritonsLivingAbroad/Moneyabroad/DG_4000102 (detailing the eligibility of UK citizens living in other European countries for disability benefits, Jobseekers Allowance, Statutory Maternity Pay and Statutory Sick Pay).

175. European Charter for Regional or Minority Languages, ETS 148, Pt I, art. 1(a).

176. In their first monitoring cycle reports, the Committee of Experts ignored this prohibition as discussed *supra*, the Committee of Experts began to suggest the inclusion of transnational minority groups such as the Roma and Sinti as linguistic minorities worthy of protection under the Charter. *See, e.g.*, Council of Europe, Charter for Regional or Minority Languages, Reports or Recommendations, Committee of Experts' Evaluation Report, United Kingdom § 1.3 12 (stating that "[w]ithin the scope of this report, the Committee of Experts has not been able to investigate their status further, but would welcome information about Romani in the next UK periodical report"); ¶ 595 ("The Committee of Experts has been informed, during the 'on-the-spot' visit, of users of Roma languages residing within the UK. The Committee of Experts has not been in a position at this stage to investigate this further."), (Aug. 29, 2003), *available at* http://www.coe.int/t/dg4/ education/ minlang/Report/default_en.asp.

177. For example, the Committee has begun to advocate on behalf of Roma migrants to Denmark of Yugoslav origin, who fled the Balkan wars of the 1990s, *see* Council of Europe, Charter for Regional or Minority Languages, Reports or Recommendations, Committee of Experts' Evaluation Report, Denmark (Sep. 26, 2007) at 7, *available at* http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/regional_or_minority_languages/2_Monitoring/Monitoring_table.asp#TopOfPage.

178. Advisory Committee on the Framework Convention for the Protection of National Minorities, Report ACFC/SR/II(2006)008, Austria, (Dec. 1, 2006), *available at* http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/regional_or_minority_languages/2_Monitoring/Monitoring_table.asp#TopOfPage.

Poland's accession to the EU.[179] The Committee's opinion reflected Poland's official declaration upon signing the FCNM that it was doing so because it envisaged the FCNM would be enforced "to protect national minorities in Poland and minorities or groups of Poles in other States."[180] In so stating, the Polish government offered no distinction between groups cross-border communities—such as Polish speakers in Lithuania—and the Polish diaspora living and working in the United Kingdom, Ireland, Germany and Austria. This blurring of the identities and hence treatment of transnational linguistic minorities and migrants in the eyes of individual nation states and the Advisory Committee is crucially important. It suggests decisive movement away from consideration of language rights as preservationist, territorially-anchored, and group-inhering toward language rights as human rights that are available to all—even individual migrants—regardless of the specific category of linguistic minority with which a person is affiliated.

The Advisory Committee's most thorough treatment of the language rights of European migrants is found in its second monitoring cycle report on the United Kingdom.[181] In this report, the Committee expressed its concern "that the proposed categories for the 2011 census would not capture the numbers of persons belonging to certain minority ethnic communities, including the increasing number of new migrants." The committee noted that European migrant communities were frequently "nonvisible" because they were Caucasian, but that they nonetheless needed government services and educational and employment opportunities that were accessible in their native languages. The Committee feared that the "failure of the census to capture these communities" would "contribute to the reported tendency of certain public authorities to view 'race relations' as referring to established and 'visible' minorities only, and not to new and often 'white' migrants." In its recommendations to the Committee of Ministers, the Advisory Committee urged the Council of Europe to press the UK government to raise "awareness among public authorities on the relevance" of the new migrant communities' linguistic and cultural needs.[182]

The decision by both the Committee of Experts on the Charter and the Advisory Committee on the FCNM to consider the language rights of European

179. *Id.*

180. *See* List of Declarations with Respect to Treaty No. 157, Poland, Declaration contained in a Note Verbale, handed at the time of deposit of the instrument of ratification on Dec. 20, 2000, http://assembly.coe.int/Documents/WorkingDocs/doc01/EDOC8939.htm. ("The Republic of Poland shall also implement the Framework Convention under Article 18 of the Convention by conclusion of international agreements mentioned in this Article, the aim of which is to protect national minorities in Poland and minorities or groups of Poles in other States.").

181. Advisory Committee on the Framework Convention for the Protection of National Minorities, Report ACFC/OP/II(2007)003 (UK) (Oct. 26, 2007). The UK is the European country that has experienced the greatest influx of migrants from other parts of the Continent in the wake of EU accession, due to the UK's liberal work authorization policies.

182. *Id.* at 46.

migrants during their second monitoring cycles is highly significant. This recognition of European migrants' language rights could be seen as a radical departure from both treaty bodies' previous practices. However, a more persuasive argument can be made that this move by both bodies in their second monitoring cycle is in fact a *continuation* of the trend that began in their first cycle when they expanded their opinions to protect the language rights of transnational European minorities such as the Roma and Sinti—a trend to view language rights not merely in narrow, preservationist, territorially defined terms, but rather as human rights applicable to all Europeans.[183] Indeed, theories advanced by scholars in the context of other individual human rights suggest that this trend is inevitable, because predicating rights vindication on prior group membership would undermine the very liberal democratic commitments underpinning greater European integration.[184] This evolution is not confined to the Council of Europe treaty bodies, a brief survey of the European Court of Justice's language rights jurisprudence suggests that very similar developments are also taking place in European case law.

B. The Right to Recognition of Migrants' Languages in ECJ Case Law

The European Court of Justice has been engaged for many years with issues of language rights and linguistic minorities. The Court has played such a prominent role in addressing the concerns of minority linguistic groups that some European scholars regard the ECJ's case law as the most significant source of minority language rights law within Europe.[185] The Court's jurisprudence over the past twenty-five years has fostered two fundamental shifts in language rights discourse in Europe. First, the Court has shifted from advancing what Heinz Kloss described as *duldende Sprachenrechte* (toleration-oriented language rights) to *fördernde Sprachenrechte* (promotion-oriented language

183. *See* discussion *supra* pp. 281-301.

184. Sujit Choudhry writes, in "liberal democracies, differentiating among citizens simply on the basis of prior membership, without additional justification... appears to contradict the basic liberal commitment of giving equal importance to the interests of every citizen." Sujit Choudhry, *National Minorities and Ethnic Immigrants: Liberalism's Political Sociology*, 10 J. POL. PHIL. 54, 56 (2002). David Gauthier also argues that a territorially fixed notion of which language groups are worthy of protection and status and which are not fosters essentialist and nationalistic viewpoints. Gauthier suggests that limiting the EU legislative instruments for protecting language minorities to autochthonous language groups perpetuates the very problems these instruments were supposed to solve—discrimination, inequality, concerns about identity, and suspicion about otherness. DAVID GAUTHIER, MORALS BY AGREEMENT 201-05 (1986). Some commentators argue that perpetuating such problems also has linguistic ramifications; sociolinguistic research has demonstrated that "inter-group grievances" can foster ethnic identity and language use while simultaneously eroding alternative linguistic development. *See* JOSHUA A. FISHMAN, *Sociolinguistics*, *in* HANDBOOK OF LANGUAGE AND ETHNIC IDENTITY 152, 154, 161 (Joshua A. Fishman ed., 1999).

185. "We can observe some language-based delimitation of Community freedoms (circulation, establishment, etc.), but it is mainly due to the jurisprudence of the Court of Justice." Iñigo Urrutia & Iñaki Lasagabaster, *Language Rights as a General Principle of Community Law*, 8 GERMAN LAW JOURNAL 5, 7 (2007), *available at* http://eiop.or.at/eiop/index.php/eiop/article/view/2008_004a/78.

rights).[186] Second, the Court has shifted from treating language rights as rights predicated upon membership of specified groups, to rights available to all individuals, irrespective of their language group membership. Four key cases—*Mutsch*,[187] *Groener*,[188] *Bickel and Franz*,[189] and *Angonese*,[190]—illustrate when and how this evolution took place, and how, by the year 2000, the recognition of European migrants' language needs and language competencies by host nations had become an accepted principle of ECJ jurisprudence.

Mutsch,[191] decided in 1985, was the first ECJ ruling on official recognition of European migrants' languages before host nations' courts. The Court held that Mutsch, a national of Luxemburg who lived in a German-speaking municipality in Belgium, was entitled to use his own language in proceedings in front of the Belgian courts, because that same privilege was available to Belgian nationals who spoke French, Flemish or German. Belgian legislation stipulates that nationals residing in a certain region of the country may ask to have proceedings before a court in that region conducted in a specific language (French or Flemish), and the Court held that this right had to be extended, without discrimination based on nationality, to EU nationals of other member states. In its opinion the Court did not address the issue of minority protection but focused instead on the importance of official recognition of other European nations' languages in the context of the free movement of workers.[192] For the Court, the right of a worker to use a language of her choice in proceedings before the courts of the "host" member state played an important role in the integration of the worker in the host nation and the recognition of that worker's individual rights.[193] The Court saw the language right as conferring a "social advantage" and concluded that national provisions adopted to confer that advantage upon a minority group (in this case the German-speaking population of Belgium) do not only concern persons who are members of that specific minority, but rather all similarly-situated Europeans. The Court's argument in *Mutsch* suggests a conceptualization of language rights as rights that are not territorially or historically bounded, but inhere in the individual, in whatever situation the individual finds himself.

A similar acknowledgment of the importance of recognizing migrants'

186. *See* KLOSS, *supra* note 16.

187. *Mutsch,* Case C-137/84, 1985, E.C.R. I-2681, paras. 11–17.

188. *Groener,* Case 378/87, 1989 ECR I-3967, 3967.

189. Criminal Proceedings Against Bickel and Franz, Case C-274/96, 1998 E.C.R. I-7637.

190. Angonese v. Cassa di Risparmio di Bolzano SpA, Case C-281/98, 2000 E.C.R. I-4139.

191. *Mutsch*, Case C-137/84, 1985, E.C.R. I-2681, paras. 11–17.

192. *Id.*

193. For a broader discussion of the importance of workers' language rights in ECJ jurisprudence, *see also* Gabriel von Toggenburg, *The EU's 'Linguistic Diversity': Fuel of Brake to the Mobility of Workers*, *in* CROSS-BORDER HUMAN RESOURCES, LABOR AND EMPLOYMENT ISSUES: PROCEEDINGS OF THE NEW YORK UNIVERSITY 54TH ANNUAL CONFERENCE ON LABOR 677-723 (Andrew P. Morris and Samuel Estreicher eds., 2004).

language needs and competences is found in *Groener*,[194] a 1987 case involving a Dutch teacher living and working in the Republic of Ireland. In *Groener,* the Court approved the use of an Irish language test for full-time instructors in vocational education, signaling its recognition of the importance of fostering the Irish language among young people in Ireland,[195] but said that an individual Dutch national, Groener, should not be denied employment if she was able to fulfill certain reformulated language criteria.[196] The opinion emphasizes that the linguistic competencies and qualifications of Groener—a non-native Irish speaker, a non-native English speaker and a native Dutch speaker—should be recognized in Ireland.[197] In its decision the Court stressed that the Irish language is recognized in the Irish Constitution as the national language, thereby framing the case as one concerned with linguistic requirements designed to protect and promote a language that is both the national language and the first official language.[198] Nonetheless, within this context, the Court also emphasized that enforcement of linguistic requirements should not impinge upon individual fundamental freedoms—suggesting that any group-oriented language requirements must be applied in a proportionate and non-discriminatory manner that takes individual migrants' linguistic competencies and personal circumstances into account.[199]

In *Bickel and Franz*,[200] a case that was, like *Mutsch*,[201] concerned with the use of languages in national courts, the ECJ held that German-speaking non-residents (in this case two truck drivers) who were traveling through a German-speaking region of Italy were entitled to use German in court proceedings on the same terms as the residents of the region. In its 1998 ruling—issued six years after the entry into force of the Charter for Regional or Minority Languages, and three years after the entry into force of the FCNM—the Court emphasized the importance of recognizing and respecting the linguistic needs of migrants, even when doing so exceeded the previously established language policies and practices of nation states. In its holding, the Court stressed that it was deferring to Italy's long-established practice of granting bilingual service in all administrative and judicial proceedings to its German-speaking minority living in the northern region of South Tyrol, acknowledging that "the protection of such a [ethno-cultural] minority may constitute a legitimate aim."[202] However, when the Italian Government argued (without success) that its rules were meant

194. *Groener*, Case C-378/87, 1989 E.C.R. I-3967.

195. *Id.*

196. *See* Nathaniel Bermann, *Nationalism Legal and Linguistic: The Teachings of European Jurisprudence*, 24 N.Y.U. J. INT'L L. & POL. 1515, 1567-68 (1992).

197. *Groener*, 1989 E.C.R. at 3967.

198. *Id.*

199. *Id.*

200. Proceedings Against Bickel and Franz, Case C-274/96, Criminal 1998 E.C.R. I-7637.

201. *Mutsch*, Case C-137/84, 1985, E.C.R. I-2681, paras. 11–17.

202. Criminal Proceedings Against Bickel and Franz, Case C-274/96, 1998 E.C.R. I-7637.

to "recognize the ethnic and cultural identity" of a given regional minority group and should not be applied to "outsiders,"[203] the Court demurred, insisting that Austrian and German visitors—individuals who shared a language characteristic of the RM group, but who were themselves members of a majority language group in their own nation—should enjoy the same linguistic privileges as long-term residents of the region.[204]

In *Angonese*,[205] a case decided in 2000, the ECJ built upon the legacy of both *Groener* and *Bickel and Franz*. As in *Groener*, the *Angonese* case involved an individual's right to non-discriminatory access to employment against the legitimacy of procedures for gauging linguistic competence, and as in *Bickel and Franz* the case concerns the German-speaking minority in the South Tyrol. Roman Angonese applied for an advertised position at a bank in South Tyrol. The advertisement stipulated that candidates needed to possess a certificate (called a "patentino") as proof of their linguistic competence in both German and Italian.[206] The bank would not accept any other form of certification and the province of Bolzano, capital of the Alto Adige, was the only authority that administered the patentino examination.[207] Angonese presented his application complete with documentation from his university training in Vienna that testified to his competence in both Italian and German, but the bank rejected his application because he did not produce the patentino. In *Angonese* the Court held that on non-discrimination grounds, institutions in one member state must recognize language qualifications issued by competent authorities in other European countries, arguing that "the principle of non-discrimination precludes any requirement that the linguistic knowledge in question must have been acquired within the national territory."[208] The ECJ's holding that the bank's actions were discriminatory, and therefore illegal, firmly suggests a movement towards conceiving of minority language rights as individual human rights, rather than preservationist, territorially anchored and group-inhering privileges.

Some commentators have criticized the *Angonese* holding, seeing it as "evidence of the dangers of extending the *Bickel and Franz* interpretation of the non-discrimination principle to an increasing array of bona fide group rights aimed at contributing to the cultural life of minority language groups."[209]

---

203. CORTE COST., 19 GIU. 1998, N.213 (ITALY).

204. Criminal Proceedings Against Bickel and Franz, Case C-274/96, 1998 E.C.R. I-7637.

205. Angonese v. Cassa di Risparmio di Bolzano SpA, Case C-281/98, 2000 E.C.R. I-4139.

206. *Id.*

207. *Id.*

208. *Groener*, 1989 E.C.R. at 3968.

209. Robert F. Weber, *Individual Rights and Group Rights in the European Community's Approach to Minority Languages*, 17 DUKE J. COMP. & INT'L L. 361, 406 (2007). Robert Weber describes the Court's approach to the patentino requirement as though its sole aim was to ascertain individual applicants' knowledge of German and Italian as "institutional blindness"—ignoring the needs of the Bolzano community and focusing "on the Community rights of individuals that speak the minority language, and not the flourishing of the minority language group itself." *Id.* at 405-06.

However, the *Angonese* holding can also be seen as a positive consequence of the expansion of language rights from national minority groups to transnational minority groups with kin states, to transnational minority groups without kin states, and ultimately to all linguistically isolated or disadvantaged Europeans. Whichever interpretation is applied—positive or negative—the chain of cases leading up to, and including, *Angonese* support the argument that minority language rights in Europe are being reframed as individual human rights. In each of the decisions discussed *supra*, the justifications given for promoting the language rights of European migrants are not preservationist and territorially bounded, but instead focused upon the consequences of social movement across European borders and the engagement of other nationals in a host state's labor market.[210]

Furthermore, although the Court's jurisprudence has thus far, with one exception,[211] referred solely to either RM groups or European migrants—i.e. nationals of other European nations, rather than immigrants[212]—the four opinions discussed *supra* do not specify that the grant of language rights to these individual litigants are, or should be, exclusively available to non-immigrant European nationals. Whether the Court's silence on this topic was deliberate or accidental, the ECJ has nonetheless left open the opportunity for the fourth and final stage in the development of language rights in Europe, the extension of language rights to immigrant minority language speakers.

V.
IMMIGRANT MINORITIES AND THE RIGHT TO DIVERSITY

The fifth Part of this Article will explore the next stage in the evolution of minority language rights as human rights in Europe—the granting of language rights to immigrant minority language speakers. As this Article has shown,

210. Contrast to the European Charter for Regional or Minority Languages, ETS 148, at Preamble and Article 12 of the FCNM which are explicitly oriented towards territorially bounded national or regional minority groups.

211. *Haim*, Case C-424/97, 2000 E.C.R. I-5123. *See infra* Part V C.

212. Some immigration rights scholars and advocates have criticized this trend in the Court's jurisprudence, arguing that the promotion and protection of European migrants' rights does nothing to help—and may even *harm*—the IM communities living alongside them in their host country. A two-tiered status of foreignness has evolved: on the one hand there are third-country national foreign residents of European countries, some of whom have been born and raised in these countries and who know of no other homeland; on the other hand are those who may be near-total strangers to the language, customs, and history of their host country but who enjoy special status and privilege by virtue of being a national of an EU member state. *See* SEYLA BENHABIB, THE RIGHTS OF OTHERS 154 (2004). Such criticism may be valid on many grounds. Indeed, several commentators argue that the Court has simply redefined the meaning of linguistic "insider" to include the speakers of languages dominant in other member states, thereby redefining the meaning of "outsider" to apply to non-territorial languages when spoken by naturalized citizens of the Union. *See* Bruno De Witte, *Politics Versus Law in the EU's Approach to Ethnic Minorities*, 3 EUI Working Paper RSC 2000/4, 2000; Palermo, *supra* note 11, at 301.

European language rights laws and jurisprudence have changed greatly over the past twenty years. An original right to preservation of RM language groups articulated in the Council of Europe's Charter for Regional and Minority Languages and in the Framework Convention for National Minorities[213] was expanded to encompass the right to protection of transnational minority languages that was delineated in the OSCE's Oslo Recommendations and in the Council of Europe treaty bodies' first monitoring cycle reports[214] and further broadened to incorporate the right to recognition of European migrants' languages that has just emerged in the same treaty bodies' second monitoring cycle reports and in the recent jurisprudence of the ECJ.[215] This Article has argued that in the course of this evolution the very notion of what a language "right" is has shifted; what began, in the early 1990s, as a preservationist, group-inhering good has been transformed over the past twenty years into an aspirational, promotion-oriented, individual human right. In this light, the reframing of European language rights to extend similar guarantees and protections to Immigrant Minority (IM) language speakers seems like the logical, and perhaps inexorable, next step.

Extending language rights to IM language speakers is a small step from the precedent of *Bickel and Franz*[216] and *Angonese*,[217] or from the Advisory Committee on the FCNM's instructions to Austria to consider the needs of migrant communities.[218] It is, however, a long way from the original grant of rights to national minority language groups in nation state constitutions and statutes, and a long way from the express intent of the drafters of the Charter for Regional and Minority Languages that the term minority languages should "not include the languages of migrants."[219] This next step is also a long way from what was, for decades, the only language "right" available to speakers of immigrant minority languages: the right to access and acquire the receiving country's language and thereby integrate into the linguistic mainstream.[220] Yet, in line with the transformation of other linguistic minorities' rights, this right to integration is already being transformed into a right to language diversity. As the discussion in this Part will demonstrate, the language rights of individual members of immigrant minorities are beginning to be advanced by the Advisory Committee on the FCNM and may soon be addressed by the ECJ. In other words, the very same instruments that were once used solely to vindicate RM

213. *See* discussion, *supra* pp. 268-81.

214. *See* discussion, *supra* pp. 281-92.

215. *See* discussion, *supra* pp. 292-301.

216. Criminal Proceedings Against Bickel and Franz, Case C-274/96, 1998 E.C.R. I-7637.

217. Angonese v. Cassa di Risparmio di Bolzano SpA, Case C-281/98, 2000 E.C.R. I-4139.

218. Advisory Committee on the Framework Convention for the Protection of National Minorities, Report ACFC/SR/II (2006)008, (Austria), (Dec. 1, 2006), *available at* http://www.coe.int/t/dghl/monitoring/minorities /3_FCNMdocs/Table_en.asp#Austria.

219. European Charter for Regional or Minority Languages, ETS 148, Pt I, art. 1(a).

220. *See* discussion *infra* pp. 303-309.

groups' language rights are now also being used to vindicate the rights of speakers of IM languages. This suggests that, in future, the rights of RM and IM language groups should no longer be considered as wholly distinct and separate, but rather interrelated and possibly even converging.[221]

A. Immigrants' Languages and the Right to Integration in European Treaties

Since the 1980s the "foreign born" population living in the European Economic Area (EEA) has increased considerably.[222] According to the Migration Policy institute, in 2005, first generation immigrants accounted for 8.6% of the total population of the EU and 8.9% of the population of the EEA and Switzerland.[223] Yet, despite the significant number of immigrants in Europe, immigrant minorities' languages have not, as yet, been granted any formal status or recognition by the European Union or by individual nation states.[224] Almost all references to the languages of immigrants in nation states' legislation and European treaties or declarations refer to the need to encourage the integration and assimilation of immigrants without any attendant recognition of the worth of immigrant minorities' own languages, or the role that native languages might play in the integration of immigrants into receiving countries and communities.[225] Some nations have even erected language barriers for new immigrants or would-be immigrants, insisting that in order to qualify for long-term residence or citizenship, immigrants must pass tests demonstrating their competence in the majority language.[226]

---

221. This suggestion undoubtedly raises normative concerns about whether such convergence is desirable. Scholars and advocates disagree vehemently about whether or not immigrants should be granted the same language rights as regional or national minority groups. *Compare* WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 34 (1995) (arguing that a two-tier system privileging RM groups is both inevitable and desirable) *and* Cristina M. Rodríguez, *Language and Participation*, 94 CAL. L. REV. 687 (2006) (arguing that there is no bright line between the claims of certain RM groups for recognition of their linguistic identity and the language rights claims of IM language speakers). This Article does not advance a normative argument about the desirability of convergence, but rather argues positively that convergence may be the ultimate outcome of the trend that is visible in the treaty body decisions and ECJ jurisprudence.

222. *See* Rainer Münz, Europe: Population and Migration in 2005, June 2006, *available at* http://www.migrationinformation.org/feature/display.cfm?id+402.

223. *See* Migration Policy Institute, Foreign Born Populations in Europe (EU/EEA + Switzerland), 2005, *available at* http://migrationinformation.org/charts/pop-table-2-jun06.cfm.

224. The one exception to this is the EU's "lifelong learning" initiative, due to run from 2007-2013.

225. *See* BENHABIB, *supra* note 212, at 141.

226. Germany, France, and the Netherlands have all introduced language tests as a prerequisite for the issuance of indefinite leave to remain or citizenship. *See id.* at 141 ("Some polities may require a written language exam to prove competence, others may be satisfied with oral demonstration alone."). *See also* DILF (diplôme initial de langue française) website at http://www.ciep.fr/dilf/index.php, outlining the proposed contents of the French language test; *See also, Turkey Slams German Immigration Law: Language Requirement "Against Human Rights,"* DER SPIEGEL, Apr. 5, 2007, *available at* http://www.spiegel.de/international/germany/0,1518,475839,00.html.

On a Europe-wide level, the rights of IM language speakers have traditionally been defined in similarly narrow terms, focused exclusively on the right to linguistic integration and assimilation. There are just two noteworthy Europe-wide pronouncements concerned with the use of IM languages, both of which address the teaching of IM languages to (non-European) "migrant" or "immigrant" schoolchildren, and both of which explicitly subordinate the goals of teaching IM languages to the goal of integrating the children into the linguistic mainstream of the receiving state. The first pronouncement is the Directive of the Council of the European Communities (now the EU) on the Schooling of Children of Migrant Workers, issued in July 1977.[227] This Directive promotes the legitimization of IM language instruction and occasionally also its legislation in some countries, but the scope and ambitions of the Directive are limited to the terms of Article 3, namely that "Member States shall, in accordance with their national circumstances and legal systems, and in cooperation with States of origin, take appropriate measures to promote, in coordination with normal education, teaching of the mother tongue and culture of the country of origin."[228]

The second pronouncement on IM language rights is the European Parliament Resolution on Integrating Immigrants in Europe through Schools and Multilingual Education, passed in 2003. [229] This Resolution goes further than the Directive of 1977, most notably in its recognition "that the school-age children of immigrants have a right to State education, irrespective of the legal status of their families, and that this right extends to learning the language of their host country, without prejudice to their right to learn their mother tongue."[230] However, the goal of the Resolution is the effective integration of immigrant children. "[P]rimary and secondary schools must provide educational support for immigrant children, especially when they are not proficient in the language of their host country, so as to enable them to adapt more easily and prevent them from finding themselves at a disadvantage compared with other children."[231] The Resolution also makes it clear that permitting assistance and instruction to IM language speakers in their own languages must not disrupt instruction in the "language of education," particularly if that language is a RM language. [232]

In addition to these two pronouncements, there is also one initiative by the

227. EC Directive 77/486 of July 1977, O.J. L 199 6.8.1977 p. 32.

228. *See generally* E. REID & H. REICH, BREAKING THE BOUNDARIES. MIGRANT WORKERS' CHILDREN IN THE EC (1992); W. FASE, ETHNIC DIVISIONS IN WESTERN EUROPEAN EDUCATION (1994).

229. 2004/2267 INI, O.J. C 233E, 28.9.2006. The full text is easily accessible online, http://www.docstoc.com/docs/16550136/EUROPEAN-PARLIAMENT.

230. *Id.*

231. *Id.*

232. *Id.* ("[T]he integration of immigrants at school must not adversely affect the development of the language of the education system, especially if that language is itself a minority language.").

Council of Europe, entitled Recommendation 1383 on Linguistic Diversification, which advances recommendations for the integration of immigrant language speakers. The Council's Parliamentary Assembly adopted the Recommendation in September 1998, the same year that the Charter for Regional and Minority Languages and the FCNM entered into force, and the same year that the OSCE issued the Oslo Recommendations. Article 8(i) of Recommendation 1383 states that:

> the Committee of Ministers invite member states to improve the creation of regional language plans, drawn up in collaboration with elected regional representatives and local authorities, with a view to identifying existing linguistic potential and developing the teaching of the languages concerned, *while taking account of the presence of non-native population groups*, twinning arrangements, exchanges and the proximity of foreign countries.[233]

Two declarations promoting the linguistic assimilation of schoolchildren and a recommendation that acknowledges that the "presence of non-native population groups" should be taken into account by governments drawing up language plans do not constitute an extensive body of laws on which to build a coherent legal regime safeguarding the rights of IM languages and IM speakers. Yet, despite the dearth of laws promoting the vindication of IM language speakers' rights, the Committee of Experts on the Charter for Regional or Minority Languages and the Advisory Committee on the Framework Convention for National Minorities have begun to engage with immigrant minorities' language rights in their most recent reporting cycles. Moreover, through this engagement, the treaty bodies have, consistent with their recommendations relating to transnational minorities and European migrants, reinterpreted the preexisting right of IM language speakers to linguistic integration[234] as a right to language diversity.

B. Immigrants' Languages and the Right to Diversity in European Treaties

This section of the Article will discuss the ways in which the FCNM and the Charter for Regional and Minority Languages—instruments originally drafted to preserve the rights of RM language groups—are now beginning to be used to provide a framework for consideration of IM language speakers' rights. Although, as discussed *supra*, immigrant groups were explicitly excluded from coverage by both treaties at the time they were signed,[235] the treaty bodies have

233. *Emphasis added.* Council of Europe Recommendation 1383 (1998), *available at* http://assembly.coe.int//Main.asp?link=http://assembly.coe.int/Documents/AdoptedText/ta98/erec1383.htm#1. *See also* Parliamentary Assembly Document 8173 (1998), *available at* http://assembly.coe.int//Main.asp?link=http://assembly.coe.int/Documents/WorkingDocs/doc98/edoc8173.html.

234. Embodied in the two Pronouncements and the Directive. *See* discussion, *supra* pp. 303-09.

235. *See* discussion, *supra* Part II.

turned to the rights of immigrant language speakers in their second and third monitoring cycle reports. A close reading of the second and third monitoring cycle decisions of the Advisory Committee on the FCNM suggests that the treaty bodies are reframing the language rights enjoyed by individual IM language speakers as rights to linguistic diversity.

As discussed *supra*,[236] the Advisory Committee on the FCNM has no general remit to consider the rights of migrants or IM groups, groups that are typically not included in the states parties' declarations regarding the presence of "national minorities" in their countries.[237] Yet, in the wake of the Committee's inclusion of European migrants' rights in its first cycle of reporting, the Committee in its second and third monitoring cycles turned *sua sponte* to the rights of both European migrants *and* IM groups.[238]

The reports generated by the second and third monitoring cycles address IM groups in a variety of ways. Several of the Committee's second and third cycle advisory opinions—such as the reports on Austria and Spain—do not mention immigrants' language rights *per se*, but do stress state parties' obligations to respect immigrants' human rights.[239] The reports on these

236. *Id.*

237. With the exception of the UK's expansive definition of "ethnic minorities." *See Advisory Committee on the Framework Convention for the Protection of National Minorities*, Report ACFC/INF/OP/I(2002)006 (UK) (May 22, 2002). "This was the result of the United Kingdom's decision to base its first State Report on the definition of 'racial group' as set out in the Race Relations Act 1976, namely: 'a group of persons defined by colour, race, nationality (including citizenship) or ethnic or national origin.' The Advisory Committee also noted that the Courts have the possibility of defining which groups amount to a 'racial group' under the Race Relations Act 1976." *Id.*

238. In the United Kingdom's case, the Advisory Committee's first monitoring report also touched, very briefly, on IM issues. The Committee praised the United Kingdom's inclusion of "minority ethnic communities" such as "Sikhs" in the scope of its application of the FCNM. However, the Committee did not reach a detailed discussion of educational, employment or government service provisions in the languages of these "minority ethnic communities," beyond declaring that "noting the importance of giving adequate recognition and support to those wishing to learn their own minority language, the Advisory Committee called on the authorities to further assess the level and variety of language needs of the minority ethnic communities." *Id.* at 215.

239. For example, the Committee's report on Austria criticized the "harassment of immigrants, particularly 'visible' minorities, and notably persons of African origin," as well as anti-immigrant reporting by the media, and anti-immigrant attitudes by politicians. Advisory Committee on the Framework Convention for the Protection of National Minorities, Report 8 ACFC/OP/II(2007)005 (Austria) (June 11, 2008). The report concluded that "additional measures need to be taken to promote the integration of immigrants and to prevent the social exclusion of persons facing difficulties in accessing Austrian citizenship" without once mentioning language. *Id.* Similarly, in its most recent report on Spain, issued in April 2008, the Advisory Committee focused on the legal and institutional measures adopted by the Spanish government "to accommodate the rapid increase in immigration and diversity in Spanish society," Advisory Committee on the Framework Convention for the Protection of National Minorities, Report ACFC/OP/II(2007)001 81 (Spain) (Apr. 2, 2008). The Advisory Committee is pleased to note that the authorities are developing a range of instruments, both legal and institutional, to accommodate the rapid increase in immigration and diversity in Spanish society. The adoption, in December 2004, of Royal Decree 2393/2004 implementing the Aliens Law 14/2003, enabled 600,000 foreign workers living in Spain without

countries mention immigrants' need to access government services and the importance of "intercultural perspectives on education" but do not make any recommendations related to IM languages. Instead, the reports encourage "the authorities to pursue further their integration efforts, above all by continuing to adapt public services, including the education system, to the needs of immigrants."[240] In other country reports, however, the Advisory Committee condemns the violation of IM groups' rights and recommends language-based remedies designed to protect individual IM language speakers' human rights and dignities, while also promoting the integration of IM speakers into civic society.[241]

The Advisory Committee's most recent report on Germany begins with the observation that the German government has not informed the Committee of "specific demands from other groups, particularly those of immigrant origin, to benefit from the protection afforded by the Framework Convention," but that nonetheless the committee believes that such groups should, in fact, be afforded the protections of the FCNM, even though the German government argued that they did "not meet the criteria of citizenship and traditional residence, in the scope of the Framework Convention."[242] The Committee's report specifically mentions Turkish *Gastarbeiter*—an immigrant minority—as the kind of group that should be afforded the protections, including cultural and linguistic protections, of the FCNM.[243]

---

legal status, who fulfilled certain conditions, to obtain work and residence permits through a special "normalisation" procedure, thereby facilitating their social inclusion, including channeling "large amounts of State funds into measures adopted by Autonomous Communities and Municipalities to facilitate access for immigrants to employment, education, social services, housing and health care."

240. *Id.* at 93.

241. For example, the Committee's report on Denmark harshly criticizes "the introduction of an anti-immigrant agenda in the political arena" and "the way in which certain media portray persons from different ethnic and religious groups, including members of the Muslim faith" and suggests that "[t]he Government's policy towards integration, while following a laudable aim, has been criticised for not sufficiently taking into account the problems, including discrimination, faced by persons from different ethnic and religious groups." Advisory Committee on the Framework Convention for the Protection of National Minorities, Report ACFC/INF/OP/II(2004)005 (Denmark) (May 11, 2005). The Committee suggests that the best way to remedy this deficit would be to do more "to promote intercultural dialogue by the reflection of the culture, history, language and religion of persons belonging to different ethnic and religious groups in the curriculum and textbooks used in schools."

242. Advisory Committee on the Framework Convention for the Protection of National Minorities, Report ACFC/OP/II(2006)001 (Germany) (Feb. 7, 2007).

243. "The Advisory Committee adds that the Citizenship Act of 2000 and the Immigration Act of 2004 will, in all probability, speed up the integration into German society of many Turkish and other people with foreign backgrounds who, in the Advisory Committee's view, could benefit from certain rights covered by the Framework Convention." In its report on Germany, the Committee returns repeatedly to the question of citizenship and the impact of citizenship status on an individual's entitlement to linguistic rights and other Convention guarantees. The Committee argues that Germany's unwillingness to extend the protections of the Charter to non-citizen residents is neither appropriate nor fair, resulting in a two-tier approach, whereby some members of the same IM group have German citizenship and are therefore entitled to vindicate their language rights, and other

The fullest articulation of IM language speakers' linguistic rights are found in the Committee's 2007 report on the United Kingdom.[244] In this report, the Committee moves away from stressing a purely integrationist agenda towards recognition of the importance of multiculturalism and multilingualism in society.[245] The Committee stresses the UK's treaty obligations to provide services for members of IM communities in their own languages, underscoring, for example, "the crucial importance of interpretation and translation services in delivering health services to persons belonging to minorities."[246] The Committee identifies a need for the government to "ensure that there are adequate funding opportunities for the initiatives of minority ethnic organisations aimed at maintaining and developing minority languages and cultures,"[247] not in order to promote greater integration, but rather as an end in its own right:

> The Advisory Committee understands that strengthening contacts between different groups is a valuable objective, but it considers that efforts to promote "community cohesion" should not be pursued at the expense of initiatives aimed at maintaining and developing the cultures and languages of persons belonging to minority ethnic communities.[248]

The Committee stresses in its recommendations that the government should provide adequate funding to achieve this goal and should encourage the media to "pursue further its actions aimed at increasing knowledge of and interest in the United Kingdom's multi-cultural and multi-lingual society."[249]

The Advisory Committee specifically calls on the UK government to address the language needs of IM children and adults who were "African and African Caribbean, Pakistani and Bangladeshi, in the field of education."[250] The Committee suggests that truly addressing the language requirements of IM

---

members of the same group are permanent or temporary residents and therefore not entitled to the provision of government services in their languages. *Id.* at 71. The Advisory Committee finds that, in most cases, Roma residing in Germany without German citizenship do not qualify for the measures taken for Roma/Sinti holding German citizenship, even though some of these measures could prove relevant to their situation, for instance in the field of education. Their integration is, therefore, made more difficult and relations with the majority population can sometimes be tense. The Advisory committee argues that the German government's failure to address problems in the implementation of the Immigration Act of 2000 and failure to treat members of the same IM language groups equally "may contribute to uncertainty and insecurity in which many immigrants live and limit their opportunities for integration." *Id.*

244. Advisory Committee on the Framework Convention for the Protection of National Minorities, Report ACFC/OP/II(2007)003 (UK) (Oct. 26, 2007). The UK was the only state party to expressly extend the protections of the FCNM to IM groups at signing, and was thus the only state party whose approach to IM groups was reviewed by the Committee during their first reporting cycle in 2000.

245. *Id.* at 19.

246. *Id.* at 75.

247. *Id.* at 93.

248. *Id.* at 91.

249. *Id.* at 116.

250. *Id.* at 193.

communities requires going beyond "boosting teaching of English as an additional language" to actually valuing and celebrating IM minorities' own languages.[251] The Committee recommends that the UK government implement "the findings of the final report of the Dearing Review on the Government's language policy, which recommends, among other things, that more attention be given to the teaching of languages of minority ethnic communities."[252] The Committee encourages the UK authorities to make concerted efforts to "promote bilingual and multi-lingual education, including by stepping up funding for supplementary schools, and take a proactive approach in encouraging schools to expand the provision of minority ethnic languages," including "Mandarin, Urdu and other widely-spoken world languages depending on local needs and circumstances."[253]

Thus, in the most recent and most thoroughgoing articulation of language rights available to members of immigrant minorities, the language right envisaged by the treaty body is not one of absorption into the linguistic mainstream, but rather one of membership of a diverse, multicultural, multilingual society. This right to language diversity is not preservationist and isolationist, but rather designed to promote dialogue and exchange with speakers of other languages. The right to language diversity is not group-inhering, but individual, being the preserve of "persons," not linguistic communities. Above all, the right to language diversity available to IM language speakers is expansive, incorporating the rights of access to government services, to schooling, and to the funding for cultural and social activities—in other words, the same rights granted in the early 1990s to speakers of RM languages.

C. Immigrants' Languages and the Right to Diversity in ECJ Case Law

The ECJ has yet to consider a claim brought by an IM speaker seeking to vindicate her language rights, so there is no binding ECJ jurisprudence that explicitly supports this Article's argument that immigrants' language rights are converging with the rights of RM language speakers.[254] However, there is one

---

251. *Id.* at 195.

252. *Id.* at 216 (citing "Languages Review," Report by Ron Dearing and Lid King for the Department for Education and Skills, Mar. 8, 2007).

253. Several reports by the Committee of Experts on the Charter for Regional and Minority Languages also pick up on the same IM language issues addressed in the opinions of the Advisory Committee on the FCNM. For example, in their 2007 report on the United Kingdom, the Committee of Experts discusses the merits of the "language ladder" scheme to introduce languages spoken in the local community—described in the report as "Asian languages, Polish etc."—into schools' curricula.

254. In the light of the recent proclamation of the Charter of Fundamental Rights by the European Parliament on 12 December 2007 and the entry into force of the Treaty of Lisbon, it seems likely that the ECJ's language rights jurisprudence will develop rapidly, as individuals now have direct recourse to the ECJ in matters relating to language rights and linguistic diversity. *See* European Bureau for Lesser Used Languages, The Lisbon Treaty and Language Rights, *available at* http://www.eblul.org/index.php?option=com_content&task=view&id=150&Itemid=1.

recent case, *Haim*,[255] which includes noteworthy dicta that, consistent with the thesis of this Article, suggests that the trend discernable in European treaty body decisions towards the acknowledgements of IM language rights may also soon appear in ECJ opinions.

In *Haim*, the ECJ found that the German government was allowed to implement its own rules regarding recognition or non-recognition of qualifications from outside the European Union, even if other EU member states adopted different standards.[256] Specifically, the Court ruled that the German healthcare and insurance system was not required to honor another European nation's decision to recognize dentistry qualifications obtained at educational institutions in non-European countries.[257] Haim, a Turkish immigrant, had studied dentistry in Istanbul and immigrated to Belgium before finally settling in Germany. The Belgian government had recognized Haim's Turkish dentistry qualifications, and Haim sought the same recognition from the German government so that he could practice in Germany.[258] This recognition was not forthcoming, and Haim was prohibited by the German courts from treating patients covered by the German healthcare and insurance scheme.

In upholding the German courts' decision, [259] the ECJ stated that while it respected a nation state's healthcare insurance system's right to establish its own standards, the same healthcare insurance system should also make provisions for individuals whose mother tongue is not the national language to speak in their own language with dental practitioners.[260] In this instance, the court suggested, Turkish-speaking dental patients in Germany should be granted an opportunity to consult with their dentist in Turkish.

This dicta in *Haim* is wholly inconsistent with the traditional characterization of language rights as inhering only in territorially-defined autochthonous European groups speaking at-risk languages in need of preservation.[261] The Turkish language is not at risk, is not indigenously European, and is spoken in Germany by *Gastarbeiters* who reside in territorially diffuse areas in Germany and other European countries.[262] Furthermore, the dicta in *Haim* suggests that the right to consult with one's dentist in one's native tongue is a right held by individuals—individual dental patients "whose mother

255. *Haim*, Case C-424/97, 2000 E.C.R. I-5123.

256. *Id.*

257. *Id.*

258. *Id.*

259. Which might perhaps be interpreted as hindering, rather than facilitating the integration of extra-European migrants into the European professions.

260. *Haim*, Case C-424/97, 2000 E.C.R. I-5123. at ¶ 60.

261. *See* discussion, *supra* pp. 268-81.

262. *See* Gabriel von Toggenburg, *The EU's 'Linguistic Diversity': Fuel of Brake to the Mobility of Workers*, *in* CROSS-BORDER HUMAN RESOURCES, LABOR AND EMPLOYMENT ISSUES: PROCEEDINGS OF THE NEW YORK UNIVERSITY 54TH ANNUAL CONFERENCE ON LABOR 677, 712 (Andrew P. Morris and Samuel Estreicher eds., 2004).

tongue is not the national language"[263] to be specific—rather than by any community or collective unit. *Haim* suggests—at least in dicta—that the logical next step in the evolution of European language rights, the extension of a right to language diversity to immigrant groups, may soon appear in ECJ case law, just as it has already done in European treaty bodies' reports and recommendations.

VI.
CONCLUSION

This Article has charted the evolution and transformation of the language rights of national minorities, transnational minorities, migrants, and immigrants in Europe. In doing so, this Article has argued that the traditionally held view of language rights as inherently preservationist and only applicable to members of certain indigenous, territorially anchored minority communities is no longer current, as the ECJ and European treaty bodies have redefined language rights as fundamental human rights, inhering in individual Europeans rather than groups. As a consequence, the very instruments originally constructed to protect the rights of the "regional" minority groups may now—or may soon—be employed to promote the rights of individual speakers of "immigrant" languages.

In advancing this argument, this Article is not seeking to contribute to the well-developed normative debate about whether there should be a two-tier system of language rights that differentiates between the claims of RM groups and IM groups.[264] Scholars, advocates and the general public disagree vehemently as to whether RM language rights are more "valuable" or "important" (either in general or in Europe in particular) than IM language rights,[265] or whether groups or individuals are the more appropriate units of analysis for rights-based jurisprudence (either generally or for Europe),[266] or whether Europe's attitude towards IM communities should be integrationist or

263. *Haim*, Case C-424/97, 2000 E.C.R. I-5123. at ¶ 60.

264. *See generally* STEPHEN MAY, LANGUAGE AND MINORITY RIGHTS: ETHNICITY, NATIONALISM AND THE POLITICS OF LANGUAGE (2003).

265. Some scholars argue that this two-tier approach is inevitable and not necessarily prejudicial to IM language speakers and groups. Will Kymlicka, for example, argues that a state of affairs in which newcomers/immigrants cannot demand the same linguistic rights as the members of old and established minority linguistic groups is generally perceived to be just. *See* WILL KYMLICKA, LIBERALISM, COMMUNITY AND CULTURE (1989); WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 34 (1995). However, other scholars, such as Cristina Rodríguez, disagree with Kymlicka's sharp differentiation between the claims of "national" minorities and "migrant" minorities, arguing that there is no bright line between the claims of certain RM groups for recognition of their linguistic identity and the language rights claims of IM language speakers. Cristina M. Rodríguez, *Language and Participation*, 94 CAL. L. REV. 687 (2006).

266. *See, e.g.*, Robert F. Weber, *Individual Rights and Group Rights in the European Community's Approach to Minority Languages*, 17 DUKE J. COMP. & INT'L L. 361, 371 (2007).

pro-diversity.[267] These arguments are incredibly important and passionately contested, but they are not the preserve of this Article.

Instead, this Article seeks to present a detached analysis of the complicated, fascinating, evolving positive European law regarding language rights—a legal framework that started in one place, with treaties designed to preserve RM language groups, and is now on the cusp of going somewhere quite different, with treaty body decisions and case law beginning to protect individual IM language speakers. When Spain undertook to preserve its fragile Basque linguistic community by granting protections to national minorities in its 1978 Constitution,[268] it could not have known that it was taking the first step down a path that would lead to the vindication of the language rights of individual Turkish-speaking dental patients in Berlin,[269] or of Bangladeshi schoolchildren in London.[270] Nonetheless, as the evolution of European law concerning minority language rights makes clear, that is, indeed, where the path leads next.

267. *See* BENHABIB, *supra* note 212.

268. *See* CONSTITUCIÓN [C.E.], art. 2.

269. *Haim*, Case C-424/97, 2000 E.C.R. I-5123.

270. *See* Advisory Committee on the Framework Convention for the Protection of National Minorities, Report ACFC/OP/II(2007)003 (UK) (Oct. 26, 2007).