MIGRANT ACCESS TO CIVIL JUSTICE IN BEIJING

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I. Introduction

In the last three decades, approximately 140 million Chinese—an estimated 3.2 million in Beijing alone—have migrated to cities from rural towns and villages left behind during China's great economic leap forward.[1] This migration has occurred despite a government policy of pervasive and strict migration control, called the household registration or *hukou* system, which has never officially sanctioned movement into large cities.[2] China's rural-to-urban wave is vast not just in its sheer numbers but especially in its effect on Chinese society.[3] While

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†††† This paper cites interviews conducted with scholars, officials, practitioners, and migrants working in the Beijing legal aid community in summer 2005. Because of the sensitivity of the information contained, only some specific information is given in the citations. To learn more about these interviews or the subjects herein, please contact the authors. The authors would also like to thank our interview subjects who shared their insights and assisted us with our research, often at substantial personal costs. Particular thanks to Prof. L, CQH, WF, and CXF.

[1] *See China's Floating Population Tops 140 Million*, PEOPLE'S DAILY ONLINE, July 27, 2005, http://english.peopledaily.com.cn/200507/27/eng20050727_198605.html; *see also* BEIJING SHI TONGJIJU 2003 NIAN GUOMIN JINGJI HE SHEHUI FAZHAN TONGJI GONGBAO [2003 National Economic and Social Development Statistical Report] (Feb. 12, 2004), *available at* http://www.stats.gov.cn/was40/reldetail.jsp_?docid=141551 (noting that there are 4 million non-officially registered citizens in Beijing's total population of 14.5 million, of which roughly 20% (3.19 million) are migrant laborers or entrepreneurs). The precise number of migrants is, for a variety of reasons, difficult to determine with accuracy. *See* DOROTHY SOLINGER, CONTESTING CITIZENSHIP IN URBAN CHINA: PEASANT MIGRANTS, THE STATE, AND THE LOGIC OF THE MARKET 17–18 (1999) (noting the disparate population estimates of migrants and showing that temporary migration patterns and difficulties in coaxing illegal migrants to cooperate with official Chinese surveys may skew population numbers). Independent sources claim that official statistics may substantially undercount the population in Beijing, leading the government to grossly underestimate the number of social workers required to service migrant populations. *See* Interview with several attorneys at a leading advocacy firm, in Beijing (Aug. 20, 2005) [hereinafter Advocacy Attorneys].

[2] *See generally* Hein Mallee, *Migration,* Hukou *and Resistance in Reform China*, *in* CHINESE SOCIETY: CHANGE, CONFLICT AND RESISTANCE (Elizabeth J. Perry & Mark Selden, eds., 2d ed. 2003); FEI-LING WANG, ORGANIZING THROUGH DIVISION AND EXCLUSION: CHINA'S *Hukou System* (2005). Although the *hukou* system has undergone substantial reforms in recent years, reports of its demise have been greatly exaggerated. *See* Joseph Kahn, *China to Drop Urbanite-Peasant Legal Differences*, N.Y. TIMES, Nov. 3, 2005, at A8 (reporting that several provinces have decided to abandon the *hukou* system). *But see* CONG.-EXECUTIVE COMM. ON CHINA, ANNUAL REPORT: 2006, at 116 & n.21 (2006), *available at* http://www.cecc.gov/pages/annualRpt/annualRpt06/CECCannRpt2006.pdf [hereinafter CECC 2006 ANNUAL REPORT] (noting that the provincial reforms in 2005 were insubstantial because migrants must still obtain a local urban *hukou* in order to receive many social services). *See generally* Fei-Ling Wang, *Research Report—Reformed Migration Control and New Targeted People: China's* Hukou *System in the 2000s*, 177 CHINA Q. 115 (2004) (highlighting how recent reforms, far from discarding the *hukou* system, have entrenched its legitimacy and unfairly targeted poor, rural migrants).

[3] *See generally* SOLINGER, *supra* note 1; LI ZHANG, STRANGERS IN THE CITY: RECONFIGURATIONS OF SPACE, POWER, AND SOCIAL NETWORKS WITHIN CHINA'S FLOATING POPULATION (2001).

migration has given China's rural peasants some benefit from the country's economic gains, it has also created an urban underclass that is denied essential social services and susceptible to abuse from both local residents and fellow migrants.[4] Separated from traditional familial and village support, these migrants test the efficacy of China's legal system in protecting those most vulnerable.

Concurrent with market reforms and mass migration, China has touted the "rule of law" as the means and legitimacy of its governance.[5] New legal institutions have been established, reams of legislation passed, and the lawyer's bar revived.[6] The Chinese government has encouraged its citizens to file their grievances in the courts rather than air their discontent in the streets—a serious concern in a country where protests have intensified in recent years.[7] With significant assistance from the international community and grassroots organizations within the country, the government has established an ambitious but underfunded legal aid program to redress widespread injustices against its poorest residents and to foster respect for the rule of law.[8] In response, citizens have seized

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[4] *See* HUMAN RIGHTS IN CHINA, INSTITUTIONALIZED EXCLUSION: THE TENUOUS LEGAL STATUS OF INTERNAL MIGRANTS IN CHINA'S MAJOR CITIES 59–64 (2002), *available at* http://www.hrichina.org/public/contents/10528 [hereinafter INSTITUTIONALIZED EXCLUSION] (describing the litany of discriminatory measures that Beijing regulations place on migrants without temporary residency permits, including the inability to rent housing legally, get a job, or start a business). The abuse of migrant populations runs the gamut—from sexual harassment of female migrant workers to the razing of entire migrant villages. *See id.* at 91–100 (stating that migrants are subject to a range of abuses in the workplace, including exposure to hazardous conditions, unpaid wages, and physical violence); SOLINGER, *supra* note 1, at 243–45 (noting that up to 40% of the migrants in Beijing are female and are subject to frequent sexual harassment); Xin Frank He, *Regulating Rural-Urban Migrants in Beijing: Institutional Conflict and Ineffective Campaigns*, 39 STAN. J. INT'L L. 177, 184 (2003) [hereinafter *Regulating Rural-Urban Migrants*] (reporting that Beijing authorities razed migrant villages in periodic efforts to crack down on migrants living illegally in the city).

[5] *See generally* STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA (1999); RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW (2002); PITMAN B. POTTER, THE CHINESE LEGAL SYSTEM: GLOBALIZATION AND LOCAL LEGAL CULTURE (2001). The content and definition of "rule of law" are disputed, but it is generally used to refer to the admittedly Western notion that legal principles should guide people's behavior and legal institutions should be free from political pressure. *See generally* Richard H. Fallon, Jr., *The Rule of Law as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1 (1997). "Rule of law" is translated as *fazhi* in Chinese. A homonym using a different Chinese character means "rule by law," leading to an obvious word play for those inclined to note China's schizophrenic and instrumentalist attitude towards law. *See* Yuanyuan Shen, *Conceptions and Receptions of Legality: Understanding the Complexity of Law Reform in Modern China*, *in* THE LIMITS OF THE RULE OF LAW IN CHINA 20, 24 (2000); Randall Peerenboom, *Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People's Republic of China*, 19 BERKELEY J. INT'L L. 161, 167 n.23 (2001).

[6] *See generally* LUBMAN, *supra* note 5 (examining the development and reform of China's legal system and lawyer's bar).

[7] *See, e.g.*, Philip Pan, *"High Tide" of Labor Unrest in China: Striking Workers Risk Arrest to Protest Pay Cuts, Corruption*, WASH. POST, Jan. 21, 2002, at A01 (placing the number of labor disputes at eighty a day); *see also* VIRGINIA HARPER HO, LABOR DISPUTE RESOLUTION IN CHINA: IMPLICATIONS FOR LABOR DISPUTES AND LEGAL REFORM 2–3 (2003) (stating that "[the] rise in strikes, demonstrations, and more violent forms of worker protest have brought labor relations to the fore").

[8] *See generally* Benjamin L. Liebman, *Legal Aid and Public Interest Law in China*, 34 TEX. INT'L L.J. 211 (1999) (tracing the establishment of China's legal aid system and the problems it faces); *see also* Allen Choate, *Legal Aid in China* (Asia Foundation, Working Paper No. 12, 2000), *available at* http://www.asiafoundation.org/pdf/wp12.pdf. For the role of Chinese NGOs in China's legal reform generally, *see* C. David Lee, *Legal Reform in China: A Role for Nongovernmental Organizations*, 25 YALE J. INT'L L. 363 (2000).

upon these changes, adopted the language of rights, and filed lawsuits in record numbers.[9]

This article examines the interaction between these two cataclysmic changes: rural-to-urban migration and the rapid development of China's fledgling legal institutions, as brokered through legal aid. Other studies have adeptly explored how substantive laws affect migrant populations and how migrants respond to the law.[10] This article, however, will assess whether and how migrants in Beijing access the courts through legal aid in seeking resolution to their disputes.[11] To the extent that "rule of law" entails formal rules and institutions, rather than discretionary powers, it is important to analyze whether formal legal institutions are open to the needs of ordinary citizens such as migrants. The obstacles these migrants face could predict the success of the "rule of law" in China.[12]

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[9] *See* LUBMAN, *supra* note 5, at 224–38, 255 (noting the rise in reported civil cases and the shrinking role of mediation committees and mediators in resolving disputes). Despite the rise in litigated claims, most instances of perceived injustice are likely to be tolerated rather than litigated. *See* Neil J. Diamant et al., *Law and Society in the People's Republic of China*, *in* ENGAGING THE LAW IN CHINA: STATE, SOCIETY, AND POSSIBILITIES FOR JUSTICE 3, 7 (Neil J. Diamant et al., eds., 2005).

[10] *See generally* He, *supra* note 4; Xin Frank He, *Sporadic Law Enforcement Campaigns as a Means of Social Control: A Case Study from a Rural-Urban Migrant Enclave in Beijing*, 17 COLUM. J. ASIAN L. 121 (2003) [hereinafter *Sporadic Law Enforcement Campaigns*]; Xin Frank He, *Why Do They Not Comply with the Law? Illegality and Semi-Legality among Rural-Urban Migrant Entrepeneurs in Beijing*, 39 LAW & SOC'Y REV. 527 (2005) [hereinafter *Why Do They Not Comply with the Law?*]. A couple of student-written law review notes have also examined aspects of rural migrants' experience with the law. *See generally* Ling Li, Note, *Towards a More Civil Society:* Mingong *and Expanding Social Space in Reform-Era China*, 33 COLUM. HUM. RTS. L. REV. 149 (2001); Hayden Windrow & Anik Guha, Note, *The Hukou System, Migrant Workers, & State Power in the People's Republic of China*, 3 NW. U. J. INT'L HUM. RTS. 3 (2005).

[11] This article will not address migrants' experience with the criminal justice system, which is, to a significant degree, still opaque to foreigners. The Chinese government has technically made legal aid for criminal defendants the responsibility of the state and has allowed legal aid organizations to represent indigent accused criminals regardless of residency status under certain conditions. *See* Regulations on Legal Aid, art. 11, 15 (adopted July 16, 2003 by the St. Council, effective Sept. 1, 2003), *available at* http://www.cecc.gov/pages/selectLaws/ResidencySocWelfare/regsLegalAid.php. In fact, criminal cases comprise the majority of cases that most legal aid offices handle. Choate, *supra* note 8, at 20. However, the reality is that many criminal defendants do not receive legal representation, probably because of official intimidation. Furthermore, it is unclear how many migrants in particular are represented; indeed, migrant criminal defendants may make unpalatable clients, because, rightly or not, they are blamed for the perceived upsurge in crime in urban areas. *See* SOLINGER, *supra* note 1, at 131–34. *See generally* Guoan Ma, *Population Migration and Crime in Beijing, China*, *in* CRIME AND SOCIAL CONTROL IN A CHANGING CHINA 65 (Jianhong Liu et al., eds., 2001). Suffice it to say, with respect to any criminal defendants, the well-known problems with China's criminal justice system, rather than access to legal representation, is likely the far greater impediment to justice. *See* CECC 2006 ANNUAL REPORT, *supra* note 2, at 42–60 (recounting the use of torture and arbitrary detention on criminal suspects and frequent criminal detentions based on an individual's political opinions or membership in ethnic, religious, or social groups).

[12] In discussing migrant access to courts, this paper does not directly examine all of the potential routes to redress, as encompassed by the phrase "access to justice." For a fuller discussion on the relationship between the concepts of "access to justice" and "rule of law," *see* Mauro Cappelletti & Bryant Garth, *Access to Justice: The Worldwide Movement to Make Rights Effective*, *in* ACCESS TO JUSTICE, VOL. I: WORLD SURVEY 3, 6 (Mauro Cappelletti & Bryant Garth, eds., 1978); Bryant G. Garth, *Access to Justice*, *in* JUDICIAL REFORM IN LATIN AMERICA AND THE CARIBBEAN 88, 88 (1995); Joel B. Grossman & Austin Sarat, *Access to Justice and the Limits of Law*, 3 L. & POL'Y Q. 125, 129 (1981); *see also* ASIAN DISCOURSES OF THE RULE OF LAW: THEORIES AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE AND THE U.S. (Randall Peerenboom, ed., 2004) (noting the importance of access to justice to governmental efforts to establish rule of law in China and several other countries). Recent

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Migrant access to courts is a recent phenomenon. Prior to 2003, migrants lacking urban temporary residency permits had little access to courts or other dispute resolution institutions.[13] Migrants were unable to exercise their legal rights in part because many cities refused to provide them legal aid. Admittedly, considering the plethora of problems migrants face—including their difficult living conditions and fear of being sent back to their home villages—and the well-noted problems within China's legal system, going to court is often not the best, and certainly not the first, recourse for the vast majority of migrants.[14] Other legal avenues of redress, such as mediation, arbitration, and petitioning government officials, are frequently utilized first. But, given the unequal bargaining power between migrants and Beijing employers, these routes are often biased against migrants.[15] Growing discontent within the migrant population, as well as pressure from both citizens and foreign governments, prompted the Chinese government to promote greater utilization of formal dispute resolution mechanisms for migrants.[16] This shift is all the more notable because it occurs against a backdrop of local and national policies that have systematically denied essential services to this population.[17] In response, migrants have increasingly turned to courts, despite their arguable lack of success.

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scholarship indicates that the peasants and migrants who use formal legal channels to resolve their disputes often do not report having achieved "justice." *See generally* Mary E. Gallagher, *Mobilizing the Law in China: "Informed Disenchantment" and the Development of Legal Consciousness*, 40 LAW & SOC'Y REV. 783 (2006) (examining legal aid plaintiffs in Shanghai and concluding that their experience with the law leads to disenchantment, but also further, better informed action); Ethan Michelson, *Justice from Above or Justice from Below? Popular Strategies for Resolving Grievances in Rural China*, 187 CHINA Q. (forthcoming 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=922072 (reporting that local solutions to grievances in rural China are more successful and lead to greater satisfaction than appealing to higher authorities or the court system).

[13] Up until 2003, several cities limited legal aid to local *hukou* holders or those with temporary residency permits. *See* CONG.-EXECUTIVE COMM. ON CHINA, FREEDOM OF RESIDENCE AND TRAVEL, ANNUAL REPORT: 2004, at n.557 (2004) [hereinafter CECC 2004 ANNUAL REPORT], *available at* http://www.cecc.gov/pages/virtualAcad/Residency/annRpt04section.php (citing Guangdong sheng falü yuanzhu tiaoli [Guangdong Province Legal Aid Regulations], art. 10(1) (issued Aug. 20, 1999); Zhejiang sheng falü yuanzhu tiaoli [Zhejiang Province Legal Aid Regulations], art. 7 (issued Oct. 29, 2000); Shaanxi sheng falü yuanzhu tiaoli [Shaanxi Province Legal Aid Regulations], art. 8 (issued Sept. 25, 2001)); *see also* Liebman, *supra* note 8, at 244–45 (noting that as of 1998, many legal aid offices refused to service migrants); Choate, *supra* note 8, at 20–21 (stating that as of 2000, legal aid clients were usually required to be a resident of the area in which the legal aid center was located).

[14] *See* CECC 2004 ANNUAL REPORT, *supra* note 13, at 72 (stating that the "formal legal system is almost entirely absent from the lives of most of China's citizens").

[15] *See* HO, *supra* note 7, at 36–82 (examining the Chinese labor dispute resolution system of engaging in mediation and arbitration before litigation). *See generally* Donald C. Clarke, *Dispute Resolution in China*, 5 J. CHINESE L. 245 (1992) (examining the Chinese form of mediation); Philip C.C. Huang, *Court Mediation in China, Past and Present*, 32 MODERN CHINA 275 (2006); Carl F. Minzner, Xinfang*: An Alternative to Formal Chinese Legal Institutions*, 42 STAN. J. INT'L L. 103 (2006) (examining the process of seeking legal redress through "letters and visits" to government officials).

[16] *See Roundtable Before the Cong.-Executive Comm. on China*, 108th Cong. 7 (2004), *available at* http://frwebgate.acess.gpo.gov/cgi-bin/getdoc.cgi?dbname+108_house_hearings&docid=F:95346.wais.

[17] *See* CONG.-EXECUTIVE COMM. ON CHINA, CHINA'S HOUSEHOLD REGISTRATION SYSTEM: SUSTAINED REFORM NEEDED TO PROTECT CHINA'S RURAL MIGRANTS 7–10 (2005), *available at* http://cecc.gov/pages/news/hukou.pdf?PHPSESSID=7b27a8b081aed087c6e07520ac11a779 (highlighting China's discrimination against migrants, particularly in receiving education and health insurance).

Legal aid is crucial for migrant access to courts for several reasons. Although a growing number of parties in civil cases represent themselves in China's courts, the technicalities of a lawsuit make bringing a case to court without legal assistance difficult even for ordinary Chinese citizens, let alone uneducated rural migrants. Migrants typically lack the bargaining power and knowledge of local law to argue successfully and often cannot afford even the minimum court filing fees, not to mention lawyers.[18] A few registered Chinese lawyers represent clients on a contingency fee basis, but many are reluctant to represent migrants because of an entrenched cultural bias and the fear that migrants will abscond with the fees, which by law go to the client first.[19] Registered lawyers are less likely to accept migrant cases, both because these cases involve minor amounts and are therefore not profitable, and because culturally they look down on migrant laborers as uneducated.[20] While most migrants are unable to afford legal representation, they are also more likely to need it because they are particularly susceptible to workplace injuries, non-payment of wages, and other forms of exploitation.[21] Legal aid, when available, is often a migrant's first contact with the formal legal system and the "gatekeeper" to a migrant's use of the courts.[22] A migrant's access to justice, therefore, is tied as equally to the limitations of legal aid as to the court system through which legal aid operates.

China is a huge country, and disaggregation of the population is necessary to understand how policies have had differing impacts.[23] In terms of subject matter, although several studies have focused generally on legal aid or labor disputes in

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[18] *See* Benjamin L. Liebman, *Class Action Litigation in China*, 111 HARV. L. REV. 1523, 1534 (1998) (examining the impact of court fees); Margaret Y.K. Woo & Yaxin Wang, *Civil Justice in China: An Empirical Study of Courts in Three Provinces*, 53 AM. J. COMP. L. 911, 920–23 (2005) (noting the disparate levels of attorney representation in rural versus urban areas). The typical salary of a migrant nationwide is estimated to be 1,100 yuan ($137.50). *See Migrant Workers Expect Higher Monthly Salaries*, XINHUA NEWS AGENCY, Feb. 7, 2006, *available at* http://china.org.cn/english/null/157162.htm. To alleviate the burden of court fees on migrants, the Beijing Higher People's Court recently ruled that migrant workers who file cases against their employers would not have to pay court fees. *See Migrant Workers Get Legal Help To Claim Owed Wages*, CHINA DAILY, July 27, 2005, *available at* http://au.china-embassy.org/eng/xw/t205034.htm. Whether this ruling has been effectively followed is unclear; the attorneys we talked to in August 2005 did not mention it.

[19] *See* Ethan Michelson, *The Practice of Law as an Obstacle to Justice: Chinese Lawyers at Work*, 40 LAW AND SOC'Y REV. 1, 18–21 (2006); *see also* SOLINGER, *supra* note 1, at 54 (stating that officials and urban residents viewed migrants as "almost a pariah class" and as "subjects, never as citizens").

[20] *See generally* Michelson, *supra* note 19 (exploring Chinese lawyers' systematic denial of access to legal services through screening of poor laborer and migrant cases because of a lack of economic incentive and cultural biases). Because Professor Michelson limited his findings to registered lawyers taking cases on a fee-basis and excluded legal aid providers, or even registered lawyers who are assigned migrant cases in satisfaction of pro bono requirements, one cannot draw from his article a more general (and more pessimistic) conclusion that migrants have no legal recourse.

[21] *See* INSTITUTIONALIZED EXCLUSION, *supra* note 4, at 93–100. Legal aid organizations thus have an almost bottomless well of potential cases from which to draw, which leads some to select particularly egregious but easily proveable cases of injustice. *See* Interview with American Law Professor Teaching in China, in Beijing (Aug. 8, 2005).

[22] *See* Michelson, *supra* note 19, at 1.

[23] *See* Neil J. Diamant, *Conflict and Conflict Resolution in China: Beyond Mediation-Centered Approaches*, 44 J. CONFLICT RESOL. 523 (2000) (urging a disaggregated study of China's population and its relationship to the law).

China, most have not addressed in detail migrant involvement in either.[24] In terms of geography, Beijing, as the seat of government (not to mention the host of the 2008 Olympiad) is a bellwether for the government's efforts to establish more meaningful access to legal institutions. Not surprisingly, lawyers, legal institutions, and legal aid are more abundant in Beijing, and therefore the city serves as an illustrative, if not representative, example of the state of migrant access to legal institutions in China's other urban areas.[25]

This article examines the legal aid providers available to migrant workers in Beijing, the forms of aid they provide, and the ways in which they broker "justice." These legal aid providers can be roughly divided into six categories depending on their structure and level of government involvement: government-sponsored legal aid, migrant-based initiatives, advocacy law firms, community-based organizations, individual attorneys, and law school clinics.[26] Despite their level of cooperation, these various legal aid providers often reflect different, if not divergent, goals in providing aid to migrants.[27] Through extensive interviews and case studies, this article follows the experience of Beijing migrants as they interact with legal aid organizations and navigate the Chinese judicial system.

Ultimately, this article concludes that migrant access to the formal court system is promising but limited. As Charles Epp has argued, the protection of individual rights is largely a "bottom-up" process, not merely a "top-down" one: legal mobilization requires a support structure of rights advocacy organizations, sympathetic government agencies, and eager lawyers capable of strategic and sustained litigation, not simply constitutional guarantees or an activist judiciary.[28] Under this formulation, the recent establishment of a support structure of legal aid for migrants marks a significant stride in China's, or at least Beijing's, legal development. The mere existence of a substantial network of legal aid providers in Beijing aiming to redress migrant abuses has the potential to strengthen the rule of law, deter abuses, and expand the rights of migrants. Yet there are also substantial impediments that may stunt the growth of this legal mobilization: for instance, the divergent goals of the various providers, the uneasy mix between government and non-government involvement, and the limited

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[24] *See, e.g.*, Ho, *supra* note 7; Institutionalized Exclusion, *supra* note 4; Mary E. Gallagher, *"Use the Law as Your Weapon!" Institutional Change and Legal Mobilization in China*, in Engaging the Law in China, *supra* note 9; Liebman, *supra* note 8.

[25] *See* Ethan Michelson, Unhooking from the State: Chinese Lawyers in Transition 32–33 (Aug. 2003) (unpublished Ph.D. dissertation, University of Chicago), *available at* http://www.indiana.edu/~emsoc/Dissertation.html (noting that even though there are more lawyers in Beijing than in any other city and the city's population and level of development calls into question its representativeness, it is a city at the vanguard of China's legal profession). Indeed, recent efforts on the part of the state and NGOs to expand legal aid for migrants to other cities seemed to have used the approach of Beijing and other more developed cities as a template. *See, e.g.*, *Hubei Sets Up First Legal Aid Center For Migrant Workers*, China Daily, Aug. 23, 2004, *available at* http://www.chinadaily.com.cn/english/doc/2004-08/23/content_368083.htm.

[26] *See infra* Part IV.B.

[27] *See infra* Part V.

[28] Charles R. Epp, The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective 18–20 (1998). Epp defines legal mobilization as "the process by which individuals make claims about their legal rights and pursue lawsuits to defend or develop those rights." *Id.* at 18.

areas of the law eligible for legal redress. In addition, the sheer size of the migrant population in Beijing and its variety of needs require an expansion of the funding and scope of legal aid to protect migrant rights more fully.

This article is comprised of seven parts. Part II briefly describes the history of urban migration in China and efforts to extend legal services to migrants. Part III gives an introduction to the methodology underlying our data. Part IV describes the various gatekeepers—governmental, quasi-governmental, and non-governmental—that provide legal services for migrants in Beijing. Part V examines the relationships between these gatekeepers and how their differing goals may limit their effectiveness. Part VI draws upon an in-depth case study to illustrate these points. Part VII concludes that the substantial involvement and cooperation of various actors in providing court access to Beijing's migrant community may provide migrants with a key weapon in the arsenal of rights, but also may raise troubling questions.

II. The History of Migrant Laborers and Court Access in Beijing

China's migrant workers—known variously as *liudong renkou* ("floating population"), *nongmin* ("peasants"), or simply *mingong* ("workers")—huddle at the fringes of China's increasingly urban society.[29] Their status is largely a function of government policy. Beginning in the 1950s, the Chinese government rigidly controlled internal migration through a system of registering its citizens in their residences called the *hukou* system.[30] Although economic changes and reforms have relaxed and decentralized some of the *hukou* controls, the system still prevents low-income rural migrants from receiving essential public services. The state's policy has clearly favored affluent urban centers over poorer rural areas and serves as a major tool in upholding the one-party regime.[31]

A. A Brief History of the *Hukou* System

Though it has analogues in Chinese history, the current form of the household regulation system arose in response to an influx of rural peasants in the early years of the People's Republic of China ("PRC").[32] From 1949 to 1957, approxi-

[29] *See generally* SOLINGER, *supra* note 1 (contending that migrants' status in Chinese society as nomadic and inferior non-citizens runs counter to the very idea of Chinese citizenship). *Cf.* ZHANG, *supra* note 3 (tracing migrants' establishment of social networks and power bases and how they have directly challenged state control).

[30] *See generally* WANG, *supra* note 2; Kahn, *supra* note 2 (reporting the trial abandonment of the *hukou* system in several provinces).

[31] *See* Statement of Prof. Fei-Ling Wang, *Roundtable Before the Cong.-Executive Comm. on China*, 109th Cong. 1, 3 (Sept. 2, 2005), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_house_hearings&docid=F:24019.pdf.

[32] The household registration system and the regulation of internal migration as a means of social control has a long history in China, extending back to the ban on Han Chinese migration to Manchuria during the Qing Dynasty (1644–1911). *See* WANG, *supra* note 2, at 32–43 (examining the historical roots of the *hukou* system); Frank N. Pieke, *Introduction: Chinese Migrations Compared*, *in* INTERNAL AND INTERNATIONAL MIGRATIONS: CHINESE PERSPECTIVES 1, 1 (Frank N. Pieke & Hein Mallee eds., 1999) (noting the historical precedent of strict migration controls in China and its uniquely Chinese characteristics).

mately twenty-six million peasants migrated to China's cities to seek jobs in the country's newly established industries.[33] Concerned that a massive influx of rural migrants would decrease social stability and undermine its Soviet-style economic plan, the government established a national household registration system in 1958 to segregate urban from rural Chinese.[34] From 1958 until the late 1970s, no resident could legally move from where they were registered without first presenting documents to the local authorities and obtaining official approval—a permission that was rarely granted.[35] Since all services were tied to where the household was registered, migrants without a residency permit in a city were denied basic services such as housing, education, employment, and even food.[36] This policy was highly effective—rural-to-urban migration within China was essentially halted until the late 1970s.[37]

Beginning in the late 1970s, however, market reforms unleashed a surge in rural-urban migration as rural residents flocked to the cities in search of better opportunities.[38] The decollectivization of rural agricultural communes created a surplus of rural laborers, and new markets from which goods and services could be purchased freed rural peasants to move in search of work. The state's establishment of Special Economic Zones and its focus on urban development also instigated rural-to-urban migration. As the economic disparity between the coun-

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[33] *See* R.J.R. KIRKBY, URBANIZATION IN CHINA: TOWN AND COUNTRY IN A DEVELOPING ECONOMY 22 (1985); *see also* SOLINGER, *supra* note 1, at 38 (noting that the early 1950s were a time of relatively unrestricted movement in China).

[34] *See* Hukou dengji tiaoli [Regulations on *Hukou*] (promulgated by the Nat'l People's Cong., Jan. 9, 1958) (P.R.C.), *available at* http://news.xinhuanet.com/ziliao/2005-01/06/content_2423627.htm (establishing a nationwide *hukou* system). The National People's Congress (NPC) is China's highest legislative body. Because the NPC meets only once a year, most law-making is promulgated by the Standing Committee, but the executive branch of PRC, headed by the State Council, also has the power to enact regulations and administrative measures. At the provincial level, people's congresses may also enact a wide range of local regulations, but laws and regulations at the national level trump local regulations if they are inconsistent.

[35] *See Regulating Rural-Urban Migrants*, *supra* note 4, at 181; ZHANG, *supra* note 3, at 26–27; Kahn, *supra* note 2. As Professor Fei-Ling Wang notes: "Chinese citizens need their *hukou* documentation for education, marriage, passports, travel, employment, business licenses, and even to open an account for a public utility . . . ." WANG, *supra* note 2, at 67. Every household in China, even today, is given one of two designations: rural or urban. This designation is reflected on their national identity card.

[36] *See* Guanyu shizheng liangshi dingliang gongying zhanxin banfa de mingling [Temporary Measures on Rationing Food Supply] (promulgated by the State Council, Aug. 25, 1955) (P.R.C.), *available at* http://news.xinhuanet.com/ziliao/2004-12/28/content2388644.htm (rationing food based on person's *hukou* status); *see also* WANG, *supra* note 2, at 49–50.

[37] *See* WANG, *supra* note 2, at 47–48 (noting that with the exception of the beginning of the Cultural Revolution (1966–76) and for those seeking college education or military training, migration essentially halted until 1978). This policy was not only enforced by government officials, but also by neighborhood watchers, typically older women wearing red armbands, who would question passersby who looked out of place. *See* Ma, *supra* note 11, at 66.

[38] *See generally* SOLINGER, *supra* note 1. The degree to which market forces versus state policies have contributed to rural-urban migration is a matter of debate. *Compare* SOLINGER, *supra* note 1, at 150–53 (maintaining that the *hukou* system and bureaucratic policies served as an impediment to market forces pushing for migration) *with* Lei Guang, *The State Connection in China's Rural-Urban Migration*, 39 INT'L MIGRATION REV. 354, 355–56 (2005) (highlighting that China's internal migration has been facilitated by the state); *see also* Kam Wing Chan & Li Zhang, *The* Hukou *System and Rural-Urban Migration: Processes and Changes*, 160 CHINA Q. 818, 819 (1999) (stating that the *hukou* system is not primarily designed to block migration, but to serve multiple state interests).

tryside and the cities widened, the lure of higher-paying jobs in the cities and special economic zones proved irresistible to many rural peasants.

In response to these market forces, China began to relax some of the *hukou* restrictions on population mobility.[39] Perhaps in recognition that migration would spur economic development by providing abundant cheap labor, as well as alleviate the problem of unemployment in the countryside, the central government in 1985 began to authorize temporary urban residency permits for those with legitimate business or employment reasons for migrating.[40] Further reforms since the 1990s have greatly increased the mobility of selected groups of rural *hukou* holders. Currently, rural *hukou* holders who have a stable source of income and reside in a small city or town can apply for an urban *hukou* after two years.[41]

However, these legal means of migrating have been limited mainly to the wealthy or educated and have not yet been extended to large cities such as Beijing and Shanghai.[42] In addition, at the same time that the government loosened the *hukou* shackles for some people, it granted local officials substantial discretion to exclude certain groups called the *zhongdian renkou* or "targeted people."[43] Those targeted include people local governments deem to pose a threat to urban stability, such as criminals, political subversives, and those with violent tendencies.[44] Because migrants are often linked to the rise in urban crime and social instability, local officials also interpret "targeted people" as applying to poor, rural migrants and can sometimes deny them legal entry into the city.[45]

Even apart from legal procedures, however, millions of poor, rural Chinese have migrated to cities without any formal registration. By 2003, government estimates placed the number of rural migrants in China's urban areas at 140 million.[46] In Beijing alone, there are currently over three million migrants, constituting roughly one-quarter of the city's total population.[47]

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[39] The legal foundations of the *hukou* system are not entirely clear; it has been governed mostly by internal decrees and directives, and its operations are still cloaked with secrecy. *See* WANG, *supra* note 2, at 28.

[40] *See* Provisional Regulations on the *Hukou* Management of Temporary Urban Residents (promulgated July 13, 1985); Regulation on Resident's Personal Identification in the People's Republic of China (promulgated September 6, 1985); *see also Regulating Rural-Urban Migrants*, *supra* note 4, at 183.

[41] *See* Statement of Prof. Fei-Ling Wang, *supra* note 31, at 30. Recently, under pressure, the government has deepened some of the *hukou* reforms. *See* Kahn, *supra* note 2. Although this has been erroneously reported in the Western press as the end of the *hukou*, social services in urban areas are still largely conditioned on *hukou* status. *See* CECC 2006 ANNUAL REPORT, *supra* note 2, at 116 & n.21.

[42] *See* WANG, *supra* note 2, at 54.

[43] *See id.* at 107–11.

[44] *See id.* at 109.

[45] *See id.* at 110. The government has had some difficulty actually putting this system into practice; because of their mobility, many migrants are able to elude control and surveillance by the authorities. *Id.*

[46] *China's Floating Population Tops 140 Million*, *supra* note 1.

[47] BEIJING STATISTIC BUREAU, BEIJING SHI TONGJIJU 2003 NIAN GUOMIN JINGJI HE SHEHUI FAZHAN TONGJI GONGBAO [2003 National Economic and Social Development Statistical Report] (Feb. 12, 2004), http://www.stats.gov.cn/was40/reldetail.jsp?docid=141551.

B. Overview of Beijing's Migrant Population

The migrant population in Beijing is far from monolithic. Migrants come from various corners of China and speak different dialects—for some, Mandarin, the lingua franca of China, is a "foreign" language. Some migrants settle in neighborhoods within Beijing with other migrants from their same province,[48] while other migrants float from worksite to worksite. Still others, after a few years, migrate back to their home villages.

Migrant occupations divide along gender lines. An estimated 60% of migrants in Beijing are males,[49]of whom at least 300,000 work in the construction jobs that have reshaped the city's skyline overnight.[50] Female migrants flock to factory jobs or the service sector, working as shopkeepers and nannies for the nascent middle and upper classes.[51] Migrants are also young—their average age is 28.6 years old.[52] Migrants working in factories or on construction grounds usually live in squalid camps at their worksites and work marathon shifts to keep construction or production running for twenty-four hours a day.[53] Migrants working in the service industry seem to have a slightly easier time: they are required to maintain a clean demeanor and are allowed to work fewer hours per week.[54]

Despite their diversity, migrants in Beijing are united in one respect—they lack urban *hukou* or even temporary residency permits and therefore are not afforded many of the rights and services received by *hukou*-holding locals. Because migrants are seen as draining the resources of local governments and as a source of social ills and competition for jobs and living space, Beijing has erected a variety of discriminatory measures against them.[55] The city has limited essential services—such as education, health, and even jobs—to local residents only.[56]

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[48] Perhaps the most famous, and certainly the most studied, is "Zhejiang Village," a portion of southern Beijing that specializes in garment production and whose residents hail from Zhejiang province. *See* SOLINGER, *supra* note 1, at 231–34, 249–56; *Sporadic Law Enforcement Campaigns*, *supra* note 10, at 124–26.

[49] *See* SOLINGER, *supra* note 1, at 21.

[50] *See generally* Victor Yuan & Xin Wong, *Migrant Construction Teams in Beijing*, *in* INTERNAL AND INTERNATIONAL MIGRATION, *supra* note 32, at 103.

[51] *See generally* DELIA DAVIN, INTERNAL MIGRATION IN CONTEMPORARY CHINA (1999); C. Cindy Fan, *The State, the Migrant Labor Regime, and Maiden Workers in China*, 23 POL. GEOG. 283 (2004).

[52] *State Council Survey Shows 200 Million Rural Labourers on the Move*, CHINA LABOUR BULL., Apr. 19, 2006, *available at* http://www.clb.org.hk/public/contents/37615.

[53] *See* Yuan & Wong, *supra* note 50, at 104 (characterizing migrant construction jobs as the hardest and most tiring of all migrant occupations).

[54] *See generally* Pun Ngai, *Becoming* Dagongmei *[Laboring Sisters]: The Politics of Identity and Difference in Reform China*, 42 CHINA J. 1 (1999) (examining the working lives of female factory workers and the discrimination they face).

[55] This may be due to the fact that three levels of government—the central government, the rural governments, and the host governments—have overlapping jurisdiction over migrants. Their policies in response to migration vary widely. *See generally* Regulating Rural-Urban Migrants, *supra* note 4. Rural officials generally encourage migration, urban governments discourage it, and the central government is somewhere in between. *Id.*

[56] For instance, for years Beijing restricted migrants from engaging in certain occupations, such as taxi driving. Beijing shi waidi laijing wugong jingshang renyuan guanli tiaoli [Ordinance for the Man-

Education of migrant children, in particular, is provided on an unequal basis.[57] The Beijing government also periodically engages in law enforcement campaigns against migrants to combat crime and restore social order.[58] Indeed, as recently as 2000, Beijing authorities leveled entire migrant villages in a brazen effort to "control" the migrant population.[59] There even have been rumblings that the Beijing authorities may again expel large numbers of migrants to "clean up" the city in advance of the 2008 Olympics.[60]

C. Migrants and Dispute Resolution

Although migrants are subject to a wide variety of injustices and discriminatory treatment, they have legal recourse to address only a small portion. This is due in part to the limitations of Chinese law; many legal protections, such as the country's labor laws, are unenforced.[61] But this is also due in part to the restrictions of legal aid. For instance, government-sponsored legal aid limits its coverage to claims involving state compensation, government benefits, support payments, labor compensation, and other undefined measures in the public interest.[62] Thus, the injustices that migrants bring to legal aid, and occasionally to court, tend to fall into three categories: non-payment of wages, workplace accidents, and, to a far lesser extent, sexual harassment.

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agement of Beijing's Migrant Workers] (promulgated by the Standing Comm. Beijing Municipal People's Cong., Apr. 14, 1995, revised 1997, repealed Mar. 25, 2005), *available at* http://www.law-lib.com/law/law_view.asp?id=25833. The bulk of these restrictions were ostensibly repealed in 2005. *See Beijing quxiao dui waidi laijing wugong jingshang renyuan de xianzhixing guiding [Beijing to Abolish its Restrictive Provisions on Migrant Workers]*, XINHUANET, Mar. 25, 2005, *available at* http://news.xinhuanet.com/newscenter/2005-03/25/content_2742633.htm. However, anecdotal evidence suggests that many less obvious forms of discrimination against migrants still remain in Beijing, as in other cities in China. *See* Jim Yardley, *A Ban Tells of Wealth and Its Discontents*, N.Y. TIMES, Jan. 15, 2007, at A4 (reporting that Guangzhou's soon-to-be instated ban on motorcycles will disproportionately affect the mobility and quality of life of its migrant workers).

57 Despite a revised national Compulsory Education Law, which requires migrant children to be enrolled in local state-run schools, Beijing requires five certificates—a temporary residence permit, work permit, proof of residence, certificate from the place of origin, and household registration booklet—in order to attend local, state-run schools. Many migrants lack this documentation, not to mention the means to afford substantial local school fees. They therefore have established their own schools in Beijing to fill the void. *See* Prepared Statement of Chloé Froissart, *Roundtable Before the Cong.-Executive Comm. on China*, 109th Cong. (2005). Because these schools are unregistered and technically illegal, they are subject to arbitrary closure by the authorities. *See Beijing Closes Schools for Migrant Children in Pre-Olympic Clean-up*, HUMAN RIGHTS WATCH, Sept. 25, 2006, *available at* http://www.hrw.org/english/docs/2006/09/26/china14263.htm.

58 *See generally Sporadic Law Enforcement Campaigns*, *supra* note 10.

59 *See generally* ZHANG, *supra* note 3 (tracing the destruction and reconstruction of a migrant enclave in Beijing).

60 *See Beijing Closes Schools for Migrant Children*, *supra* note 57.

61 For this reason, even a revised draft of China's labor law that expands legal protections and the role of labor unions may do little to protect migrants, who tend to work illegally at smaller businesses. *See* David Barboza, *China Drafts Law to Empower Unions and End Labor Abuse*, N.Y. TIMES, Oct. 13, 2006.

62 Falü yuanzhu tiaoli [Regulations on Legal Aid] (promulgated July 16, 2003, effective Sept. 1, 2003), art. 10, *available at* http://www.cecc.gov/pages/selectLaws/ResidencySocWelfare/regsLegalAid.php.

Aware that migrants lack sophisticated legal knowledge and are desperate for money to support family members left behind in their hometown villages, employers take advantage of a contract law that, up until recently, required written evidence of employment.[63] Employers deliberately refused to sign an employment contract and later used this as an excuse to refuse to deny migrant employees their wages.[64] In fact, some studies suggest half of all migrants have been unpaid for work.[65] Migrants also tend to work in dangerous industries with lax safety codes, leading to gruesome workplace accidents.[66] Migrant women face the additional problem of sexual harassment from bosses and co-workers and are often fired if they become pregnant.[67]

The vast majority of disputes involving China's migrants end up in non-formal channels.[68] Migrants frequently tolerate abuse, or pursue informal methods of dispute resolution such as mediation, arbitration, or petitioning government officials directly for redress—a process called *xinfang* or "letters and visits."[69] But mediation and arbitration function best when there is some degree of similar social status, which is rarely the case for civil actions involving migrants. Likewise, petitioning a government official through an office dedicated to such requests, which can either supplement or replace a formal lawsuit, hinges on the subjective receptiveness of an official who may have little to gain from resolving

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63 *See* Wang Ye, *Projects to Further Protect Migrant Workers*, CHINA DAILY, Mar. 10, 2006, at 3, *available at* http://www.chinadaily.com.cn/english/doc/2006-03/10/content_530649.htm (quoting the vice-chairman of the All-China Federation of Trade Unions as saying his organization "will strive to ensure 90 per cent of migrant workers have a labour contract with their employers by 2008"). Although judges are no longer supposed to bar labor disputes where there was no written contract, in reality the substantial discretion that judges are granted may allow many of them to do so. *See generally* Margaret Y.K. Woo, *Law and Discretion in the Contemporary Chinese Courts*, 8 PAC. RIM L. & POL'Y J. 581 (1999).

64 Many migrants, used to more communal and informal social arrangements in their villages, do not understand the importance of written contracts or official work relationships.

65 *See* BEIJING QINGSHAONIAN FALÜ YUANZHU YU YANJIU ZHONGXIN ZHIZUO [BEIJING CHILDREN'S LEGAL AID AND RESEARCH CENTER], ZHONGGUO NONGMINGONG WEIQUAN CHENGBEN: DIAOCHA BAOGAO [REPORT: THE IMPACT OF MIGRANTS EXERCISING THEIR RIGHTS] 1 (2005) (on file with authors) (noting that 48% of migrants in Beijing have reported being unpaid for work).

66 *See* Fu Jing, *Migrant Workers to Get Injury Insurance*, CHINA DAILY, July 26, 2004, at 1, *available at* http://www.chinadaily.com.cn/english/doc/2004-07/26/content_351589.htm (noting that workplace accidents take 100,000 lives each year, many of them migrants).

67 *See* ZHANG YE, ASIA FOUND., MIGRANT WOMEN WORKERS AND THE EMERGING CIVIL SOCIETY IN CHINA 4–6 (2001), *available at* http://www.asiafoundation.org/pdf/ZhangYe.BSR.pdf (highlighting the unique problems facing migrant women workers).

68 *See* CECC 2004 ANNUAL REPORT, *supra* note 14, at 72. This is also true within Beijing's general population. *See* Ethan Michelson, How Much Does Law Matter in Beijing? Prepared Statement for Law and Society Association Annual Meeting, at 21 (May 28, 2002), *available at* http://www.indiana.edu/~emsoc/Publications/Michelson_HowMuchDoesLawMatter.PDF.

69 *See* CECC 2004 ANNUAL REPORT, *supra* note 14, at 72–75; *See also* Isabelle Thireau & Hua Linshan, *One Law, Two Interpretations: Mobilizing the Labor Law in Arbitration Committees in Letters and Visits Offices*, *in* ENGAGING THE LAW IN CHINA: STATE, SOCIETY, AND POSSIBILITIES FOR JUSTICE 84 (Neil J. Diamant et al., eds., 2005) (comparing workers' expressions of injustice in *xinfang* administrative bureaus and arbitration committees).

the dispute. Indeed, some estimates place the rate of response at 0.2%.[70] Protests, another age-old form of addressing injustice, can occasionally be successful but carry great risks for their participants, who may face retribution.[71] Because of the fickle and dangerous nature of these methods, it is perhaps not surprising that China's poorer citizens and their advocates have increasingly turned to the courts for redress.

Migrants' use of the court system, though, is predicated on legal aid. In general, migrants are significantly poorer than the average urban resident and cannot pay for legal services provided by registered lawyers. Until the turn of the century, however, many cities barred migrants without temporary residency permits from using city-sponsored legal aid, preferring to earmark their aid for local residents instead.[72] As early as 1996, the central government enacted a Lawyers Law that imposed obligations on registered lawyers to engage in pro bono representation.[73] The law, however, did not directly address migrants, and local officials often did not extend legal aid to non-residents. Although Beijing's migrants occasionally were represented by nongovernmental organizations ("NGOs") prior to 2000, few chose to seek legal aid for a variety of reasons.[74]

Beginning in 2001, however, several developments made it easier for migrants to bring their cases to court and focused public attention on migrant legal rights. A 2001 Chinese Supreme Court decision clarified the country's Labor Law, making it easier for migrants engaged in labor disputes to file suit.[75] Two years later, in 2003, the death of a young migrant arrested in Guangzhou for failing to produce a temporary residency permit triggered national attention on the plight of migrants and led to a reevaluation of the system of repatriating "urban vagrants and beggars" (*shourong qiansong*) to their home villages.[76]

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[70] Zhao Ling, *Guonei shoufeng xinfang baogao huo gaoceng zhongshi* [*The First Report on* Xinfang *Receives High-Level Attention*], NANFANG ZHOUMO [Southern Weekend], Nov. 4, 2004, *available at* http://www.nanfangdaily.com.cn/zm/20041104/xw/szxw1/200411040012.asp.

[71] *See generally* ELIZABETH J. PERRY, CHALLENGING THE MANDATE OF HEAVEN: SOCIAL PROTEST AND STATE POWER IN CHINA (2002). Increasingly, appealing to the Chinese media has been an effective accompaniment to any of these methods of seeking redress. *See generally* Benjamin L. Liebman, *Watchdog or Demagogue? The Media in the Chinese Legal System*, 105 COLUM. L. REV. 1 (2005) (exploring several ways in which the Chinese media influences the courts).

[72] *See* Liebman, *supra* note 8, at 244–45 (noting that as of 1999, regulations in many Chinese cities stated that legal aid is available only to local residents or to those with temporary residency permits); *see also* Choate, *supra* note 8, at 20.

[73] Lüshi fa [Lawyers Law] (promulgated by the Standing Comm. Nat'l People's Cong., May 15, 1996, effective Jan. 1, 1997), *available at* http://www.legalinfo.gov.cn/moj/lsgzgzzds/2003-03/19/content_19544.htm.

[74] For example, in 1995 Beijing established a migrant worker service center designed to assist in resolving labor disputes between migrant workers and management. *See* SOLINGER, *supra* note 1, at 93.

[75] *See* Chinese Supreme Court Guiding Principle (Mar. 22, 2001), *available at* http://law.chinalawinfo.com/newlaw2002/SLC/SLC.asp?Db=Chl&Gid=35573. What constitutes a "labor dispute," however, is narrowly defined under Chinese law, so the effect of this pronouncement was not as far-reaching as it appears. *See* Ho, *supra* note 7, at 41 (noting that the legal protections of the 1995 Labor Law do not apply to temporary workers and contractors, many of whom are migrants).

[76] *See* Liebman, *supra* note 71, at 82–89; Zhu Lijiang, *The* Hukou *System and the People's Republic of China: A Critical Appraisal under International Standards of Internal Movement and Residence*, 2 CHINESE J. INT'L L. 519, 548–50 (2003). Sun Zhigang was a 27-year old graphic designer originally

Also in 2003, the government under new Premier Hu Jintao adopted national Legal Aid Regulations. These regulations implicitly extended legal aid to migrant workers; Article 6 states that applicants seeking legal aid can obtain a statement proving economic need either from the authorities in their place of *hukou* registration or their actual place of residence.[77] The national Legal Aid Regulations also explicitly state that legal aid is the responsibility of the state, but at the same time, invites NGOs to supplement state-sponsored legal aid, a stance that came as a surprise.[78] Despite the government's rosy pronouncements, however, legal aid remains chronically underfunded at the local level and often fails to reach those in need.[79]

Three main obstacles often prevent migrants from filing lawsuits even apart from the need for free legal services. First, the cost for bringing a lawsuit (filing fees, gathering evidence, etc.) is too high for migrants in contrast to the small amounts of recovery. Secondly, migrants rarely have a basic awareness of their rights nor are they familiar with court process. Finally, the Chinese legal system does not make it easy. At the time of the interview, there were over 900 national laws and regulations governing labor, and local provinces generally have their own and often contradictory labor laws. For example, migrants often do not inquire about legal actions—or are even made aware of actionable transgressions—until long after the migrants can legally state a claim.

Migrants' use of courts coincides with the central government's push to channel politically acceptable disputes through its legal institutions.[80] Admittedly, the government's efforts to establish a rule of law are partially motivated by a desire for social control—placing disputes in the courts takes them out of the streets where they may foment social unrest. But that does not necessarily mean that migrant cases lack any social impact. As the rise in cases brought by migrants demonstrates, even the establishment of a structure of legal aid can have some impact on migrants' legal rights.

from Hubei province. *Id.* at 548 n.113. After being arrested on the street for not carrying his temporary residency card, he was beaten to death by fellow inmates at a detention center. *Id.* The case prompted a media outcry and massive protests. *Id.* Several legal scholars petitioned the government to revise its administrative detention policy for migrants and the poor, and shortly thereafter the government responded. *Id.* at 549 n.115, 550.

[77] Falü yuanzhu tiaoli [Regulations on Legal Aid] (promulgated July 16, 2003, effective September 1, 2003), art. 10, *available at* http://www.cecc.gov/pages/selectLaws/ResidencySocWelfare/regsLegalAid.php.

[78] *See* Prepared Statement of Benjamin L. Liebman, *Roundtable Before the Cong.-Executive Comm. on China*, 108th Cong. 7, 24 (2004) (noting that prior to 2003 there was a fear that the government would channel all legal aid through the Ministry of Justice).

[79] *See* CECC 2006 ANNUAL REPORT, *supra* note 2, at 135.

[80] For instance, the Ministry of Justice has advocated a "popularization of the law," or *pufa*, as a means to improve citizens' familiarity with legal rights and institutions. *See* P.R.C. Ministry of Justice, Law Popularization Home Page, http://www.legalinfo.gov.cn/english/LawPopularization/LawPopularization1.htm (last visited Oct. 1, 2006) (highlighting the government's efforts at popularizing the law).

III. Methodology

In August 2005, we interviewed Beijing legal aid organizations from six different categories of providers.[81] These legal aid organizations varied in many respects, including their financial support from the city, funding levels from NGOs, goals, and legal expertise. In most cases, we interviewed multiple members of each organization. When applicable, these interviews included the groups' main decision-makers as well as the direct service providers. Interviews were conducted at the legal aid office with the assurance of anonymity for all interview subjects. In several instances, the publications or files each organization produced supplemented our interviews. Additional supplemental documents included copies of case files, advocacy papers, and publications given directly to migrants.

Additionally, to understand migrants' perception of legal aid providers and migrant labor law, we interviewed a pair of migrant plaintiffs who had attempted to gain assistance from several legal aid providers, as they pursued an all-too-common nonpayment action against a former employer.[82] Substantively, our interviews focused on what legal aid organizations perceived to be the goals of their organizations, and how they functioned individually and with each other.

IV. Legal Aid Gatekeepers and Migrants

Our legal aid providers identified several resources necessary to service migrants' legal aid needs. Our interviews also highlighted the procedures and challenges faced by these legal aid providers and the different manner used to achieve their legal aid goals.

A. Overview of Migrant Legal Aid Providers' Resources

We interviewed six different forms of legal aid providers working with Beijing's migrant population. The six providers span a spectrum in the recognition they receive from local and national governments and the types of legal aid services they provide migrants.[83] All of them work with the migrant population but vary in their strategies and goals because of their particular constraints. These constraints included prosaic concerns, such as limited financial resources, legal training, access to a dedicated workforce, access to migrants, and status and reputation. An individual provider's lack of a certain resource often drives them to establish relationships with other providers in hopes of furthering their own or-

[81] Interviews were conducted at the legal aid providers' worksites with the assurance of anonymity for all interview subjects. In most cases, we interviewed multiple legal aid organizations (and multiple members of these organizations) within each category. For the purpose of this article, we have selected one organization from each category which best demonstrates the themes we observed across all examples of each category.

[82] *See infra* Part V.A.

[83] The variety of legal aid organizations is perhaps surprising. Prior to 2003, some predicted that the government, through the Ministry of Justice, would dominate legal aid and snuff out private providers. *See* Prepared Statement of Liebman, *supra* note 78, at 24 (noting that prior to 2003 there was a fear that the government would channel all legal aid through the Ministry of Justice).

ganization's goals. A brief overview of the resources identified as invaluable by the providers follows. They include financial resources, trained and dedicated workforce, access to migrant communities, and reputation.

1. Financial Resources

Perhaps the most ubiquitous challenges faced by migrant legal aid organizations are limited resources and funding. Clearly, a well-funded organization is potentially better able to offer services for migrants. Since the financial costs associated with filing cases are high for migrants and even the rare victorious case often fails to result in attorney fees, organizations hoping to represent migrants must be ready to do so at a monetary loss. At present, most legal aid organizations still rely on government support, most notably from the provincial government. Thus, legal aid varies greatly from province to province.[84] Pro bono services from bar associations are only in its infancy; domestic private contributions to legal assistance programs are even rarer. By and large, legal assistance programs are found in law school clinics and some are externally funded by foreign organizations.

2. Legal Training

Given the developing nature of migrant advocacy, it has become important for organizations to improve their legal training and knowledge by familiarizing themselves with both substantive laws relating to migrant rights and the unique means courts and administrative bureaus address migrant-related cases. Because providers working with migrants enter legal aid with diverse backgrounds, individual providers may have little, if any, formal legal training. Even for well-trained attorneys, relevant statutes are numerous and may include various national and city-wide statutes in multiple areas of law.[85] The unique issues migrants face in the judicial process can range from lack of evidence to difficulty in communications as differences in dialect and culture test the patience of both lawyers and clients. Representing migrants often becomes an exercise in busywork such as unearthing evidence, filling endless forms, and navigating a large bureaucratic system on behalf of clients. For the lawyer, working with a migrant population means training not only in law, but also in cultural and social sensitivity.

3. Access to a Dedicated Workforce

Limited legal training may circumscribe such providers' impact or efficiency within the Chinese legal system. Since private lawyers in business practices can be more readily profitable, legal aid organizations struggle to identify, utilize, and retain a properly trained workforce. Currently, few lawyers or organizations

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[84] *See generally* Liebman, *supra* note 8.

[85] For example, there are 963 national statutes regarding labor law, one of multiple areas of national laws (not to mention city- or province-specific laws) that may be relevant in bringing a migrant action. *See* Advocacy Attorneys, *supra* note 1.

profit from migrant representation and fewer lawyers remain in migrant practice for long.[86] Alternately, nonlawyer advocates may be more dedicated to migrant representation and advocacy, especially if they have personal connections with the migrant population.

4. Access to Migrant Clients

Even with an experienced workforce, outreach to migrants is problematic. Migrants often distrust seemingly official institutions. Much like their relationships with courts and bureaus, legal aid organizations must establish *guanxi* with migrants or migrant leaders to earn their trust.[87] Since many of the providers are Beijing residents, reaching these migrants may also require overcoming dialect and cultural differences. Many migrants still retain strong ties to their home villages and may only trust lawyers originally from their home provinces.

5. Status and Reputation

Finally, an organization's reputation often proves to be a nearly indispensable asset. Traditionally, establishing strong *guanxi* between attorneys and judges is an important element of litigation. In civil cases, it was common practice for attorneys litigating a civil suit to treat the presiding judge to dinner and drinks prior to the trial—all on the client's tab—to argue the merits of the case and foster a positive personal relationship with the judge.[88] In a migrant case, where the migrant clients cannot afford to establish such relationships with judges, an organization's existing relationship with officials is an even more significant asset to migrant representation.

Each of these resources can limit and define an organization's actual work, apart from its stated goals. Exploring the organization's full ambit of influence would require not only an examination of its professed aims but also a probing of the five resources listed above.

B. Migrant Legal Aid Providers

Migrant legal aid providers can be divided generally into six categories—government-sponsored, individual practictioners, advocacy law firms, university-sponsored clinics, community-based organizations, and migrant-sponsored initiatives.

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[86] *See* Michelson, *supra* note 19, at 19 (observing that Zhou Litai, the famed lawyer for migrant industrial workers, was engaged in litigation against his former clients for failing to pay his attorney's fees).

[87] *Guanxi* refers to a vaguely Confucian concept of relationships, social order, and the brokering of favors. The connection between the Chinese concept of *guanxi*, and formal law has been examined in the past. *See* Ethan Michelson, Chinese Lawyers: *Guanxi* as a Substitute for Rights, Paper Presented at Human Rights in China: Progress, Problems, and Prospects, at University of Chicago, Apr. 19, 2003.

[88] *See* Interview with Chinese law professor and practitioner who has represented migrants, in Boston (Mar. 27, 2006) [hereinafter Chinese Law Professor].

1. Government-Sponsored Legal Aid Centers for Migrants[89]

The Chinese government has fostered the development of government-sponsored legal aid since the mid-1990s, when several legal aid centers were opened in cities across the country.[90] In 1994, Beijing began to require local lawyers to engage in legal aid work and three years later, Beijing established a centralized legal aid center to coordinate these efforts.[91] Migrant eligibility for government-sponsored legal aid in Beijing, however, was not clear-cut until the 2003 law on legal aid.[92] Since then, migrant usage of the government legal aid offices has increased markedly; by 2005, migrants constituted 80% of the cases one Beijing legal aid office handled.[93] This is significant for at least two reasons. First, many government-sponsored legal aid clinics in other cities tend to ignore migrant issues, choosing instead to focus limited legal aid resources on local residents.[94] In contrast, Beijing's government-sponsored legal aid system can be seen as comparatively supportive of migrant issues. Secondly, and more cynically, the government's reason for responding to migrant legal needs may have less to do with empowering a deprived population or advocating for class equality.[95] Rather, it is designed to instill respect for the law, or more specifically, to maintain social control. This goal informs how they respond to migrant cases.[96]

We visited a Beijing government-sponsored legal aid office in a Beijing district to examine how the office screens and processes its cases. Within government-sponsored legal aid, the coordination is elaborate and theoretically hierarchical. The district legal aid center, for instance, operates as a district office under the purview of Beijing's central legal aid office.[97] However, increasingly, the district legal aid office's day-to-day interactions and services for migrant workers must take place independent of centralized supervision or assis-

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[89] Interview with Director of Government Sponsored Legal Aid Office, in Beijing (Aug. 18–19, 2005) [hereinafter Director Interview]. Unless otherwise noted, all information in Part IV.B.1 derives from this interview.

[90] *See* Liebman, *supra* note 8, at 219–20 (reporting that the 1994 draft of the Lawyer's Law included a provision stating that the government would provide legal aid to assist those unable to afford legal fees).

[91] Beijing's legal aid center traditionally assigns attorneys to assist indigent clients who qualify for aid. *Id.* at 229.

[92] *Cf.* Shanghai Municipality Decisions on Legal Aid [Shanghai shi falü yuanzhu ruogan guiding], art. 5 (May 9, 2005), *available at* http://www.fengcn.cn/assistance/0653022350588.html (finally clarifying in 2005 that migrant workers were eligible for government-sponsored legal aid for labor disputes, occupational injuries, and domestic violence).

[93] A large number of these, however, may have been criminal cases. *See* sources cited *supra* note 11. While our interview subject anecdotally noted that this represented a substantial increase in the percentage of serviced migrant workers, she also stated that her office did not possess accurate records of aid recipients prior to 2003.

[94] *See* sources cited *supra* note 13.

[95] *See infra* Part V.

[96] *See infra* Part V.A.

[97] In fact, the director of the district office only consented to our interview after learning that the Beijing office had provided us with an interview. The director also asked several questions about the content of our interview with the Beijing office before her own interview. *See* Director Interview, *supra* note 89.

tance. In part, this is because of the sheer distances between offices, and migrants' inability to reach more distant central legal aid offices.[98] As a result, district legal aid offices working with migrant workers increasingly function self-sufficiently in order to provide even minimal services. In addition to managing their own resources, local offices establish their own policies regarding case intake and service procedures and develop relationships with local alternative legal services.

To determine whether a case rises to the level of a litigable claim, the city-sponsored district legal aid office's performs an intake consultation during which a case worker or telephone operator responds to a migrant's or migrants' complaints and weighs the case's merits. If an intake worker determines that a particular case is litigable, the case is then farmed out to local attorneys to fulfill their mandated pro bono requirements. The initial screening procedure is often a brief and perfunctory process. Evidence suggests that only a small percentage of migrant disputes pass this first step.[99] This procedure emphasizes the processing of high caseloads of relatively simple disputes.

As an initial matter, aid workers determined whether the migrant seeking assistance qualifies for legal aid based on the potential client's income.[100] Second, the migrant must present a problem that can be remedied under the law—a determination wholly within the discretion of the caseworker.[101] Finally, aid workers ask clients to produce documentation to support their claims. This proved to be the most serious deterrent for migrants seeking assistance.

The need for documentation by aid workers essentially meant that many cases brought to the office were disposed of without resolution. Most migrant workers provide employers with anonymous labor and are willing to work without identification or paper documentation. Even in cases where migrants can provide documentation of their employment, it is difficult to demonstrate that the terms of employment have been violated. Chinese civil trials rely largely on documentary evidence. In cases where oral testimony is the only available evidence, the lack of documentation often proves to be an insurmountable barrier to recovery, but also allows pro bono attorneys to represent clients with more straightforward claims. This policy of asking for documentation serves government-sponsored

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98 Migrants often do not have the time or capital needed to travel across the city via Beijing's convoluted public transportation. In addition, migrants, who generally arrive and operate in the city within a *tong bao*, are often afraid to travel individually in the city or even leave their job sites for extended periods for fear of arousing their employers' suspicions.

99 *See 1000 ming waidi mingong zhong, zhenzheng nenggou huode falü yuanzhu de bu zu 3%* [Of 1000 Migrant Workers, Less Than Three Percent Are Actually Able to Receive Legal Aid], BEIJING WANBAO [BEIJING EVENING POST], Jan. 12, 2004, *available at* http://news.xinhuanet.com/legal/2004-01/12/content_1271931.htm.

100 *See China Simplifies Legal Aid for Migrant Workers*, PEOPLE'S DAILY ONLINE, July 27, 2006, http://english.people.com.cn/200607/27/eng20060727_287033.html ("[Government-sponsored] le-gal aid departments no longer examine the migrant worker's financial status before giving aid").

101 Though the office's director stated that all "relevant personnel" had legal training from reputable undergraduate law programs, it is unclear whether these graduates include the caseworkers who initially screen migrant complaints.

legal aid's dual goals of servicing more cases and encouraging attorneys to comply with their pro bono requirements.

In order to make the best use of limited funding, the district legal aid center divides migrant complaints into three categories. From most to fewest, these cases include: 1) laborers who are generally unskilled and often work within their *tongbao*,[102] generally on construction jobs; 2) service workers of various skill levels, ranging from cleaning ladies to round-the-clock nurses; and 3) self-employed migrants, who earn a living buying, growing, or making inexpensive items for sale on city streets.

Resources are allocated in a manner that allows caseworkers to maximize the number of migrants helped. Since it is common practice for construction developers—often with the help of several layers of middle men[103]—to hire dozens, or even hundreds of individual workers from a single village or area at a time, a single settled case in the construction area could provide remedy for many migrants at one time.[104] This is also true in actions involving migrants working in the service industry, such as female hotel workers, which could allow the provider to service a dozen or more migrants at a time. In comparison, addressing complaints about smaller employers is likely to only service the needs of an individual or a family of migrants.

Focusing on civil actions from clients within these categories (with an emphasis on the first two) allows legal aid to focus on cases with straightforward and non-controversial legal elements such as worker's compensation or breach of contract and maximizes the number of migrants helped. The first two categories of cases also provide some semblance of a formal employer-employee contract, even though producing documentation is a recurring challenge for the legal aid offices. Few criminal cases are accepted because there is a lack of qualified attorneys to represent criminal clients. Additionally, though our interview subjects did not explicitly allude to such challenges, bringing criminal actions against employers could place the government-sponsored legal aid offices in direct opposition to government-sponsored employers investing in local and national development—a showdown the legal aid offices are determined to avoid.

Government legal aid offices, such as the one we interviewed, largely handle cases that are non-controversial in terms of upsetting established legal and social norms. Although large numbers of complaints are funneled through their intake system, these cases are not designed to be "impact" cases that lead to a change in

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[102] *Tongbao* is a phrase roughly translated to "fellow countryman." Migrants and legal aid workers, however, often use this phrase to describe the groups of migrants from the same rural area who enter the city together and are hired as a group.

[103] Migrant workers often refer to these middle-men as *xiao laoban*, or "minor employers." It was understood that each level of "employers" took a cut of the fees paid from the original developer. In some extreme cases, like the case study outlined in Part V, "employers" midway through the chain have taken the entirety of the moneys paid them and simply disappeared, leaving an ostensible employer with hundreds of unpaid workers he has never met on an individual basis. *See infra* Part V.

[104] This is possible because of the Chinese rules on class action. *See* Benjamin L. Liebman, *Class Action Litigation in China*, 111 HARV. L. REV. 1523 (1998). However, China is increasingly discouraging class actions for fear of the class action's potential to organize dissatisfied citizens and create social unrest.

the laws. Rather, the office will take on those cases that will most expeditiously appease the greatest number of migrants. Its purpose is to calm social dissatisfaction rather than address the root causes of such dissatisfaction.

2. *Individual Attorneys*[105]

Private, registered attorneys in Beijing have traditionally not been receptive to representing migrant clients.[106] The private lawyers who do assist migrants usually do so to satisfy pro bono services or, in the rare case, through contingency-fee type arrangements. Beginning in 1993, Beijing was the first city to require lawyers to provide legal aid through city-sponsored legal aid offices.[107] To satisfy these requirements, some lawyers represent migrants assigned to them by local city legal aid offices.[108] While city-sponsored legal aid officials have tried to identify attorneys skilled at working migrant cases, pro bono attorneys are often unfamiliar with legal matters pertinent to migrants.[109]

At present, there is no systematic training of lawyers for migrant-related problems. National and local labor and migrant laws are convoluted and often inconsistent. Pro bono attorneys are often unable to provide complete or even competent advice to migrant clients, limiting the impact of most pro bono attorneys. For these reasons, in addition to the lack of income for migrant representation, attorneys often dislike working on pro bono cases and represent such clients with mixed results.[110] However, assigning attorneys otherwise uninvolved with migrants to represent migrant-related cases does raise the legal community's overall awareness of migrant issues.

There are attorneys who reach out to the migrant communities themselves by establishing relationships with migrant-sponsored initiatives.[111] An emerging

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[105] Interview with private migrant attorney, in Beijing (Aug. 9, 2005) [hereinafter Private Attorney]. Unless otherwise noted, all information in this Part IV.B.2 derives from this interview.

[106] *See* Michelson, *supra* note 19, at 15, 21 (noting that Beijing lawyers are unlikely to take on migrant labor cases because of the low fee potential and the lawyers' cultural stereotypes against poor migrants); *see also* Michelson, *supra* note 25, at 210–12 (stating that most Beijing law firms dislike providing pro bono representation because it reduces their paycheck and the firms therefore tend to shunt the cases to the most junior lawyers). In recognition of lawyers' entrenched reluctance to assist migrants, in November 2004, the Ministry of Justice promulgated a directive calling on lawyers to accept more cases from migrant workers trying to collect back wages and to reduce or waive migrants' legal fees in doing so. Ministry of Justice, Construction Division, Guanyu wei jiejin jianshe tuoci gongcheng he yimingong gongzi wenti tigong falü fuwu he falü yuanzhu de tongzhi [Circular on the Provision of Legal Services and Legal Aid to Resolve the Problem of Construction Fee Arrears in the Construction Industry and the Problem of Back Wages Owed to Migrant Workers] (Ministry of Justice Document No. 159), (promulgated Nov. 6, 2004), *available at* http://www.cin.gov.cn/indus/file/2004120901.htm.

[107] *See* Liebman, *supra* note 8, at 229.

[108] *See* Director Interview, *supra* note 89.

[109] *See id.*

[110] *See generally* Michelson, *supra* note 25.

[111] The attorney we interviewed worked in a mergers and acquisition firm and has established a working relationship with such community-based organizations. In this capacity, the attorney has represented at least three migrant clients brought to his attention by the organization on issues such as workplace injury and accident liability. Echoing challenges observed by other aid providers, these lawyers found that representing migrant plaintiffs required large amounts of time to gather evidence often for unsuccessful claims. Given the time demands, lawyers willing to work with migrants must be financially

handful of registered lawyers have specialized in migrant representation as the mainstay of their client base. Capitalizing on occasionally generous damage awards for workplace accidents, these lawyers provide legal services to migrants on a fee basis. The best known example of such a lawyer is Zhou Litai, who operates out of Shenzhen and Wuhan.[112] Zhou has earned national and international renown for his work in 1998 where he won a record amount for a workplace injury. All of the providers we spoke to were aware of Zhou's practice and expressed surprise that he had created a profitable practice from a migrant client base. While the impact of his work is difficult to determine, some attorneys have noted that Zhou's profitable work may encourage more attorneys to represent migrants in court, or at least demonstrate to employers that courts are willing to enforce migrant rights and encourage employers to follow labor and migrant regulations.[113]

The motivations for private lawyers working on migrant cases are varied. When our interview subject was asked why he chose to take migrant cases, he refused to offer a more specific explanation beyond the fact that he is "interested" in migrant cases and that he "had extra time." When probed further as to what interested him about migrant work, the attorney noted that his time at his firm served as a means of making a living and that working with migrants in his own time is more engaging. This lawyer acknowledged the need of migrants for more legal representation since city-sponsored legal aid offices, which are funded by district budgets, often acquiesced to pressure from "local indigents" and focused city-sponsored funds on these populations rather than migrants.

Through his collaboration with the migrant initiative, this attorney has met five or six other individual attorneys who also represent migrant cases pro bono. While differing in professional backgrounds and ages, these attorneys all demonstrate extensive interest in migrant issues and recognize the need in working with migrants. These pro bono lawyers handle few cases, but generally provide some resolution to disputes. Relationships between these lawyers extend beyond a shared interest for profitability to a broader concern about social justice.

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secure with some flexibility in their schedules. Many pro bono lawyers prefer working with migrant-run organizations so that the organizations can pre-screen cases and perform many of the more menial and time-consuming tasks involved. The above sentiments suggest that even attorneys working on straightforward migrant cases require a significant amount of sacrifice and commitment.

[112] Mr. Zhou's representation on behalf of migrant workers has been profiled often both within and beyond China. *See, e.g.*, Shai Oster, *Chinese Lawyer Raises Legal Bar*, CHRISTIAN SCI. MONITOR, Aug. 7, 2001, at 6.

[113] However, Zhou's much-publicized and successful career success may ironically have at least a minor adverse impact on practitioners willing to work with migrants. According to Zhou, several migrants have balked on paying his fees after the collection of damages. In 2004, Zhou claimed that 161 former migrant clients had refused to pay his fees, resulting in a loss of five million RMB. Zhou has gone so far as to bring suits against some of his former clients for nonpayment and defamation, demonizing him to migrants and the popular press alike. The client who received the 1998 settlement has gone on record to describe Zhou as "a money-hungry ambulance chaser (who) overcharges his clients." This backlash against Zhou may give many attorneys pause before taking on labor cases involving migrants. Indeed, none of the providers we interviewed knew of any Beijing-based migrant attorneys with such fee arrangements. *See* Yao Ying, *Legal 'Savior' fighting for His Fees*, CHINA DAILY, July 5, 2004, *available at* http://www.chinadaily.com.cn/english/doc/2004-07/05/content_345478.htm.

Indeed, although a few private lawyers have established profitable practices by bringing migrant suits, far more represent migrants out of a sense of justice or to fulfill Beijing's pro bono requirements. Resolving individual migrant cases is a time-consuming process, exacerbated by migrants' unfamiliarity with Beijing and legal culture. Providers working toward settlement must be both willing and able to spend large amounts of time or resources for their migrant clients. Whether pro bono or for profit, these lawyers offer assistance with the deceptively simple intention of settling an individual client's dispute, but ultimately may reflect a growing sense of public-mindedness among the legal profession.

3. *Advocacy Law Firms*[114]

In the last few years, several Chinese "advocacy law firms" have cropped up to address the growing needs of China's underserved populations.[115] We interviewed one Beijing law firm that supplements its representation of migrant clients with scholarship and grassroots legal education for migrants as a form of advocating for legal change. Established in late 2003 as an offshoot of a firm representing children, the five-attorney firm provides pro bono consultation and representation for migrants. Though all of the attorneys graduated from esteemed law schools and passed the bar, they earn a fraction of most private lawyers' income.[116] The firm differentiates its staff from city-sponsored legal aid providers, which rely largely on individual and often uninterested lawyers fulfilling pro bono obligations. By contrast, these firm lawyers represent a fiercely committed and idealistic workforce. At the time of the interview, the firm had hired a new licensed associated who had graduated from one of China's top law schools and intended to hire five more lawyers within the year.

With a combination of funding from foreign NGOs and Chinese government grants, the advocacy law firm provides three forms of direct legal services to migrants at no cost to their clients. They provide outreach legal training sessions, a nationwide migrant telephone hotline, and formal representation for migrants in legal proceedings. These lawyers travel to migrant populations to present training sessions or "teaching classes" about basic migrant rights. At the time of the interview, the firm conducted two migrant classes per month.

None of the lawyers are Beijing natives, a fact that "helped them relate better to the migrants." The firm fosters relationships with local migrant community leaders to increase their knowledge of migrants' needs and challenges. The firm found migrant camps by contacting local government officials. Their reasons for using government connections are twofold. First, government connections made finding and organizing migrants more convenient for the lawyers from the firm.

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[114] Unless otherwise noted, all information in Part IV.B.3 is derived from Advocacy Attorneys, *supra* note 1.

[115] *See* Liebman, *supra* note 8, at 277–78 (noting the growing role of lawyers as activists and advocates for legal change in China).

[116] One of the lawyers noted with some bitterness that she earned between two and three thousand yuan—less than some of her more enterprising migrant clients.

Secondly, the firm believed that if local officials organized the training sessions, other governmental bureaus would be less likely to oppose the training sessions.

Adopting strategies used by both city-sponsored legal aid and migrant initiatives, the firm has also established a national telephone hotline, which it uses to advise migrants facing legal complications. Using the hotline, the firm vastly increases the number of migrants it can assist, since these calls often last between three and five minutes. Allied with like-minded legal providers across the country, the firm often refers callers to local providers willing to work with migrants.

Finally, the firm represents migrants from the Beijing area in court for cases requiring more assistance than could be provided via a telephone consultation. At the time of the interview, each of the four lawyers was working on an average of five to ten court cases per month. Half of these cases were for non-payment of employment and the other half were worker injury cases. Migrant representation includes courtroom visits, but unlike school- or community-based providers, lawyers from this firm were often able to negotiate and reach settlements directly with employers. The firm provides all of their services free of charge, even covering their client's travel costs to and from the courts. In some instances, the expenses accrued by the firm in litigating these cases exceed the value of the collected damages.

These services, however, only represents a single facet of the firm's practice. The firm lawyers believe that migrants' main obstacle to receiving fair treatment under the law is lawmakers' fundamental misunderstanding about migrant populations and the challenges they face. As a result, the firm's primary function is to serve as an advocacy group, aimed at dispersing migrant-related information and advocacy to lawmakers. By contrast to government legal aid, perhaps, this law firm seeks to address the root cause of migrant problems by seeking to change the established legal norms.

Incorporating conversations with members of the migrant communities, notes from their hotline consultations, and discussions with migrants they personally represented, the firm produced periodic reports about migrant difficulties in and out of court. The reports, which include both original qualitative and quantitative data, underscore issues facing migrants and advocate for migrant legal reforms. Multiple reports are distributed to government offices that shape migrant policy. The firm is uncertain as to the impact of these reports, or if they are even being read by their intended audiences. To increase the chances that a government official will read their publications, the firm publishes its reports under its parent firm's name, which has a better-established reputation among the courts.

As one migrant client stated, the firm operates as more of a "public welfare policy firm/think tank" than a law firm. Although additional migrant-focused organizations have been established since 2003, this is the one of the few organization with full-time lawyers and a migrant-centric practice. Since all the lawyers in the firm have passed the bar, the firm feels that they command the respect

of judges and other practitioners when they work independently.[117] Consequently, the firm focuses its relationships with other organizations as a means of establishing contact with more migrants. The advocacy law firm thus largely services migrants through education and advocating for policy and legal changes. Having strong relationships with other organizations as well as the government assists this law firm in spreading its influence.

4. *University-Sponsored Clinics*[118]

Several universities have funded and run migrant-sponsored legal aid clinics out of their law departments.[119] Following the example of foreign university-sponsored clinics, particularly those based in the United States, these clinics are staffed by student attorneys working under the supervision of law professors.[120] Many were originally established with funding and support from foreign NGOs.[121] Besides direct financial support, NGOs also sponsor foreign legal professionals to work in clinics and establish exchange programs between Chinese and Western professors in an effort to develop clinical legal education in China. Several of these school-sponsored initiatives began working with migrants in 2003, after the central government increased its focus on migrant rights. This shift meant that school clinics, almost all of which are run from state-sponsored universities, could work with migrant workers without risk of exposing their sponsoring universities to politically-motivated sanctions.

We interviewed several students and directors at a legal aid clinic located on the campus of one of Beijing's premier universities. Although the clinic initially specialized in products liability claims, in 2003 it shifted its focus to labor disputes. The clinic is not exclusively focused on migrants, but its new emphasis on labor law, coupled with its income eligibility restrictions, has resulted in a majority of migrant clients. Like many of their Western counterparts, Chinese law schools traditionally do not emphasize lawyering skills, research, or collaboration, making the clinic a singular experience for many of the student volun-

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[117] *See* Chinese Law Professor, *supra* note 88 (stating that since judicial appointments have traditionally been considered administrative positions, many judges have not received a legal degree and may sometimes be unfamiliar with substantive areas of law).

[118] Interview with students and directors at a worker-focused, university-sponsored clinic, in Beijing (July 26, 2005, Aug. 20, 2005) [hereinafter University Clinic]. Unless otherwise noted, all information in Part IV.B.4 is derived from these interviews. We interviewed several students and directors, including the assistant director who helped establish the clinic's current incarnation.

[119] *See* Kara Abramson, *Paradigms in the Cultivation of China's Future Legal Elite: A Case Study of Legal Education in Western China*, 7 ASIAN-PAC. L. & POL'Y J. 302, 320 & n.58 (2006) (noting the recent history of university-run legal clinics). Though universities do offer graduate law degrees, Chinese legal degrees are usually undergraduate programs.

[120] This practice of looking to the West for its legal aid models has been criticized. *See* Michael William Dowdle, *Preserving Indigenous Paradigms in an Age of Globalization: Pragmatic Strategies for the Development of Clinical Legal Aid in China*, 24 FORDHAM INT'L L.J. S56, S57 (2000) (arguing that international development programs focused on China's clinical legal aid have inadvertently suppressed potentially more effective indigenous legal aid models).

[121] *See* June Shih, *From the Rule of Man to the Rule of Law*, Ford Foundation, Summer 2003, http://www.fordfound.org/publications/ff_report/view_ff_report_detail.cfm?report_index=431.

teers.[122] The students we interviewed felt that the clinic helped them develop their practical legal skills and heighten their sense of public-mindedness.

Students in the legal aid clinic undertake several activities under a professor's direction. Responsibilities include manning hotlines, securing the intake information of potential clients, accompanying clients to various bureaus, collecting evidence, and appearing before judges. Because of the university's reputation, the clinic is often able to convince defendant employers to settle their cases rather than face off against a well-respected and well-funded institution. Students use the same reputation to gather data and evidence from entities that may otherwise be unwilling to provide the information to migrants themselves.

At this university legal aid clinic, student volunteers are both undergraduate and graduate students. Generally, graduate students undertake the more complex cases and play greater roles in developing case strategies. Since migrant representation is, with rare exceptions, largely unprofitable, it is perhaps unsurprising that none of the students interviewed expressed interest in working in migrant-related field following graduation. Nevertheless, the students note that they are more aware of migrants' struggles and issues after participating in the clinic.[123]

To further serve the clinic's pedagogical aims, the clinic does not select cases based on the severity of an individual client's needs or the substantive area of law a case may address. Instead, cases may be selected to expose a student attorney to civil procedure, trial techniques, or courtrooms themselves. In some instances, the clinic will take cases with little chance of succeeding in court. While this provides migrants with last-ditch assistance in seeking legal redress, it may also provide them with false hope. The impact of such false hope may be emotionally draining and financially disastrous.[124]

Furthermore, court filing fees and travel costs to and from the clinics also contribute to the cost of litigation. Migrant workers can risk losing all of their limited savings to have a day in court. In other instances, the clinic may choose to represent clients with especially simple or straightforward cases for similar pedagogical purposes rather than focusing on migrants who may be particularly needy. The following narrative is illustrative.[125]

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[122] Compared to the Socratic method largely adopted by American Law Schools, Chinese law classes involve very limited student discussion or collaboration, relying mostly on large lecture-format classes with an emphasis on memorization and recitation. *See* Chinese Law Professor, *supra* note 88.

[123] One of the lawyers working at the advocacy firm profiled earlier in this section, however, worked in a different legal clinic at another top-ranked University before joining her current firm. *See supra*, Part IV.B.3.

[124] For a migrant who is often not working while litigating a case, living within the city is a significant expense. The cost of living in Beijing is exponentially higher than their rural hometowns. The workers profiled in Part V stated that the food fees their employers docked from their wages each day could feed their families for a week in their home province.

[125] We interviewed one nineteen-year old student who recounted such a case. The student represented a thirty-five-year-old migrant surnamed Yen, who served as the spokesperson for eighty-two other migrants from his home province. The student attorney stated that working on the case allowed her to gain in-court experience and gave her a better understanding of both the legal community and the community at large. She also credited the clinic with teaching her more compassion and self-reliance, time management skills, and broadening her point of view, traits that the clinic is uniquely positioned to groom within the law school.

After the conclusion of a year-long construction engagement, an employer who had hired Yen and his *tongbao* claimed that none of the contracts the migrants signed were binding and refused to pay any of the migrants. The migrants claimed they were owed over 70,000 RMB. As the group's representative, Yen spent considerable time and effort researching and preparing his case. Yen only contacted the university-sponsored legal aid clinic after several of his own in- and out-of-court attempts to recover the money failed.

Yen's case was much stronger than the vast majority of migrant cases. First, Yen was able to borrow money during the months he spent researching his case, collecting evidence, and filing claims. He amassed about 3,000 RMB of debt while pursuing his case. In addition to allowing him to pay for forms and complaint filing fees, these funds also freed him from several of the practical restraints migrant plaintiffs often face when litigating their cases, including being able to travel freely during business hours and openly pursuing the legal claims without concealing these actions from current employers. Additionally, Yen, who was literate and relatively educated, was also able to consult a relative who helped him understand the process of filing claims and the types of evidence needed to support his case. Most importantly, Yen was able to produce evidence that was highly probative of his relationship with the developer. He had the uncommon foresight to insist on written documentation proving his relationship with the developer and the developer was needy enough for immediate workers to provide it for him. When the validity of this evidence was called into question, Yen was able to collect additional evidence, going so far as to surreptitiously record conversations with the developer's employees to support his claims.

Due to its straightforward nature and the limited legwork required by the students, this case proved to be ideal for the Tsinghua clinic. Students were able to work on the legal aspects of the case while Yen conducted the more mundane aspects of the preparation such as finding and preparing documents or collecting necessary forms. Individual students were brought on to work with Yen during specific portions of the trial such as discovery, the trial, attempted collection of damages, and appeal.

5. *Migrant Community-Based Organizations*[126]

In recent years, community-based organizations have been established by migrant leaders and their local supporters, often with funding from foreign nonprofit organizations.[127] These organizations are created to serve specific segments of the migrant population such as school-aged immigrants, sex workers, or women. Often created to serve as a de facto resource and community center for migrant sub-groups, community-based organizations provide legal aid as an extension of their regular services.

[126] Interview with assistant director, migrant-run women's organization, in Beijing (Aug. 5, 7, 2005) [hereinafter Migrant Women's Organization]. Unless otherwise noted, all information in Part IV.B.5 is derived from these interviews.

[127] *See* Li, *supra* note 10, at 172–76 (describing several migrant-based legal organizations).

One of the oldest migrant-established community-based organizations in Beijing focuses on women. Founded in 1996 with financial support and training from several international non-profit organizations, this organization was one of the first to target migrant women in Beijing. Initially a project directed by the publishers of a nationwide advocacy periodical, the office has grown to foster its own community and identity. At the time of the interview, the organization provided multiple services from its center in addition to its legal work. These services included employment-skills development programs, publication of migrant-written advocacy papers, literacy programs, regular social events, and suicide counseling. In the time we spent with this organization, we encountered multiple foreign scholars working directly with migrants, including an American professor, a Taiwanese sociology PhD candidate, and a British theater professional. Despite the apparent invasion of foreign scholars, however, the organization remained migrant-run with the underlying goal of raising migrant women's status in the city and self-respect overall. The assistant director we spoke to was a female migrant worker, as were the majority of the organization's directors.

The assistant director felt that migrants' greatest difficulty in receiving aid stems from migrants' limited—if not nonexistent—understanding of their rights.[128] In providing legal aid, the organization's primary goal is to provide outreach programs and materials that educate migrants about their rights. Outreach initiatives include flyer and checklist distributions, magazine publications, and visits to migrant camps. In order to learn about legal rights, staff members invite individual attorneys to educate the organization's staff on issues such as evidence gathering, workplace rights, and forming valid contracts. When this material is in turn presented to invited migrant classes or local migrant communities, staff members, rather than attorneys, present the training and information sessions. Depending on the migrants' ages and sophistication, the organization has utilized multiple techniques to teach migrants about their rights. The British theater professional, for instance, was subsidized by foreign NGOs to use theater techniques such as role-play simulations and the performance of migrant-created plays to educate younger women about their rights against sexual harassment.

Pragmatically, the associate director feels that it is important for staff members, themselves migrants, to establish a strong rapport with migrants who are often reclusive and distrustful of outsiders. Additionally, staff members are well-positioned to introduce legal concepts and precautions in manners which migrants are more likely to understand. For the organization, however, it is equally important to empower the migrants they serve. Rather than leaving migrant fates within the control of agencies run by local professionals or government bodies, the organizations hope that empowering migrants with an understanding of basic legal rights will eventually result in a more self-sufficient population. Migrants who participate in the organizations' training programs are encouraged to share information they learn with other migrants they live or work with.

[128] One teenage migrant who attended the organization's training session stated that prior to attending the organization's workshops, she was unaware of the concept of sexual harassment.

In addition to their rights-education outreach efforts, the organization has also connected some of its members whose rights have been violated with legal practitioners willing to represent migrants in a personal capacity.[129] The organization matches volunteer lawyers with migrant clients. Many of these volunteer attorneys also have ongoing practices of their own, leaving the organization's staff to conduct the time-consuming tasks related to litigation such as evidence-collection and client interviews. Though these tasks are completed under the volunteer attorneys' supervision and direction, the assistant director noted that after collaborating with so many attorneys, several of the staff members had become familiar with basic legal principles and some particular substantive laws relevant to their members. Staff members have used these experiences to provide rudimentary legal suggestions to their members. At the time of our interview, the organization's volunteer attorneys had litigated forty cases on behalf of migrants.

6. *Individual Migrant-Sponsored Initiatives*[130]

At least one migrant has undertaken the daunting task of assisting fellow migrants without the direct support of other non-migrant domestic or foreign entities. A migrant farmer surnamed Chen, who tilled fields near Beijing University until the University displaced him to make way for faculty housing, has established a hotline for migrants to call to ask for general advice and air grievances. For migrants with legal issues, Chen serves as a conduit between migrants and legal advisors sympathetic to migrants. To Chen, however, this service is ancillary to his primary goal of establishing a communal spirit and sense of identity within the migrant communities across the country.

Chen is a thirty-something year old Hebei native, who migrated in search of work. He settled in a migrant camp in Beijing's Haidian district, in a one-room shack he shared with his mother and, later, his father.[131] The area was predominantly filled with migrants; Chen estimated that 4,000 individuals in the area were Beijing natives while 15,000 were migrants. While he worked and lived within this migrant village, Chen developed a reputation within his migrant village as a compassionate and mature listener for migrants seeking advice and opinions. Though Chen claimed that others spoke to him merely because he had been in Beijing longer than most, several migrants and legal aid providers working with Chen noted that he was a perceptive individual who was also a talented speaker, an admired trait in China.[132]

In January of 2003, Chen decided to nationalize his practice of speaking with migrants in need. Sponsored initially by the little excess income his parents gen-

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[129] This includes the attorney profiled in Part IV.B.3.

[130] Interview with Chen Jun, migrant activist, in Beijing (Aug. 21, 2005) [hereinafter Migrant Activist]. Unless otherwise noted, all information in Part IV.B.6 is derived from this interview.

[131] The shack, made of wooden planks and the original brick wall, was not meant to be a permanent structure. At the time of the interview, Chen Jun had been informed that the Beijing Government intended to take the land on which he cultivated vegetables and sell it to a local developer within a few weeks.

[132] Perhaps contributing to his reputation as a talented man of words, Chen is also a self-taught poet. When local media write articles about his hotline, they often include a sample of his original works.

erated from their small garden, Chen took out several advertisements in migrant-read newspapers and printed hundreds of flyers with his phone number. Referring to the migrants across China as his "friends," Chen invited migrants to contact him on his "hotline" to discuss issues they faced in their adopted cities. To his knowledge, his is the only migrant-run hotline for migrants in the country. Chen believes that this allows him to present more consistent points of view and explain issues in ways that migrants can better understand.

Initially, few people called, leaving Chen to spend numerous nonworking hours in his shack beside the telephone, reading bootlegged books about migrant issues, the Chinese legal system, and introduction to psychology. By 2004, however, word of Chen's hotline began to spread. Chen answered between 300–400 calls a month at all hours, leading to him eventually rent a small room with a cot. In the year-and-a-half since Chen established his hotline, he estimates that he has answered over 5,000 phone calls, most of them since the latter portions of 2004. Given its popularity, several local citizens, including several lawyers, began sponsoring part of Chen's costs.[133]

The popularity of his hotline generated media coverage across China, which in turn increased the number of received calls. With the expansion of his hotline, Chen also developed a small network of local organizations willing to help his callers. He attended grassroots community building seminars hosted by foreign NGOs and in time, formed a relationship with individual attorneys working at the advocacy law firm and other lawyers to provide free legal advice over the phone. He also established similar relationships with psychiatric experts who were willing to listen and counsel migrants over the phone. Faced with a caller who has issues beyond his knowledge or ability, Chen would pass the specialist's contact information to the caller.

However, Chen faced significant resistance in convincing callers to contact established specialists. In light of this observation, Chen has changed his methodology in answering calls. Rather than only directing his callers to established legal aid providers, Chen now provides rudimentary legal advice, which he has learned by consulting basic law books. Chen's advice often focuses on preventative measures. For example, even when callers contact him regarding unrelated issues, Chen reminds migrants to sign contracts with future employers.[134] He also teaches his callers to refer to migrant rights and legal aid providers in conversations with their employers to demonstrate that they have a basic awareness of their rights and possible avenues of relief. Chen considers his messages as encouragement for migrant self-improvement and characterizes his message as a step toward social equality for migrants. As a migrant himself, Chen feels that this is an important distinction; he promotes his hotline as means to foster an independent grassroots migrant community.

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[133] As a result of the sponsorship, Chen began to use a more organized approach to his venture and itemized his costs on a receipt which he distributed to his sponsors.

[134] Like more formally trained counterparts, Chen is aware of the inherit problem with insisting on contracts. Migrants insisting on contracts are less likely to find employment because there is an abundance of labor, and employers may see those migrants as potential troublemakers.

Chen does not believe that formal legal aid—even if it continues its rapid expansion—could provide significant assistance to addressing the issues of migrants.[135] Instead, Chen believes that only pro-active migrants can foster significant improvements to legal issues facing migrants. Chen feels that his migrant-sponsored hotline furthers his primary goal of educating and empowering the migrant population.

V. The Goals of and Relationships between Legal Aid Organizations

As can be seen above, legal aid for migrants in Beijing is provided through a variety of institutions running the full spectrum of government support and recognition.[136] As a result, these providers have developed different strategies in serving migrants, even as their resource limitations have required the interaction between them to increase.

A. Legal Aid's Goals in Addressing Migrant Disputes

The goals of Chinese legal aid services are multifaceted. Besides the overarching, shared goal of resolving individual disputes, these goals include exercising social control, increasing rights consciousness among migrants themselves, advocating for change in migrant legal and social protections, and even utilizing migrant cases to further legal pedagogy among new practitioners. Clearly, these goals are fluid and not mutually exclusive; individuals working within each provider's system may feel that he or she is providing aid for reasons completely different those of the provider itself. Nevertheless, whether by a providers' own choice, a sponsor's recommendation, or in reaction to the needs of their migrant clients, migrant legal aid providers largely focus on one or two of the four identified goals. Interestingly, the strategies adopted by each provider to assist migrants would vary depending on the dominance of particular goals.

1. Legal Aid for Migrants as a Means of Exercising Social Stability

Government legal aid also has the goal of settling social unrest, but processing cases as quickly as possible to minimize unrest may override the goal of actually resolving disputes. In Beijing, city-financed legal aid operates to both directly serve migrant clients and as a means of symbolizing the government's stance against the exploitation of migrant workers. City-financed legal aid thus strategically publicizes its migrant cases as a means of demonstrating that the government is following through with its promise to empower migrant workers and to

[135] Chen acknowledges that there have been some improvements in the migrants' status under the law since he moved to Beijing. He noted that the government had recently identified migrants as a protected class of people. The importance of such an action does not stem only from the protection itself, but given the significance Chinese society has traditionally given names, the mere naming of migrant workers as a class has elevated the standing of migrants within cities.

[136] *See supra* Part III; *see also* Liebman, *supra* note 8, at 224–37 (profiling five models of legal aid).

deter migrant exploitation.[137] While government-sponsored legal aid may be the only provider whose main goal appears to be maintaining social stability, it is also the most robust, well-known, and consulted provider.[138] To a large degree, this means that the *de facto* purpose of most legal aid efforts is directed towards maintaining social control.

When asked about their office's most significant effects on the migrant population, legal aid directors did not describe the services they provided or the individuals assisted, but instead referred to their office's encouragement of social stability and the potential impact on employers' treatment of migrants.[139] The term *fada*, which roughly translates as "develop prosperously," was used to describe both the developments in migrant legal aid and Beijing's growing economy and infrastructure.[140] Individual migrant cases that may not further these goals may be weeded out through the provider's extensive screening processes. This could be particularly problematic for migrant plaintiffs seeking to file politically sensitive suits.[141]

The city legal aid office's emphasis on its symbolic influence rather than actual services may also stem from more pragmatic reasons: Beijing's legal aid offices currently lack the resources necessary to serve the needs of the migrant population. According to the district director, 80% of her office's caseload since 2003 is migrant-related. The astronomical number of migrant workers also makes it imperative for the central government to control this population in order to maintain national stability. With three million migrants in Beijing, government-sponsored legal aid offices have recently begun to adopt strategies to try to lower the number of migrant clients they serve, even as they steer increasingly toward symbolic action.

Finally, the city legal aid office's emphasis on the symbolic—wherein the appearance of providing aid may be as important, if not more so, than the actual aid—also has a historical basis. Chinese law has traditionally been characterized and criticized as simply implementing government policies and maintaining social stability.[142] The *hukou* system[143] and sporadic law enforcement campaigns against migrant encampments[144] are earlier examples of the Beijing's largely unsuccessful attempts to use law to implement migrant policy and prevent social

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[137] *See, e.g.*, INFORMATION OFFICE OF THE STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA, China's Progress in Human Rights in 2004, http://news.xinhuanet.com/english/2005-04/13/content_2822511_7.htm (highlighting the improvements in the provision of legal aid to migrant workers).

[138] By way of comparison, there are 3,023 government-sponsored legal aid organizations, while only thirty universities have established legal aid clinics. *Id.*

[139] *See* Director Interview, *supra* note 89. More interestingly, this legal aid provider sees migrant legal aid as an extension of the nation's more general goals of economic and social expansion.

[140] *Id.*

[141] *See* Liebman, *supra* note 8, at 276; *see also* CECC 2006 ANNUAL REPORT, *supra* note 2, at 135–36 (2006) (reporting that the government has restricted representation for suits alleging government abuses).

[142] Support for such an ideological approach to law has a long history in China, including the closing moments of Zhang Yimou's 2002 film *Yingxiong* ("Hero").

[143] *See generally* SOLINGER, *supra* note 1; Mallee, *supra* note 2.

[144] *See generally, Regulating Rural-Urban Migrants*, *supra* note 4.

unrest. The shift in central government policy toward raising awareness of migrant issues and assisting the entire demographic is part and parcel of the latest government campaign to maintain social stability.

2. *Legal Aid as a Means of Migrant Empowerment*

Other non-governmental legal aid organizations also voiced quelling social unrest as a goal, but with a different emphasis and hence, a different strategy. Mirroring government legal aid, several community legal aid providers such as the advocacy firm and the migrant-led initiatives render services because they hope to empower migrants to express themselves in court and to raise migrants' consciousness of individual rights.[145] These providers hope that such empowerment will help migrants integrate within the Beijing community.[146] These providers advocate for migrants with the hope that advocacy will offer a means for migrants to become stakeholders in their adopted communities.

These providers argue that migrant laborers are often exploited in Beijing not because there are no laws defining migrants' rights, but simply because migrants are typically unaware of these rights. Providers note that migrants are often unable to speak out affirmatively to prevent abuse or to seek legal action when abuses do occur. When abuses do occur and migrants bring cases against employers, their legal actions are often stillborn, since migrants do not know to sign contracts or establish some other proof of employment before beginning work. Thus, migrant community-based providers direct their legal aid efforts largely toward outreach programs, describing basic personal, employment, and housing laws to migrants in the hopes of preventing abuse. Notably, however, this goal requires that legal institutions through which empowered migrants seek redress can adequately address migrant needs. In this sense, this goal illustrates legal aid's delicate balance between advocating for change and at the same time, relying on the Chinese legal system.[147]

3. *Legal Aid for Migrants as a Means of Advocating for Change in Migrant Legal Status*

A third goal among some migrant legal aid providers is advocacy for change in social and legal norms. Advocacy law firms tout this as their primary goal; their strategy is not to contact as many migrants as possible, but to gather data and formulate policy recommendations for submission to relevant authorities. Their reports outline migrants' roles in urban society or advocate for specific reforms to migrant-related statutes.[148] Some articles, often funded by govern-

[145] *See* Advocacy Attorneys, *supra* note 1; Migrant Women's Organization, *supra* note 126.

[146] *See* Advocacy Attorneys, *supra* note 1; Migrant Women's Organization, *supra* note 126.

[147] *See* Austin Sarat, *Access to Justice*, 94 HARV. L. REV. 1911, 1911 (1980–81) (book review) ("Access to justice is both evocative and double-edged: It argues for legal change, yet reaffirms faith in law and legal procedure and in the justice they provide").

[148] Examples of article titles from a May 2005 publication produced by the advocacy law firm interviewed for this paper included "Migrant's Economic Contributions," "Delay of Migrant Payment," "Reasons for Migrants' Current Status," and "Simplify the Labor Procedures." (On file with the authors).

ment bodies, highlight discrepancies between official statistics and their own calculations of migrant numbers and trends. Other articles attempt to describe migrant situations from migrant perspectives.[149] The advocacy law firm published detailed case studies of migrant cases they had successfully litigated, including detailed accounts of the facts of the case and procedural and substantive approaches they utilized, in the hope that they could serve as guidelines for future cases.[150] The advocacy law firm must establish relationships with all sectors (other legal aid, government, migrants) to ensure that their recommendations are well received.

Legal aid organizations representing migrants with the intent of encouraging migrant rights would sometimes use migrant cases litigated by other legal aid providers as research for advocacy-driven reports. While the impacts of these "joint advocacy" reports on governmental policy-makers are beyond the scope of this paper, these advocacy papers will be circulated within the migrant legal aid community. Notably, advocacy papers are rarely traded between two specific organizations, but they are often made possible when there is express or inadvertent cooperation between multiple providers.

4. Legal Aid for Migrants as a Pedagogical Tool

Finally, there is a pedagogical goal in migrant legal aid. Law school clinics are developed to train student lawyers, while pro bono lawyers may wish to hone their own skills. Migrants represent an ideal population for many students or attorneys to develop their litigation skills. Their cases often present clear-cut and egregious instances of injustice. There are many potential migrant cases available, many of which have similar general fact patterns, allowing more experienced practitioners to guide newer ones. Individual migrant cases often involve discreet substantive areas of law, allowing providers to become intimately familiar with a particular practice. As individual cases (collective cases are another matter), migrant cases are unlikely to disturb formal political interests because Beijing is making a conscious push to improve migrants' legal status. This allows legal aid providers to continue training future practitioners without fear of being shut down or having funding removed. Legal aid clinics tend to handle fewer cases, but give each case greater attention.

Additionally, providers familiar with specific legal issues may deliberately choose to provide formal or informal training to other legal aid providers. Training may be offered deliberately to encourage the spreading of migrant knowledge

[149] For example, in an article addressing the reasons for payment delays, migrants were directly surveyed and were quoted liberally throughout the essay. (On file with the authors).

[150] The firm described the case of a nineteen-year-old migrant graduate of a parochial school who was hired, under contract, to work as a secretary. After a month of work, the migrant was fired and did not receive any wages for hours worked or compensation for the sum she spent on transportation to and from the office. Upset, she contacted the firm through their hotline. The firm represented the migrant in negotiation and eventually secured 450 RMB, a fraction of the amount the girl was owed (580 RMB is the minimum monthly wage for legally-hired employees in Beijing). The "success" of this case would seem dubious to practitioners reading this case study, however, in addition to providing free legal services, the firm absorbed the costs of court filing fees and the client's travel expenses. These costs were far in excess of 580 RMB.

of legal rights. In other circumstances, less-formally trained legal aid providers acquire rudimentary legal knowledge merely by working with other providers. This training and exchange marks yet another form of interrelationship between legal aid organizations.

In sum, government legal aid, while representing a seismic shift in the way the government perceives and addresses migrants, maintains social stability as its goal. By contrast, migrant-sponsored legal initiatives arguably have more migrant-empowerment goals, and see utilization of courts as a means of advancing "rights-consciousness." School-sponsored migrant clinics, meanwhile, in receiving financial support from foreign NGOs and operating under the purview of the government, must simultaneously balance the needs and restrictions of working within an academic environment.

B. Cooperation and Limitations among Migrant Legal Aid Providers

Legal aid organizations increasingly do not work in isolation. Due to the need for additional resources, providers have, by choice or necessity, established formal and informal networks to service and reach the migrant population. Since individual legal aid providers have different, if not contrary, goals, each provider may be better suited for certain specific tasks. But several official and unofficial working relationships have emerged between the organizations. Out of necessity, these organizations are coordinating and interacting in a way that generates a legal culture that can be called "public-minded."

Not all of the migrant organizations are willing or capable of advising or representing every migrant who comes in the door. Those that do represent migrants often establish parameters about the clients they can represent and the scope of that representation. Legal aid organizations often recommend migrants they cannot personally assist to other organizations better suited to the migrants' needs. Individual migrant cases are passed off to other groups in hopes that another organization may be better equipped or more willing to address specific cases. Cooperation between organizations entails an exchange in expertise.

When individual cases are referred to different legal aid providers, migrants are ideally directed toward providers whose goals are more closely tailored to the client's needs. In some circumstances, such as when government-sponsored legal aid directs migrants toward pro bono attorneys uninterested in migrant issues, this aim may not be exactly realized.[151] In other cases, such as when migrant-run community based organizations direct individual migrants to the advocacy firm, the former is generally very clear about the latter's goals and the types of cases it typically takes.[152] In these circumstances, both organizations work toward providing migrants with the most appropriate aid possible. However, whether an individual client receives appropriate aid in these circumstances is then dictated

[151] *See* Michelson, *supra* note 25, at 210–11 (reporting that Beijing's private attorneys typically dislike performing legal aid work assigned to them and try to shunt such cases to lower-level associates, which is possible because the cases are assigned to the firm rather than the individual attorney).

[152] *See* Migrant Women's Organization, *supra* note 126.

by an element of chance—whether the first provider they contact can redirect them successfully.[153]

Legal aid organizations also benefit more directly from cooperation. Legal aid providers with less experience gain greater knowlege by working with more experienced providers. On the other hand, less-experienced providers, such as the migrant advocate Mr. Chen, sometimes have closer relationships with the migrant community than their better-trained counterparts, such as the advocacy firm.[154] Organizations are able to educate each other as well as able to pass on such legal knowledge to migrants directly.

The relationship between the city-sponsored legal aid provider and the advocacy firm further demonstrates the impact of expertise exchanges. The advocacy firm readily accepts cases from the city-sponsored legal aid clinic—a welcome relief for the overworked government-sponsored provider.[155] In taking on these cases, the advocacy firm broadened its capacity to locate cases to further its research and maximized the resources it has dedicated to finding appropriate cases themselves. The advocacy firm also uses this relationship with government-sponsored entities to serve as a conduit for two-way communication and influence the migrant policies established by the central government.[156]

C. The Effect of Legal Aid's Differing Goals and Interaction on Migrants

Despite their differing goals, the relationships between these organizations ultimately have increased migrant access to courts.[157] Given the limited success migrants have traditionally had in the legal system, it is perhaps unsurprising that many of them have become disenchanted with the system as a whole and with the individual providers established to assist them.[158] Migrants are not docile players in this relationship. They are increasingly savvy in utilizing both the recent media attention focused on them and the resources of multiple providers in their attempt to access justice.[159] As we noted earlier, some migrants themselves have established their own forms of legal aid specifically to increase the migrant population's usage of other providers' resources.[160]

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153 *See infra* Part V.C. (illustrating the difficulty migrants faced in receiving aid after being rebuffed by private attorneys and government legal aid).

154 *See* Migrant Activist, *supra* note 130 (explaining that the activist regularly directs cases towards the advocacy firm and learns basic legal principles, such as the importance of written contracts, through this relationship).

155 *See* Advocacy Attorneys, *supra* note 1.

156 *Id.* (stating that their firm often uses its relationship with government-sponsored legal aid and government officials to further the impact of their publications on the plight of migrants).

157 *See supra* notes 70–77 (explaining the recent extension of legal aid to migrants).

158 *See generally* Gallagher, *supra* note 12 (contending that legal aid plaintiffs' experience with the legal system leads to disenchantment, but also to better informed action).

159 *See supra* Part IV.B.4 (describing a case study wherein a migrant client used a university-sponsored legal aid clinic to further his specific goal of having a trained student attorney present his own research and preparation in a courtroom).

160 *See supra* Parts IV.B.5 and 6.

Migrants understand that providers have different goals and some have learned to treat legal aid more as a buffet than as a single entrée. They consult several parallel organizations at once in hopes of being directed to an organization that may ultimately assist them.[161] Legal aid providers are beginning to understand how migrants seek legal aid, and adapt their procedures to accommodate this buffet-style approach in seeking access to courts.[162]

Although migrants are increasingly savvy in seeking legal assistance, the different policies and goals of legal aid offices have had a disparate impact on migrants. For migrants, this system can be overwhelming. When they are directed from one provider to another, some cannot continue to earn wages since seeking assistance can be a time-consuming endeavor. Furthermore, new-found employment can invalidate eligibility to receive legal aid. Mundane tasks such as traveling across the city to meet with providers, leasing a cell phone to communicate for meetings, renting a place to live, or purchasing food in the expensive city can prove prohibitively expensive for migrants attempting to bring legal action. Where in some extreme cases, providing aid to migrants is only tangentially related to a provider's actual goals, the nature and quality of service received by an individual client is often mixed.

While the increased interaction between legal aid providers is encouraging in some respects, it can also be problematic. The more aid providers pass off migrants to other providers, the more the migrants' lack of income and continued expenditures cumulate. This leaves migrants to reconsider whether pursuing legal action is worth the continued financial, emotional, or even physical costs. Migrant cases that are eventually litigated, therefore, are the exceptional ones, representing a combination of determined migrant litigants and a timely cooperation by a relevant legal aid provider or a group of providers working efficiently together.

VI. Case Study in Migrant Access to the Courts

The following case study illustrates the tortuous course of migrant laborers seeking legal assistance but also how they affirmatively advocated their case. The case involved two migrants seeking to recover back wages from a Beijing-based employer. As the migrants were directed to different providers, they quickly compiled a surprisingly in-depth understanding of how each provider could or could not assist them and the limitations of the legal system itself.

In March 2004, about two dozen men from Guanyuan Guangyuan city in Sichuan province, ranging in age from twenty to fifty-eight, arrived in Beijing seeking work as unskilled construction workers. Most were distantly related to each other; all of them were connected by their common dialect, shared background, and outsider status in the city. Only four or five of them had previously

[161] *See* Interview with migrant plaintiffs, in Beijing (July 27, 2005) [hereinafter Migrant Plaintiffs]. Unless otherwise noted, all information in Part V.C is derived from this interview. It was conducted with the assistance of the student attorney representing the migrant plaintiffs. At the migrants' request, this interview was not recorded.

[162] *See* University Clinic, *supra* note 118.

worked in Beijing in construction, but none expected or wanted to stay in Beijing. Largely uneducated, they elected one of their more savvy members—a thirty-two year-old surnamed Chen—to serve as their spokesman in finding work. Chen left behind his wife and seven-year-old son and sporadic work as an electrician to seek work in Beijing. Chen planned to use money he saved from construction to allow his son to continue his education beyond elementary school.

Upon arriving in Beijing, Chen and his *tongbao* met a *Sichuan* province migrant, surnamed Liao, who had worked in Beijing for a number of years. For a portion of their expected wages, Liao promised to contact a local manager who needed migrants to create the mortar for a building contract.[163] Liao asked for one-half of an RMB for each eleven RMB the *tongbao* earned.[164] The rate was agreed to orally, with no representatives for the developer present. This rate made Chen suspicious, since *xiao laoban*—the lower level bosses—often take a portion of one-and-a-half RMB per eleven RMB earned. While discussing the situation with two other migrant representatives who were offered the same deal—Pang, an older man representing four migrants and Wang, a thirty-four year-old former farmer representing twenty migrants—they told Chen to inform them when Liao was given wages for distribution.[165]

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[163] Chen referred to Liao as a *xiao laoban*—a "small employer"—meaning that Liao was a migrant entrepreneur one step closer to the source of payment. The man who had hired Liao to find laborers, in turn, was probably another *xiao laoban* who also kept a portion of the payment handed down. Chen did not know of any individuals closer to the developer than Liao's "superior." Chen suspected that there were probably six or seven layers of *xiao laoban* between the migrants and the developers. Though Beijing illegalized the labor practice in recent reforms, this feudal hierarchy remains common and allows developers to unofficially create a business structure without establishing direct contact or relationships with the almost any of the migrant laborers working on a building project. *See also* Yuan & Wong, *supra* note 50, at 103, 106 (describing the hierarchy of relationships between migrants and bosses on a typical construction site in Beijing). According to Chen, migrant workers often do not even know who is funding the projects they are building. With so many layers of middle-men involved in hiring migrant labor, Chen estimated that only fifty to sixty percent of the money paid by developers eventually reaches the migrant workers.

[164] For each square meter of mortar a team of migrants lays out, the team was promised eleven RMB. According to Chen, a team of six migrants working ten or more hours a day can lay out 4,000 square meters over a six-month period if they work everyday. Teams are paid upon the completion of the construction site in order to ensure that migrants do not leave the site midway through the job and facilitate the calculation of the amount of work completed. In theory, migrants could each earn over 1,200 RMB for each month's work, a staggering improvement over the 400 or 500 RMB households earn each month in the village when there is work available. However, in addition to the percentage that *xiao laoban* take, migrants have additional costs to work at a construction site. Though they are provided free housing—un-heated and un-cooled rooms filled with over a dozen men and women per room—and a bathroom to share with up to 100 other migrants, workers are docked eight RMB every day to pay for the three meals provided by the developers. These meals usually consist of boiled rice and a few vegetables, fare that would cost less than a fraction of an RMB in a local market. Since they lack access to cash, migrants can only buy marked-up food or cigarettes—a nearly ubiquitous habit—by purchasing supplies from developer-run stands. Some migrants borrow cash from local foreman on credit to buy rice or other foodstuffs beyond the workplace. A 2003 amendment to the statutes governing migrant worker rights has made the payment of migrants upon completion of a job or the garnishing of wages for food unlawful. Violations of these amendments remain rampant, however, as there have been almost no legal actions brought against violators.

[165] Chen knew from experience that migrants were sometimes cheated out of their full wages. By his estimation, migrants lost a modest amount of the wages—110 to 200 RMB—once or twice for every ten

Chen, Pang, Wang, and their respective *tongbao* worked on the construction site for six months. Upon completion of the project around September 27, 2004, the three migrant representatives learned that Liao had stolen their wages several days earlier, in violation of a 2003 statute requiring migrants to be paid directly. When they discovered that Liao had absconded with their wages, they contacted Liao's "superior" in the wage-distribution hierarchy, who in turn claimed that his hands were tied. The superior and Liao both hailed from the same county, leading Chen and Wang to suspect that they had conspired to steal the wages. The migrant representatives then attempted to contact the developer. The developer disclaimed responsibility to the individual migrants, stating that he had already distributed the full amount to Liao, and recommended that they find Liao themselves. Both Chen and Wang agreed that given the size of Beijing and their meager resources, locating Liao was nearly impossible. According to the migrants, they were denied ninety thousand RMB of wages.

The three migrant representatives eventually decided to approach the legal aid office in Beijing's Haidian district, their local government-sponsored bureau. The migrants were slow to arrive at this decision—traveling to the legal aid office was difficult given the size of Beijing. Finding safety in numbers, the migrants were also generally hesitant to travel alone. If all of the migrants left at the same time, however, the developers could refuse to allow reentry or deny knowing them. If a substantial fraction of the migrant workers left the worksite with the representatives, the developers could grow suspicious and forcibly remove the migrants staying at the site. As it were, several of the migrants decided to cut their losses and leave the camp either to return home or to find new work elsewhere. The remainder initially stayed on the worksite, paying rent but not working, preventing the developer from bringing in new workers. A few migrants from both Chen and Wang's *tongbao* accepted small cash payments of 1,000 RMB and 3,600 RMB from the employer—a fraction of what they were owed—and agreed to leave the worksite.[166] Seeing their leverage and perceived safety in numbers dwindle, the three groups of remaining migrants decided to pool their numbers together to facilitate efforts to seek help from legal aid offices.

When the migrants arrived at the Haidian district legal aid, caseworkers told the migrants that the district office could not—or at least would not—address the migrants' problems and directed them to the Beijing legal aid office, which had more case-workers. The migrants went to the Beijing office, a much farther and more challenging trip, but the Beijing office claimed that they lacked jurisdiction and referred the case back to the Haidian office. Upon revisiting the Haidian office, the Haidian caseworker again claimed that he lacked authority to address the migrants' cases. Beyond a cursory understanding of their situation, neither of the legal aid centers looked into the legal merits of the case.

jobs undertaken. Though the amount is significant to the migrants, they considered the burden of disputing this amount as too troublesome to pursue.

[166] The payments were handed to the migrants by safety inspectors who were not directly employed by the developer, allowing the developer to maintain that it had no official working relationship with the migrants.

The migrants opted not to continue seeking aid from the government legal aid bureau. Instead, they sought assistance from an administrative office addressing labor issues (*siji qing laodong ke*). With the threat of the bureau investigating and reporting corporate construction violations, the developer cooperated. The developer did not dispute the migrants' statements, but refused to pay the entirety of the ninety thousand RMB. Because it was the Chinese New Year, a holiday where work is set aside and family is emphasized, the bureau relied on the "holiday spirit" to ask the developer for at least partial reparations to allow the migrants to return home. The developer agreed to pay for a portion of the back wages for this purpose. On December 26, a team of five of Chen's *tongbao* received ten thousand RMB while eleven members of Wang's *tongbao* received thirty thousand for their work.[167] Referring to the payment as "going home money," the developer hoped that these payments would end the dispute. Several of the migrants accepted this offer and left Beijing nearly a year later, bringing home a fraction of the wages they were owed.

The remainder of the migrants, however, remained in Beijing, seeking to collect the outstanding fifty thousand RMB they felt they were still owed. Initially believing that a lawyer would not accept their case, these migrants next approached the local workers' bureau office (*laodong ju*) for assistance. The caseworker at the workers' bureau who heard their case sympathized with the situation but could not guarantee any action on the migrants' behalf. For three months, the migrants visited the office several times each week to plead their case, to little avail. During these three months, the migrants did not take on any new jobs.[168] The bureau did help them procure temporary housing at a construction site dormitory, where their rent was deferred. The administrative bureau also sent a representative on-site to investigate the migrants' case. Eventually, the worker's bureau fined the employer for the amount it would cost to send the migrants back home to their home province. After the migrants learned that the bureau had collected the payment from the developer, the migrants visited the bureau three times in as many weeks before receiving payment. Disheartened, most of the migrants accepted this partial payment and returned home. Of the sixteen who went to their home province, five returned to attempt to collect their wages.[169] Others, who had returned in earlier months, returned to Beijing to support Chen and Wang's attempt to recover their losses.

While the migrants were confined to their shelter for three months, they began to learn more about their rights, from other migrants and by reading newspapers.

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[167] The bureau required a receipt for this transaction, which contained signatures from all of the migrant representatives. No representative from the developer signed this receipt. This document would turn out to be the only record indicating that the migrants had worked for the developer.

[168] In part, this was because during the Chinese New Year, construction jobs were scarce. Since canvassing for the few available jobs would require the migrants to travel away from their construction site, the migrants opted to stay closer to their former employer to ensure that they could collect their damages.

[169] Chen and Wang stayed in the city during the holiday period to ensure that the developer would not disappear. At one point when he was in the city himself, Chen received a telephone call in the middle of the night. One of the developer's overseers offered to provide Chen with some money if he were to meet the overseer immediately. Fearing for his safety, Chen refused to meet the caller.

These migrants tried to contact the few private lawyers with migrant-focused practices, but soon found that either the lawyer's fees were far too high for them to afford even a consultation or the lawyers were not interested because the case lacked documentation or evidence. Through a newspaper advertisement, the migrant workers eventually contacted the Tsinghua University's student-run legal aid program. After their case was presented to a student intake-worker, the faculty advisor agreed to take the case. On March 22, 2005, three students were assigned to work on the migrants' case.

Under guidance from their director, the students managed to bring the case before a preliminary hearing with seventeen plaintiffs. The judge ruled that these issues should be brought up as seventeen separate cases rather than as a collective case, and indicated that there was little to no evidence to support their claims. Sensing that they had a weak case because of the court's relative disinterest and the dearth of evidence concerning the relationship between the migrants and the developers, the clinic representatives eventually recommended that the migrants withdraw their case before being required to pay unrecoverable court fees. Unable to risk more money and time away from work, the migrants accepted the clinic's recommendation. More than a year after their *xiao laoban* absconded with their money, the migrants withdrew their case without ever presenting it in court. The Tsinghua legal aid clinic has not heard from this group of migrants since. It is not clear at the time of this writing if the migrants have pursued other legal means to recover their wages.

VII. Conclusion

Migrant access to courts in Beijing is no longer an oxymoron. Despite significant obstacles, migrants have increasingly turned to the courts to redress their grievances. This is the result of the state's desire to ensure stability by channeling its disgruntled citizens through a court system, the public's enhanced awareness of a legal means of redress, and the increasing availability of legal aid services. Legal aid for migrants is also the result of the efforts of a variety of actors: the Chinese government, semi-public institutions such as universities, nongovernmental organizations, lawyers, and migrants themselves.

Although both governmental and public awareness of migrant issues has increased, migrants in Beijing remain a particularly vulnerable population. They are outsiders in their own country's capital, set apart by a web of official and unofficial discrimination, not to mention cultural and linguistic differences. Their communities are perceived by officials and fellow citizens as a potential threat to social stability, and they face the possibility of displacement and abuse.

In the last few years, legal aid providers in Beijing have attempted to provide migrants with a forum to address some of these wrongs. These providers serve not only as migrants' gatekeepers to the court system, but as transmitters of legal norms. In many cases, legal aid providers are not simply advocates, but counselors and instructors who teach migrants about the existence of their rights.

Yet the variety of legal aid providers and the differing goals they serve can be daunting to migrants. These goals range from enforcing social control to em-

powering the migrant population to promoting social change. Legal aid providers are hampered, to differing degrees, by resource limitation, legal training, and recognition by state agencies. Out of necessity, however, they have begun to form cooperative relationships with each other. Since migrant-provider relationships are established as often through convenience and serendipity as they are through similarities between client needs and provider methods, the actual services provided vary widely. In some cases, such as in school-sponsored legal aid clinics, the pedagogical value of migrant cases for law students may overshadow the goal of providing successful legal aid to individual migrants. In sum, the increased variety of legal aid services may result paradoxically in migrants having more difficulty finding services appropriate for their needs.

Furthermore, it is important to keep in mind that legal aid will not unilaterally change the plight of migrants within the city without additional reforms. At its worst, legal aid for migrants may only offer migrants false hope and inform would-be oppressors which individual migrants are troublemakers. From the migrant's perspective, even a victorious case may not necessarily be helpful. In the absence of real social change in other areas of their life, a migrant's ability to file lawsuits is unlikely to change their social situation significantly. Chen Jun, the migrant hotline operator introduced above, provides a sadly ironic example of this: even as he reaches out to migrant callers seeking deliverance from their grievances, Beijing University housing is dispossessing him of his land.[170]

Despite these lingering questions, though, the mere fact that migrant legal aid is available is an encouraging sign. Although legal aid's approach to problems facing China's migrant population could be cynically described as a band-aid on a wound, the Chinese government's tacit support of the various legal aid agencies suggests that Beijing's migrant population may serve as an incubator for ideas and best practices for rights advocacy in China as a whole.

Tensions within China's legal aid and its migrant population provide insight into how China's legal system may develop. Legal aid providers focus a significant portion of their efforts towards raising migrants' rights consciousness. Given migrants' propensity to operate as their own underground society and the ever-increasing formal and informal lines of communication among migrant groups, it seems reasonable to presume that rights-consciousness among migrants will continue to grow. As a result, the vulnerable—and previously invisible—urban population of migrants will quickly become knowledgeable about the concept of their rights as individuals.

Similarly, the scale of potential migrant cases may force the Chinese legal system to develop quickly. Legal aid must not only continue to service more migrants, but must also begin to more consistently provide victorious outcomes. Already, the government's adjustment of its legal aid practices, acknowledgment of school-sponsored clinics and tacit support of similar private enterprises suggests that Chinese legal system is trying to adjust to this wave of litigation. If such services meet the demands of migrant litigants, the developing judicial sys-

[170] *See* Migrant Activist, *supra* note 130.

tem may grow in a direction that legitimizes the rights of China's most vulnerable groups.

In the long run, access to the court system may provide migrants with a key weapon in the arsenal of individual rights. But given the inconclusive results faced by migrants in the courts today, this weapon has yet to be equated with the ability to redress grievances effectively. Perhaps, then, the most that legal aid offices can be credited with currently is adding to the rising expectation among the Chinese that law and the legal system can and should be used to address their grievances. Ultimately, however, the true impact of these organizations may become clear—with sufficient funding and social support, these providers have the potential to agitate for migrant rights, deter abuses, and help raise the status of China's migrants to that of full-fledged citizens. For now, the existence of these organizations themselves, and the developing coordination amongst them, suggest the promise of a "civil society."

CIETAC'S CALCULATIONS ON LOST PROFITS UNDER ARTICLE 74 OF THE CISG

Sharon G. K. Singh & Dr. Bruno Zeller†

I. Introduction

In China, it is said, "[i]n death, avoid hell; in life, avoid the law courts."[1] The remarks, made by Thomas Klitgaard in his address to the Northern Californian International Arbitration Club in 2005, address the Chinese view toward litigation.[2] Given the rise of arbitration as a form of alternative dispute resolution in China and the prevailing reputation of its legal system, this paper concentrates on the work undertaken by the Chinese International Economic and Trade Arbitration Commission ("CIETAC"), and how it resolved the calculation of lost profits under Article 74 of the United Nations Convention on Contracts for the International Sale of Goods ("CISG").[3] This is particularly of interest because CIETAC, in one form or other, has existed since 1956, well before the CISG was ratified in 1980.

Furthermore, claiming lost profits from a breach of contract is not specifically recognized in Chinese contract law. Article 113 of the 1999 revision of the Chinese Contract Law provides that "the amount of damages payable shall be equivalent to the other party's loss resulting from the breach, including any benefit that may be accrued from performance of the contract, provided that the amount shall not exceed the likely loss resulting from the breach which was foreseen or should have been foreseen by the breaching party at the time of conclusion of the contract."[4] In other words, the amount of compensation for losses must be equal to the losses caused by the breach, including the interest receivable after the performance, provided that they do not exceed the probable losses caused by breach of contract.

In contrast, Article 74 of the CISG specifically states, "[d]amages for breach of contract by one party consist of a sum equal to the loss, including loss of

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[1] Thomas J. Klitgaard, Esq., Address to the Northern California International Arbitration Club, Arbitration in the Peoples Republic of China, May 11, 2005, outline *available at* http://www.wirepaladin.com/Arbitration%20in%20China.pdf.

[2] *See id.*

[3] At this stage up to 179 CIETAC case translations are available in translated form. However, very few were decided after 2000, when the new Chinese Contract Law was promulgated. Hence, this study relies only on pre-2000 cases. *See Article 74: CIETAC and PRC Case Annotations*, http://cisgw3.law.pace.edu/cisg/text/CIETAC-PRC-74.html (last visited Mar. 17, 2007). Al Kritzer, in correspondence with the authors, suggests that there are at least 200 cases subsequent to January 2000 that he has not seen yet.

[4] Contract Law of the People's Republic of China, Chapter 7, Article 113 (adopted and promulgated by the Second Session of the Ninth Nat'l Peoples Cong., Mar. 15, 1999, effective Oct. 1, 1999), Chinese Civil Law Forum, *available at* http://www.cclaw.net/download/contractlawPRC.asp.

profit, suffered by the other party as a consequence of the breach."[5] The CISG specifically envisions that lost profits are to be taken into consideration when calculating damages, whereas the Chinese Contract Law has not done so. However, this does not mean that the inclusion of lost profits is not possible under Chinese contract law. Lost profits may be included in the term "equal to the loss," found in the Chinese Contract Law. The CISG specifically included lost profits as an obligatory item in the calculation of loss under Article 74. The Secretariat's Commentary to the CISG states that this inclusion was deemed necessary "because in some legal systems the concept of loss standing alone does not include loss of profit."[6]

Scholars argue whether lost profits are, or should be, consistently part of the Chinese remedial scheme and how lost profits should be calculated. This article does not examine whether loss of profit is consistently applied in the calculation of losses, but instead aims to identify and examine the methods adopted by CIETAC to calculate lost profits under Article 74 of the CISG. To this end, this article evaluates the published decisions by CIETAC since the inception of the CISG in China, and also discusses whether or not CIETAC's decisions on lost profits under Article 74 are uniform and consistent with international interpretations.

CIETAC's methodology has not been readily apparent until recently. Previously, CIETAC decisions were either available only in Chinese or not at all. However, as translated decisions become more readily available, the methodology and analysis of the tribunal becomes clearer. A study of CIETAC decisions is important, as it serves as an illustration of the growing integration of international law into China's legal framework. Indeed, China's development into an economic superpower has led to trade liberalization, which, in turn, has brought an ever-increasing number of conflicts between parties to trade contracts. This article will attempt to reveal how Chinese arbitration is conducted by examining the important issue of how to calculate lost profits suffered by an aggrieved party.

Furthermore, this study is restricted to an investigation of Article 74 of the CISG, and specifically, the awarding of lost profits in cases where a contract has been breached. First, lost profits are an integral and important part of Article 74. Second, as stated earlier, Chinese contract law does not specifically recognize lost profits as an automatic right when claiming damages for breach of contract. If CIETAC correctly applies Article 74, one of the contentious issues in applying the CISG would be resolved, and further study could confidently move forward.

Part I of this article provides a brief history of CIETAC, which is necessary to appreciate the work completed by the Chinese Arbitration system. Part II discusses the issue of lost profits within the context of Article 74 of the CISG, describing the methodology of international jurisprudence and considering sev-

[5] United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 19 I.L.M. 668, 1489 U.N.T.S. 3, *available at* http://www.cisg.law.pace.edu/cisg/text/treaty.html [hereinafter CISG].

[6] Secretariat Commentary, Guide to CISG Article 74, http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-74.html (last visited March 15, 2007).

eral academic works. Part III provides an overview of lost profits in general. Part IV analyzes specific CIETAC decisions on lost profits and how damages are calculated under Article 74. Part V draws together and discusses those inconsistencies found during examination of the CIETAC decisions. Parts VI and VII summarizes the trend in CIETAC decisions and draws together conclusions on how to strengthen the tribunal on the international stage.

II. A Brief History of CIETAC

The foundations of CIETAC date back to 1956. This half-century history of CIETAC sheds light on economic and political changes within China that have put the country into the forefront of economic growth. CIETAC began as the Foreign Trade Arbitration Commission ("FTAC") when the China Council for the Promotion of International Trade first inaugurated FTAC in the 1950s.[7] In 1979–1980, FTAC became known as the Foreign Economic and Trade Arbitration Commission ("FETAC") upon the inclusion of dispute settlement among Chinese and foreign joint ventures. Eight years later, in 1988, the Commission underwent another name change, this time from FETAC to its current name, CIETAC.[8] The cumulative role of CIETAC and its predecessors was to arbitrate disputes arising out of foreign trade by Chinese nationals.[9] Along with the name change to CIETAC in 1988, the arbitration rules were also revised,[10] which broadened the scope of CIETAC's jurisdiction and its pool of listed arbitrators. The aim was to create consistency between the Chinese arbitration system and those of other players in international arbitration, such as Switzerland.

The new 1988 CIETAC rules specifically permitted the appointment of foreign arbitrators, selected from a limited list that CIETAC first approved.[11] This was a significant step in trans-nationalizing CIETAC and the arbitration process, because prior to these changes, only Chinese nationals were allowed to arbitrate. In 1989, thirteen non-Chinese nationals were added to the CIETAC panel of arbitrators, eight from Hong Kong and five from various other countries.[12] Nonetheless, the overwhelming majority, ninety-six of the CIETAC arbitrators in total, were Chinese nationals.

In 1994, the CIETAC panel of arbitrators and the 1988 CIETAC rules underwent another significant reform. The number of foreign arbitrators on the panel was pushed to sixty, thereby increasing the perception of CIETAC neutrality in

[7] Bonnie Hobbs, *CIETAC Arbitration Rules and Procedures: Recent Developments and Practical Guidelines*, 2, Apr. 1999, http://www.omm.com/webcode/webdata/content/publications/CIETAC.PDF.

[8] China International Economic and Trade Arbitration Commission, Arbitration Rules, (revised and adopted by the China Council for the Promotion of Int'l Trade/China Chamber of Int'l Commerce, Jan. 11, 2005, effective May 1, 2005), *available at* http://www.cietac.org.cn/english/rules/rules.htm. [hereinafter CIETAC 2005].

[9] Hobbs, *supra* note 7, at 2.

[10] Given effect from October 1, 2000, CIETAC also uses the name Arbitration Institute of China Chamber of International Commerce of the People's Republic of China ("IAC").

[11] CIETAC 2005, *supra* note 8, art. 4.

[12] Hobbs, *supra* note 7, at 2–3; Paulsson & Alastair Crawford, *1994 Revision of CIETAC Rules Promises Increased Neutrality in Arbitration in China*, 9(6) MEALEY'S INT'L ARB. REP. 17, June 1994.

international trade cases .[13] Furthermore, CIETAC adopted internationally accepted arbitration rules by modeling themselves after the United Nations Commission on International Trade Law Arbitration Rules ("UNCITRAL Model Law"), the International Chamber of Commerce ("ICC") rules, and the Stockholm Chamber of Commerce rules.[14]

Subsequent amendments in 1995, 1998, and most recently in 2005, have been structured to ensure that CIETAC continues to remain competitive in an increasingly global market.[15] One change allows parties to freely choose the language of arbitration, instead of automatically defaulting to Chinese.[16] Another significant change allows the parties, through mutual consent, to select arbitrators from outside CIETAC's panel of arbitrators, with the proviso that the chairman must approve the selection (thus, still allowing CIETAC to maintain some control over the conduction of proceedings).[17]

The expansion of external arbiters' involvement in tribunal proceedings has arguably resulted in an increase in arbiters who possess a greater breadth of knowledge and experience to adjudicate cases.[18] Currently, CIETAC has 206 foreign arbitrators out of 738 total arbitrators for foreign-related disputes.[19]

With the emergence of China as an economic power and the recent boom in trade, CIETAC has become one of the most active international commercial arbitration bodies in the world.[20] In 2000, CIETAC heard 543 arbitration cases, compared to 500, 541, and 294 cases heard by the American Arbitration Association, the International Arbitration Centre, and the Hong Kong International Arbitration Centre, respectively.[21] However, skepticism surrounding CIETAC since its inception has not completely subsided, and critical analysis of its decisions is still required. This skepticism mainly focuses on China's communist regime and the political considerations surrounding its state instrumentalities, including CIETAC. Consequently, some commentators argue that certain CIETAC decisions have the perception of partiality or prejudice—which negatively affects confidence in the global arbitration system as a whole.

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[13] Victor Perez, *CIETAC*, 12 FLA. J. INT'L L. 491, 494 (2000).

[14] *See* Hobbs, *supra* note 7, at 3–5, for an explanation as to the depth of modeling.

[15] *Id.*

[16] CIETAC 2005, *supra* note 8, art. 67.

[17] *Id.*, art. 21.

[18] Edward Alder & Rosamund Cresswell, *CIETAC Arbitration Rules Revised*, Bird & Bird, May 2005, http://www.twobirds.com/English/publications/articles/CIETAC_arbitration_rules_revised.cfm (last visited Mar. 28, 2007).

[19] China International Trade and Arbitration Commission, Panel of Arbitrators for Domestic Disputes, http://www.cietac.org.cn/english/arbitrators/arbitrators_n1.htm (last visited Mar. 15, 2007).

[20] Li Zhang, *The Enforcement of CIETAC Arbitration Awards*, HONG KONG LAW., February 2002, *available at* http: //www.hk-lawyer.com/2002-2/Feb02-china.htm.

[21] *International Arbitration Cases Received*, HONG KONG INT'L ARB. CENTRE (2006), http://www.hkiac.org/HKIAC/HKIAC_English/en_statistics.html#top (last visited March 15, 2007) (noting the following annual numbers of arbitrations have taken place with CIETAC from January 2000 until 2005, respectively: 543, 731, 684, 709, 850, and 979).

Keeping in mind that the CISG became effective on January 1, 1988,[22] CIETAC has been exposed to the international standard for quite some time, allowing it to observe international convention and jurisprudence in action.[23] However, CIETAC's interpretations of the CISG present a broad view of how key provisions should be interpreted to maintain the effectiveness of the Convention and avoid ethnocentric interpretations.[24] One of the issues addressed in the CISG is how to calculate damages and, specifically, loss of profits.[25] CIETAC, like its other international counterparts, will no doubt be tested on the methods it employs in determining this issue.

III. Lost Profits: A General Overview

The obligation, or right, to claim lost profits is contained within Article 74 of the CISG.[26] Article 74 covers both reliance[27] and expectation interests,[28] with expectation interests providing the limitation for recovery.[29] However, the CISG does not explicitly use the terms "reliance interest" and "expectation interest" when providing for compensation.[30] In this article, reference to these terms is only made because they are still in use (despite the terms' misleading and generally unhelpful character).[31]

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[22] *See 1980—United Nations Convention on Contracts for the International Sale of Goods (CISG)*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html (last visited Mar. 28, 2007).

[23] *Id.* China exercised its right to opt out of Article 1(b) and 11 of the CISG. Note that Article 10 of the Chinese Contract Law no longer requires contracts to be concluded in writing and therefore the reservation is inconsistent with Article 10 of the CCL.

[24] *See* CISG, *supra* note 5, art. 7(1) ("In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.").

[25] Victor Knapp, *Article 74*, *in* BIANCA-BONELL COMMENTARY ON THE INTERNATIONAL SALES LAW 538–48, (Dott A. Giuffrè ed., 1987), *available at* http://www.cisg.law.pace.edu/cisg/biblio/knapp-bb74.html.

[26] CISG, *supra* note 5, art. 74. Article 74 reads in full, "Damages for breach of contract by one party consists of the sum equal to the loss, including loss of profit suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract."

[27] Reliance, in the realm of contract law, is the principle that an aggrieved party has the right to be put into the situation in which it would have been had the contract never been performed.

[28] Expectation interests refer to the principle that a party has the right to be placed in the same economic position it would have been in had the contract been properly performed.

[29] BRUNO ZELLER, DAMAGES UNDER THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, 43–44 (2005); *see also* Joseph Lookofsky, *The 1980 United Nations Convention on Contracts for the International Sale of Goods*, *in* INTERNATIONAL ENCYCLOPAEDIA OF LAWS—CONTRACTS, Suppl. 29 (R. Blanpain & J. Herbots eds., 2000) *available at* http://www.cisg.law.pace.edu/cisg/biblio/lookofsky.html.

[30] ZELLER, *supra* note 29, at 39.

[31] For reasons why and further details of this view, *see* David W. McLaughlan, Reliance Damages for Breach of Contract (unpublished conference paper, on file with authors).

The first sentence of Article 74 clearly provides for two categories of losses: actual losses (*damnum emergens*) and loss of profit (*lucrum cessans*).[32] Despite this broad language, Article 74 does not define in detail which losses can be compensated or how they are to be calculated. Consequently, liability is determined by the general principle of full compensation, taking into account the particular purpose of the contract in question.[33] The principle of full compensation provides that the aggrieved party is entitled to full compensation for harm sustained as a result of the breach. The harm can include any loss suffered and any deprivations of gain. Put differently, "[A]rticle 74 aims to give an aggrieved party the right to put themselves back into the position they were in had the contract been properly performed."[34] Therefore, when the full compensation principle is properly applied it necessarily includes loss of profit.

Lost profits are differentiated from the actual loss category. Actual loss "generally means the diminution in the assets of an injured party at the time of the conclusion of the contract, loss of profit [on the other hand] means the loss of any increase in the assets caused by the breach."[35] Hence, a loss of profit represents the difference between the aggrieved party's assets if the contract had been adequately performed and the aggrieved party's assets absent the breach of contract.[36] It follows from the principle of full compensation that such compensation is to be made not only for lost profits prior to the date of judgment, but also for any foreseeable and calculable profit that would have been achieved after the judgment date.[37] Losses are not merely confined to actual losses, but include future losses and loss of chance as well.[38]

The CISG does not provide specific rules on how to calculate loss of profits. Consequently, some commentators have observed that there is an assumption that the injured party may recover lost profits suffered, or expected to suffer, without limitation on the period of time for which the injured party may recover.[39] Therefore, the aggrieved party under the CISG "should be able to demand compensation of any profit lost as a consequence of the breach of contract by the

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[32] *See* CHENGWEI LIU, REMEDIES FOR NON-PERFORMANCE: PERSPECTIVES FROM CISG, UNIDROIT PRINCIPLES & PECL (2003), *available at* http://www.cisg.law.pace.edu/cisg/biblio/chengwei.html.

[33] Knapp, *supra* note 25; PETER SCHLECHTRIEM & INGEBORG SCHWENZER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS—CISG, art. 74, ¶¶ 12–14 (2nd ed. 2005).

[34] ZELLER, *supra* note 29 at 117. It should also be noted that Article 74 also makes it clear that the contractual liability is not unlimited. Three rules are contained within the CISG that are pertinent in circumstances when damages are claimed: the foreseeability rules pursuant to Article 74 and the duty to mitigate damages as explained in Article 77 and Article 79, which set out the exemptions due to unexpected circumstances.

[35] Djakhongir Saidov, *Methods of Limiting Damages Under the Vienna Convention on Contracts for the International Sale of Goods*, 14 PACE INT'L L. REV. 307, 317 (2002).

[36] CLAUDE WITZ, HANNS-CHRISTIAN SALGER, & MANUEL LORENZ, INTERNATIONAL EINHEITLICHES KAUFRECHT. PRAKTIKER-KOMMENTAR UND VERTRAGSGESTALTUNG ZUM CISG, ART. 74, ¶ 15 (2000).

[37] JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION, art. 74, ¶ 404 (3d ed. 1999).

[38] ZELLER, *supra* note 29 at 127–31.

[39] Knapp, *supra* note 25.

other party."[40] The amount is limited only by foreseeability and the full compensation rules as set out in Article 74.

However, the full compensation rule does not suggest that an award for profits is possible. The wording of Article 74 makes it clear that only *lost* profits are recoverable. The plaintiff must show that profits indeed were achievable and that the business was not taking on losses.[41] It follows, therefore, that compensation is only made for those losses that are a consequence of the breach, and the plaintiff would be limited in his recovery to the extent of the balance sheet analogy.[42]

IV. CIETAC Decisions Regarding the Calculation of Loss of Profits under Article 74

As pointed out above, Article 74 does not explicitly provide a loss of profit calculation. However, Article 74 does make it clear that damages cannot exceed full compensation.[43] In effect, damages under Article 74 are capped by the general principle of full compensation.

CIETAC's decisions since 1988 have adopted a variety of different methods to calculate lost profits under Article 74.[44] Hence, the appropriate method of calculating lost profits under the CISG is disparate and unclear. This in itself is not unusual in light of international practice and varying factual situations which parties face. An analysis of CIETAC decisions suggests that the awards which are made under the category of lost profits can be classified into eight broad categories:[45] (1) seller's lost profits calculated as the difference between the contract price and the actual production cost of the goods; (2) the difference between the contract price between the seller and the buyer and the contract price between the seller's supplier and the seller; (3) the price difference between the contract price and the price of actual resale; (4) the buyer's lost profits calculated as his anticipated net profits (anticipated gross profits minus fees payable); (5) the price difference between the contract price and the price of the intended resale to sub-buyer (minus costs of resale); (6) the difference between the prices of the intended resale to sub-buyer and the actual resale made; (7) the price difference according to the calculations set out in Article 76; and (8) the awarding loss

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[40] *Id.*

[41] Saidov, *supra* note 35.

[42] It is not within the scope of this paper to discuss types of losses. However, one must keep in mind that if a party would have suffered a loss in performing under a contract, that loss would diminish the actual recoverable damages. The ultimate aim is to put the claimant or plaintiff into a position as if the contract would have been performed. Hence a breach can actually amount to a profit for the plaintiff. In such a case, the plaintiff ought to compensate the respondent or defendant under the principle of good faith.

[43] CISG, *supra* note 5, art. 74.

[44] *See infra* Part IV for an in depth analysis of the varying methods used by CIETAC in calculating lost profits.

[45] For further analysis on CIETAC awards, see Dong Wu, *CIETAC's Practices on the CISG*, NORDIC J. OF COM. L. (2005), *available at* http://www.njcl.fi/2_2005/article2.pdf.

profits as well as price difference under Article 75 or 76 and associated calculations to either party.[46]

By no means, however, are the calculations restricted to such categories. CIETAC's arbitration tribunals have been amiable to the methods of calculations as stipulated by the parties as well.[47] CIETAC has sought to adopt those methods as appropriate when suitable evidence is provided in support of the parties' method of calculation.[48] In order to fully understand the different approaches used by CIETAC in calculating lost profits, the brief facts and holdings of the decisions are discussed below. This analysis will assist in future understandings of the Chinese arbitral process.

A. Seller's Lost Profits Calculated as the Difference between the Contract Price and the Actual Production Cost of the Goods

In the *Semi-Automatic Weapons Case (*7 August 1993),[49] a United States buyer contracted with a Chinese seller to purchase 5000 guns per year for three years. The guns were to be manufactured according to the buyer's specifications. In preparation for the delivery of the first shipment of 5000 guns, the seller requested payment. The American buyer responded that it could not make payment, claiming that it could not obtain the necessary authorization to import the guns into the United States. The seller applied to arbitrate its claim, and together with other damages, submitted an amount of expected profits from the first shipment which were lost due to the buyer's breach of the contract. The basis for the calculation was the profit expected using Free on Board ("FOB")[50] pricing, as opposed to the Cost Insurance and Freight ("CIF")[51] pricing stipulated in the contract, per gun, minus the seller's cost per gun multiplied by the quantity to be delivered. The tribunal accepted this calculation, and provided an award accordingly. This method for reaching such a calculation is in line with the principles of the CISG. By providing FOB pricing as opposed to the CIF pricing under the contract, the tribunal avoided unduly enriching the seller for costs it had not yet incurred.

In the *Frozen Beef Case (*26 October 1993),[52] a United States buyer entered into a contract with a Chinese seller to purchase 200 tons of beef, payment of

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[46] *See infra* Part IV (outlining the different categories and calculations of lost profits awards).

[47] *Id.*

[48] *Id.*

[49] Semi-Automatic Weapons (P.R.C. v. U.S.), CIETAC (1993), *available at* http://cisgw3.law.pace.edu/cases/930807c1.html.

[50] Intercoms, http://www.ltdmgmt.com/incoterms.htm (last visited Feb. 27, 2007). FOB is used here as defined by the Incoterms 2000. A FOB term requires the seller to deliver goods on board a vessel designated by the buyer. The seller fulfils its obligations to deliver when the goods have passed over the ship's rail.

[51] *Id.* CIF is used here as defined by the Incoterms 2000. A CIF term requires the seller to arrange for the carriage of goods by sea to a port of destination, and provide the buyer with the documents necessary to obtain the goods from the carrier.

[52] Frozen Beef (P.R.C. v. U.S.), CIETAC (1993), *available at* http://cisgw3.law.pace.edu/cases/931026c1.html.

which was to be effectuated by a letter of credit. Upon the seller receiving the letter of credit, it noticed that additional terms not included in the original agreement were inserted. The seller asked the buyer to issue another letter of credit in line with the parties' agreement. When the buyer failed to alter the letter of credit and negotiations failed, the seller applied for arbitration. The seller provided two different methods of calculations for loss of profits. The first of which will be discussed in the fourth method.[53] The second calculation was based upon the contract price minus the seller's expected cost of the beef not yet produced. Such a calculation could not be based on actual costs but expected or anticipated ones. The arbitral tribunal implicitly agreed that such a calculation was appropriate; however, the tribunal failed to award the calculated amount due to lack of evidence. Almost certainly, the tribunal would have agreed to award the seller reimbursement of the bargain to which it was entitled under the contract, had the evidence been available.[54]

B. Seller's Lost Profits Calculated as the Difference between the Buyer's and Seller's Contract Price and the Contract Price of the Seller's Supplier and the Seller

This calculation arguably rests on the same methodology as described in the immediately preceding section above, except the manufacturer is now replaced by a seller who can also be a wholesaler. For example, in the *Hot-Rolled Steel Plates Case* (10 May 1996),[55] a Singaporean seller and a Chinese buyer entered into a contract for the supply of 10,000 tons of hot rolled steel plates. When the buyer failed to pay for 2000 tons of the product, the seller took its claim to arbitration seeking its lost profits, among other damages. The tribunal deemed that the loss of profits should be calculated according to the difference between the contract price with the buyer and the supplier respectively.[56] In the *Steel Coil Case (*31 December 1999)[57] the arbitral tribunal awarded a seller lost profits calculated using the same methods.[58]

C. Seller's Lost Profits Calculated as the Price Difference between the Contract Price and the Price of Resale Actually Made

The *Chrome-Plating Machines Production-Line Equipment Case* (12 July 1996)[59] involved a Swiss seller and a Chinese buyer who signed a contract providing for the sale of a set of chrome-plating production-line equipment at the

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[53] *See infra* Part IV.D.

[54] Frozen Beef, *supra* note 52.

[55] Hot-Rolled Steel Plates (Sing. v. P.R.C.), CIETAC (1996), *available at* http://cisgw3.law.pace.edu/cases/960510c1.html.

[56] *Id.*

[57] Steel Coil (P.R.C. v. Switz.), CIETAC (1999), *available at*, http://cisgw3.law.pace.edu/cases/991231c1.html.

[58] *Id.*

[59] Chrome-Plating Machines Production-Line Equipment (Switz. v. P.R.C.), CIETAC (1996), *available at* http://www.cisg.law.pace.edu/cases/960712c1.html.

price CIF Shanghai at 257,070 Swiss francs. The buyer failed to pay the contract price, causing the seller to resell at a lower price. The tribunal awarded the seller lost profits for the price difference between the resale amount and the contract price of the machines had the contract been fully performed.

The tribunal applied similar calculations based upon Article 75 of the CISG in the *Nickel-Plating Machines Production-Line Equipment Case* (12 July 1996),[60] the *Dioctyl Phthalate Case* (16 August 1996),[61] the *Yam-Dyed Fabric Case* (21 July 1997),[62] the *Chrome-Plating Production Line Equipment Case* (12 February 1999),[63] the *New Zealand Raw Wool Case* (8 April 1999),[64] and the *Industrial Raw Materials Case* (4 June 1999).[65]

D. Buyer's Lost Profits Calculated as the Buyer's Anticipated Net Profits (Anticipated Gross Profits Minus Fees Payable)

In the *Tin Plate Case* (17 October 1996),[66] a Korean seller and Chinese buyer entered into a contract for the supply of Korean tin plates. The seller defaulted on the contract by failing to deliver the goods as stipulated, resulting in the buyer bringing an arbitration proceeding. The buyer sought compensation of 432,200 yuan for the loss of expected profit under the contract. This was calculated by determining the domestic sales contract price less the cost under the present contract and less other expenses. Import duties and gains taxes, however, were not deducted, and the seller subsequently argued that they should have been. The tribunal accepted the majority of the seller's calculations and awarded the loss of expected profit as the difference between the contract price and the price under the sales contract. The tribunal, however, stated that the amount of the loss of expected profit should be the contract price for domestic sales contract: the sum of the contract price, customs duties, and gains taxes.[67]

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[60] Nickel-Plating Machines Production-Line Equipment (F.R.G. v. P.R.C.), CIETAC (1996), *available at* http://cisgw3.law.pace.edu/cases/960712c2.html.

[61] Dioctyl Phthalate (P.R.C. v. N. Korea), CIETAC (1996), *available at* http://cisgw3.law.pace.edu/cases/960816c1.html.

[62] Yam-Dyed Fabric (P.R.C. v. U.S.), CIETAC (1997), *available at* http://cisgw3.law.pace.edu/cases/970721c1.html.

[63] Chrome-Plating Production-Line Equipment (Switz. v. P.R.C.), CIETAC (1999), *available at* http://cisgw3.law.pace.edu/cases/990212c1.html. In this case, the CIETAC tribunal first rendered its arbitral award on 12 July 1996. The Buyer applied for setting-aside of the award before Beijing Municipal No. 2 Intermediate People's Court. On October 24, 1997, the Court notified the CIETAC for the latter to re-arbitrate the case. Based on the notification from the Court, on October 29, 1997 the CIETAC decided to re-arbitrate. On February 12, 1999, a new CIETAC tribunal rendered this arbitral award.

[64] New Zealand Raw Wool (N.Z. v. P.R.C.), CIETAC (1999), *available at* http://www.cisg.law.pace.edu/cases/990408c1.html.

[65] Industrial Raw Material (P.R.C. v. U.S.), CIETAC (1999), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/990604c1.html.

[66] Tinplate (N. Korea v. P.R.C.), CIETAC (1996), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/961017c1.html. This case can also fall within the category of the price difference between the contract price and the price of the intended resale to sub-buyer (minus costs of resale) as the buyer changed its pleadings to deduct some costs however not all costs were accounted for.

[67] *Id.*; *see* Compound Fertilizer (Austl. v. P.R.C.), CIETAC (1996), *available at* http://cisgw3.law.pace.edu/cases/960130c1.html (this case had a similar ruling).

E. Buyer's Lost Profits Calculated as the Price Difference Between the Contract Price and the Price of the Intended Resale to Sub-buyer (Minus Costs of Resale)

In the *Palm Oil Case* (22 January 1996),[68] a Singaporean seller and a Chinese buyer entered into a contract for the sale of 3000 tons of refined edible palm oil. Upon the seller's failure to deliver the goods, the buyer sought damages, including loss of profits. The buyer's final calculation of lost profits provided to the tribunal was based upon the difference between the resale price and the "prime price," including tax, which the buyer would have received had the seller performed according to the contract. The tribunal accepted this calculation and held that the CISG and international trade usages also found such a method appropriate.

A similar approach was followed in the *Art Paper Case* (12 February 1996),[69] the *Dried Sweet Potatoes Case* (14 March 1996),[70] the *Tinplate Case* (17 October 1996), and the *Carbamide Case* (10 July 1997).[71] In all of these cases, tribunals held that the loss of profit should be calculated as the difference between the contract price and the intended price for reselling to the buyer's customer.

F. Buyer's Lost Profits Calculated as the Difference between the Prices of the Intended Resale to Sub-buyer and the Actual Resale Made

In the *Old Corrugated Carton Case* (8 March 1996),[72] a Dutch seller and a Chinese buyer entered into a contract for the supply of old corrugated cartons with certain specifications. The seller's delivery did not correspond to those specifications, thereby causing the buyer to resell the goods to another one of its clients for only 600 yuan, as opposed to the 1500 yuan originally contracted for. The buyer sought the difference in the respective prices as lost profits. The seller argued that such a calculation should not be accepted, but rather the loss of price difference claimed by the buyer should be limited to the difference between the contract price and the market price at that time (implicitly relying upon Article 76). The tribunal rejected the seller's methodology on the basis that the loss as calculated by the buyer was clearly foreseeable and therefore the seller should be liable. Similar conclusions were reached in the *Heliotropin Case* (10 July 1993),[73] *the Hot-Rolled Steel Plates Case* (16 July 1996),[74] the *Graphite Elec-*

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[68] Palm Oil (Sing. v. P.R.C.), CIETAC (1996), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/960122c1.html.

[69] Art Paper (U.S. v. P.R.C.), CIETAC (1996), *available at* http://cisgw3.law.pace.edu/cases/960212c1.html.

[70] Dried Sweet Potatoes (P.R.C. v. Switz.), CIETAC (1996), *available at* http://cisgw3.law.pace.edu/cases/960314c1.html.

[71] Carbomide (U.S. v. P.R.C.), CIETAC (1997), *available at* http;//cisgw3.law.pace.edu/cases/970710c1.html.

[72] Old Boxboard Corrugated Cartons (Neth. v. P.R.C.), CIETAC (1996), *available at* http://cisgw3.law.pace.edu/cases/960308c1.html.

[73] Heliotropin (P.R.C. v. U.S.), CIETAC (1993), *available at* http://cisgw3.law.pace.edu/cases/930710c1.html.

*trodes Scraps Case (*2 June 1997),[75] and the *PVC Suspension Resin Case* (7 April 1999).[76]

G. Buyer's Lost Profits According to the Calculations Set Out in Article 76

Article 76 in essence allows a party—instead of making a cover purchase—to simply claim the difference between the contract price and the current price at the time of avoidance. Article 76, despite only being applicable in case of avoidance, does not deprive the aggrieved party from claiming damages which can only be obtained by taking recourse to Article 74. Hence loss of profit which re not included in Article 76, and any other incidental losses associated with the breach of the contract are recoverable under Srticle 74.

Article 76 of the CISG states:

> (1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.
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> (2) For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.[77]

The *Steel Case* (19 September 1994)[78] involved an Italian seller and a Chinese buyer who entered into a contract for various forms of steel. The seller could not deliver on time even after the buyer had granted various extensions. The buyer initiated arbitration proceedings to avoid the contract and seeking indemnification from the seller for the difference between the contract price and market price of the goods. The tribunal correctly laid out a three-step process provided for in Article 76 by stipulating that the burden of proof rests on the buyer. The tribunal stated the buyer must show:

> (1) The domestic market price was reasonable for the purposes of Article 76(2) of the CISG;

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[74] Hot-Rolled Steel Plates (Austria v. P.R.C.), CIETAC (1996), *available at* http://cisgw3.law.pace.edu/cases/960716c1.html.

[75] Graphite Electrodes Scraps (P.R.C. v. F.R.G.), CIETAC (1997), *available at* http://cisgw3.law.pace.edu/cases/970602c1.html.

[76] PVC Suspension Resin (U.S. v. P.R.C.), CIETAC (1997), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/990407c1.html.

[77] CISG, *supra* note 5, art. 76.

[78] Steel (Italy v. P.R.C), CIETAC (1994), *available at* http://cisgw3.law.pace.edu/cases/940919c1.html.

(2) The loss of profits was suffered by the buyer itself and was foreseen, or ought to have been foreseen, by the seller when the parties executed the contract; and

(3) The buyer had taken reasonable measures to mitigate the damages according to Article 77 of the CISG.[79]

The tribunal held that if the buyer claims the difference between the contract price and the market price, the market price should be the price at the time and place of delivery—in this case, the price of the goods at the Russian port between June and July 1993. The tribunal held that the domestic Chinese price at the same time was not comparable.

In the *High Tensile Steel Bar Case* (25 October 1994),[80] a United States seller and a Chinese buyer contracted for high tensile steel bars. One of the terms of the contract stipulated that the seller open a performance bond within five business days after receiving the pre-advice letter of credit issued by the buyer. The seller failed to issue the performance bond and allowed the buyer to cancel the contract if it so pleased. The buyer took up this option and subsequently claimed that the seller's breach prevented it from performing a contract with a third party.

The buyer sought reimbursement from the seller for the amount it had to pay the third party due to the seller's breach. The buyer further sought damages for anticipated profits, basing its calculation on the difference between the contract price and the market price according to Article 76. The arbitral tribunal held that the buyer's calculation of damages was correct and the buyer was entitled to all damages sought.

Similar approaches were followed in the *Australian Raw Wool Case (*23 April 1995),[81] the *Scrap Copper Case (*12 January 1996),[82] and the *Caffeine Case* (29 March 1996).[83] In *"FeMo" Alloy Case* (2 May 1996),[84] the tribunal also awarded the price difference between the contract price and the international market price calculated under Article 76 of the CISG as the relevant lost profits.

As has been seen, the CISG allows an aggrieved party to claim the difference between the contract price and the current price at the time of avoidance. Furthermore lost profits, which are not included in the price differential, can also be claimed via Article 74. However there is an obligation on the aggrieved party to mitigate the losses as much as possible. If a party fails to do so the actual losses

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[79] *Id.*

[80] High Tensile Steel Bar (U.S. v. P.R.C.), CIETAC (1994), *available at* http://cisgw3.law.pace.edu/cases/941025c1.html.

[81] Australian Raw Wool (Austl. v. P.R.C.), CIETAC (1995), *available at* http://cisgw3.law.pace.edu/cases/950423c1.html.

[82] Scrap Copper (U.S. v. P.R.C.), CIETAC (1996), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/960112c1.html.

[83] Caffeine (P.R.C. v. H.K.), CIETAC (1996), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/960329c1.html.

[84] "FeMo" Alloy (P.R.C. v. U.S.), CIETAC (1996), *available at* http://cisgw3.law.pace.edu/cases/960502c1.html.

including loss of profits will be reduced. The reduction of the damages normally corresponds to the amount that would have been saved if the party had mitigated.

H. Awarding Lost Profits as Well as Price Difference under Article 75 or 76 and Associated Calculations to Either Party

Calculations that invoke the application of Articles 75 or 76 of the CISG are relatively uncontroversial because they are founded on factual appraisal of the circumstances. Article 75 states:

> If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.[85]

The CISG recognizes that not in all cases an aggrieved party can be satisfied with monetary compensation. Under certain circumstances the party suffering the loss has to satisfy third parties, that is, the goods were to be unsold. Therefore Articles 75 and 76 do exactly that. Article 75 covers situations where a cover purchase needs to be made and Article 76 covers situations where the aggrieved party claims monetrary damages calculated on the difference between the contract price and the current price for the goods at the time the contract was avoided. The aggrieved party in essence is put to an election. They either claim damages and lost profits under Article 75 or Article 76 but never both.

In relation to lost profits, the tribunal has awarded these losses with the rationale that an aggrieved party should not benefit from the breach.[86] For example, due to fundamental breach, the buyer in the *Cotton Bath Towel Case* (26 October 1996)[87] was forced to dispose of the goods below contract price. If the contract had been performed per the agreement, the buyer could have sold the goods to a sub-buyer and obtained a profit.[88] In such cases, the tribunal has awarded the buyer the difference between the contract price and the lower resale price, and lost profits were calculated as the difference between the contract sale and the intended sale to the sub-buyer.[89]

However, where the aggrieved party is the seller, the tribunal has generally denied the seller's claim for lost profits in order to preserve the principle of disallowing over-compensation. The award for the price difference under Arti-

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[85] CISG, *supra* note 5, arts. 75, 76. Articles 75 and 76 provide for a calculation of lost profits in certain circumstances stipulated in the text of the articles.

[86] Canned Mandarin Oranges (P.R.C. v. F.R.G.), CIETAC (1999), *available at* http://cisgw3.law.pace.edu/cases/990301c1.html; Cysteine (P.R.C. v. F.R.G.), CIETAC (2000), *available at* http://cisgw3.law.pace.edu/cases/000107c1.html.

[87] Cotton Bath Towel (P.R.C. v. Austl.), CIETAC (1996), *available at* http://cisgw3.law.pace.edu/cases/961026c1.html.

[88] *Id.*

[89] *Id.*

cles 75 and 76 had already covered such lost profits. This approach was also followed in the *Canned Oranges Case (*1 March 1999)[90] and the *Cysteine Case (*7 January 2000).[91]

These cases are good examples within the regime of the CISG demonstrating that the principle of full compensation requires a reading of all relevant requirements in order to arrive at the correct solution. In the above cases Articles 75, 76 and 77 are the prime articles on which the aggrieved party relied on. However the principle of full compensation allowed the aggrieved party to fall back onto Article 74 to achieve the started goal of the CISG namely to bring the parties back to the position they would have been had the contract been properly performed.

V. Inconsistencies

Before CIETAC's basis of mathematical calculations can be analyzed, its interpretation of Article 74 of the CISG must first be addressed. The points of contention do not arise with CIETAC's mathematical calculations themselves, but with CIETAC's interpretations of the principles contained within the four corners of the CISG. This section identifies three areas under which CIETAC's interpretations conflict with the aim of Article 74 of the CISG: (1) the incorrect application of the principle of reasonableness; (2) the incorrect treatment of third-party transactions; and (3) the inevitably ethnocentric approach taken by CIETAC.

A. Criterion of Reasonableness

Reasonableness is an important concept in the CISG, but it has not been applied accurately by CIETAC. The *Equipment Case* (20 December 1993)[92] is illustrative. In the *Equipment Case*, a United States seller and a Chinese buyer entered into a contract for the sale of sets of equipment, the payment of which was to be effected by letter of credit. The buyer failed to issue the letter of credit and the seller applied for arbitration. In determining its loss of profits, the seller sought the difference between the contract price and the cost that the seller paid to the manufacturer. However, the arbitral tribunal rejected this calculation on the basis that the profit to be made by the seller was unreasonable and therefore unforeseen by the buyer.

Many argue that reasonableness of the amount of lost profits cannot be the basis for awarding loss of profits. Article 74 specifically provides that the principle of foreseeability will cap the amount of profit an aggrieved party can claim.[93]

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[90] *See* Canned Mandarin Oranges, *supra* note 86.

[91] *See* Cysteine, *supra* note 86.

[92] Equipment (U.S. v. P.R.C.), CIETAC (1993), *available at* http://cisgw3.law.pace.edu/cases/931220c1.html.

[93] CISG, *supra* note 5, art. 74 ("Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.").

Foreseeability in the CISG does not stipulate that the party in breach must foresee the exact amount of damage suffered, but rather that some damage could be suffered. The basis of the arbitral tribunal's reliance upon the criterion of reasonableness in this case can be compared to the criterion of reasonableness in Article 46(2) of the 2005 version of CIETAC Arbitration Rules. Article 46(2) states as follows:

> The arbitral tribunal has the power to decide in the award, according to the specific circumstances of the case, that the losing party shall compensate the winning party for the expenses reasonably incurred by it in pursuing its case. In deciding whether the winning party's expenses incurred in pursuing its case are reasonable, the arbitral tribunal shall consider such factors as the outcome and complexity of the case, the workload of the winning party and/or its representative(s), and the amount in dispute, etc.[94]

Although this article was not in force at the time of the decision, it no doubt provides a comparison as to how the tribunal decided the lost profits issue based on reasonableness. The tribunal's decision would have been correct in law had Article 74 of the CISG alternately been framed to state that damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages *must be reasonable* and may not exceed the loss, which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract. However, Article 74 of the CISG does not apply a reasonable test, and therefore, the tribunal arguably erred in its reasoning by placing a criterion of reasonableness, weighed by factors subject to the discretion of the tribunal, into its interpretation of Article 74 of the CISG.

We are not arguing that the decision was incorrect, but instead that reliance upon reasonableness *in this context* is fraught with danger. It negates party autonomy and the right of a party to be entitled to the bargain for which it contracted. The correct question for the tribunal would have been: are the damages foreseeable in "light of the facts and matters of which he then knew or ought to have known as a possible consequence of the breach of contract?"[95]

An accurate application of this approach was applied by the tribunal in the *Weaving Machines, Tools and Accessories Case (*5 September 1994).[96] The tribunal in that case articulated a three-step approach in reaching its decision. First, subject to the CISG, the breaching party should compensate the aggrieved party for all losses (including loss of profits) caused by its breach. Second, in light of the facts and matters of the case, the loss must be foreseeable. Finally, whether

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[94] CIETAC 2005, *supra* note 8, art. 46(2).

[95] CISG, *supra* note 5, art. 7.

[96] Weaving Machines, Tools and Accessories (Switz. v. P.R.C.), CIETAC (1994), *available at* http://cisgw3.law.pace.edu/cases/940905c2.html.

the damages claimed by the aggrieved party are reasonable must be ascertained, and not only in the context of whether the damages could have been mitigated.[97]

B. Third Party Transactions

In many cases goods are bought for the purpose of reselling to a third party. If the original contract is either avoided or breached the resulting loss will flow on to the third party. The CISG will allow the buyer to claim these damages from the original seller.

In the *Bicycles Case* (11 August 1994),[98] a French buyer and Chinese seller entered into a contract for bicycles. Upon receiving the bicycles, some were found to be defective. The seller lowered the price of the goods and the buyer disposed of the defective products. The buyer claimed damages, including the lost profits suffered from the avoidance of a sole distributorship contract with a third party as a result of the non-conforming bicycles. The tribunal rejected the buyer's claims, stating that the claims "exceed the total contract price, which [the seller] could not foresee when signing the contract." The tribunal failed to provide sufficient grounds as to the reason claims exceeding the contract price would be considered unforeseeable.

Contrast the *Bicycles Case* with the *Nickel-Plating Machines Production-Line Equipment Case* (12 February 1999),[99] where the tribunal awarded the seller damages exceeding the contract value. Specifically, it awarded damages of DM 2,026,439 (not including legal expenses) on a contract valued at only DM 1,550,000. The reasoning provided in the *Bicycles Case* is insufficient to determine a clear outcome. There are three possible reasons that could arguably be advanced. First, the buyer could not discharge his burden of proof sufficiently. Second, the claims exceeded the contract price, and the loss, therefore, is disproportionate and needs to be cut back. Third, the damage suffered was unforeseeable. If the second argument is advanced, then such reasoning is erroneous and not in line with Article 74 of the CISG, because it would indicate that the arbitral tribunal placed the emphasis on the fact that the claims exceeded the contract price and the damage suffered was unforeseeable. This would indicate that the tribunal, by its own standards, dictated that if at any time damages exceed the contract price, such damages would automatically be unforeseeable, regardless of whether the breaching party actually foresaw such a result.

The tribunal in this case further disregarded the damages sought by the buyer for loss of its distributorship contract with a third party, holding that "this contract signed by [buyer] and France GIB has nothing to do with this case, so it cannot be used as the basis to calculate damages."[100] Because the buyer's contract with the third party was avoided due to the seller's breach, the requirement of causation under Article 74 is satisfied. The reasoning by the arbitral tribunal

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97 *Id.*

98 Bicycles (Fr. v. P.R.C.), CIETAC (1994), *available at* http://cisgw3.law.pace.edu/cases/940811c1.html.

99 Nickel-Plating Machines Production-Line Equipment, *supra* note 60.

100 Bicycles, *supra* note 98.

that such damages suffered have nothing to do with the case against the seller is inconsistent with Article 74 of the CISG.

Furthermore, a seller should realize that a buyer who imports bicycles *en masse* is likely to resell the goods to consumers. Consequently, if the bicycles are non-conforming, a reasonable seller should foresee the buyer's lost profits. In other words, the buyer would suffer losses as a consequence of not being able to perform its duties to the third party, and the seller ought to have known that fact. As already stated, a seller does not need to foresee the exact amount of damages, but rather the seller need only foresee the assumed risk and potential liability that would result in damages at the conclusion of the contract.[101]

An illustration of the tribunal's inconsistent decisions is highlighted in the *Lindane Case* (31 December 1997).[102] Here the buyer requested the tribunal hold the seller liable for damages claimed by the buyer's client, because the goods were not delivered. The tribunal noted that the damage claim made by the buyer's client was a direct result of the seller's failure to deliver the goods to the buyer, thereby establishing the link of causation. The arbitral tribunal further noted that because the buyer was a trading company, it should have been self-explanatory to the seller that the buyer did not aim to purchase the contractual goods for domestic uses, but for trade purposes (an obvious point if the CISG is to apply in the first place).[103] Therefore, the arbitral tribunal concluded it was reasonable for the seller to foresee that the failure of its performance to the contract may lead to certain damages to the buyer.

Furthermore, in the *High Tensile Steel Bar Case* (25 October 1994),[104] *Dried Sweet Potatoes Case* (14 March 1996),[105] and the *Hot-Rolled Steel Billets Case* (5 August 1995),[106] the arbitral tribunals accepted that buyers had the right to be compensated for a settlement made with a third party.[107] The contract between the original buyers and the third party was avoided due to the original seller's breach.

The arbitral tribunal rejected the causal connection between the seller's breach and the buyer losing a contract with a third party in the *Bicycles Case*, finding instead that the contract with the third party had no bearing on the case. This is inconsistent with international practices and CIETAC's own subsequent decisions.[108] It should be noted that a clear distinction between losses and loss of profits is not always explained, but it can be reasonably assumed that if goods are

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[101] *See supra* Part III.

[102] Lindane (Fr. v. P.R.C.) CIETAC (1997), *available at* http://cisgw3.law.pace.edu/cases/971231c1.html.

[103] *Id.*

[104] High Tensile Steel Bar, *supra* note 80.

[105] Dried Sweet Potatoes, *supra* note 70.

[106] Hot Rolled Steel Billets, (U.S. v. P.R.C. and U.S.), CIETAC (1995), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950805c1.html.

[107] *See id.*; High Tensile Steel Bar, *supra* note 80; Dried Sweet Potatoes, *supra* note 70.

[108] *See, e.g.*, Hot Rolled Steel Billets, *supra* note 106.

either faulty or are not delivered, and hence cannot be sold to a third party, profits will be lost.

C. Reliance upon Domestic Law

Once the CISG is invoked as the applicable law, recourse to domestic law is only applied in circumstances where the CISG is either silent on or has specifically excluded the particular issue.[109] The principle of uniformity demands that the use of domestic law be restricted to situations specifically stipulated by the CISG; that is, the filling of external gaps.[110]

One of the unfortunate practices employed by CIETAC arbitrators has been the application of domestic law in conjunction with the CISG, specifically in situations where the CISG clearly addresses the issue. This practice is not only restricted to the calculation of loss of profit but pervades many aspects of case management. CIETAC decisions refer first to the domestic law, and then its equivalence in the CISG. The problem with such a practice is that the interpretation of the CISG articles is jeopardized when substituting domestic law to the CISG or trying to bring about a decision satisfying both domestic and CISG articles. Rather than applying the international interpretation of the relevant CISG article, the panel may be tempted to interpret the article in line with domestic law, on the basis that the wording is similar or in some provisions the same.

As a contracting state, China's domestic law should be overridden by the CISG;[111] however, the words "to override and replace" are far too positive and final and not sufficiently fluid.[112] Furthermore, the words "to modify or replace" would nearly, but not quite, achieve the effect of "to override" and such "near precise" language fits much better into Chinese decision making as it allows interpretation of the CISG within the confines of Chinese policy.[113]

Such observations can be found in various CIETAC decisions. In the *Sesame/Urea Case* (13 June 1989),[114] the *Monohydrate Zinc Sulfate Case* (26 June 1997),[115] the *BOPP Film Case* (8 September 1997),[116] and the *Isobutanol Case* (7 July 1997),[117] the tribunal insisted upon applying domestic law which sup-

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109 CISG, *supra* note 5, art. 7(2).

110 BRUNO ZELLER, FOUR-CORNERS—THE METHODOLOGY FOR INTERPRETATION AND APPLICATION OF THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, Ch. 5, ¶ 1 (May 2003), *available at* http://www.cisg.law.pace.edu/cisg/biblio/4corners.html.

111 CISG, *supra* note 5, art. 1.

112 BRUNO ZELLER, *CISG and China*, *in* CISG AND CHINA—THEORY AND PRACTICE: AN INTERCONTINENTAL EXCHANGE, 13 (Michael Will ed., 1999).

113 *Id.*

114 Sesame/Urea (P.R.C. v. Jordan), CIETAC (1989), *available at* http://cisgw3.law.pace.edu/cases/890613c1.html.

115 Monohydrate Zinc Sulphate (P.R.C. v. N. Korea), CIETAC (1997), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/970626c1.html.

116 BOPP Film, (N. Korea v. P.R.C.), CIETAC (1997), *available at* http://cisgw3.law.pace.edu/cases/970908c1.html.

117 Isobutanol (P.R.C. v. U.S.), CIETAC (1997), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/970707c1.html.

ported the respective articles in the CISG. In the *Black Melon Seeds Case* (4 April 1997), involving a dispute between a buyer from Hong Kong and a Chinese seller,[118] the tribunal referred to Article 19 of the Economic Contract Law ("ECL"), which applies to domestic contracts. This reference was unnecessary, as there was no apparent gap within the CISG, upon which domestic law would be called to fill. The use of domestic law side by side with the CISG may suggest "that the CISG is not used with confidence in some [Chinese] courts,"[119] or Chinese tribunals for that matter. In sum, the CISG has to be interpreted first within its four corners, and only if a gap needs filling should there be any resort to domestic law. Otherwise, the internationality of the convention is jeopardized.[120]

VI. The Trend

Obvious criticism can be leveled at CIETAC's early decisions. However, such criticism must be made while taking into consideration that CIETAC is not the only arbitration organization that has expressed an ethnocentric bias toward its domestic law. Examples can be found, for instance, in Australia in *Downs Investment Pty Ltd v. Perwaja Steel SDN BHD*[121] and in the United States in the classic case of *Raw Materials Inc. v. Manfred Forberich GmbH & Co.*[122] It should not be surprising that CIETAC has ethnocentric tendencies considering the cultural and political habitat from which it has emerged.

Over the past decade, CIETAC's decisions on the CISG have become more consistent with international interpretation. Since 1999, the shift has been dramatic. One example is the *Flanges Case (*29 March 1999).[123] In brief the primary issues in dispute were connected with the existence of deficiencies or concealed deficiencies of the goods and the authenticity of the testing data. Unfortunately, the decision did not specifically state the law, but the conclusion was in line with Article 74 of the CISG. Arguably, the arbitrators must have had CISG Article 74 in mind in reaching the ruling.

This shift may correspond to China's reform of its contract law. In 1999, China introduced the Chinese Contract Law ("CCL"), which was hailed to be China's big leap forward in legal reforms, as the CCL sought to bring Chinese

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[118] Black Mellon Seeds (H.K. v. P.R.C.), CIETAC (1997), *available at* http://cisgw3.law.pace.edu/cases/970404c1.html.

[119] *Zeller, supra* note 112, at 13.

[120] *See generally* Frank Fisanich, *Application of the U.N. Sales Convention in Chinese International Commercial Arbitration: Implications for International Uniformity*, AM. REV. INT'L. ARB. 101–22 (1999), *available at* http://www.cisg.law.pace.edu/cisg/biblio/fisanich.html (regarding how Chinese arbitrators and lawyers are not applying the CISG uniformly, which poses an international threat).

[121] Downs Inv. Pty. Ltd. v. Perwaja Steel SDN BHD, [2000] Q.S. CT. R. 421 (2000), *available at* http://cisgw3.law.pace.edu/cases/001117a2.html.

[122] Raw Materials Inc. v. Manfred Forberich GmbH & Co., 2004 WL 1535839 (N.D. Ill. 2004).

[123] Flanges (U.S. v. P.R.C.), CIETAC (1999), *available at* http://cisgw3.law.pace.edu/cases/990329c1.html.

law in line with the law of many developed nations.[124] Most significantly, the CCL shifted the focus of Chinese contract laws from preserving the characteristics of a centrally planned economy to preparing for an increasingly globalized economy. The shift was transparent when the CCL abolished the term "economic contract," opting instead to place the principle of freedom of contract as its main priority.[125]

Creating uniformity in Chinese contract law was overseen by Chinese administrators who searched the world over for the best practices and invited eminent academics and scholars to participate in helping China move forward.[126] Among the main references was the CISG, whose theoretical and practical preparation facilitated the public appearance of a uniform contract law in China.[127] The CCL invalidated the ECL applying to domestic contracts and to the special Law on Technology Contracts and the Law on Contracts Involving Foreign Interests ("FECL").[128]

Since the FECL and the CISG differed on several important issues,[129] some CIETAC decisions may well have been reached by applying a mixture of the two, "thereby restricting the effect of the CISG within the ideas of the FECL, which in turn is tailored towards serving the policies of the Chinese government."[130] Some academics have noted that the CCL demonstrates China's willingness to open its legal system to foreign influences and to receive inspiration from foreign laws.[131] The new domestic law also allows the Chinese legal system to gain the maturity signified in the concept of freedom of contract, which some claimed had been lacking.[132]

The trend of CIETAC decisions being more consistent with international interpretations of the CISG and relying less upon domestic law can arguably be linked to the introduction of the CCL, in so far as the Chinese legal mentality is shifting. Another benefit of the reformed contract law is the predictability of results. Prior

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[124] Ding Ding, *CISG and China, in* CISG AND CHINA—THEORY AND PRACTICE: AN INTERCONTINENTAL EXCHANGE, 33–37 (Michael Will ed., 1999).

[125] Feng Chen, *The New Era of Chinese Contract Law: History, Development and Comparative Analysis*, 27 BROOK. J. INT'L L. 153, 169 (2001).

[126] *Id.*

[127] Chen, *supra* note 125, at 169.

[128] Frederich Blase, *CISG and China—An Intercontinental Exchange*, 4 VINDOBONA J. 95, 95 (2000).

[129] Foreign Economic Contract Law of the People's Republic of China ("FECL") (1985) *in* 1 CHINA LAWS FOR FOREIGN BUSINESS: BUSINESS REGULATION (1998). Differences between the CISG and the FECL are apparent in the area of contract formation, in so far as the FECL has no provisions for offer and acceptance. Article 7 of the FECL states "A contract is formed when the clauses of contract [sic] are agreed in written form and signed by the parties. In case one party requests to sign a confirmation letter when the agreement is reached by the means of letter, telegram, or telex, the contract is only formed upon the confirmation letter being signed." Even taking into consideration China's reservation under Article 96 of Article 11, Article 7 of the FECL can be interpreted so that it is consistent with Article 8 of the CISG as there is only one valid way to form a contract and the agreed terms—to reduce all agreements to writing; *see also* Fisanich, *supra* note 120, at 103, 110.

[130] Blase, *supra* note 128, at 95 (but note Friedrich Blase refers to Chinese courts rather than tribunals; nonetheless a comparison can be made).

[131] *Id.*

[132] *Id.*; Zhang, *supra* note 20.

to 1999, depending upon the type of transaction or business relationship, CIETAC decisions had the appearance of favoring the Chinese party.[133] This may be attributed to the Chinese party's understanding of the domestic legal system better then the foreign party. With the introduction of a uniform domestic law, hopefully it will become easier for foreign parties to understand the Chinese legal system. To what extent the domestic changes will impact CIETAC's interpretation and application of the CISG is unknown. However, one may be optimistic that the current trend of internationally-aligned CIETAC decisions may continue.

VII. Conclusion

CIETAC decisions on calculation of lost profits under Article 74 are difficult to comprehensively evaluate. Because of the lack of fully published decisions with satisfactory tribunal findings and reasoning, and the slow rate of translation of published decisions,[134] it is especially difficult for outsiders to ascertain clear rules under CIETAC's calculations of lost profits.

To add to the changing face of China's legal system, CIETAC needs to make a concerted effort to have its decisions published and translated as soon as practicable. CIETAC also needs to refer to academic reasoning behind the CISG in support of its decisions, rather than simply making statements like "the seller shall pay the buyer's loss of profit resulting from the defective goods, at a rate of 20% which it deemed to be reasonable."[135] In this case, the tribunal did not attempt to explain why twenty percent was deemed to be a reasonable rate; it merely stated that it was.[136] This arbitrary figure provides no guidance for future parties wishing to litigate or arbitrate, and poses questions as to the uniformity of application of the CISG as required by Article 7(1).

Providing the *obiter dicta* for its reasoning rather then the *ratio decidendi* will make CIETAC appear more transparent, thereby lending the body more credibility in the international community. It also will provide future parties guidance as to possible outcomes and predictability of arbitral decisions. In sum, CIETAC's rulings serve as "a significant gauge of what a practitioner should review prior to representing clients in transactional matters as well as in an arbitral hearing."[137]

Despite the need for improvements, CIETAC has come a long way. It has followed the trend of its country's legal system and has adopted practices and

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133 This is the authors' personal perception from the reading of the cases.

134 *See* Fisanich, *supra* note 120, at 120.

135 Clothes (P.R.C. v. Ger.), CIETAC (2000), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/000131c1.html.

136 Another illustration is provided by China 21 September 1992 CIETAC Arbitration proceeding, *in* SELECTED WORKS OF CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION AWARDS (1989-1995) 309–16 (Priscilla Leung Mei-Fun & Wang Sheng-Chang eds., UPDATED TO 1997, AUTHORIZED ENGLISH VERSION, 1998) (where the arbitral tribunal did not attempt to define "reasonable time." The arbitral tribunal merely indicated that the period in question was beyond what is expected in international trade practice).

137 Allison Butler, *Contracts for the International Sale of Goods in China*, 21 INT'L LIT. Q. 1, 4 (2006), *available at* http://cisgw3.law.pace.edu/cisg/biblio/butler5.html.

procedures making it sufficiently advanced. The trend in the calculation of lost profits under Article 74 of the CISG by CIETAC, appears to be consistent with the interpretation and application of the CISG. The tentative conclusion, focusing only on pre-January 2000 cases, is that a shift toward accepted international interpretations of Article 74 can be observed and that a shift away from an ethnocentric approach is taking place. Allison Butler, in examining eleven post-January 2000 cases, reached the same tentative conclusion.[138] However, eleven cases are not an adequate statistical demographic from which to draw definitive conclusions and further research is needed once post-January 2000 cases become available.[139]

It is sometimes forgotten, but one must remember what a great feat CIETAC is, considering the circumstances under which the body operates. CIETAC exists in a country trying to find a balance between maintaining a socialist state while undertaking significant free-market reforms demanded by capitalist-backed globalization. Could it be more difficult?

[138] *See id.*, at 4–5.

[139] In the opinion of Al Kritzer, at least 200 post-2000 CIETAC decisions have not yet been made available for translation (e-mail on file with authors).

INTERNATIONAL WATER DISPUTES: HOW TO PREVENT A WAR OVER THE NILE RIVER

Lee A. Laudicina†

The next war will be over water, not politics.
Boutros Boutros-Ghali[1]

I. Introduction

One out of every three people lacks access to an adequate supply of water, and with significant population increases, urbanization, pollution, and global warming, the problem is rapidly intensifying.[2] While the global population has tripled in the last century, water consumption has increased over six-fold.[3] Thus, because the world has only a fixed amount of water, geopolitical, social, and health concerns are escalating. As the demand for water on a worldwide basis doubles every twenty-one years,[4] 35% of the global population is projected to suffer from water scarcity or water stress by 2025.[5] Such shortages cause 3.4 million people to die from water-related illnesses each year.[6]

United Nations figures suggest there are nearly 300 potential water conflicts around the world.[7] Because more than two billion people in the world lack access to clean drinking water,[8] tensions are most acute in developing countries, where the little water resources that are available are often polluted or squandered.[9] Additionally, more than "90% of all future population increases will take

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[1] Daniel Pipes, *Boutros Boutros-Ghali: "I Support the Algerian Government"*, MIDDLE EAST Q., Sept. 1997, *available at* http://www.meforum.org/article/364.

[2] *See* Alister Doyle, *"Water Wars" Loom? But None in Past 4,500 Years*, REUTERS, Sept. 17, 2006, *available at* http://geo.oregonstate.edu/events/Press_2006/20060918_waterwars.pdf (noting that one in three people live in a region suffering from water scarcity).

[3] U.N. Population & Info. Network [POPIN], U.N. Population Div., Dep't of Econ. & Soc. Affairs, Population and Water Resources (contrib. by FAO), *Population and the Environment: A Review of Issues and Concepts For Population Programmes Staff*, ¶ 4, Sept. 1994, (*prepared by* Alain Marcoux), http://www.un.org/popin/fao/water.html.

[4] Stephen McCaffrey, *The Coming Fresh Water Crisis: International Legal and Institutional Responses*, 21 VT. L. REV. 803, 808 (1997).

[5] *Id.* at 807–08. Water scarcity is one thousand cubic meters or less of fresh water available to each person per year. Water stress is between one thousand and seventeen thousand cubic meters of fresh water available to each person per year. *Id.* at 807.

[6] *Water, the Looming Source of World Conflict*, AGENCE FRANCE PRESSE, Mar. 20, 2001, *available at* http://www.globalpolicy.org/security/natres/water/2001/0320cflt.htm [hereinafter *Looming Source of World Conflict*].

[7] *Id.*

[8] Laura Carlsen, *World Water Forum Not the Place to Solve Global Water Crisis*, IRC AMERICAS PROGRAM COLUMN, Mar. 28, 2006, *available at* http://americas.irc-online.org/am/3168.

[9] *Looming Source of World Conflict, supra* note 6.

place in the developing world."[10] Many, therefore, recognize the Nile Basin as the most likely spot for a war over water;[11] former Secretary-General of the United Nations, Boutros Boutros-Ghali, said the next war in Northern Africa would be over the waters of the Nile.[12] Because population rates are among the highest in the world, each African country shares at least one river basin with a neighboring nation. With the ten Nile Basin countries continuing to disagree over its use, the region must develop a system of water use based upon transnational cooperation in order to ensure future political stability.[13]

Despite the global concern over water scarcity, infrastructural and political barriers have historically blocked international transboundary agreements across the globe from producing effective systems of water management.[14] Recent negotiations between the United States and Mexico, however, peacefully ended a fifty year struggle over the shared waters of the Rio Grande River. While it has yet to be seen if the recent progress will solve the region's long-term water problems, it exposed methods of cooperation that can be used to foster international agreement in Northern Africa.

This article will examine the negotiations between the United States and Mexico as a basis for suggesting a method of transboundary cooperation to ease intensifying conflicts over water use in Northern Africa. Even if the current water shortage does not cause outright warfare in the near future, "it already causes enough violence and conflict within [African] nations to threaten social and political stability."[15] Part II of this paper will analyze the effectiveness of the negotiations between the United States and Mexico. Part III will introduce the water problems in Northern Africa, specifically along the Nile River. It will then examine the current status of international cooperation efforts and explain the possible consequences that will result without a change of strategy. Part IV will introduce and critique two proposed solutions to global water scarcity: treating access to water as a basic human right, and privatizing the water supply by making water an economic good. Part V will compare the situation between the United States and Mexico to that of the Nile River Basin and explain why each requires a unique solution. It will then combine aspects from the United States—Mexico dispute, the privatization model, and the human rights approach to pro-

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[10] McCaffrey, *supra* note 4, at 805 (quoting Stephen McCaffrey, *Water, Politics and International Law*, *in* WATER IN CRISIS, 105 (Peter H. Gleick ed., 1993).

[11] Shlomi Dinar, Ariel Dinar, *Recent Developments in the Literature on Conflict Negotiation and Cooperation Over Shared International Fresh Waters*, 43 NAT. RESOURCES J. 1217, 1233 (2003).

[12] Pipes, *supra* note 1.

[13] Shreevani Suvarna, *Development Aid in an Environmental Context: Using Microfinance to Promote Equitable and Sustainable Water Use in the Nile Basin*, 33 B.C. ENVTL. AFF. L. REV. 449, 450 (2006); Valentina Okaru-Bisant, *Institutional and Legal Frameworks for Preventing and Resolving Disputes Concerning the Development and Management of Africa's Shared River Basins*, 9 COLO. J. INT'L ENVTL. L. & POL'Y 331, 332 (1998).

[14] Rachel McHugh, *Time's Come for Jointly Managing Border's Surface, Underground Water*, IRC AMERICAS PROGRAM COMMENTARY, May 9, 2005, *available at* http://americas.irc-online.org/commentary/2005/0505tbwater.html.

[15] Sandra L. Postel & Aaron T. Wolf, *Dehydrating Conflict*, FOREIGN POL'Y, Sept. 18, 2001, *available at* http://www.globalpolicy.org/security/natres/water/2001/1001fpol.htm.

pose an optimal framework for a successful water management plan in Northern Africa based on common interests, transnational institutions, private funding, and minimal standards of water allocation and quality.

Although the current setting in the Nile River Basin may likely cause military conflict, effective planning and cooperation can mold future water issues through effective peacemaking and diplomatic efforts.

II. The United States—Mexico Water Dispute

The United States and Mexico signed a treaty in 1944 to share the waters of the Rio Grande,[16] which provides drinking water for over thirteen million people.[17] Under the terms of the treaty, the United States gains access to one-third of the water flowing into the Rio Grande, equaling a minimum of 350,000 acre-feet annually.[18] In return, Mexico receives 1.5 million acre-feet of water per year from the Colorado River.[19] Putting this number into context, economists estimate that each acre-foot of irrigation water used in the border region is worth about $652 to the local economy.[20] With such profound economic importance, the 1944 treaty stipulated that, "if Mexico cannot deliver the required minimum for a five-year accounting cycle because of extraordinary drought or serious accident to the water infrastructure . . . Mexico must make up the deficit during the following five-year cycle."[21] The treaty also created the International Boundary and Water Commission ("IBWC") to oversee the distribution of water between nations.[22]

Up until the 1990s, Mexico was able to satisfy its internal needs as well as its obligations under the treaty because of a water surplus.[23] However, during recent years, Mexico has not upheld its end of the agreement. Mexico began to fall behind on water deliveries to the United States in 1992, and a decade later, it owed the United States roughly 450 billion gallons of water.[24] Severe droughts in 2000 and 2001, paired with over exploitation of water resources, severely de-

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[16] *Mexico's Water Debt: Behind the U.S.-Mexico Water Treaty Dispute*, INTERIM NEWS (House Research Organization: Texas House of Representatives), Apr. 30, 2002, at 1, *available at* http://www.hro.house.state.tx.us/interim/int77-7.pdf [hereinafter Mexico's Water Debt].

[17] Mary Kelly, Arturo Solis & George Kourous, *The Border's Troubled Waters*, INTERNATIONAL RELATIONS CENTER, Nov. 2001, http://www.irc-online.org/us-mex/borderlines/2001/bl83/bl83water.html.

[18] *Id.* An acre-foot of water is the volume that would cover an acre of land at a depth of one foot, or roughly 326,000 gallons. It will meet the water needs of a family of five for approximately one year. *Units of Measure*, 24837 NBI-CLE 3, 3 (2005).

[19] *Mexico's Water Debt*, *supra* note 16, at 2.

[20] *Id.* at 3 (stating the total exchange of water under the treaty represents over $1 billion to the border economies of the United States and Mexico).

[21] *Id.* at 2.

[22] Kelly, Solis & Kourous, *supra* note 17.

[23] *Mexico's Water Debt*, *supra* note 16, at 5.

[24] *Id.* at 1.

pleted the Rio Grande.[25] The shortage was so severe that in February 2001 the Rio Grande stopped reaching the Gulf of Mexico for the first time in nearly 500 years because sand banks and plant growth blocked its lessened flow.[26]

Debate over which country should have access to the dwindling water supply has become a source of mounting tension between federal and state governments.[27] With thirty-eight Mexican cities facing severe water shortages,[28] Mexico blamed one of its worst droughts in fifty years[29] for failing to meet the treaty's demands.[30] However, American farmers alleged that Mexico was unjustly using water to increase its own agricultural production.[31]

In August 2001, a Mexican agricultural union filed suit in a Mexican court to stop repayment of the water, claiming they were not left with enough water for themselves.[32] Similarly, American farmers brought suit against Mexico under the North America Free Trade Agreement ("NAFTA"), seeking $500 million for damages and crop losses.[33]

Mexico owed the United States over 1 million acre-feet of water from the 1992–1997 period, plus an additional 300,000 acre-feet from the 1997–2002 period.[34] The 1944 treaty specifies that Mexico can defer water payments to the following five-year period if there is a condition of "extraordinary drought,"[35] but the treaty does not define "extraordinary drought." This omission effectively leaves "the determination [of who gets the water] in the hands of the upstream party when negotiators for the two countries are unable to agree."[36] Such ambiguity has fueled debate over the true extent of the drought and ignited criticism of the treaty.[37] Like many columnists across the United States who have called for revision of the treaty, Ruben Navarette of the Dallas Morning News wrote, "[t]he 1944 Treaty was tainted from the beginning."[38]

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[25] Jonathan Treat, *Mexico and U.S. Cut Rio Grande Deal, but Tensions Run High as Border Water Runs Low*, INTERNATIONAL RELATIONS CENTER, June 2001, http://www.irc-online.org/us-mex/borderlines/2001/bl78/bl78water.html.

[26] *Id.*

[27] Treat, *supra* note 25.

[28] Kelly, Solis & Kourous, *supra* note 17.

[29] Treat, *supra* note 25.

[30] Kelly, Solis & Kourous, *supra* note 17.

[31] *Mexico's Water Debt*, *supra* note 16, at 5.

[32] *Id.* at 6.

[33] Suzanne Gamboa, *Sources Say Mexico, U.S. Reach Agreement on Water Debt*, ASSOCIATED PRESS, March 10, 2005, *available at* http://www.freenewmexican.com/news/11421.html.

[34] Kelly, Solis & Kourous, *supra* note 17.

[35] *Id.*

[36] Stephen P. Mumme, *Revising the 1944 Water Treaty: Reflections on the Rio Grande Drought Crisis and Other Matters*, J. OF THE SOUTHWEST, Dec. 22, 2003, *available at* http://goliath.ecnext.com/coms2/summary_0199-102715_ITM.

[37] *Id.*

[38] *Id.*

Despite inherent flaws, the 1944 treaty is binding and the possibility of entering into an alternate treaty is highly unlikely.[39] Professor Stephen P. Mumme explains that the treaty is "practically immutable, as difficult to change in its text as any international agreement to which the United States is a party."[40]

While the treaty's text has never been modified, it has produced over 300 minutes—official statements of meaning and intent adopted by the IBWC.[41] Without a system of strategic planning for management of water resources, the treaty relies on an ad-hoc approach to problem solving.[42] The treaty also fails to set rules to manage droughts continuing beyond a two-cycle interval (ten years or more).[43] Although the IBWC has authority to interpret the treaty to solve such problems of ambiguity, the treaty does not explain the specific role the commission should take in interpreting the hydrological data it collects.[44] Thus, the IBWC monitors water flows and shares information, but because the authority to interpret data remains with the governments of the United States and Mexico, its power of enforcement is circumscribed and international agreements are subject to the difficulties of political diplomacy.[45]

While the treaty has only produced one drought-related minute in the past forty years, there have been three such minutes since 1995.[46] Even though the recent drought was substantial, demand for water continues to grow, making it hard to determine how much of the shortage results from decreased rains.[47]

Minutes 307 and 308 are responses to the United States' demands that Mexico repay its deficit (estimated at 1.4 million acre-feet in 2001).[48] In Minute 307, Mexico agreed to give the United States 600,000 acre-feet of water in the coming months or to adopt other methods to meet its obligation under the treaty.[49] Minute 307 also committed the governments to "work jointly to identify measures of cooperation on drought management."[50] When Mexico failed to deliver the 600,000 acre-feet by the time stipulated in Minute 307, the two governments agreed on Minute 308, committing Mexico to provide the United States with 90,000 acre-feet of water.[51] Minute 308 also provides that the governments must

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39 *Id.*

40 *Id.* (noting that altering the treaty would affect domestic water law in a number of states, as well as impact half a dozen interstate compacts).

41 *Id.* at 3 (noting that the minutes were adopted in meetings of the IBWC and signed by representatives from the United States and Mexico).

42 *Id.* at 2, 3.

43 *Id.* at 4.

44 *Id.*

45 *Id.*

46 *Id.* at 5 (noting that there was a drought-related minute passed in 1952).

47 *Id.*

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.*

ask international funding agencies to help finance conservation projects in Mexico and must also increase data exchanges on water flows between the nations.[52]

Abundant rains in 2003 and 2004 allowed Mexico to reduce its debt to the United States to below 800,000 acre-feet and temporarily quieted dissatisfied farmers on both sides of the border,[53] but environmental groups assert that alleviating the immediate water shortage will do little to solve the border region's long-term water problems.[54] According to a recent study by the Universidad Nacional Autonoma de Mexico ("UNAM"), Mexico's cities lose almost 40% of their water "as a result of leaks and faulty equipment. In some cities, half the water is lost due to such problems."[55]

Nevertheless, the recent treaty minutes represent significant progress toward solving such problems and fostering international cooperation. The minute procedure has turned out to be "a flexible mechanism of binational cooperation, allowing for the application, extension, elaboration, and modification of the treaty's provisions."[56] Further, the United States and Mexico, in the last decade, have recognized the need to create sustainable water management plans, pursue international financing, increase data sharing, strengthen the IBWC, and to develop a forum for binational cooperation.[57]

While abundant rains and positive agreements have tamed the United States—Mexico conflict for now, without increased cooperation around the globe, similar future conflicts will escalate much further.

III. Water Problems of the Nile Basin

The Nile River, the world's longest river, runs through much of Africa, yet 36% of Africa's population lacks access to clean drinking water.[58] The Nile Basin, home to 160 million people,[59] suffers from "poverty, [political] instability, rapid population growth, environmental degradation and frequent natural disasters."[60] Such problems have made international agreement concerning water use very difficult.

The waters of the Nile are shared by ten countries—Kenya, Burundi, Democratic Republic of Congo, Egypt, Eritrea, Ethiopia, Rwanda, Sudan, Tanzania,

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52 *Id.*

53 Gamboa, *supra* note 33.

54 *Mexico's Water Debt, supra* note 16, at 6.

55 Kelly, Solis & Kourous, *supra* note 17.

56 Mumme, *supra* note 36.

57 *Id.*

58 Jacklynne Hobbs, *Do 'Water Wars' Still Loom in Africa*, INTER PRESS SERVICE, May 15, 2004, *available at* http://ipsnews.net/africa/interna.asp?idnews=23759.

59 *Id.*

60 Nile Basin Initiative: Overview, The World Bank Group, *available at* http://www.worldbank.org/afr/nilebasin/overview.htm (last visited Jan. 28, 2007).

and Uganda[61]—four of which are among the world's ten poorest states.[62] The 1929 Nile Basin Treaty, revised in 1959, regulates the use of the Nile waters today.[63] The treaty pits Egypt and Sudan against the other riparian nations by prohibiting the other eight countries from undertaking any project that may cause a drop in Egypt or Sudan's water level without getting permission from both Egypt and Sudan first.[64]

Tension over the Nile started in colonial times when nations with colonial representation (Sudan and Egypt) were able to exploit the resources of the other Basin nations.[65] At the beginning of the twentieth century, a world cotton shortage led Egypt (under British rule) to focus on producing cotton, which requires constant irrigation and high levels of water.[66] The Nile Projects Commission, comprising representatives from India, the United Kingdom, and the United States, was formed in 1920 to compile estimates of each of the Basin states' water needs.[67] By the end of World War I, Egypt recognized the need to create a formal agreement on water allocation before further advancing any regional development plans.[68] The 1929 Treaty ensued, giving most of the Nile's water to Egypt.[69] Sudan later convinced Egypt that its population was 50% larger than estimated in 1929 and the two countries adjusted the water allocations accordingly by revising the treaty in 1959.[70]

The Nile produces an estimated seventy-four BCM (billion cubic meters) of water annually for distribution among Basin nations.[71] Under the 1959 agreement, Egypt receives fifty-five and a half BCM per year and Sudan receives eighteen and a half BCM per year.[72] Egypt and Sudan estimated that the combined needs of all other riparian nations would not exceed one or two BCM per year.[73] The treaty specified that if any other nation wanted to make a claim for more water, it would have to be approved by a unified Egyptian-Sudanese position.[74] Egypt also reserved the right to unilaterally begin any Nile-related project

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[61] Cathy Majtenyi, *African Water Ministers Call for Better Nile River Cooperation*, VOICE OF AMERICA, Mar. 18, 2004, *available at* http://www.globalpolicy.org/security/natres/water/2004/0318minister.htm.

[62] Joyce Mulama, *Development-East Africa: The Fate of the Nile in the Spotlight*, INTER PRESS SERVICE, Mar. 16, 2004, http://ipsnews.net/interna.asp?idnews=22875.

[63] *Id.* at 1.

[64] *Id.*

[65] Kimberly E. Foulds, *The Nile Basin Initiative: Challenges to Implementation* (Managing Shared Water Conference), June 23–28, 2002, http://nilebasin.com/documents/kim1.htm.

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *The Nile Waters Agreement*, Transboundary Freshwater Dispute Database, http://www.transboundarywaters.orst.edu/projects/casestudies/nile_agreement.html (last visited Jan. 28, 2007).

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

without the consent of the other riparian nations.[75] Despite the glaring inequities, the other basin nations have adhered to the allocations of the treaty until present day, and no other riparian nation has exercised a legal claim to the waters distributed under the 1959 treaty.[76]

However, the other riparian nations have expressed dissatisfaction with their current access to Nile waters.[77] Ethiopia, for example, one of the world's poorest nations, accounts for more than 75% of the water flowing into the Nile, but consumes less than 1% of the Nile's water.[78] Since 1957, Ethiopia has spoken of pursuing unilateral water development[79] and has recently announced plans to use Nile water for irrigation.[80] Similarly, Tanzania is formulating a $27.6 billion project to construct a pipeline which extracts drinking water from the Nile.[81] Further, since its independence, the Kenyan government has stated publicly that it does not recognize the treaty.[82] Despite such dissatisfaction, the treaty has remained intact because Egypt has made it known that it will consider any attempt to violate the treaty as an act of war.[83]

In renouncing the treaty, Tanzania's Minister of Water Resources, Edward Lowasa, explained its inequitable underpinnings by saying, "the treaties have been entered into without the consent of the people of the region. The British had no mandate to sign treaties with Egypt on our behalf."[84] As outrage spread throughout Northern Africa, the East African press printed editorials chronicling the injustice of the treaty as a "colonial relic."[85]

However, Egypt's Minister of Water and Irrigation, Mahmoud Abu-Zeid, exclaimed that "any unilateral change in the 1929 Nile Basin Treaty would be a breach of international law."[86] Even though all the riparian nations did not ratify the treaty, Abu-Zeid's claim has merit because non-party states are bound by a provision in an international treaty when it rises to the level of international customary law (as the Nile Basin Treaty has).[87] As a result, for change to be effec-

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[75] Gamal Nkrumah, *Fresh Water Talks*, AL-AHRAM WEEKLY, June 11, 2004, http://yaleglobal.yale.edu/display.article?id=4080.

[76] Hobbs, *supra* note 58.

[77] *See* Nkrumah, *supra* note 75.

[78] *The Nile Waters Agreement*, *supra* note 70; Mulama *supra* note 62 (providing that 80% of Ethiopians live under the poverty line of a dollar a day).

[79] Foulds, *supra* note 65.

[80] Martin Plaut, *Nile States Hold 'Crisis Talk,'*, BBC, Mar. 7, 2004, http://news.bbc.co.uk/2/hi/africa/3541617.stm#top.

[81] Nkrumah, *supra* note 75.

[82] *Kenya: Minister Gives Kenya Position on the Treaty*, allAfrica.com, Jan. 12, 2007, http://allafrica.com/stories/200701110918.html.

[83] *See* Majtenyi, *supra* note 61.

[84] Nkrumah, *supra* note 75.

[85] Davin O'Regan, *The Nile River: Building or Stumbling Block?*, allAfrica.com, Apr. 30, 2004, http://allafrica.com/stories/200404300089.html.

[86] *Id.*

[87] Amy Hardberger, *Whose Job is it Anyway?: Governmental Obligations Created by the Human Right to Water*, 41 TEX. INT'L L.J. 533, 537 (2006) [hereinafter Government Obligations].

tive, it must be agreed upon collectively with all the riparian nations, including Egypt and Sudan.

Recognizing the need for collective action, the Nile nations took a historic step by establishing the Nile Basin Initiative ("NBI") in February 1999.[88] The program was designed "to achieve sustainable socio-economic development through the equitable utilization of, and benefit from, the common Nile Basin water resources."[89] The NBI created the Nile Council of Ministers ("Nile-COM"), comprising water ministers from all of the riparian countries, as its highest decision-making body.[90] The Nile-COM released a statement declaring, "[w]e all believe that by moving together to major joint development, we can look forward to peace and prosperity and not backwards to dispute and conflict."[91] However, the NBI is only a transitional arrangement designed to foster communication until a permanent framework is in place.[92] While the NBI is a great step toward diplomacy, until a permanent water management program is created, conflict will continue to escalate.

The NBI did not establish specific goals or deadlines for progress; it focused more on building trust.[93] The World Bank Senior Water Advisor, David Grey, stated that the NBI's goal is to negotiate a legal framework for establishing and discussing development projects, but such progress has "yet to be attained in its seven years of existence."[94] Accordingly, the NBI has many critics, including Mekonen Loulseged, head of the Ethiopian Ministry of Water Resources' Design Department, who stated that, "[u]ntil the agreement of 1959 is null and void, cooperation will be unsustainable."[95] Journalist Gamal Nkrumah added that, "the gap between the NBI's aims and means leaves the body ineffective and unconvincing."[96]

For the NBI to reach its goal, the Nile region must have greater political stability.[97] Achieving stability includes ending civil wars and border disputes.[98] Contributing to the current instability are "recent or ongoing armed conflicts in at least four, and between two of the [stakeholder countries]."[99] As a result of the present political environment, Jo Raisin, a consultant with the United States Agency for International Development, stated that "the projects of the NBI will

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88 Nile Basin Initiative: Overview, *supra* note 60.

89 *Id.*

90 O'Regan, *supra* note 85.

91 *Id.*

92 Nile Basin Initiative: Overview, *supra* note 60.

93 O'Regan, *supra* note 85.

94 *Id.*

95 Foulds, *supra* note 65.

96 Nkrumah, *supra* note 75.

97 *Id.*

98 *Id.*

99 Foulds, *supra* note 65 (remembering that Sudan is suffering from a period of civil war and its government allegedly organized efforts to overthrow Egypt's president, Hosni Mubarak).

take at least twenty years to implement."[100] Such instability has already lead to unilateral actions which threaten the effectiveness of the NBI, such as the irrigation plans in Ethiopia and the pipeline construction in Tanzania. Kenyan politician Samson Ojiayo encouraged Kenya to take water for itself because a "war on one nation means war on all."[101] A source close to the Tanzanian government who refused to be named added, "[w]e cannot sit and wait while we can save our people from famine."[102] Such sentiments illustrate the increasing probability of a water war in Northern Africa.

Other problems in the area include recurrent droughts, conflicts of interest stemming from ethnic rivalries,[103] and severe pollution.[104] For example, Lake Victoria, the Nile's major source, "has become the toilet for East Africa. People are doing all sorts of things in the lake—including urinating [and] passing stools."[105] While the NBI has much work left to do, "if countries sharing the waterway are able to rise above the history, the poverty, and the conflict that threatens cooperative engagement, the pay-off may be significant economic development and regional peace."[106]

Today, the 1929 treaty continues to govern the Nile Basin as customary international law. The NBI represents a momentous step of collective action, but without effective enforcement mechanisms in place, it will not prevent conflict. Despite international discussions beginning to form, Egypt still controls the water supply, tensions remain high, and faced with extreme poverty, disease and drought, other Basin nations are beginning to take unilateral actions to violate of the treaty.

IV. Proposed Solutions to International Water Disputes

There are two main approaches to solving problems of transboundary water allocation: privatizing the water supply and recognizing a human right to water. This section will briefly explain each method and then show why neither solution would be effective in Northern Africa.

A. The Privatization of Water

In an effort to bring economic improvements to developing countries, some governments have begun to treat water as a commodity by privatizing water sys-

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[100] *Id.*

[101] Mulama *supra* note 62 (Samson Ojiayo is a Coordinator of Bunge la Wananchi [Parliament of the People]).

[102] *Id.*

[103] Foulds, *supra* note 65.

[104] Hobbs, *supra* note 58.

[105] *Id.* (quoting Rosemary Rop of Maji na Ufanisi [Water and Development], a non-governmental organization in Kenya).

[106] O'Regan, *supra* note 85.

tems.[107] Under the privatization approach, governments solicit private companies "to take over the management, operation, and sometimes even the ownership of the public water sector."[108] The system's proponents, such as the World Bank, claim that privatization provides incentives for countries to preserve water resources and promotes efficiency in services.[109]

Privatization would give individuals who have a direct personal stake in the enterprise the power to make decisions regarding the price of water.[110] It also has the potential for quick results because the private sector can more easily obtain capital than the public sector.[111] Such access to capital would be especially useful in poor nations that do not have the necessary funding to improve flawed infrastructures.

However, privatization has brought fervent opposition. In March 2006, thousands of people marched through Mexico City protesting water privatization; it was the first time an environmental issue had mobilized so many people.[112] Many fear that "profit-driven companies will be reluctant to serve the poor"[113] and will take advantage of gratuitous price increases.[114] Water sold as a commodity is often only affordable to the privileged and can deepen inequalities between the rich and poor.[115]

Recent privatization projects have not been successful, even in poor, developing nations.[116] In Latin America, for example, "private concessions have exacerbated inequities in access to water by focusing services in lucrative urban zones and ignoring areas where the need is worst."[117] Experts have also declared one of the world's largest privatization efforts, taking place in the Philippines, a failure because of substantial increases in water rates, water losses due to inadequate infrastructure, and insufficient private funding to maintain programs for the urban poor.[118]

Nile Basin nations cannot afford the risk of increased civil protest or violence. The director of the International Relations Center Americas Program, Laura Carlson, exclaimed, "[t]he privatization model for water use and distribution has failed to deliver. It's time to make room for new, more democratic, alterna-

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[107] Amy K. Miller, *Blue Rush: Is an International Privatization Agreement a Viable Solution for Developing Countries in the Face of an Impending World Water Crisis?*, 16 IND. INT'L & COMP. L. REV. 217, 218–19 (2005).

[108] *Id.* at 218.

[109] *Id.* at 229.

[110] *Id.* at 234–35.

[111] *Id.* at 233.

[112] Carlsen *supra* note 8.

[113] *Id.* at 219.

[114] *Id.* at 235.

[115] *Selling Canada's Water*, CBC NEWS ONLINE, Aug. 25, 2004, http://www.cbc.ca/news/background/water/index.html.

[116] Miller, *supra* note 107, at 219.

[117] Carlsen, *supra* note 8.

[118] Miller *supra* note 107, at 220.

tives."[119] Globally, public opinion is strongly against private-sector management of water resources,[120] and people more often view water as a basic human right that should not be managed by private companies.[121]

B. Water as a Human Right

It is hard to imagine many things more deserving of human right status than access to water; life cannot exist without water. Yet, human rights are a relatively new and rapidly expanding source of international law.[122] Human rights are "the freedoms, immunities, and benefits that, according to modern values (especially at an international level), all human beings should be able to claim as a matter of right in the society in which they live."[123] Such human rights are protected by international standards that ensure fundamental freedoms and are normally held by citizens and enforced against their nation of citizenship.[124]

Human rights are divided into two categories: welfare rights and liberty rights.[125] Welfare rights are those rights necessary to assure the availability of goods or services vital to human well-being.[126] They are positive rights because the state must take affirmative action to ensure welfare rights exist for its citizens.[127] Such rights include economic, cultural, and social rights.[128] Liberty rights are those which the government cannot interfere with, such as civil, political, and moral rights.[129] Liberty rights are negative rights because the state is only required to refrain from interfering with them; there is no duty for the state to actively provide liberty rights.[130]

Currently, international law does not explicitly recognize the right to water as a human right. If there is to be such a right, it must either be inferred from existing rights or created as a right in itself.[131] Inferring the right is a realistic possibility because the dependency on water to survive closely parallels rights already considered customary in international law. If inferred from the right to life, the right to water would become a liberty right and governments would only be obligated to prevent interference with access; there would be no obligation to

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119 Carlsen, *supra* note 8.

120 *Id.* at 1.

121 *Id.*

122 Amy Hardberger, *Life, Liberty, and the Pursuit of Water: Evaluating Water as a Human Right and the Duties and Obligations it Creates*, 4 NW. U. J. INT'L HUM. RTS. 331, 335 (2005).

123 BLACK'S LAW DICTIONARY 712 (7th ed. 1999).

124 Government Obligations, *supra* note 87, at 536.

125 *Id.* at 537.

126 *Id.*

127 *Id.*

128 *Id.*

129 *Id.*

130 *Id.*

131 Stephen C. McCaffrey, *A Human Right to Water: Domestic and International Implications*, 5 GEO. INT'L ENVTL. L. REV. 1, 20 (1992).

provide a minimal amount of water to citizens.[132] Another option arises through Article 25 of the Universal Declaration of Human Rights, which proclaims that everyone has "the right to a standard of living adequate for the health and well-being of himself and of his family, including food."[133] Such a standard of living could not be maintained without access to a minimal level of clean water. If included under the right to a standard of living, the right to water would become a welfare right, giving the state a positive duty to provide access for its citizens.[134] While an inadequate water supply would then seemingly constitute a violation of the right to water, an expectation of unlimited access is not realistic, so international law would have to create a middle ground.[135] A solution could require states to deliver a minimum allowance of water to citizens, but only if they have the economic ability to do so.

With a welfare right to water, the question arises whether neighboring states have the obligation to assist nations which do not have the capability of providing an adequate amount of water to their citizens. It is generally accepted in international law that a state can exploit its own resources, but cannot exploit the resources of other states.[136] Fair resource sharing can be achieved by following the doctrine of equitable utilization which allows a nation to "utilize a resource as long as it does not harm another user who is using the resource equitably."[137] In administering water as a human right, "it seems clear that a state's "right" to receive water from a co-riparian state would not require more from the co-riparian than that it use the international watercourse in an equitable and reasonable manner."[138] However, equitable utilization sets a vague standard of what is considered "equitable" and how to determine whether a state is "economically capable" of providing minimum levels of water. Such ambiguities will prove especially difficult to enforce in Northern Africa, where nations are plagued by political instability, tension, and contrasting cultures.

If created as its own individual right, access to water would likely become a welfare right, just as other social rights.[139] While the right to water has not reached status as international customary law, textual support has increased recognition of the right to water and several nations, including South Africa and Ethiopia, have already begun to recognize a human right to water.[140] In 2002,

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[132] *See* Hardberger, *supra* note 122, at 344, 336.

[133] Hardberger, *supra* note 122, at 337; McCaffrey, *supra* note 131, at 1 (Article 25 was adopted by the United Nations General Assembly in 1948).

[134] McCaffrey, *supra* note 131, at 8.

[135] Government Obligations, *supra* note 87, at 540.

[136] *Id.* at 543.

[137] *Id.* (equitable utilization does not mean that neighboring states have to have equal access to water. It simply means each state should be able to provide at least a minimal standard).

[138] McCaffrey, *supra* note 131, at 23.

[139] Hardberger, *supra* note 122, at 354.

[140] Government Obligations, *supra* note 87, at 539.

Comment 15 of the International Covenant of Economic, Social, and Cultural Rights ("ICESCR") recognized water as a separate right.[141] The comment states:

> The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible[,] and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease[,] and to provide for consumption, cooking, personal[,] and domestic hygienic requirements.[142]

This definition is significant because it mentions the quantity, quality, and accessibility to water; not just a general need for drinking water.[143] While Comment 15 is not binding per se, it is intended to clarify rights given in the covenant, and provides strong support for establishing water as a human right by raising levels of social and political awareness.[144]

However, recognizing water as a human right is not the best mechanism for bringing a timely solution to the problems of the Nile River Basin. Establishing a human right to water is purported to help reduce poverty by raising the living standard, but there is no guarantee of such a result.[145] While the right to food, for instance, is recognized as a human right, widespread famine still exists.[146] Furthermore, the unstable and impoverished nations of the Nile Basin would have extreme difficulty enforcing claims of deprived water access; especially claims regarding co-riparian nations. In countries that currently recognize water as a human right, like South Africa, the local courts adjudicate accountability in situations of misuse.[147] However, such an enforcement mechanism would be ineffective against co-riparian nations as questions of jurisdiction, and the responsibilities neighboring states owe one another are yet to be definitively answered. Moreover, most Nile Basin countries suffer from dysfunctional judicial systems and most judges are unable to adjudicate water disputes effectively because government administrative institutions often undermine the independence of judiciary systems.[148] While a human right to water may eventually become customary international law, with rapidly diminishing resources, increasing poverty, and continuing political instability, the riparian nations of the Nile Basin cannot wait until that time comes.

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141 Hardberger, *supra* note 122, at 348.

142 *Id.*

143 *Id.*

144 *Id.* at 349.

145 *Id.* at 338.

146 *Id.* at 336.

147 Government Obligations, *supra* note 87, at 564.

148 Okaru-Bisant, *supra* note 13, at 336.

V. A Solution for the Nile Basin

The general contention among international practitioners and commentators is that it is not possible to establish a generic model of water law applicable to all nations.[149] Yet, great progress can be made in the Nile Basin if the riparian nations supplement the NBI by extracting features from the recent United States—Mexico negotiations, the privatization model, and the human rights model. To prevent future conflict, Basin nations should focus on their common interests and develop a central institution backed by private funding that has the power to enforce agreements, which maintain flexible standards of water allocation and quality.

There are a number of reasons why the current decision-making body in Northern Africa, the Nile-COM, cannot merely mimic the United States—Mexico agreements. First, abundant rains were arguably the most influential factor enabling Mexico to satisfy the United States' demands for repayment. In the Nile Basin, however, drought conditions have not subsided in recent years.[150] Furthermore, the United States and Mexico are allies and much more politically stable than the ten riparian nations of Northern Africa. Also, the 1944 treaty was ratified by both North American countries; the 1959 agreement, however, did not include eight of the riparian nations. Ten poverty-stricken nations desperate for resources with a long history of political instability will have much more difficulty reaching a compromise than the United States and Mexico.

As allies, each of whom has other sources of water, the United States and Mexico allow for water debt forgiveness in a given year if repaid as soon as possible.[151] Such a trusting agreement is highly unlikely among the historic rivals of the Nile Basin. Moreover, while the 1944 treaty created the IBWC,[152] the Nile-COM, created by the 1959 agreement, is an ineffective counterpart as a mechanism to enforce the treaty's provisions and foster co-riparian cooperation.

Yet, the recent negotiations between the United States and Mexico do have positive aspects which can help the Nile Basin, as well as shortcomings which can be improved upon in future Nile negotiations. First, and most importantly, Minutes 307 and 308 show an interest of increased collaboration for both countries and illustrate diplomatic compromise as a means to tame tensions over international water.[153] Expressing such a common interest has been the greatest success of the NBI[154] and such efforts must continue to expand. NBI Executive Director Meraji Msuya recognized the accomplishment in saying, "there has been

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[149] Andrew Allan, *A Comparison Between the Water Law Reforms in South Africa and Scotland: Can a Generic National Water Law Model Be Developed from These Examples?*, 43 NAT. RESOURCES J. 419, 474 (2003).

[150] *See* Mulama, *supra* note 62 (Ethiopia currently suffers from a severe drought).

[151] Mumme, *supra* note 36.

[152] *Id.*

[153] Rachel McHugh, *Federal Aquifer Bill Would Help Calm Troubled U.S.-Mexico Border Waters*, IRC AMERICAS PROGRAM POLICY REPORT, Mar. 21, 2005, *available at* http://americas.irc-online.org/am/740.

[154] Nkrumah, *supra* note 75, at 4 ("the most important new development is that the states of the Nile Basin are meeting regularly, discussing openly and exchanging viewpoints and ironing out differences").

tremendous achievement [since the formation of the NBI]. People are now talking openly about the Nile . . . not like it was ten to fifteen years ago when no one could talk about it."[155]

The IBWC also exposes two important features of an effective transboundary water agreement: the importance of sharing data and the need to establish an enforcement institution. The Nile nations must commit to more extensive data-sharing methods than the United States and Mexico did with the IBWC, which left the responsibility of data interpretation to individual governments.[156] This will be especially difficult in Northern Africa "because most basin countries lack the capacity to share environmental and scientific data on the shared water use and development initiatives."[157] Since the IBWC was not fully effective in monitoring shortages in binational rivers,[158] Nile nations must develop a similar institution that has extensive powers to share data and enforce water allotments.

A major problem across most international water agreements is that "apart from the force of public opinion, there is no effective monitoring and compliance system to ensure that obligations assumed under treaties are enforced within national boundaries."[159] Most riparian nations have also had trouble enforcing international agreements because they have not clearly defined their water boundaries.[160] The creation of a central institution similar to the IBWC, but with powers to interpret data, enforce agreements, and define boundaries, would be a significant step toward not only reaching an agreement today, but also toward ensuring the success of future agreements.[161]

When creating such an institution, Basin nations should follow recent trends in environmental border management that favor greater public participation.[162] A major weakness of the 1944 treaty is that it contains no provision for public consultation, relations, or participation.[163] International politics professor Stephen P. Mumme noted, "[a]s originally conceived, then, the IBWC was to be a secretive, hierarchical, and otherwise narrow body . . . [with an] exclusivist, privileged approach to border water management."[164] Nile nations could avoid such a downfall by creating a representative body to assess progress toward stated

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155 Mulama, *supra* note 62.

156 Mumme, *supra* note 36.

157 Okaru-Bisant, *supra* note 13, at 343 (nations lack the capacity to share information because of infrastructural shortcomings).

158 Mumme, *supra* note 36.

159 Okaru-Bisant, *supra* note 13, at 350.

160 *Id.*

161 *Id.* at 357–58 ("Problems in the available institutional and legal frameworks at the regional level further demonstrate the need to strengthen the enforcement of available laws and enhance both the soundness and performance of existing institutions").

162 Mumme, *supra* note 36.

163 *Id.*

164 *Id.*

goals and strategies.[165] Such active public participation "is required to maintain the legitimacy and strength of regulatory and management bodies."[166]

Nations of the Nile Basin should also look to most other African river basins which have entered into regional agreements[167] using inter-governmental structures.[168] Every international river basin in Southern Africa already has a commission in place or one currently being developed.[169] The Tri-partite Permanent Technical Commission, established by South Africa, Mozambique, and Swaziland, is an example of such an institution that has proven successful.[170]

When creating such a transboundary institution, co-riparian nations should prescribe minimal standards for water allocation and quality.[171] In doing so, countries can look to international human rights vocabulary without having to adopt water as a human right. A stated purpose to provide a minimal standard of both quality and quantity of water to all nations for reasonable use, which allows for decent human subsistence and the prevention health concerns, would improve upon the current vague standard of equitable utilization.[172] A potential agreement must also leave room for future growth. Nile water flows are often deceptive, and demands can frequently change due to such factors as population growth.[173] Adopting a flexible definition of "reasonable use" will be more easily subject to future change than the 1959 agreement which allocates specific BCMs of water to each riparian country.

As proponents for the privatization model profess, funding will be a major hurdle for the poverty-stricken basin nations. While avoiding the risk of deepening inequalities inherent in the full scale privatization model, North African countries should take advantage of the model's aggressive funding procedures. Adopting a large-scale effort to attract finances from abroad is a fundamental necessity for poor nations. By building international trust and identifying similar interests with other nations, obtaining such funds is a realistic goal. Looking at the United States and Mexico for example, "due to the proximity of the two states, environmental hazards created in Mexico by a lack of infrastructure directly affect both sides of the border; therefore, the United States has a vested interest in assisting Mexico with water supply and treatment facilities."[174] With so many interdependent nations on the Nile amid serious drought, pollution, and

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165 Allan, *supra* note 149, at 486.

166 *Id.*

167 Okaru-Bisant, *supra* note 13, at 358.

168 Hobbs, *supra* note 58.

169 *Id.*

170 *Id.*

171 Eyal Benvenisti, *Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law*, 90 AM. J. INT'L L. 384, 400 (1996).

172 *Id.* at 12.

173 O'Regan, *supra* note 85.

174 Government Obligations, *supra* note 87, at 548.

poverty concerns, the NBI can appeal to similar international interests. By mid 2004, the NBI had already raised $130 million from donors.[175]

The solutions proposed herein will allow the Nile Basin to effectively deal with problems of population growth, urbanization, poverty, political instability, and pollution. Flexible standards designed to evolve with time are apt to accommodate shifting population and urbanization trends. Increased international funding will supplement insufficient infrastructural budgets and minimum standards of quality will raise the level of life at the poverty line and reduce pollution. Lastly, by strengthening binational forums and implementing an inter-governmental institution with the power to enforce agreements, cooperative efforts will ultimately alleviate political instability by fostering trust and communication throughout the region.

VI. Conclusion

Although conflict over the Nile waters may likely escalate to warfare, if managed correctly, the international water shortage can serve as a pathway to peace.[176] By coming together, countries can build trust and prevent conflict.[177] The Nile nations must use water as a negotiating tool, which offers communication and common interests in the midst of crisis.[178]

The NBI is a monumental step, but there is much more work to be done. Despite recent increased communications, relations between Egypt and Kenya hit a low during a meeting of the Nile-COM in December 2006 when "Kenya's Minister of Water Resources, Marha Karua, stormed out of the talks after disagreements about sharing of the Nile's resources, an action that was termed a 'declaration of war' by her Egyptian counterpart, Mahmoud Abu-Zeid."[179]

The recent negotiations between the United States and Mexico have shown that implementing an inter-governmental institution designed to share data and enforce future agreements will enable co-riparian nations to begin paving a path to peace. Negotiations must involve active public participation and flexible standards which evolve as demands change. The NBI must also continue focused efforts to attract international investors and foster international communication.

Joint development of the Nile's resources creates an opportunity to institutionalize cooperation in a win-win situation for Basin nations plagued by a history of warfare. Yet, despite recent progress, failure of the NBI would generate even greater mistrust and suspicion among co-riparian nations, thus making the risk of armed conflict even more probable.[180] Recognizing the gravity of the situation, the Minister of Water Affairs and Forestry in South Africa, Ronnie Kasrils, said,

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175 O'Regan, *supra* note 85.

176 Geoffrey D. Dabelko, *Water Can Be a Pathway to Peace, Not War*, GLOBAL POL'Y FORUM, June 2005, *available at* http://www.globalpolicy.org/security/natres/water/2005/06peace.htm.

177 *Id.*

178 *Id.*

179 Mulama, *supra* note 62.

180 Foulds, *supra* note 65.

"[b]ut I state very clearly—we can deliver clean drinking water and adequate sanitation to the people of the world IF WE TRULY WANT TO, IF WE HAVE THE POLITICAL WILL TO DO SO."[181] With the need for change in the international spotlight, the time for action is now and the nations of the Nile River must focus on their common interests by looking to other transboundary water disputes and proposed solutions for effective methods of fostering collective action.

The recent United States–Mexico agreements illustrate the importance of a trans-national water management system with the power to enforce agreements through a centralized institution. Further, the water quality standards of the human rights model provide a strategy to prevent disease and decrease pollution. Finally, the methodology of the privatization model creates a means to generate the necessary funding to produce a lasting effect. Thus, implementing an international system of collective action based upon each of these principles has the potential not only to prevent war in Northern Africa, but also to promote peace and provide water to the citizens of one of the most over-populated and impoverished regions in the world.

[181] Allan, *supra* note 149, at 487.

BOTSWANA'S SUCCESS IN BALANCING THE ECONOMICS OF HIV/AIDS WITH TRIPS OBLIGATIONS AND HUMAN RIGHTS

Beata Guzik†

> "The right of property is the guardian of every other right, and to deprive a people of this is in fact to deprive them of their liberty."[1]

I. Introduction: Botswana Leading Africa in Economics and AIDS

Botswana serves as a model for Africa and developing countries worldwide. Due to its groundbreaking response to HIV/AIDS, Botswana is a model of access to medical treatment in Southern Africa.[2] Botswana is the first African country to aim toward providing antiretroviral therapy to all disadvantaged citizens. It has enjoyed peace since its independence in 1966, and has become relatively prosperous,[3] with a per capita income of $11,200 in 2006.[4] Much of Botswana's success is due to diamond mining (accounting for more than one-third of its GDP), but other key sectors include tourism, financial services, farming, and cattle.[5] With an estimated 2006 GDP of nearly $19 billion, the Central Intelligence Agency ("CIA") ranks Botswana 120 out of 229 world economies.[6]

Despite such economic success, Botswana battles against HIV/AIDS.[7] With 24.1% of its population infected, Botswana has the second highest adult HIV/

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[1] Arthur Lee, An Appeal to the Justice and Interests of the People of Great Britain, in the Present Dispute with America, (4th ed. 1775), available at *Citizens' Alliance for Property Rights*, http://www.proprights.org (last visited Apr. 1, 2007).

[2] 3D Three, *Trade-Related Intellectual Property Rights, Trade in Services and the Fulfillment of Children's Rights—Botswana* ¶ 1 (Sept. 2004), http://www.3dthree.org/pdf_3D/3DCRCBotswana Sept04en.pdf [hereinafter Trade and Children's Rights].

[3] Avert, *HIV and AIDS in Botswana*, http://avert.org/aidsbotswana.htm (last visited April 28, 2007) [hereinafter AIDS In Botswana].

[4] The World Factbook, *Botswana*, CIA, https://www.cia.gov/cia/publications/factbook/goes/bc.html [hereinafter CIA Factbook].

[5] *Id.*

[6] The World Factbook, *Rank Order—GDP (purchasing power parity)*, CIA, https://www.cia.gov/cia/publications/factbook/rankorder/2001rank.html. Actual 2006 GDP estimate is $18.72 billion. *Id.*

[7] "The United Nations has characterized the impact of the HIV/AIDS crisis in Africa as 'no less destructive than that of warfare itself.'" Lissett Ferreira, *Access to Affordable HIV/AIDS Drugs: The Human Rights Obligations of Multinational Pharmaceutical Corporations*, 71 FORDHAM L. REV. 1133, 1133 (2002) (quoting Press Release, United Nations, In Address to Security Council, Secretary-General Says Fight against AIDS in Africa Immediate Priority in Global Effort against Disease, SG/SM/7275 AFR/200 SC/6780 (Jan. 6, 2000)).

AIDS rate in the world.[8] Human rights and health concerns, therefore, must be balanced against economic interests in policy making.

Botswana attempts to address both human rights and economic concerns as a signatory to the Convention on the Rights of the Child ("CRC"), the World Trade Organization Intellectual Property Agreements ("TRIPS"), and the General Agreement on Trade in Services ("GATS"). Human rights groups fear that the resulting obligations conflict with one another, and may hinder the nation's ability to fight the HIV/AIDS epidemic.[9] One worry is that the TRIPS-mandated twenty year exclusivity rights for the developer of patented technology will artificially drive up prices of pharmaceuticals, making them unaffordable for many of Botswana's citizens.[10] Unaffordable medications directly conflict with the country's obligation under the CRC to protect the life, health, survival, and development of the nation's children.[11]

While preserving human rights, Botswana must deal with the seemingly conflicting need of ensuring economic growth. Economic growth and prosperity from diamond mining helps Botswana fight against the HIV/AIDS epidemic.[12] Economists agree that innovation plays a pivotal role in continued economic growth and development.[13] "Over the past half century, researchers beginning with Nobel Laureate Robert Solow have established that the development and adoption of economic innovation is the most powerful factor determining a nation's underlying growth rate."[14] Moreover, strong intellectual property laws encourage technology transfers and investments by foreign countries.[15] For

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[8] AIDS in Botswana, *supra* note 3 at ¶ 1. In 2005, there were an estimated 270,000 people living with HIV in Botswana; the total population is about 2 million people. *Id.* Botswana has accepted a prevalence rate of 17.1%, based on people aged eighteen months and above reported to be HIV positive in 2004. *2005 Progress Report of the National Response to the UNGASS Declaration of Commitment on HIV/AIDS*, Ministry of State President, § 2.2. [hereinafter 2005 Report]. The estimate rises drastically, however, when compared to individuals 15–49 years old, 25.3% of whom were living with AIDS in 2004. *Id.* Additional statistics are frightening. Life expectancy at birth from 2000–2005 is less than forty years and 120,000 children have lost at least one parent to AIDS. AIDS in Botswana, *supra* note 3. *The Impact of Aids*, United Nations, 2004.

[9] *See* Trade and Children's Rights, *supra* note 2, ¶ 3–5.

[10] *See id.*, ¶ 8. In 2003, 30.3% of Botswana's population fell below the poverty line. CIA Factbook, *supra* note 4.

[11] *See* Trade and Children's Rights, *supra* note 2, ¶ 8.

[12] *See* CIA Factbook, *supra* note 4.

[13] Robert J. Shapiro & Kevin A. Hasset, *The Economic Value of Intellectual Property*, 6, (Oct. 2005), http://www.usaforinnovation.org/news/ip_master.pdf. "In the United States, the world's most successful advanced economy, an estimated 30 percent to 40 percent of the gains in productivity and growth achieved during the 20th century are attributable to economic innovation in its various forms." *Id.* Of the gains in the growth rate of U.S. productivity from 1995–2001, the development of new information technologies accounted for 28% of gains, capital investment in those technologies for 34%, research and development for 10% and response by firms in the areas of organization and worker training in response to innovation accounted for another 10%. *Id.* at 7.

[14] *Id.* at 6.

[15] *Id.* at 13. The strength of intellectual property protection sends an important signal to would-be investors: "It is likely that potential investors perceive the adequacy of the [intellectual property rights] regime as an indication of the government's attitude towards foreign direct investment . . ." Simon Helm, *Intellectual Property In Transition Economies: Assessing the Latvian Experience*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 119, 132 (2003) (quoting Beata Smarzynska, Composition of Foreign

example, for every 1% increase in the degree of patent protection in a developing country, United States based investment in that country expands by .45%.[16] Property rights protection also encourages multinational firms to shift research and development activity to developing countries, creating a virtuous cycle as technology is transferred and adopted by domestic citizens and firms, and the domestic rate of intellectual property development increases.[17] Additional encouragement is provided for pharmaceutical firms to begin research and development of medicines necessary to fight the specific medical afflictions of each region.[18] This demonstrates "that greater respect for intellectual property rights can be literally a matter of life and death in many developing countries."[19]

For Botswana to continue to grow and prosper it must fulfill its obligations in fighting the HIV/AIDS epidemic while ensuring that innovation is encouraged through the protection of intellectual property rights.[20] This article will examine whether such obligations are truly inconsistent, and suggests that both aims may be met through already existing compromises. Part II of this paper discusses the CRC and corresponding obligations. Part III explores the Agreement on Trade Related Intellectual Property Rights ("TRIPS") and the agreement's effect on drug availability and affordability. Part IV examines how Botswana worked to fulfill its obligations under both of these international agreements. Finally, Part V concludes that these obligations can be fulfilled in a manner consistent with both treaties, and that Botswana may, in the future, pave the way to combating the HIV/AIDS epidemic in Africa.

II. Convention on the Rights of the Child: Life Saving Medicines for the Whole Family

The CRC entitles all children to basic human rights protections and is considered by many as "the most rapidly and universally accepted human rights document in the history of international law."[21] The CRC represents the first binding international human rights instrument to incorporate civil, political, economic, social, and cultural rights while managing to provide each priority with equal

Direct Investment and Protection of Intellectual Property Rights in Transition Economies 2 (Center for Economic Policy Research, Discussion Paper No. 2228, 1999)).

16 *Id.*

17 Shapiro & Hasset, *supra* note 13, at 15–16.

18 *Id.* at 16. One study found an increase in local research of anti-malaria drugs by pharmaceutical companies as a result of improved IP protection in areas prone to malaria outbreaks. *Id.*

19 *Id.*

20 *See id.* at 5–6.

21 Lauren M. Spitz, *Implementing the U.N. Convention on the Rights of the Child: Children's Rights under the 1996 South African Constitution*, 38 VAND. J. TRANSNAT'L L. 853, 854 (2005) (quoting Barbara Bennett Woodhouse, *Recognizing Children's Rights: Lessons from South Africa*, 26 SPG HUM. RTS. 15, 15 (1999)).

emphasis.[22] Article 6 awards children the most basic of all human rights: the right to life.[23]

The right to life facially creates an obligation to prevent death and illness, but some have suggested a broader interpretation.[24] Article 6 of the CRC states that each signatory must "ensure to the maximum extent possible the survival and development of the child."[25] Article 24 of the CRC creates an affirmative right to the "highest attainable standard of health."[26] According to the U.N. Commission on Human Rights, access to HIV/AIDS medication is "one fundamental element for achieving progressively the full realization of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[27]

Perhaps these obligations can be read to protect the child's entire family unit from the ravaging effects of HIV/AIDS. In sub-Saharan Africa, 9% of all children under the age of fifteen have lost at least one parent to the disease.[28] The results for these children are heartbreaking. They suffer from psychological trauma, poverty, social dislocation, and often, discrimination.[29] Education is significantly affected, as orphans are 13% less likely to attend school than non-orphans.[30] Demands on public sector services such as health care and education also begin to increase as the adult population wanes.[31]

"Botswana lost approximately 17% of its health-care workforce due to AIDS between 1999 and 2005."[32] The loss created an obstacle as Botswana continues to work to provide antiretroviral therapy to all of its citizens.[33] In deciding whether to make investments, Botswana's business community also takes the loss into account, as Botswana projects that 23% of its agricultural labor force alone will be lost by the year 2020.[34] The children of families with HIV/AIDS, lacking resources such as education and stability, face many difficulties in attempting to fill the gaps their parents leave behind.[35] Any failure in fighting the HIV/AIDS epidemic, therefore, is a failure to protect the right to both the physi-

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22 *Id.* at 866.

23 M.E. Klinck, B. Iuris, D.A. Louw & B.J. Peens, *A South African Perspective on Children's Rights: Pertinent Issues In Remedial and Protection Interventions*, 19 MED. & L. 253, 254 (2000).

24 *Id.* at 254.

25 *Id.*

26 *Id.* at 256.

27 Access to Medication in the Context of Pandemics such as HIV/AIDS, Hum. Rts. Comm'n Res. 2003/29, U.N. ESCOR, 57th Sess., Supp. No. 3, 56th mtg. U.N. E/CN.4/2003/L.11/Add.3 (Apr. 22, 2003).

28 UNAIDS, *2006 Report on the Global AIDS Epidemic*, Chapter 4 at 92, http://www.unaids.org/en/HIV_data/2006GlobalReport/default.asp [hereinafter UNAIDS Impact].

29 *Id.* at 91.

30 *Id.* at 92.

31 *Id.*

32 *Id.* at 95.

33 World Health Organization, *Summary Country Profile for HIV/AIDS Treatment Scale-Up: Botswana* (Dec. 2005), http://www.who.int/hiv/HIVCP_BWA.pdf [hereinafter WHO Treatment].

34 UNAIDS Impact, *supra* note 28, at 98, 100.

35 *See generally* UNAIDS Impact, *supra* note 28.

cal and productive life of the nation's children. The future stability of Botswana depends upon stabilization of both HIV/AIDS and its after-effects.[36]

III. TRIPS, Compulsory Licenses, and the Delivery of Medication

As a signatory to the TRIPS agreement,[37] Botswana is required to provide minimum standards for intellectual property protection.[38] Botswana officially notified the World Trade Organization ("WTO") of its compliance in June 2001.[39] In reaching compliance, the country incorporated many of TRIPS flexibilities into its intellectual property laws.[40] It made use of compulsory licensing and government use measures, and excluded from patentability "diagnostic, therapeutic and surgical methods for the treatment of humans."[41] As a result, HIV/AIDS diagnostic kits cannot be patented in Botswana and are therefore available at low cost.[42]

TRIPS reoriented intellectual property protection as an international issue (rather than a purely national issue), setting minimum enforceable international standards.[43] From the outset, TRIPS represented the tension existing between the need to protect pharmaceutical patents, and the need to protect public health through access to medicines.[44] TRIPS aims to ensure that "protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation . . . in a manner conducive to social and economic welfare, and to a balance of rights and obligations."[45] Thus, the agreement intends to enhance both economic and social welfare by protecting intellectual property, which should in turn contribute to innovation and the transfer of technology.[46]

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[36] *See Id.*

[37] General Agreement on Tariffs and Trade-Multilateral Trade Negotiations (The Uruguay Round): Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Dec. 15, 1993, 33 I.L.M. 81 [hereinafter TRIPS].

[38] Trade and Children's Rights, *supra* note 2, ¶ 9.

[39] *Id.*

[40] *Id.*

[41] *Id.* (citing Botswana, *Industrial Property Act*, 1996, §§ 30–31, 69.)

[42] *Id.* (citing Botswana, *Industrial Property Act*, 1996, § 9(f), as amended by *Industrial Property (Amendment Act)*, 1997.)

[43] *See* Srividhya Ragavan, *The Jekyll and Hyde Story of International Trade: The Supreme Court in PhRMA v. Walsh and the TRIPS Agreement*, 38 U. RICH. L. REV. 777, 777-78 (2004). *See also* TRIPS, *supra* note 37, arts. 15–18.

[44] *See* Peggy B. Sherman & Ellwood F. Oakley, III, *Pandemics and Panaceas: The World Trade Organization's Efforts to Balance Pharmaceutical Patents and Access to Aids Drugs*, 41 AM. BUS. L. J. 353, 363 (2004). *See also* World Trade Organization, *Understanding the WTO: The Agreements: Protection and Enforcement*, *available at* http://www.wto.org/english/thewto_e/whatis_e/ tif_e/agrm7_e.htm (last visited Apr. 18, 2007) [hereinafter TRIPS Explanation]. "The extent of protection and enforcement of these rights varied widely around the world; and as intellectual property became more important in trade, these differences became a source of tension in international economic relations." *Id.*

[45] TRIPS, *supra* note 37, § 1, art. 7.

[46] Trips Explanation, *supra* note 44.

Therefore, both producers and users of pharmaceuticals should enjoy the benefits of increased development.[47]

This balance is the result of a compromise between the desire of developed countries to obtain strong global intellectual property protection, and the resistance of the developing world to any standards of protection.[48] Some developing nations argue that conforming their patent laws to those of developed nations causes the price of medication to rise too high for their citizens to afford.[49] On the other hand, many developed nations contend that uniform international laws promote free and balanced trade, the maintenance of a healthy economy, and the development of new medicines.[50] TRIPS is a result of a compromise between the two, in which developed countries received minimum intellectual property protections in exchange for improvements in agricultural and textile trade positions for the developing countries.[51] Additionally, TRIPS allowed flexibility for developing nations, including the "exclusion of certain items from patentability, compulsory licensing under certain conditions, parallel importation, and technical and financial cooperation in favor of developing and least-developed member states."[52]

Two of the main objectives of TRIPS are to promote "social and economic welfare,"[53] and a "reciprocal balance of exchange that yields net benefit to all."[54] Intellectual property protection benefits all participating countries, as an enhancement in such laws is analogous to removing trade barriers such as tariffs.[55] Such protection encourages investment, and allows artists and investors to remain within their own countries because they can be compensated for their work.[56] It also ensures continued incentives for pharmaceutical companies to fight specialized diseases in developing areas of the world because any newly developed medicines are subject to patents.[57]

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47 *Id.*

48 Sherman & Oakley, *supra* note 44, at 362.

49 Jessica J. Fayerman, *The Spirit of TRIPS and The Importation of Medicines Made Under Compulsory License After the August 2003 TRIPS Council Agreement*, 25 NW. J. INT'L L. & BUS. 257, 257 (2004).

50 *Id.*

51 *See* Sherman & Oakley, *supra* note 44, at 362. *See also* Jose E. Alvareaz & Joel Trachtman, *Institutional Linkage: Transcending Trade*, 96 AM. J. INT'L L. 77, 78–79 (2002). TRIPS attempts to address the shortcomings of earlier treaties including the Paris Convention, Berne Convention, and Washington Treaty. Michelle M. Nerozzi, *The Battle Over Life-Saving Pharmaceuticals: Are Developing Countries Being TRIPed by Developed Countries?* 47 VILL. L. REV. 605, 611 (2002). Two weaknesses experienced by the Paris Convention were the lack of harmonized international patent laws, and the lack of enforcement provisions. *Id.* at 611–12. TRIPS was created to alleviate some of these problems while addressing the concerns of developing members. *Id.* at 612.

52 Nerozzi, *supra* note 51, at 612.

53 TRIPS, *supra* note 37, art. 7.

54 Ragavan, *supra* note 43, at 779–80 (quoting Alan O. Sykes, *TRIPS, Pharmaceuticals, Developing Countries, and the Doha "Solution,"* 3 CHI. J INT'L L. 47, 60 (2002).)

55 Fayerman, *supra* note 49, at 268.

56 *Id.*

57 *Id.*

Furthermore, developing nations carry a high cost in prioritizing trade interests (often to the detriment of welfare), referred to as the "poverty penalty."[58] As a result of TRIPS, countries must prioritize international obligations to avoid trade sanctions.[59] Such prioritization, however, affects the ability of signatories to fulfill national obligations.[60] At issue is the use of compulsory licensing and price control mechanisms, often utilized by developing nations to increase access to medication by the population.[61]

A. Patent Protection and the Public Health Exception

TRIPS extends patent protection to pharmaceuticals pursuant to Article 27.[62] Patent protection is offered for a minimum of twenty years from the date of the filing of the patent application.[63] The patent holder has the exclusive rights to make, use, offer for sale, assign or transfer the patent, and to enter into licensing contracts—creating value for the patent holder.[64] Such protections, however, "can affect access to affordable medicines, which is a crucial element of fulfilling the child's right to health and the right to life, survival and development."[65]

While the patent holder's rights are broad, they are not without exception.[66] Before 1995, many developing countries did not recognize patent protection for pharmaceuticals.[67] Piracy, parallel importing, and the generic production of patented pharmaceuticals were common problems.[68] Patent protection aims to rem-

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[58] Ragavan, *supra* note 43, at 779. The term "poverty penalty" refers to the cost born by developing nations in implementing international agreements that require prioritizing trade responsibilities to the detriment of sovereign welfare. *Id.* The poorer nations suffer a loss where they do not have the resources that allow developed nations to resort to price controls and compulsory licenses in times of crises. *Id.* at 779–80.

[59] *Id.* at 778. *See also* TRIPS, *supra* note 37, arts. 41–50. TRIPS includes mandatory enforcement provisions. *Id.*

[60] Ragavan, *supra* note 43, at 778.

[61] *Id.* Patrick Marc, *Compulsory Licensing and the South African Medicine Act of 1997: Violation or Compliance of the Trade Related Aspects of Intellectual Property Rights Agreement?*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 109, 121–22 (2001).

[62] Sherman & Oakley, *supra* note 44, at 363; TRIPS, *supra* note 37, art. 27. Patent protection is made clear through a cross-reference to Article 70(8). Sherman and Oakley, *supra* note 44, at 363.

[63] TRIPS, *supra* note 37, § 5, art. 33; TRIPS Explanation, *supra* note 44.

[64] TRIPS, *supra* note 37, § 5, art. 28. "1. A patent shall confer on its owner the following exclusive rights: (a) where the subject matter of a patent is a product, to prevent third parties not having [the owner's] consent from the acts of: making, using, offering for sale, selling, or importing for these purposes that product. . . ; (b) where the subject matter of a patent is a process, to prevent third parties not having [the owner's] consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process. 2. Patent owners shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts." TRIPS, *supra* note 37, § 5, art. 28.

[65] Trade and Children's Rights, *supra* note 2, ¶ 8.

[66] Sherman & Oakley, *supra* note 44, at 365.

[67] *Id.* at 363.

[68] *Id.* Parallel importation results in a "grey market" where medicines sold at lower prices in less developed countries are sold in wealthier countries at below market prices. Fayerman, *supra* note 49, at 271–72.

edy such dilemmas while allowing governments room to protect the public health.[69]

Article 27 of the TRIPS agreement contains two public health exceptions.[70] First, members may exclude from patentability inventions when exclusion is necessary for the public order or morality, including for the protection of human life or health.[71] Ambiguity in this provision led some to argue that HIV/AIDS drugs should not be subject to TRIPS because they are necessary to protect the public health.[72] In contrast, others argue that the exception simply excludes dangerous products from patentability.[73]

Second, an exception exists for the "diagnostic, therapeutic and surgical methods for the treatment of humans."[74] Ethical reasons and the difficulty of enforcement, however, resulted in few countries granting such patents.[75] Methods used directly on humans also do not generally avail themselves to patentability because "a method that is applied to the human body is not considered industrially applicable and so does not comply with one of the key patentability requirements of most patent laws."[76] In the rare circumstances where such patents are offered, they negatively affect the ability of low-income patients to access treatments.[77] This is true in areas such as gene-therapy,[78] and may have more of an effect on HIV/AIDS patients as advances in medicine continue.

B. Compulsory Licenses, Circumventing the Patent?

In striking a balance between the needs of patent holders and poor nations, TRIPS includes allowances for provisions such as compulsory licenses to ensure that developing countries will gain access to life saving medicines.[79] It also makes technology building in least developed countries a goal, so the need for compulsory licenses is diminished over time.[80]

"A patent is a grant issued by a national government conferring the right to exclude others from making, using, or selling the invention within the national territory."[81] Patents represent a compromise between the public interest and the

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[69] *See* Sherman & Oakley, *supra* note 44, at 362; TRIPS, *supra* note 37, art. 7.

[70] TRIPS, *supra* note 37, § 5, art. 27(2).

[71] *Id.*

[72] Fayerman, *supra* note 49, at 260.

[73] *Id.*

[74] TRIPS, *supra* note 37, § 5, art. 27(3).

[75] Carlos M. Correa, *Public Health and Patent Legislation in Developing Countries*, 3 TUL. J. TECH. & INTELL. PROP. 1, 16. (2001).

[76] *Id.*

[77] *Id.* at 17.

[78] *Id.*

[79] Fayerman, *supra* note 49, at 269.

[80] *Id.*

[81] Ferreira, *supra* note 7, at 1138, (quoting INTERNATIONAL INTELLECTUAL PROPERTY LAW 3 (Anthony D'Amato & Doris Estelle Long eds., 1997)).

patentee's absolute property rights over the invention.[82] This compromise strikes a balance between the patentee's ability to seek maximum compensation and society's need for the product.[83] This limited monopoly provides an incentive for pharmaceutical companies to invest in, research, and produce new drugs.[84]

In contrast, compulsory licenses are an involuntary contract between a willing buyer, the government, and an unwilling seller, the patentee.[85] Such contracts affect market exclusivity directly, and market price indirectly, through the use of price controls.[86] "Direct price control is where the government restricts the market price of a product from exceeding a certain percentage above the cost of production. Indirect price control is where the government uses an incentive, a deterrent, or both to prevent the manufacturer from realizing the highest marginal profit."[87]

The demand for pharmaceuticals, however, is inelastic, and it produces different results in both low and high per capita income-earning countries. In low per capita areas, the result is the need to resort to tools such as compulsory licensing.[88] This is because increasing the cost reduces affordability in the short run, but increases demand for the drugs as diseases worsen.[89]

However, for patents to cause an effect on drug prices, patents must first be secured.[90] "Patents have to be secured on a country-by-country basis."[91] If a particular country has not granted some form of protection, then its residents cannot be sued for copying the product, importing copies, or parallel importation.[92] Therefore, patents alone can not be responsible for limited access to medications because most of Africa does not have patented medicine.[93] The Journal of the American Medical Association reported in 2001 that only 21% of antiretrovirals were patented in African countries.[94] This study, however, has

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[82] Ragavan, *supra* note 43, at 782. Rafael V. Baca, *Compulsory Patent Licensing in Mexico in the 1990's: The Aftermath of NAFTA and the 1991 Industrial Property Law*, 35 IDEA 183, 184 (1994). Compulsory licenses allow governments "to compensate for the economic shortcomings associated with not establishing a domestic industrial base when not working an invention within its borders." *Id.* at 187.

[83] Ragavan, *supra* note 43, at 782.

[84] Ferreira, *supra* note 7, at 1138.

[85] Sara M. Ford, *Compulsory Licensing Provisions Under the TRIPS Agreement: Balancing Pills and Patents*, 15 AM. U. INT'L L. REV. 941, 945 (2000) ("Compulsory licensing is defined generally as the granting of a license by a government to use a patent without the patent-holders permission"). Gianna Julian-Arnold, *International Compulsory Licensing: The Rationales and the Reality*, 33 IDEA 349, 349 (1993).

[86] Ragavan, *supra* note 43, at 782.

[87] *Id.* at 782–83.

[88] *Id.* at 783.

[89] *Id.*

[90] Simon Barber, *Finance, not patents, bars AIDS treatment in Africa*, Business Day: South Africa, Center for International Development at Harvard University, (Oct. 17, 2001), *available at* http://www.cid.harvard.edu/cidinthenews/articles/SA_Business_Day_101701.html.

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.* (average over all African countries).

been criticized for its omission of crucial drugs and the lack of consideration of the effects of patents on new drug combinations of older drugs.[95]

Where patents are secured in the international forum, TRIPS ensured access to medication through flexibilities written into the document.[96] Article 31 leaves open the possibility of using compulsory licenses although it does not refer to them per se.[97] The language, however, is sufficiently ambiguous such that it is read differently by developed and developing countries: "[w]ithout terming it such, TRIPS allows for compulsory licensing amidst several provisions in Article 31."[98]

Article 31 specifically limits the exportation of medicines under compulsory licenses outside the country that issued the license.[99] Drug companies often sell their drugs at varying prices in different countries, while each country offers varying degrees of patent protection.[100] When a government imports a patented drug from a country where it is sold at a discount, the practice is dubbed parallel importation.[101]

To begin manufacturing under a compulsory license, the government must first make reasonable attempts to seek permission of the patent owner.[102] This requirement is waived under a national emergency, and the government has discretion in determining whether public health concerns outweigh the urgency of international intellectual property protections.[103] However, the government's use

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95 Ferreira, *supra* note 7, at 1139.

96 TRIPS Explanation, *supra* note 44.

97 Fayerman, *supra* note 49, at 258. Article 31 provides "Where the law of a Member allows for other use of the subject matter of a patent without the authorization of the right holder. . .such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. TRIPS, *supra* note 37, § 1, art. 31. This requirement may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. . ." It also provides that members are not obligated to abide by these conditions "where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive." *Id.*

98 Nerozzi, *supra* note 51, at 613 (quoting Sara M. Ford, *Note & Comments, Compulsory Licensing Provisions under the TRIPS Agreement: Balancing Pills and Patents*, 15 AM. U. INT'L L. REV. 941, 949 (2000)); *See also* Robert Weissman, *A Long, Strange TRIPS: The Pharmaceutical Industry Drive to Harmonize Global Intellectual Property Rules, and the Remaining WTO Legal Alternatives Available to Third World Countries*, 17 U. PA. J. INT'L ECON. L. 1069, 1115 (1996) (suggesting that Article 31 authorizes the use of compulsory licensing while also creating obstacles to such programs).

99 Fayerman, *supra* note 49, at 262.

100 Ferreira, *supra* note 7, at 1140.

101 *Id.*

102 Fayerman, *supra* note 49, at 260. *See also* TRIPS, *supra* note 37, § 5, art. 31(b) ("such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time.")

103 Fayerman, *supra* note 49, at 262 (clarification made to TRIPS in 2001 at WTO meeting in Doha, Qatar, stating that AIDS and malaria would be adequate grounds for declaring a national emergency). *See* World Trade Organization Ministerial Declaration on the TRIPS Agreement and Public Health of 14 November 2001, WT/MIN(01)/DEC/2 (Nov. 20, 2001), *available at* http://www.wto.org/English/thewto_e/minist_e/min01_e/mindecl_trips_e.htm.

is constrained, while the patent holder is protected with several measures.[104] Countries may not export compulsory licensed products, the patent holder must be adequately compensated, and use is non-exclusive, non-assignable and subject to judicial review.[105]

Compulsory licenses would thus be made unreachable to countries with no manufacturing base.[106] However, the WTO rectified this problem by ensuring flexibility within the agreement.[107] Under TRIPS, countries can export medicines to an "eligible importing member," but only in a limited way designed to limit a "grey market" or parallel importation.[108] The importing country must state the name and expected quantity of the drug it wishes to use, must present evidence that it lacks the requisite manufacturing capacity, must comport with the compulsory license requirements of Article 31, and must remunerate the exporting country.[109] Exporting countries must limit the amount of drugs shipped and label the product with special colors and shapes.[110] All WTO members are required to provide legal means by which to limit illegal importation, and all members are encouraged to transfer needed technology.[111]

The flexibilities built into TRIPS enable Botswana to gain access to needed medications in the short term. To ensure continued economic success, however, Botswana must guard against too much dependence on outside assistance to combat the HIV/AIDS crises within its own borders.[112] As more knowledge is gained about the HIV/AIDS virus, perhaps Botswana would find it beneficial to combat the disease from its own unique perspective.[113] Botswana faces unique benefits in its economic success and already existing HIV/AIDS programs, but receives less and less outside aid, which threatens to stall this fledgling economy. To encourage development of such specialized products, pharmaceutical companies require incentives and the assurance they will receive remuneration for their developments.[114] "Some authors in favor of compulsory licensing seem to forget that without intellectual property protection there would be no medicine at all for the country to license."[115]

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104 Fayerman, *supra* note 49, at 260–61; *See also* TRIPS, *supra* note 37, § 5, art. 31.

105 *Id.*

106 Fayerman, *supra* note 49, at 262.

107 *Id.*

108 *Id.* at 263.

109 *Id.* at 263–64.

110 *Id.* at 263.

111 *Id.*

112 *Id.* at 270.

113 *Id.*

114 *Id.*

115 *Id.*

IV. The Way Ahead: Treatment and Economy

In fulfillment of the CRC, Botswana took considerable steps in fighting HIV/AIDS through its landmark national antiretroviral therapy program.[116] Since 2001, Botswana provided free drugs to pregnant women with HIV/AIDS, all HIV positive children less than twelve-months old, and children with AIDS symptoms.[117] As of October 2005, 55,829 people were reported as receiving antiretroviral treatment.[118] However, in the same year, 110,000 people were reported to need such treatment.[119] Of those receiving treatment, 85% received it free of charge from the public sector, while only 15% receiving funding through the private sector.[120] Botswana receives funding from multiple sources including international NGOs, the U.S. government, pharmaceutical manufacturers, and other agencies.[121]

Challenges to increasing the scope of Botswana's antiretroviral program include shortages in government staffing, the need to decentralize, and the need to involve private practitioners in continuing patient treatment.[122] Staffing shortages resulted from a government hiring freeze to prevent future budget deficits, as much of the country's monetary resources for antiretroviral treatment come from outside.[123] The Bill and Melinda Gates Foundation, together with U.S. drug maker Merck, provided antiretrovirals to every citizen in need.[124] Positive results are shown in the number of AIDS-related deaths, falling from 33,000 in 2003 to 18,000 in 2005.[125] Cooperation with international pharmaceutical manufacturers, therefore, is imperative in aiding Botswana's continued struggle against HIV/AIDS.

Despite the successful implementation of HIV/AIDS prevention and treatment programs and generous outside donations, Botswana faces a lot of pressure from constraints on its economic resources.[126] In 2005, the government spent about

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116 *See* Trade and Children's Rights, *supra* note 2, ¶ 6.

117 *Id.* Since the antiretroviral therapy program was implemented in January of 2002 at the Princess Marina Referral Hospital in Gabarone, the number of people being treated has increased steadily. WHO Treatment, *supra* note 33. In 2005 there were thirty-two public sites available within at least one of each of the country's twenty-four health districts. *Id.*

118 WHO Treatment, *supra* note 33.

119 *Id.*

120 *Id.*

121 *Id.*

122 *Id.*

123 *Id.* Funding has come from the Bill & Melinda Gates Foundation ($50 million over five years), pharmaceutical manufacturer Merck & Co., Inc. (matching the Gates Foundation), the United States President's Emergency Plan for AIDS Relief ($24.4 million in 2004 to support prevention, and close to $51 million in 2005 to combat AIDS), the Global Fund to Fight AIDS, Tuberculosis and Malaria ($18.6 million), and other agencies. *Id.*

124 Joseph Hall, *Canada Breaks AIDS Pledge; Africa Still Waiting for Life-Saving Drugs Two Years After Ottawa Passed 'Breakthrough Law,'* TORONTO STAR, (Aug. 3, 2006), *available at* http://www.accessmed-msf.org/prod/publications.asp?scntid=11820061738348&contenttype=& [hereinafter Canada Breaks Pledge].

125 *Id.*

126 *See* 2005 Report, *supra* note 8, ¶ 4.2.

$165 million in HIV/AIDS-related expenditures (excluding recurrent indirect costs such as development of infrastructure, drug procurement, training costs, hospital budgets, and others).[127] Recently, many donor agencies started to shift their focus on poorer nations as Botswana is now classified as an upper-middle class country.[128]

Criticisms aside, TRIPS may help to save developing countries such as Botswana. Article 7 of the agreement "calls for international intellectual property protection to be instituted 'in a manner conducive to social and economic welfare.'"[129] Therefore, TRIPS calls on the international community to give a helping hand to nations faced with both the devastating HIV/AIDS crises and limited resources, which would ensure far more success than the mere use of compulsory licenses.[130] By encouraging technology investment both domestically and internationally, the TRIPS agreement widens the scope of prospective pharmaceutical development.[131]

Viable alternatives to compulsory licenses may also be utilized. These measures include bulk procurement, voluntary donation, and publicly funded research and development schemes.[132] Bulk procurement involves a group of developing countries pooling its resources to obtain large quantities of needed drugs.[133] This method results in regional cooperation and innovation while guaranteeing high demand, reliable payment, straightforward pricing-negotiations, and overall pharmaceutical profits in the developing world.[134] Voluntary donations by wealthy countries of excess drug supplies have been successful in both Haiti and India.[135] Such schemes, however, risk large fluctuations in supply, and do not further the goal of promoting technology transfers and investment.[136] Publicly funded research projects resulted in improved nutrition in agriculture, but again relied on wealthier donations and non-governmental organizations.[137]

While Botswana has been highly successful in implementing its ARV program, the financial cost is staggering.[138] In 2003, the drugs alone cost the gov-

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[127] *Id.* The country's office exchange rate GDP in 2006 is estimated at approximately $9.7 billion; despite positive growth rates, HIV/AIDS and an expected leveling off in diamond mining production threatens long-term economic growth. CIA Factbook, *supra* note 4.

[128] *See* 2005 Report, *supra* note 8, ¶ 4.2.

[129] Fayerman, *supra* note 49, at 269.

[130] *Id.*

[131] *Id.* at 268.

[132] *Id.* at 272–74.

[133] *Id.* at 273.

[134] *Id.* Critics of the bulk procurement method often point to the fact that the poorest nations may not be able to afford medicines even on such a large scale. *Id.* at 274. As an upper-middle class country, Botswana can utilize its position without this setback. 2005 Report, *supra* note 8, ¶ 4.2.

[135] *Id.* at 273.

[136] *Id.*

[137] *Id.* at 274.

[138] U.N. Office for the Coordination of Humanitarian Affairs, *Botswana: More than Money Needed for Successful AIDS Programme* (Aug. 4, 2003), http://www.irinnews.org/report.aspx?reportid=45306 (listing the costs of drugs, clinics, and equipment per year, per patient).

ernment between $1,200 and $3,000 a year per patient; the price jumps to between $7,000 and $10,000 a year per patient when the price of clinics and equipment is included.[139] Much of this success, therefore, can be attributed to the fact that Botswana's market-led economy is among the freest economies in the world.[140] Current laws serve to encourage investment, and an independent judiciary provides a sufficient framework for conducting secure commercial dealings.[141] However, obstacles remain for investors, as a backlog of cases is increasingly preventing investors from obtaining timely trials.[142] An additional problem exists in the fact that starting a business in Botswana takes 108 days compared to the world average of only forty-eight days.[143]

Further obstacles could arise if the flexibilities of TRIPS are undermined. For example, currently the United States is quietly entering into bilateral and regional trade agreements around the world.[144] The United States signed and ratified the TRIPS agreement "in order to create a broader framework for regulating world trade."[145] However, the agreement is non-self-executing which gives it no force in U.S. courts.[146] Actions brought against the United States would be before a WTO panel.[147] If implemented, the resulting bilateral and regional agreements would limit the conditions under which United States pharmaceutical companies' patents could be broken in exchange for lucrative trade benefits.[148] Negotiations have begun with several nations in the heart of the fight against HIV/AIDS, including Botswana, South Africa, and Thailand.[149]

The United States argues that stronger patents will save lives by assuring pharmaceutical companies that their rights will be protected.[150] According to an assistant United States trade representative, "It is crucial to public health . . . to promote the innovation of drugs and to make sure research and development of drugs continues."[151] Although the United States promises to exempt AIDS drugs from tightened protections, the promise remains absent from the text of the

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139 *Id.*

140 *See* Heritage Foundation, *2007 Index of Economic Freedom: Botswana*, http://www.heritage.org/index/country.cfm?id=Botswana [hereinafter 2007 Index] (stating that Botswana's economy is ranked the 38th freest economy in the world). This score, however, has fallen since 2006 when Botswana was ranked 30th and the most free of Africa's economies. *See South Africa economically freer,* International Marketing Council of South Africa, *available at* http://www.southafrica.info/doing_business/economy/fiscal_policies/freedom-090106.htm.

141 2007 Index, *supra* note 140.

142 *Id.*

143 *Id.*

144 Anand Giridharadas, *U.S. Pushes to Limit Generic Drug Rights,* INT'L HERALD TRIB., Apr. 19, 2006, *available at* http://www.bilaterals.org/article.php3?id_article=4458.

145 Helen A. Christakos, *WTO Panel Report On Section 110(5) of the U.S. Copyright Act,* 17 BERKELEY TECH. L.J. 595, 597 (2002).

146 *Id.*

147 *Id.*

148 Giridharadas, *supra* note 144.

149 *Id.*

150 *Id.*

151 *Id.*

agreement.[152] The new agreements would prolong patents beyond the twenty-year mark where the developing country shows "unreasonable delays" in approving a patent.[153] They would also require retesting of generics, exclude forced competition of branded products with generics, and limit the situations under which patents may be broken.[154] All these measures threaten affordability as well as the ability for the world's nations to operate cohesively to fight HIV/AIDS. The carefully orchestrated compromises of the TRIPS agreement could therefore be rendered null.[155]

In hopes of taking advantage of compulsory licensing in the TRIPS agreement, Canada took the opposite approach in May 2004.[156] Passing the Jean Chrétien Pledge to Africa Act (later renamed Canada's Access to Medicines Regime), Canada is aiming to compel its pharmaceutical companies to offer some patented drugs to generic producers.[157] The act requires that impoverished countries first request such drugs, and then that generic producers contract to charge the countries only 25% of the cost of the brand-name counterpart.[158] Generic drugs, however, have not reached poor countries under the act because negotiations between patent holders and the generic producers proved difficult and unsuccessful.[159] Accordingly, the forced-agreement attempt utterly failed.[160]

V. Continued Compromise

The need for price-effective drugs will mostly likely become more urgent in the near future.[161] Many successful HIV/AIDS programs have been effective because of the lower cost of generic drugs.[162] "Most AIDS patients eventually need to switch to second-line treatment because of the side-effects and drug resistance."[163] For example, one new antiretroviral combination therapy does not need refrigeration and would be useful in Botswana, where as recently as 2002,

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152 *Id.*

153 *Id.*

154 *Id.*

155 *See* Sherman & Oakley, *supra* note 44, at 362.

156 Canada Breaks Pledge, *supra* note 124.

157 *Id.*

158 *Id.*

159 *Id.*

160 *See id.*

161 Jacqui Wise, *Access to AIDS Medicines Stumbles on Trade Rules*, Bulletin of the World Health Organization (May 1, 2006), *available at* http://www.who.int/bulletin/volumes/84/5/news10506/en/index.html [hereinafter Wise] (explaining that although first-line antiretrovirals are available as inexpensive generics, patients will eventually need to switch to second-line antiretrovirals which are less widely available at affordable prices).

162 *Id.*

163 *Id.*

only 24% of households had access to electricity.[164] However, according to Medecins Sans Frontieres, this drug is not available in Africa at all.[165]

In addition to health conditions, social, economic, and psychological problems threaten to become much worse before the HIV/AIDS epidemic subsides.[166]

> The impact of AIDS is still not fully understood, particularly when the long term is considered. The epidemic comes in successive waves, with the first wave being HIV infection, followed several years later by a wave of opportunistic diseases, and later still by a wave of AIDS illness and then death.[167]

Botswana has not yet been hit by the peak of the third wave, and has not advanced very far into the fourth wave of illness and death.[168]

Yet hope is prompted by falling death and infection rates.[169] Additionally, Botswana has been successful in complying with TRIPS obligations while maintaining the use of flexibilities inherent in the agreement; this balance included the use of compulsory licenses.[170] Its antiretroviral therapy program has been highly successful and is a model for all developing countries dealing with the threat of HIV/AIDS.[171] Forcing negotiations between pharmaceutical manufacturers does not work, as firms have no incentive to enter into unprofitable contracts.[172] On the other hand, circumventing the flexibilities and compromises inherent in TRIPS threatens the ability of developing nations to protect property rights while serving their citizens in emergency and epidemic situations.[173] Such actions would threaten the very "broad framework" for regulation of world trade, as opportunities for negotiation and compromise would be destroyed.[174]

The use of TRIPS flexibilities in Botswana could be the answer to ensuring such drugs continue to reach the hands of needy citizens.[175] Botswana shows that participation in the world market and participation in TRIPS need not result in dismissing health and other human rights concerns. This model, therefore, can serve to aid other nations in battling life-threatening illness while maintaining a growing economy. After all, Botswana will provide many heralded opportunities

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164 *Id.* Helio International, *2002 Energy and Sustainable Development in Botswana*, http://www.helio-international.org/reports/2002/botswana.cfm.

165 Wise, *supra* note 161.

166 UNAIDS Impact, *supra* note 28, at 80–81.

167 *Id.* at 80.

168 *Id.* (explaining that none of the highly affected countries in Africa have hit the peak of the third wave).

169 *See* Canada Breaks Pledge, *supra* note 124. This hope is evidenced by the fact that AIDS related deaths dropped by nearly 50% between 2003 and 2005. *Id.* Such deaths fell from 33,000 to 18,000. *Id.*

170 Trade and Children's Rights, *supra* note 2, ¶ 9.

171 *See* Trade and Children's Rights, *supra* note 2, ¶ 6.

172 *See* Canada Breaks Pledge, *supra* note 124.

173 *See* Giridharadas, *supra* note 144.

174 *Id.*

175 *See id.*

for both medical and economic researchers[176] as the HIV/AIDS epidemic carries out its course. Secure investments by private medical companies can provide a plethora of information regarding the disease. Resulting pharmaceutical developments could help patients and drug companies throughout the world fight and eliminate the disease.

All such possibilities, however, depend upon the protection of invaluable intellectual property rights. Secure intellectual property rights lead to better developments in healthcare, which leads to a stronger economy. Botswana has shown the world that human rights and economic concerns are not independent; rather both objectives can be obtained in building a stronger, healthier nation.

[176] *See* Shapiro & Hasset, *supra* note 13, at 15–16; Fayerman, *supra* note 49, at 268.

THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT: SOLUTION OR MERE PAPER TIGER?

Amy Hornbeck, Bethany Johnson, Michelle LaGrotta, & Kellie Sellman†

Introduction

After suffering physical violence and emotional abuse at the hands of her husband and his family, an Indian woman sought protection of the law. Her husband and in-laws harassed her for a motorcycle, beat her on several occasions, and after only two months of marriage, the woman's brother-in-law doused her in kerosene and set her on fire. She brought suit seeking protection from her husband's violence. However, the High Court refused to help her. The court concluded that the beatings and harassment were not enough to require protection under the law because they were not done to induce her or her family to fulfill dowry demands or done with the intent to force her to commit suicide.[1]

Prior to October 2006, this was the likely outcome for women seeking protection from domestic violence. That may change, however, with the adoption of India's Protection of Women from Domestic Violence Act ("Act").[2] The Act is designed to provide emergency civil protection for female victims of domestic violence.[3] The primary protection the Act provides is a Protection Order prohibiting the alleged abuser from engaging in further domestic violence.[4] In providing a comprehensive definition of domestic violence and by protecting a woman's right to reside in her household,[5] the Act is groundbreaking and an important step toward gender equality for Indian women. The concern, however, is whether the Act will be enforceable or whether it is a mere paper tiger.

Despite the Act's potential to assist women experiencing domestic violence, the Act will not be effective in reducing overall levels of violence unless the patriarchal mindset of Indian society is dismantled, Indian women are empowered to recognize that violence is unacceptable, and there is training for, sensitization of, and cooperation among police, protection officers, service providers, and magistrate judges in enforcing the Act. This article begins by introducing the cultural backdrop that has perpetuated Indian society's acceptance of violence

† We would like to extend our deepest appreciation to Professor Diane Geraghty, who made this experience possible, and to all of our interviewees, who took time out of their schedules to share their thoughts, experiences, and research with us. Without their help, our research would not have been complete.

1 See Waghmare v. State of Maharashtra, (1991) 1 HLR 438.

2 The Protection of Women from Domestic Violence Act, No. 43 of 2005; India Code (2005) [hereinafter Protection of Women Act].

3 LAWYERS COLLECTIVE WOMEN'S RIGHTS INITIATIVE, ONLY HER WORD: A NATIONAL CAMPAIGN FOR LAW ON DOMESTIC VIOLENCE 45 (Gondals Press 2004) [hereinafter LAWYERS COLLECTIVE, ONLY HER WORD].

4 Protection of Women Act, ch. 4, § 18.

5 *Id.* ch. 2, § 3; *Id.* ch. 4, § 21.

against women. Next, it outlines the provisions of the Act, its protections, and its limitations, and discusses the Act's enforcement provisions. Finally, it presents suggestions from a general perspective for successful implementation of the Act through both the public and private spheres.

I. The Problem: A Legacy of Patriarchy

In India, a crime is committed against a woman every three minutes.[6] In a 2005 survey, 37% of married women in India reported experiencing domestic violence at some point during their marriage.[7] Despite these alarming statistics, experts agree that actual rates of violence against women are likely higher than what is reported in these studies; underreporting may be caused by embarrassment, denial that violence is a problem, or a failure to recognize that the behavior is abusive.[8] In fact, as many as 70% of the female victims of domestic violence in India believe their physical abuse was justified for one reason or another.[9] The cultural issues that contribute to these high rates of violence against women threaten the effectiveness of the Act.

India's longstanding and widespread discrimination against women, rooted in the patriarchal social structure,[10] makes it unlikely that any purely legal solution will decrease rates of violence against women because violence against women is socially maintained by Indian cultural norms. First, many people fail to recognize domestic violence as an unacceptable form of control over women. Indian society expects and tolerates a certain level of violence against women while failing to recognize the true cause of domestic violence.[11] While Western literature views domestic violence as a means of exerting control over the woman, this view does not prevail in India.[12] Instead, "maladjustment" is often cited as the cause of domestic violence.[13] Therefore, the preferred method of dealing with domestic violence is joint counseling, which may value the continuation of the

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[6] NATIONAL CRIME RECORDS BUREAU, CRIME IN INDIA 2005 9 (Aug. 4, 2006), *available at* http://ncrb.nic.in/crime2005/cii-2005/Crime%20Clock-05.pdf.

[7] MINISTRY OF HEALTH & FAMILY WELFARE, GOVERNMENT OF INDIA, 2005–2006 NATIONAL FAMILY HEALTH SURVEY NFHS-3: NATIONAL FACT SHEET INDIA 3 (2006), *available at* http://www.nfhsindia.org/pdf/IN.pdf. (noting, however, large regional discrepancies in reporting, from 6% in Himachal Pradesh to 59% in Bihar).

[8] *See, e.g.*, INT'L CTR. FOR RES. ON WOMEN, VIOLENCE AGAINST WOMEN MUST STOP: TOWARD ACHIEVING THE THIRD MILLENNIUM DEVELOPMENT GOAL TO PROMOTE GENDER EQUALITY & EMPOWER WOMEN 1, (INT'L CTR. FOR RES. ON WOMEN 2005) *available at* http://www.icrw.org/docs/2005_brief_mdg-violence.pdf.

[9] Pami Vyas, *Reconceptualizing Domestic Violence in India: Economic Abuse and the Need for Broad Statutory Interpretation to Promote Women's Fundamental Rights*, 13 MICH. J. GENDER & L. 177, 187 (2006).

[10] Interview with Dr. Jyotsna Chaterji, Director, Joint Women's Programme, in New Delhi, India (March 6, 2007); NATIONAL SEMINAR, STOP VIOLENCE FROM WOMB TO TOMB: BATTERED & SHATTERED, Domestic Violence & Rape: A Bitter Reality 4 (Nat'l Seminar 2006).

[11] Purna Manchandia, *Practical Steps toward Eliminating Dowry and Bride-Burning in India*, 13 TUL. J. INT'L & COMP. L. 305, 319 (2005)

[12] Judith G. Greenberg, *Criminalizing Dowry Deaths: The Indian Experience*, 11 AM. U. J. GENDER SOC. POL'Y & L. 801, 809–10 (2003).

[13] *Id.* at 810; Interview with Dr. Jyotsna Chaterji, *supra* note 10.

marriage above the safety of the woman.[14] This perception is reflected in the Act itself, which provides the husband and wife time to work out their differences.[15] The failure of the courts and some advocacy groups to recognize domestic violence as a form of domination and control by men is a serious impediment to providing true protection for women from domestic violence.

Second, prejudice against women is widespread in India. The conception of a woman as her husband's property pervades Indian society.[16] Although the Indian Constitution guarantees equal rights for all citizens, gender equality is neither recognized nor accepted in Indian society.[17] There is also a general prejudice against women, which is reinforced and maintained through the system of dowry and Indian personal laws.[18] The dowry system is both evidence of gender inequality and a tool for perpetuating the system of discrimination.[19]

Discrimination against women begins even before a female child is born and continues throughout her life, due in large part to the Indian system of dowry. This prejudice is first evidenced by the widespread practice of sex-selective abortion among upper and middle-class families, which occurs despite India's explicit prohibition against it.[20] Discrimination against female infants and children is further exemplified by the substandard education, poor medical care, and inadequate nutrition female children endure in comparison to male children.[21] Furthermore, an unmarried adult daughter is considered a social taboo, as well as a financial drain on her parents.[22] Therefore, there is strong pressure to marry, with a husband often being selected for the daughter by her parents or other relatives.[23] Once a potential husband is found, the woman's parents must pay a dowry to the husband's family.[24] The amount of dowry is based on the husband's economic means and social status.[25] In many cases, a woman's family may pay many times their annual income to ensure that their daughter is married to a suitable husband.[26] Once married, a woman is considered part of her husband's family, rather than part of her natal family.[27] Because she becomes a

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[14] Greenberg, *supra* note 12, at 811.

[15] Interview with Brototil Dutta & Kamolika Dutta, Esquires, Lawyers Collective Women's Rights Initiative, in New Delhi, India (March 5, 2007); Interview with Dr. Jyotsna Chaterji, *supra* note 10.

[16] Laurel Remers Pardee, *The Dilemma of Dowry Deaths: Domestic Disgrace or International Human Rights Catastrophe?*, 13 ARIZ. J. INT'L & COMP. L. 491, 502 (1996).

[17] Vyas, *supra* note 9, at 182.

[18] *Id.*

[19] Pardee, *supra* note 16, at 502.

[20] Namratha S. Ravikant, *Dowry Deaths: Proposing a Standard for Implementation of Domestic Legislation in Accordance with Human Rights Obligations*, 6 MICH. J. GENDER & L. 449, 457 (2000).

[21] *Id.* at 457–58.

[22] *Id.* at 458.

[23] Sunil Bhave, *Deterring Dowry Deaths in India: Applying Tort Law to Reverse the Economic Incentives that Fuel the Dowry Market*, 40 SUFFOLK U. L. REV. 291, 298–99 (2007).

[24] Manchandia, *supra* note 11, at 312.

[25] *Id.*

[26] Ravikant, *supra* note 20, at 458.

[27] Manchandia, *supra* note 11, at 314–15.

member of her husband's family, a woman is not able to support her parents in old age, which further contributes to the strong preference for male children.[28] While some evidence indicates that these norms are fading in younger generations,[29] the dowry system and the discrimination it creates against girls and women are deeply rooted in Indian culture.

The evolution and enforcement of Indian personal laws also reflects a prejudice against women in Indian culture. Although India's Constitution directs the state to create a uniform civil code applicable to all citizens, a single, secular civil code does not exist.[30] Instead, laws relating to marriage, divorce, child custody, property inheritance, and other personal and family issues are determined by the individual religious community to which the particular citizen belongs.[31] These laws, which vary between Hindus, Muslims, Christians, and Sikhs, are known as personal laws.[32] The evolution and enforcement of Indian personal laws also reflect a prejudice against women in Indian culture. While the existence of personal laws is justified by advocates as protective of pluralism and the religious rights of minority groups, they have been criticized as a mere means of reinforcing patriarchy and preventing gender equality.[33]

Property inheritance laws are demonstrative of the effect personal laws have on the status of women in India. Approximately 80% of Indian citizens are Hindu and are therefore subject to Hindu laws regarding property inheritance.[34] Hindu personal law originally provided that a married woman could not inherit any interest in her father's property.[35] In 1947, motivated by a desire to improve the status of women, the Hindu Law Committee proposed a revision to the Hindu personal laws that recommended, among other changes, the granting of equal property inheritance rights to sons and daughters.[36] This change was fiercely opposed by Hindu religious leaders who saw women's property rights as a Muslim practice that had no place in Hindu family law.[37] Despite widespread opposition, this change was eventually enacted, and daughters now have equal legal rights to inherit their fathers' property.[38] Nonetheless, the change in the law has not resulted in a change in practice for most families; sons continue to inherit their fathers' property to the exclusion of daughters.[39] This is likely due to both a

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[28] *Id.* at 314.

[29] Interview with Purnima, Nirantar: A Centre for Women and Education, in Delhi, India (Mar. 6, 2007); Interview with Reenu Ram and Anubha Rastogi, Human Rights Law Network, in Delhi, India (Mar. 5, 2007).

[30] Pratibha Jain, *Balancing Minority Rights and Gender Justice: The Impact of Protecting Multiculturalism on Women's Rights in India*, 23 BERKELEY J. INT'L L. 201, 211 (2005).

[31] *Id.* at 212.

[32] Asha Bajpai, *Custody and Guardianship of Children in India*, 39 FAM. L.Q. 441, 441 (2005).

[33] Jain, *supra* note 30, at 212.

[34] Bajpai, *supra* note 32, at 441.

[35] *See* Jain, *supra* note 30, at 212.

[36] *Id.* at 214.

[37] *Id.*

[38] Interview with Dr. Jyotsna Chaterji, *supra* note 10.

[39] *Id.*

lack of information regarding the change in the law and a strong preference for the traditional male-dominated form of property ownership in India.[40]

Finally, the social stigma attached to divorce and living outside the marital home prevents women from leaving abusive relationships. In Indian culture, "the breakdown of a marriage . . . with its attendant discrimination means a virtual civil death for a woman."[41] The failure of a marriage is nearly always viewed as the woman's fault and a reflection of her character, morals, or child-bearing ability.[42] Returning to her parent's home would bring great shame on her natal family; therefore, most women considering divorce would have no option other than to live alone.[43] Even if a woman is prepared to deal with the shame and social isolation associated with living outside the marital home, most women lack the economic resources to support themselves.[44] Therefore, a woman living in an abusive relationship has limited options when she is considering leaving the relationship.

II. Legal Background

Despite these cultural issues, some women experiencing domestic violence choose to seek legal protection. Prior to 2006, however, the options for these women were limited to divorce under Indian civil law or criminal sanctions under the Indian Penal Code.[45] A woman's options were further limited because criminal sanctions are only available if the abuse involves extreme cruelty or dowry-related acts of violence.[46]

A. Criminal Domestic Violence Laws under the Indian Penal Code

The Indian Penal Code provides two avenues for criminal sanctions against perpetrators of domestic violence, as illustrated in the chart below. Section 498-A of the Indian Penal Code ("Anti-Cruelty Act") provides that "whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty, shall be punished with imprisonment . . . and shall also be liable to fine."[47] However, this section only results in punishment where the violence or harassment is likely to drive the woman to commit suicide or to cause grave danger to her life, limb, or health.[48] Section 304B ("Dowry Death Act") criminalizes violence against a woman when it can be shown that the death of a

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[40] *Id.*

[41] LAWYERS COLLECTIVE, ONLY HER WORD, *supra* note 3, at 5.

[42] Interview with Dr. Jyotsna Chaterji, *supra* note 10.

[43] *Id.*

[44] *Id.*

[45] LAWYERS COLLECTIVE, ONLY HER WORD, *supra* note 3, at 5.

[46] *Id.*

[47] INDIA PEN. CODE (1986), §498A.

[48] INDIA PEN. CODE (1986), §498A; Kirti Singh, *Violence Against Women and the Indian Law*, *in* VIOLENCE, LAW & WOMEN'S RIGHTS 77, 82 (Savitri Gooneskere, ed., 2004).

woman was caused in conjunction with dowry demands.[49] The Dowry Death Act creates a presumption of murder "where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for . . . any demand for dowry." The point at which a remedy can be sought varies between the acts; the Anti-Cruelty Act can be invoked while a woman is still alive, while the Dowry Death Act provides punishment after the woman is dead.[50]

To further complicate a woman's options in seeking help, fabrication of some claims under the Anti-Cruelty Act led police and the courts to heavily scrutinize those claims.[51] However, many commentators suggest that some of these fabrications are the result of women being forced to overstate the violence they are experiencing and thereby "misuse" the Anti-Cruelty Act because they have no other options for recourse.[52] These allegations make it more difficult for women to succeed in criminal actions against abusive husbands, leaving the importance of domestic violence claims seriously undermined.

Because the law did not provide an adequate remedy, women were forced to either live with the violence or endure the wrath of a community that does not accept divorce. Therefore, the greatest impediment to a woman seeking recourse against a violent husband was her own fear that exposing her husband's violent behavior would force her into homelessness and shame.[53] Additionally, in many cases, the woman needed time to evaluate her present situation to determine whether she wanted to reconcile with her husband or whether she was prepared to deal with the social stigma associated with being a divorced woman.[54] Protecting a woman's right to reside in her home, even after reporting domestic violence, and giving women time to evaluate their options were precisely the goals behind advocating for the Act.

B. The Protection of Women from Domestic Violence Act

The fight for new domestic violence legislation began in 1993 when the Lawyers Collective was approached by the National Commission of Women to draft

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[49] INDIA PEN. CODE (1986), §304B (criminalizes dowry violence resulting in the death of a woman and creates a presumption of dowry death where a woman dies under other than normal circumstances within seven years of marriage and it is shown that before her death the husband or his family subjected her to cruelty or harassment in connection with dowry demands).

[50] LAWYERS COLLECTIVE, ONLY HER WORD, *supra* note 3, at 11.

[51] *Id.* at 6.

[52] LAWYERS COLLECTIVE, ONLY HER WORD, *supra* note 3, at 13.

[53] Greenberg, *supra* note 12, at 837–839; *see* Jayoti Gupta, *Property Ownership of Women as Protection for Domestic Violence: The West Bengal Experience*, *in* PROPERTY OWNERSHIP & INHERITANCE RIGHTS OF WOMEN FOR SOCIAL PROTECTION—THE SOUTH ASIA EXPERIENCE: SYNTHESIS OF THREE STUDIES 37, 47 (Int'l Ctr. of Research for Women, ed., 2006), *available at* http://www.icrw.org/docs/2006_propertyrights-southasia.pdf.

[54] *See* Greenberg, *supra* note 12, at 838 (suggesting that divorce is not a practical remedy because it brings a sense of shame to the woman).

a law to close the legal loophole created by the lack of general domestic violence legislation.[55] Members of the women's rights movement and government officials gathered at several colloquia to discuss what legislation was needed in order to adequately protect victims of domestic violence.[56] The passage of the Act was the result of a unified effort by the Lawyers Collective, who drafted the statute, and various other women's rights groups, both in India and internationally.[57] The legislation was a response to the appeal for a law to "deal with the cases of women who want to stop violence, who need time to review their relationships and look at their life options, [and] who wish to negotiate their problems with their husbands with dignity in an atmosphere free from violence, physical or mental."[58] As a result of this effort, the Indian legislature passed the Act in 2005, which became effective on October 1, 2006.[59]

The Act is a civil law that "runs parallel to the criminal law provisions contained in [the Anti-Cruelty Act]."[60] Therefore, a woman can file a criminal complaint under the Anti-Cruelty Act in addition to seeking emergency relief under the Act, depending on her objectives.[61] In providing a civil remedy, the Act is not designed to punish the abuser, and no arrests can be made based on a complaint filed under the Act.[62] Arrests under the Act can be made only if the abuser violates a Protection Order issued by the court.[63] The groups drafting the Act determined that the remedy should be civil rather than criminal to ensure that women who are not ready to leave their spouses are still able to seek protection from domestic violence.[64]

1. Definitions under the Domestic Violence Act

The Act provides an expansive definition of domestic violence. Domestic violence includes multiple forms of violence against women, including physical, sexual, verbal, emotional, and economic abuse.[65] Not only does the Act proscribe acts of abuse, it also proscribes the *threat* of any physical, sexual, verbal, emotional, or economic abuse.[66] This liberal expansion of the term domestic

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55 Interview with Brototil Dutta & Kamolika Dutta, *supra* note 15.

56 *Id.*

57 LAWYERS COLLECTIVE, ONLY HER WORD, *supra* note 3, at 45; Interview with Brototil Dutta & Kamolika Dutta, *supra* note 15.

58 *Id.* at 13.

59 *Id.*

60 *Id.* at 46.

61 LAWYERS COLLECTIVE WOMEN'S RIGHTS INITIATIVE, FREQUENTLY ASKED QUESTIONS ON THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT 2005 1 (2005-2006) [hereinafter LAWYERS COLLECTIVE, FREQUENTLY ASKED QUESTIONS].

62 *Id.*

63 *Id.* at 6; Protection of Women Act, ch. 5, § 31.

64 Interview with Brototil Dutta & Kamolika Dutta, *supra* note 15.

65 Protection of Women Act, ch. 2, § 3.

66 *Id.*

violence extends the right to protection into many areas that have traditionally been considered private family matters.[67]

The Act provides protection for women who are in a "domestic relationship," which includes any "two persons who live or have, at any point in time, lived together in a shared household."[68] This protection extends the reach of the Act to more than just married women. It embraces relationships based on consanguinity, marriage, adoption, and cohabitation.[69] Therefore, the Act provides protection for all women who have a relationship with the abuser, including sisters, widows, mothers, in-laws, and unmarried women living with the abuser.[70]

A key provision of the Act is the creation of a woman's right to reside in the "shared household" or to seek support for alternative housing arrangements.[71] A shared household is a household where a woman lives or has lived in a domestic relationship, whether or not she has any ownership rights in the property.[72] This provision is intended to protect a woman from eviction even where her in-laws hold title to the house in which she lives with her husband.[73] It recognizes only a right to reside in the household in which she has become accustomed to living and does not create an ownership interest in the house.[74] This right was incorporated in the Act because, as discussed above, most women do not have the option to return to their parents' home or the resources to live on their own.[75] If the woman does not want to return to the shared household, the court can order the abuser to provide alternative accommodations for her.[76]

Although the interpretation of "shared household" was intended to cover a broad range of intimate housing arrangements, the Indian Supreme Court narrowly interpreted the scope of the definition in *S.R. Batra v. Taruna Batra*, the only Supreme Court case to date interpreting the Act.[77] In *Batra*, a husband and wife lived together on the second floor of a house owned by the husband's mother.[78] After some time, the husband filed for divorce and moved out of the

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[67] *Cf.* Pardee, *supra* note 16, at 501 (indicating that police may not investigate dowry deaths because they consider them to be family matters).

[68] Protection of Women Act, ch. 1, § 2(f).

[69] *Id.*

[70] VakilNo1.com, The Act to Protect Women from Domestic Violence Comes into Effect from Today, Oct. 26, 2006, www.vakilno1.com/news/Protection-of-Women-From-Domestic-Violence.php (last visited May 3, 2007); LAWYERS COLLECTIVE, FREQUENTLY ASKED QUESTIONS, *supra* note 61, at 2–3.

[71] Interview with Brototil Dutta & Kamolika Dutta, *supra* note 15; Interview with Dr. Jyotsna Chaterji, *supra* note 10.

[72] Protection of Women Act, ch. 1, § 2(s).

[73] LAWYERS COLLECTIVE, FREQUENTLY ASKED QUESTIONS, *supra* note 61, at 3. As a part of normal Indian culture, a woman assimilates into her husband's family, which many times may lead to living with the husband's family. *See* Vyas, *supra* note 9 at 185.

[74] Interview with Brototil Dutta & Kamolika Dutta, *supra* note 15.

[75] *See supra* Part I.

[76] LAWYERS COLLECTIVE, FREQUENTLY ASKED QUESTIONS, *supra* note 61, at 3; Protection of Women Act, ch. 4, § 19(f).

[77] *SR Batra v. Taruna Batra*, 136 (2007) DLT 1 (SC).

[78] *Id.*

house.[79] The wife, who was locked out by her mother-in-law, applied for an injunction to prohibit her dispossession of the marital home.[80] The High Court held that the wife was in possession of the matrimonial home and granted the injunction.[81] The mother-in-law and husband appealed to the Supreme Court.[82] The Act became effective while the case was pending in the Supreme Court, and the wife argued that sections 17 and 19(1) of the Act protected her right to remain in the shared household.[83] She argued that the plain meaning of section 2(s), which defines shared household, encompasses not only a household where the victim lives, but also any household in which she has lived at any stage of the domestic relationship. The Supreme Court rejected the wife's argument, and removed from the scope of shared household a house owned entirely by a woman's in-laws.[84] The Court held that section 17(1) of the Act entitles the wife to claim a right to reside in the shared household only when the house is joint family property.[85] Here, the property did not belong to the husband, the husband did not pay rent, and the house was not joint family property.[86] Therefore, the Court vacated the injunction, thus permitting the woman's in-laws to evict her from the home if they so desired.[87]

One of the criticisms of this opinion is that the judge disregarded the plain language of the Act.[88] The language of section 2(s) expressly states: "shared household means a household where the person aggrieved lives or at any stage has lived in a domestic relationship . . . irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household."[89] Therefore, the Act is intended to protect the right to reside in the shared household no matter who holds title to the property. Although the Court criticized section 2(s) as being "not very happily worded, and . . . the result of clumsy drafting,"[90] it appears that adherence to the plain meaning of the section would have led to a contrary conclusion. The Court's insistence that it "give [section 2(s)] an interpretation which is sensible and which does not lead to chaos in society"[91] does exactly the opposite; this decision strains India's commitment to end domestic violence by failing to consider some of the fundamental traditions

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79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.*

83 *Id.*

84 *Id.* (stating in a hostile tone, "such a view would lead to chaos and would be absurd"); *see* Lawyers Collective Women's Rights Initiative, Critique of the Batra Judgment & the Aftermath—A Note by LCWRI, http://www.lawyerscollective.org/%5Ewri/%5EProjects_&_Activities/%5EDomestic_Violence/landmark_judgements_&_orders.asp (last visited May 3, 2007).

85 *S.R. Batra v. Taruna Batra,* 136 (2007) DLT 1 (SC).

86 *Id.*

87 *Id.*

88 Interview with Brototil Dutta & Kamolika Dutta, *supra* note 15.

89 Protection of Women Act, ch. 1, § 2.

90 S.R. Batra v. Taruna Batra, 136 (2007) DLT 1 (SC).

91 *Id.*

underlying Indian culture. In a patriarchal society that prevents women from returning to their natal families after marriage, this decision may have a debilitating effect on the protections afforded under the Act.[92]

Although women's groups acknowledge the impact of this restrictive interpretation, the decision has not been fatal to the women's movement or the effectiveness of the Act thus far. As evidenced in *Shalu Bansal v. Nitin Bansal*, the courts may be willing to find creative ways to circumvent the Supreme Court's narrow construction of the term "shared household."[93] In *Bansal*, a Delhi magistrate judge took notice of the Supreme Court's decision in *Batra* but held that the woman could not be dispossessed of the marital residence without due process of law, and in the event that she was dispossessed, the husband must pay the woman rent as maintenance.[94] Therefore, it appears that even though *Batra* is a setback for the women's movement, judicial activism may find a way to keep it alive.

2. *Protection Officers and Service Providers*

The Act also establishes a network of protection officers and service providers. The Act requires the states to appoint protection officers, whose sole focus is enforcement of the Act.[95] A protection officer's responsibilities include assisting women in filing domestic incident reports with the magistrate, filing applications for Protection Orders and other court orders with the magistrate, ensuring that women are provided legal aid, a safe shelter home, medical attention, and enforcing Orders passed by the court.[96] The Act also calls for service providers, non-governmental organizations ("NGOs"), or other voluntary organizations to assist women in filing complaints, filing applications for court Orders, and providing other necessary support to victims of domestic violence.[97] The rationale behind the designation of protection officers and registered service providers is to afford domestic violence complaints importance in the eyes of the law and to provide women an alternative avenue to seek help other than the Indian police.[98]

3. *Protections and Remedies under the Act*

The Act provides for six remedial protections: 1) a Protection Order;[99] 2) a Residence Order;[100] 3) monetary relief;[101] 4) a Compensation Order;[102] 5) a Cus-

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[92] See Lawyers Collective Women's Rights Initiative, Landmark Orders & Judgments Passed on Protection of Women from Domestic Violence Act 2005, http://www.lawyerscollective.org/%5Ewri/%5EProjects_&_Activities/%5EDomestic_Violence/landmark_judgements_&_orders.asp (last visited on May 3, 2007) (describing the possible implications of the court's holding).

[93] Shalu Bansal v. Nitin Bansal, CC 1250/1 (Delhi, Unreported Judgment January 3, 2007) (order granting Residence Order).

[94] *Id.*

[95] Protection of Women Act, ch. 3, §§ 8(1) & 9(1).

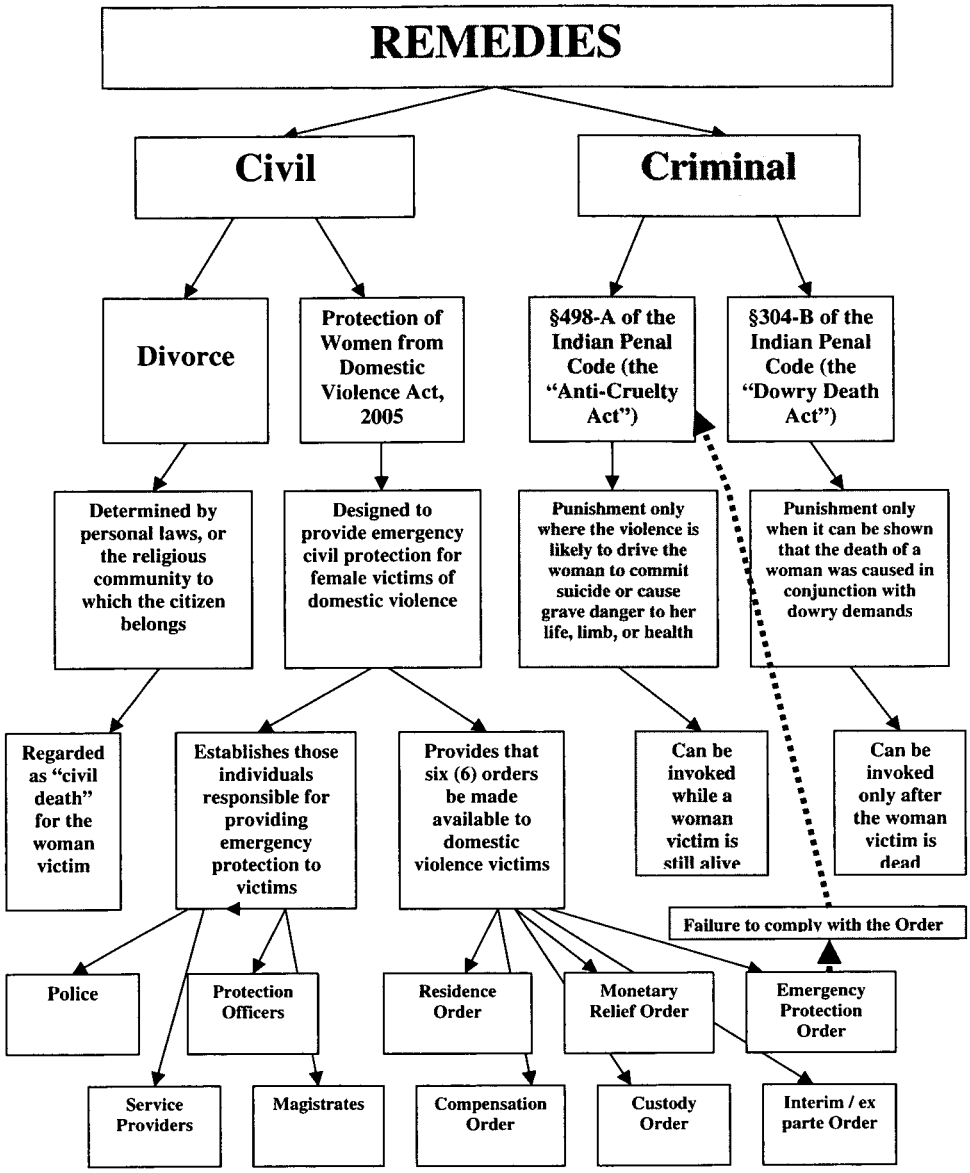
[96] *Id.*

[97] *Id.* ch. 3, § 10.

[98] Interview with Brototil Dutta & Kamolika Dutta, *supra* note 15.

[99] Protection of Women Act, ch. 4, § 18.

[100] *Id.* § 19.



tody Order;[103] and 6) an interim or ex parte order.[104] A Protection Order or "stop violence" order prohibits the alleged abuser from committing any act of violence

[101] *Id.* § 20.

[102] *Id.* § 22.

[103] *Id.* § 21.

[104] *Id.* § 23.

against the victim, aiding or abetting the commission of violence against the victim, entering the victim's place of employment or school, attempting to communicate in any form with the victim, alienating any financial assets to the detriment of the victim, and/or harming any dependant or relative of the victim.[105] Although it is not clear from the language of the statute, it appears that the magistrate determines the scope of the order after making a determination that domestic violence has taken place or is likely to take place and weighing the need for each of the aforementioned prohibitions.[106]

The Act also allows the magistrate to enter a Residence Order, which prohibits the victim from being dispossessed of the shared household, directs the alleged abuser to remove himself from the shared household, prohibits the abuser or any of his relatives from entering any portion of the shared household in which the victim lives, restricts the abuser from renouncing his rights in the shared household, or orders the abuser to provide the same level of alternate accommodation for the victim.[107] No removal order may be passed against any woman entitled to protection under the Act.[108] The goal of this provision is to prevent the woman from being displaced from her home and forced into homelessness.

In addition to Protection and Residence Orders, a victim of domestic violence may also seek monetary relief to cover any expenses she incurred as a result of the domestic violence.[109] This includes medical expenses, lost earnings, loss of property, and maintenance for the woman and her children.[110] In addition to monetary expenses, a victim may seek a Compensation Order, which permits the woman to recover compensation and damages for her physical injuries and emotional distress.[111] These damages are intended to be awarded in addition to monetary relief, which only covers actual expenses related to the violence.[112]

Furthermore, a woman may seek a temporary Custody Order to ensure that the abuser does not take her children from her.[113] A magistrate may also pass any interim or ex parte order that he deems necessary to thwart immediate threats to the life or limb of the woman.[114] The only condition appears to be that proceedings must have commenced before the magistrate under the Act.[115]

In order for a woman to obtain an Order from the court, she must first file a formal complaint in the form of a domestic incidence report with the police, a

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105 *Id.* § 18(a)–(g).

106 *See id.* § 18.

107 *Id.* § 19(1)(a)–(f).

108 *Id.* § 19(1).

109 *Id.* § 20.

110 *Id.* § 20(1)(a)–(d).

111 *Id.* § 22.

112 *Id.* § 22; LAWYERS COLLECTIVE, FREQUENTLY ASKED QUESTIONS, *supra* note 61, at 4.

113 Protection of Women Act, ch. 4, § 21.

114 *Id.* § 23.

115 *Id.*

protection officer, a service provider, or directly with the magistrate.[116] Thereafter, a woman may file an application for an order of relief directly with the magistrate.[117] Alternatively, a protection officer or any other person may file the application on her behalf.[118] The Act requires that all proceedings brought under the Act be disposed of within sixty days of the first hearing, which must occur within three days following the application.[119] Once the magistrate enters an Order, failure to comply with the Order will result in criminal punishment.[120] As mentioned previously, this is the only instance in which a complaint under the Act can result in criminal sanctions against the abuser. The failure to adhere to an Order of the court is punishable with imprisonment for a maximum of one year or a maximum fine of 20,000 rupees.[121] In addition, the magistrate may bring charges against the abuser under the Anti-Cruelty Act or the Anti-Dowry criminal laws if he deems it appropriate.[122]

III. Barriers to Implementation

The Act is groundbreaking legislation. Before the Act was passed, women in India had no specifically defined rights.[123] The Act, nonetheless, has certain key limitations; notably, the scope is limited, and the Act does not provide the intended comprehensive protection for women against domestic violence.

A. Limitations of the Act

For women turning to the Act for protection from domestic violence, the most significant limitation is the civil character of the Act. The drafters of the Act made a strategic decision to make the Act's remedies civil.[124] As a civil statute, however, the Act does not allow criminal punishment for men who engage in domestic violence. Therefore, even with the enactment of the Act, women are left with only the Anti-Cruelty Statute and the Dowry Death Statute under which to bring criminal charges for domestic violence. As outlined above, these acts are not broad enough to provide criminal recourse for most victims of domestic violence.[125]

Additionally, the Act does not provide victims of domestic violence with permanent relief. The Act provides only an interim solution, by providing for Protection Orders and other temporary orders that are designed to give women time

[116] LAWYERS COLLECTIVE, FREQUENTLY ASKED QUESTIONS, *supra* note 61, at 8; *See* Protection of Women Act, *supra* note 2, ch. 3, § 5.

[117] *See* LAWYERS COLLECTIVE, FREQUENTLY ASKED QUESTIONS, *supra* note 63, at 8–9.

[118] Protection of Women Act, ch. 4, § 12(1).

[119] *Id.* § 12(4)–(5).

[120] *Id.* ch. 5, § 31(1).

[121] *Id.* § 31(1).

[122] *Id.* § 31(3).

[123] Interview with Purnima, *supra* note 29.

[124] *See supra* Part II.

[125] *See supra* Part II.

to evaluate their options.[126] During this period, the woman's right to reside in her home is protected, but after this period, the Act does not provide any protection for victims of domestic violence. Due to the interim nature of the Act and the lack of comprehensive criminal statutes punishing domestic violence, perpetrators of domestic violence have no real incentive to curb their violent behavior, even when a woman seeks protection under the Act.

The Act is also limited because it grants women only one right—the right to reside in a shared household. As discussed above, the creation of any right specific to women is groundbreaking in Indian human rights history and is an important step toward the creation of other rights for women. The right to reside in the shared household protects a woman from being thrown out of her home; however, it does not directly protect her from being subjected to violence. While the orders of protection that can be granted under the Act prohibit the respondent from committing any act of domestic violence and require the perpetrator to have no contact with the victim,[127] these orders are only temporary. Therefore, the Act does not create a right to freedom from violence.

B. Structural and Procedural Barriers to Successful Implementation

Although the Act has the potential to protect women from domestic violence, a lack of information regarding the Act, a lack of training, and police and judicial corruption threaten the successful implementation of the Act. Under the Act, the government is responsible for disseminating information regarding the Act and for training protection officers and magistrate judges.[128] If these steps are not carried out and if existing corruption among public officials is not addressed, the Act will be no more successful in reducing rates of domestic violence than the Dowry Death Act was in eliminating dowry violence.[129]

Currently, the average Indian citizen is likely unaware of the Act and the protection it offers.[130] Section 11 of the Act provides that the government "shall take all measures to ensure that the provisions of the Act are given wide publicity through public media including the television, radio and print media at regular intervals."[131] While it is difficult to determine whether the government is fulfilling this obligation, women's advocacy groups in New Delhi consistently cite a lack of dissemination of information regarding the Act.[132] Because the Act became effective in October 2006, it is possible that the required media campaigns

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126 Interview with Brototil Dutta & Kamolika Dutta, *supra* note 15.

127 Protection of Women Act, ch. 4, § 22.

128 *Id.* § 14.

129 *See* Pardee, *supra* note 16, at 502.

130 Interview with Brototil Dutta & Kamolika Dutta, *supra* note 15; Interview with Dr. Jyotsna Chaterji, *supra* note 10; Interview with Reenu Ram and Anubha Rastogi, *supra* note 29, Human Rights Law Network reported no increase in the number of domestic violence cases coming in after the Act was passed.

131 Protection of Women Act, ch. 4, § 14(a).

132 Interview with Brototil Dutta & Kamolika Dutta, *supra* note 15; Interview with Reenu Ram and Anubha Rastogi, *supra* note 29.

are still being developed. Nonetheless, the creation and regular distribution of information are necessary to bring greater public awareness of the Act and the protection it provides.

Despite the lack of government public relations campaigns, there has been some media reporting of the Act.[133] However, anecdotal evidence indicates that much of the early media coverage was negative, highlighting the potential for misuse and abuse of the Act.[134] While this portrayal of the Act is unfortunate, some women's advocacy groups are pleased that the passage of the Act is being reported at all, because even negative publicity leads to greater public awareness.[135] Furthermore, media coverage has become more balanced recently, with an increased focus on the provisions of the Act rather than the potential for misuse.[136]

While the early media coverage of the passage of the Act may have created awareness among some populations, many groups cannot be reached through newspaper and television reporting. This is particularly true for rural and poor urban communities with high levels of illiteracy and limited access to television media.[137] Community-level campaigns with the ability to spread information about the Act to socially and geographically isolated communities are lacking.[138] To bring awareness to these communities, non-traditional means of disseminating information will need to be implemented in addition to the traditional media campaigns that the government is required to fund.

In addition to circulating information about the Act, the government is required to provide training for protection officers and magistrate judges charged with carrying out the Act. Section 11 of the Act provides that the government "shall take all measures to ensure that . . . the police officers and the members of the judicial services are given periodic sensitization training and awareness on the issues addressed by this Act."[139] Because of widespread gender discrimination in India,[140] gender-sensitization training is necessary to enable protection officers and magistrate judges of both sexes to properly carry out the provisions of the Act. Without this training, social norms regarding the acceptability of violence against women will color protection officers' and magistrate judges' execution of their duties under the Act.[141]

The women's advocacy groups interviewed were not aware of any gender-sensitization training that had been provided for protection officers and magistrate judges in the first six months after the law became effective.[142] This lack of

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[133] Interview with Brototil Dutta & Kamolika Dutta, *supra* note 15.

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] Interview with Purnima, *supra* note 29.

[138] *Id.*

[139] Protection of Women Act, ch. 4, § 11(b).

[140] *See supra* Part I.

[141] *See* Manchandia, *supra* note 11, at 320.

[142] Interview with Dr. Jyotsna Chaterji, *supra* note 10.

training may be the result of the short time period since the Act became effective. Nonetheless, if comprehensive training is not conducted, this will be a significant barrier to the successful implementation of the Act.

Widespread police and judicial corruption and judicial inefficiencies also threaten the effectiveness of the Act. While corruption among public officials is difficult to measure, it is generally accepted that sometimes Indian police and courts consciously choose not to enforce laws designed to protect women.[143] Failure by police officers to properly report and investigate domestic violence and possible dowry-related deaths is widely reported.[144] Unwillingness by the police to investigate and report incidents of domestic violence stems from the view that domestic violence is a family problem and should be dealt with privately.[145] Because of the Act's lack of a criminal remedy, some police officers will have an additional reason to refuse to assist women in bringing complaints.[146] While these problems might deter victims from filing complaints, the Act does include provisions to deal with this barrier. As discussed in more detail below,[147] the Act expressly states the duties of protection officers, which include assisting women in filing complaints and informing women of their rights under the Act.[148] Despite these requirements, the corruption among police officers and judges will result in circumvention of the Act's safeguards if left unaddressed.

Finally, the traditionally slow response of the courts may deter victims of domestic violence from seeking recourse through the judicial system.[149] The Act addresses this problem by providing in section 16 that the magistrate judge shall have the first hearing within three days of the receipt of a petition under the Act and "shall endeavor to dispose of every application . . . within a period of sixty days from the date of its first hearing."[150] It remains to be seen whether this will be a realistic goal considering the number of petitions and the already overburdened caseload of magistrate judges.[151]

IV. Enforcement of the Act

As with all newly enacted legislation, time must pass before a determination can be made as to whether the Act will be effectively implemented. Questions

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[143] *See e.g.*, Manchandia, *supra* note 11, at 320; Tara S. Kaushik, *The Essential Nexus Between Transformative Laws and Culture: The Ineffectiveness of Dowry Prohibition Laws of India*, 1 SANTA CLARA J. INT'L L. 74, 87 (2003).

[144] *See e.g.*, Kaushik, *supra* note 143, at 87; Greenberg, *supra* note 12, at 813; Melissa Spatz, *A "Lesser" Crime: A Comparative Study of Legal Defenses for Men Who Kill Their Wives*, 24 COLUM. J.L. & SOC. PROBS. 597, 611–12 (1991).

[145] Pardee, *supra* note 16, at 501.

[146] Interview with Dr. Jyotsna Chaterji, *supra* note 10.

[147] *See infra* Part IV.

[148] Protection of Women Act, ch. 3, § 9.

[149] *See* Manchandia, *supra* note 11, at 320 (stating that "It can take eight to ten years for a case to go to court").

[150] Protection of Women Act, ch. 4, § 12(4), (5).

[151] Justice Gita Mittal, Delhi High Court, Speech on Protecting Women from Domestic Violence Under the PWDV Act, 2005 (on file with the author).

remain as to how, and if, the new Act will be enforced. The Act sets forth specific provisions that require certain services to be made available to victims of domestic violence. Under the Act, a victim of domestic violence has rights to the services of protection officers and police officers.[152] These individuals may receive the initial complaint of domestic violence, and the Act must contain clear descriptions of their duties and responsibilities.

A. Protection Officers as Enforcers of the Act

The Act assigns protection officers to handle cases of domestic violence. Protection officers, who are appointed by the state governments, are the primary enforcers of the Act.[153] Protection officers are entrusted with handling domestic violence cases from the initial complaint to its conclusion, either by offering services to the victim or by following the case through the final stages of court intervention.[154] Section 8 of the Act directs that protection officers shall "as far as possible be women," and provides that the state governments shall appoint such number of protection officers in each district as it considers necessary.[155] Some NGOs have construed this to mean that not less than one protection officer should be appointed for the area of each magistrate judge; however, this is not specifically enumerated within the Act.[156] Once protection officers are appointed, the state governments must notify the police and service providers of the identity of the protection officer(s) serving the local area.[157]

Despite the importance of the role, the qualifications and experience of protection officers are not clearly defined within the Act. Instead, the Act merely states that protection officers "shall possess such qualifications and experience as may be prescribed."[158] While the Act confers power upon the central government to make rules for carrying out the Act,[159] the qualifications and required experience of protection officers are absent from the Act.

Protection officers must carry out a number of functions in order to successfully assist a victim of domestic violence. After receiving a complaint of domestic violence, a protection officer must inform the victim of her right to apply for a Protection Order, an Order for Monetary Relief, a Custody Order, a Residence Order, or a Compensation Order.[160] Additionally, protection officers have an affirmative duty to inform the victim of the availability of the services of protection officers and service providers, her right to free legal services under the Legal

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[152] Protection of Women Act, ch. 3, § 5(a)–(e).

[153] *Id.* at § 8(1).

[154] *Id.* at § 9.

[155] *Id.* at § 8(2).

[156] Solution Exchange for Gender Community E-Discussion Summary-Implementing the Protection of Women from Domestic Violence Act, http://www.solutionexchange-un.net.in/gender/e-discuss/disc01-t01-fullsumm.htm (Mar. 1, 2007) [hereinafter Solution Exchange].

[157] Protection of Women Act, ch. 3, § 8(1).

[158] *Id.* § 8(2).

[159] *Id.* ch. 5, § 37(2)(a)–(b).

[160] *Id.* ch. 3, § 5(a).

Services Act of 1987, and the right to file a criminal complaint under the Anti-Cruelty Act, if she chooses.[161]

In addition to informing a victim of her rights under the Act, protection officers perform other administrative functions, such as assisting the victim in filling out a domestic incident report.[162] These reports are used to document the allegations of abuse and to provide a formal record of the complaint.[163] Once the domestic incident report is complete, the protection officer must forward copies of the report to the chief of police in the jurisdiction where the domestic violence is alleged to have occurred and to all service providers in the area.[164] Moreover, if a domestic violence victim requires medical attention, it is the protection officer's duty to have the victim medically examined and to forward copies of medical reports detailing the victim's treatment to the police and any shelter homes or medical establishments assisting the victim.[165]

Lastly, protection officers are responsible for maintaining a list of all service providers providing legal aid or counseling, shelter homes, and medical facilities in a given jurisdiction.[166] Protection officers also assist magistrates in the discharge of their adjudicative functions under the Act.[167] Additionally, if a victim chooses to file a criminal complaint or apply for free legal aid or any orders available to her, the protection officer must assist her in securing these services.[168]

To ensure protection officers are more than simply "enforcers on paper", the Act provides for the punishment of protection officers who willfully fail to execute their duties.[169] Section 33 of the Act provides that if a protection officer fails or refuses to discharge his duties as required in a Protection Order without sufficient cause, he may be punished with imprisonment up to one year, a fine up to 20,000 rupees (approximately $492.28 on August 14, 2007), or both.[170] However, these penalties will only be ordered if the protection officer acts in bad faith in failing to execute his duties.[171] A protection officer may not be prosecuted, or named as a party to a civil suit, for any damage caused or likely to be caused by actions performed in good faith in executing his duties under the Act.[172] Because protection officers are assigned significant responsibility and face risk of penalty if they do not execute their duties, the number of protection officers assigned to

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161 *Id.* § 5(d)–(e).

162 *Id.* § 9(1)(b).

163 *Id.* ch. 1, § 2(e).

164 *Id.* ch. 3, § 9(1)(b).

165 *Id.* § 9(1)(g).

166 *Id.* § 9(1)(e).

167 *Id.* § 9(1)(a).

168 *Id.* § 9(1).

169 *Id.* ch. 5, § 33.

170 Protection of Women Act, ch. 5, § 33.

171 *Id.* § 35.

172 *Id.*

each jurisdiction is vital in determining whether the Act will be effectively enforced.

B. Police Officers as Enforcers of the Act

In addition to protection officers, police officers are also responsible for enforcement of the Act. The Act provides that "nothing in this Act shall be construed in any manner as to relieve a police officer from his duty to proceed in accordance with law upon receipt of information as to the commission of a cognizable offence."[173] Therefore, if a police officer is present during an incident of domestic violence or if a complaint of domestic violence is reported to him, the police officer is required to inform the victim of her rights under the Act. Additionally, the police officer must inform the victim of her rights to seek the services of service providers, protection officers, free legal advocates, and her right to file a criminal compliant under the Anti-Cruelty Act.[174]

Perhaps of greatest importance, the Act mandates that the central government and state government officers, including police officers, be given sensitization and awareness training on domestic violence issues addressed by the Act.[175] As will be discussed in greater detail below,[176] the requirement of sensitization training is a tremendous accomplishment by those who drafted and voted to pass the Act. It is a call to law enforcement to positively change the ways they interact with female victims and react appropriately to complaints of domestic violence.

C. Enforcing the Act: Initial Concerns and Solutions

As discussed above, the Act provides victims of domestic violence with access to a number of resources, including protection officers, police, and service providers. Protection officers and police are the primary enforcers of the Act, and therefore, they are responsible for helping a victim navigate the system, from the receipt of the first complaint to the final resolution of the case. Protection officers, police, and service providers are bestowed with the ultimate duty of maximizing the protections under the Act to keep the victim safe.

1. Protection Officers—Concerns and Suggestions

Protection officers are instrumental to the Act's success. However, the protection officer is a newly created position, and there are few structural guidelines in place to ensure that protection officers are effective in carrying out their duties. Because few protection officers have been appointed, it remains to be seen whether the use of protection officers will prove effective as a means of enforcing the Act.

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[173] *Id.* ch. 3, § 5(e).

[174] *Id.* § 5(a)–(e).

[175] *Id.* § 11(b).

[176] *See infra* Part V.

As mentioned above, the Act is void of any detailed, or even suggested, qualifications, education, or experience a protection officer should possess before being appointed. Guidelines for protection officers' qualifications would not only ensure that protection officers can effectively execute their duties, but it would also give the position a level of legitimacy. This suggestion was voiced at the National Women's Conference held in February 2006, when representatives from twenty-three states met to demand effective implementation and enforcement of the Act.[177] Protection officers should, at a minimum, be full-time professionals appointed directly by or recommended by NGOs and should receive an adequate salary and mandatory gender-sensitization training.[178]

In addition, at least one protection officer per magistrate is necessary.[179] As discussed above, the Act does not specify the number of protection officers that should be appointed in each jurisdiction.[180] Although one protection officer may be all that is needed at this time because of the lack of reporting, one protection officer per magistrate may prove to be insufficient in the future given the significant amount of responsibility each protection officer is supposed to undertake. For example, in the Northwest District of Delhi, two protection officers have been appointed.[181] Although this is a good start, two protection officers will likely prove inadequate given that the Northwest District's population is over 1,412,476 citizens and has the highest rates of domestic violence against women in Delhi.[182]

Lastly, the training of protection officers should not only be mandatory, but also uniform across jurisdictions. Since the role of a protection officer is new, it is vital that protection officers have clearly defined roles and responsibilities. Most importantly, protection officers should be made aware of the NGOs and government agencies they may turn to for assistance or guidance. These trainings will ensure that the enforcers of the Act are both correctly interpreting and successfully enforcing the law.

2. *Police Responses and Attitudes*

As mentioned previously, domestic violence is often underreported.[183] A victim's fear that the police will not take her complaint seriously or that she will be subjected to additional violence at the hands of the police initiating reports may contribute to underreporting.[184] Police investigations of dowry-related crimes and domestic violence have historically been inadequate and inappropriately con-

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[177] Solution Exchange, *supra* note 156.

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] Interview with Dr. Sagar Preet Hooda, Deputy Police Comm'r, Nw. Dist. of Delhi Police, in Delhi, India (Mar. 5, 2007).

[182] DELHI POLICE, PARIVARTAN: ANNUAL REPORT 2006 4 (Delhi Police Pub. 2007) [hereinafter DELHI POLICE ANNUAL REPORT 2006].

[183] Greenberg, *supra* note 12, at 803.

[184] Singh, *supra* note 48, at 131–32.

ducted.[185] The Supreme Court of India has stated that "the perpetrators of [dowry violence] not infrequently escape from the nemesis of the law because of inadequate police investigation."[186] The Indian Supreme Court has also criticized police for delaying the investigations of domestic violence complaints, insufficient evidence gathering techniques and documentation of their investigation, and a "lackadaisical" approach to investigating domestic violence incidents.[187]

In response to these concerns, the Act specifically addresses the duties of the police in their handling of domestic violence cases. Most importantly, the Act mandates that police participate in sensitization and awareness training.[188] These trainings are an integral step in ensuring that the Act's provisions are carried out. Additionally, some police districts have recently integrated female police officers into their police force in part to encourage victims to report domestic violence incidents.[189]

3. *All-Women's Police Units*

One early attempt to increase reporting of crime against women was the establishment of All-Women's Police Units ("AWPUs"). These were established by a number of police districts throughout India in response to the growing awareness of the problem of familial violence.[190] Despite the initial belief that the AWPUs would work in a law enforcement capacity to combat violence in families, AWPUs have focused largely on the reunification of families through counseling.[191] Therefore, they have been criticized for frequently returning women to the home where domestic violence is occurring without fully ensuring that the woman will be safe.[192] A further critique of AWPUs is that they contribute to the marginalization of women's domestic violence complaints.[193] The presence of AWPUs allows police working within main police stations to funnel all domestic violence complaints to the AWPUs as a method of avoidance.[194] Therefore, domestic violence cases are merely handed off to the AWPUs, which often suggest that the victim return to the violent matrimonial home. As a result, the police, the victims, and their aggressors continue to believe that domestic violence is less

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[185] *See supra* Part III.B.

[186] *Bhagwant Singh v. Delhi Comm'r of Police*, (1983) S.C.R. 3 109, 121; Singh, *supra* note 48, at 132.

[187] Singh, *supra* note 48, at 132; *Bhagwant Singh*, (1983) S.C.R. 3 at 120–21.

[188] Protection of Women Act, ch. 3, § 11(b).

[189] DELHI POLICE, PARIVARTAN: VISION 2006–2011 (A draft Five-year Plan for Reduction of Violence Against Women) 31 (Delhi Police Pub. 2006) [hereinafter DELHI POLICE, VISION 2006–2011].

[190] Greenberg, *supra* note 12, at 811.

[191] *Id.*

[192] *Id.*

[193] *Id.*

[194] *Id.*

serious than other forms of violence because a non-traditional approach is taken.[195]

Despite the criticism of the AWPUs, the 295 units located throughout India can continue to serve a valuable function. Many victims are unwilling or unable to leave the marital home due to their cultural or religious beliefs.[196] For those victims who choose not to file a complaint under the Act, the AWPUs can provide counseling and inform a victim of the services available to her if she later decides to file a complaint under the Act. Additionally, some domestic violence victims may fear going directly to the main police station, and may view the AWPUs as a more approachable option. As one researcher has suggested, "[victims] don't want to talk about their personal relationships with a man. They think they won't get any justice."[197] Assuming AWPUs are made aware of the Act's provisions and are given sensitization training, AWPU officers may be able to aid victims in obtaining assistance from protection officers or police if the victim's situation worsens.

4. Parivartan

In 2006, the Northwest District of the Delhi Police implemented a program called Parivartan in an effort to increase reporting of violence against women.[198] The Northwest District created this program after discovering that their district had the highest incidence of violence against women in Delhi and that women were reluctant to report violence because of a fear of police retaliation.[199] Parivartan was implemented in twenty beats in the Northwest District after discovering that these beats had the highest incidences of rape and spousal battery.[200] These beats are densely populated by the poor who have little, if any, education.[201] These areas were targeted for Parivartan's five-year program, which focuses on reducing crime against women in the district, increasing the reporting of violence, improving the behavior of men toward women in both domestic and public spaces, and increasing awareness among women.[202]

To achieve these goals, Parivartan seeks to increase the accessibility of police officers to victims of domestic violence.[203] Aware that victims were suffering in silence and that a lack of reporting was a challenge in combating violence within the district, the Northwest District sought to change their methodology.[204] The

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[195] *Id.* at 812.

[196] *See supra* Part I.

[197] Rebecca Ruiz, India's All-Women Police Pursue Dowry Complaints, WOMEN'S E-NEWS, Sept. 13, 2006, http://www.womensenews.org/article.cfm/dyn/aid/2886.

[198] DELHI POLICE, VISION 2006–2011, *supra* note 189, at 30–32.

[199] *Id.*

[200] *Id.*

[201] *Id.* These twenty beats include colonies such as Sultan Puri, Jahangir Puri, Deep Vihar, and Pansali, Mukundpur.

[202] DELHI POLICE, VISION 2006–2011, *supra* note 189, at 32.

[203] Interview with Dr. Sagar Preet Hooda, *supra* note 181.

[204] *Id.*

Police Commissioner of the Northwest District emphasized, "[The police] could not wait for the women to come to them to report; instead, the police would have to go to [the victims]."[205]

Parivartan reaches out to victims of violence in the district through female beat constables.[206] In contrast to AWPUs, female beat constables supervise and patrol the beats to combat and prevent crime against women on the street.[207] Parivartan's advocates believe that utilizing female officers on beat patrol will increase the visibility of female officers and encourage reporting of domestic violence.[208] AWPU officers are useful in addressing matrimonial disputes, but because the officers are primarily assigned to desk duties, victims must know of and seek out their services. To address this problem, Parivartan places female beat constables on the street to reach out to victims who otherwise would not report violence.[209]

In an effort to increase reporting, forty female beat constables were selected for deployment to street patrol in 2006.[210] Initially, female beat constables experienced a number of obstacles, such as reluctance to report violence, tolerance of violence, cultural traditions, and social stigmas.[211] Nevertheless, the female beat constables joined in a cumulative effort with the larger law enforcement agencies, local schools, social workers, NGOs, and citizens to raise awareness and were able to overcome the initial difficulties.[212] Female beat constables have proven successful thus far and have been extended to an additional fourteen police beats in the Northwest District.[213] Largely because the police beat officers are women, victims often feel a greater level of comfort in reporting domestic violence.[214] The implementation of female beat constables is one of the most important components of the Parivartan program.[215] Due to their visibility on the street, female beat constables cultivate a sense of security and empowerment for women at the local level.[216] In addition to increasing visibility of female officers, Parivartan utilizes pantomimes and street plays to raise awareness in poor communities and slum colonies, and to promote two-way communication between citizens and police.[217]

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205 *Id.*

206 DELHI POLICE, *supra* note 189, at 30–31.

207 *Id.*

208 *Id.* at 32.

209 *Id.*

210 DELHI POLICE, ANNUAL REPORT 2006, *supra* note 185, at 7.

211 DELHI POLICE, PARIVARTAN: BRIEF NOTE SUPPLEMENTAL HANDOUT 1 (Delhi Police Pub., 2007) [hereinafter DELHI POLICE, SUPPLEMENTAL HANDOUT].

212 *Id.* at 1; DELHI POLICE, VISION 2006–2011, *supra* note 189, at iii.

213 DELHI POLICE, SUPPLEMENTAL HANDOUT, *supra* note 211, at 1.

214 *See* DELHI POLICE, ANNUAL REPORT 2006, *supra* note 182, at 2.

215 DELHI POLICE, VISION 2006–2011, *supra* note 189, at ii.

216 *Id.*

217 *Id.* at 3; DELHI POLICE, ANNUAL REPORT 2006, *supra* note 182, at 6.

Although the program is still in the initial phases of implementation, there are indications that the program is successful. However, it remains to be seen whether rates of violence against women, and more specifically rates of domestic violence, will fall. Street play audiences have had a strong positive reaction, namely directly reporting incidences of domestic violence to the police officers present.[218]

The Northwest District has also implemented mandatory sensitization training for both male and female police officers.[219] Although any sensitization training is beneficial, it is critical that these trainings be continued over the long-term to maximize their effectiveness.[220] Initially, male police officers were not receptive to Parivartan and reacted negatively to the introduction of female beat constables.[221] Because the attitudes and responses of police officers are critical to ensuring enforcement of the Act, the district will continue to conduct sensitization training for these male officers.[222]

The Northwest District has taken critical steps to enforce the Act by increasing visibility of female beat constables and using street plays to reach populations that are often overlooked in campaigns to educate the public about their rights. Although the success of Parivartan will not be fully determined until its conclusion in 2011, it is an ambitious program that may prove beneficial in the implementation of the Act. Each district will need to assess its unique population to determine whether Parivartan is an appropriate model for raising awareness and reducing rates of domestic violence.

V. The Role of Service Providers and the Path to Success

In addition to the important role of police and protection officers, women's rights organizations have an integral role in ensuring the Act is successfully implemented. Because women's rights organizations are most familiar with the goals of the Act, these groups will continue to serve an important function in monitoring the implementation and enforcement of the Act. Nevertheless, the role of these organizations must be specifically defined so that their function is not merely a duplication of efforts by protection officers and police.

A. Women's Rights Organizations as Service Providers

As discussed above, the Act was drafted and passed due in large part to the efforts of various Indian and international women's rights organizations.[223] These organizations pushed for the enactment of a law that would afford women

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218 DELHI POLICE, ANNUAL REPORT 2006, *supra* note 182, at 6.

219 *Id.* at 5.

220 The need for continued sensitization training was reiterated in February 2006 at a review conference designed to assess the performance of the Parivartan program at the conclusion of its first year. *Id.*

221 *Id.* at 3.

222 *Id.*

223 Interview with Purnima, *supra* note 29.

greater protection.[224] Although the Act is the product of collaboration among various women's rights organizations, the effort was led by the Lawyers Collective, which is a public interest organization that strives to set high standards for human rights advocacy, litigation, and legal aid.[225] The Women's Rights Initiative of the Lawyers Collective strives to empower women through the law.[226] With this mission in mind, they provide legal counsel and representation to women and facilitate access to other NGOs.[227]

While the role of women's rights organizations in the drafting and passage of the Act was known, the responsibilities that these organizations will have now is unclear.[228] The Act does not specify, nor do these organizations know, what their role will be in overseeing the implementation of the Act.[229] Despite this uncertainty, without the participation of NGOs, the Act cannot be successful in reducing the rate of domestic violence. While protection officers and police can ensure that the Act's provisions are enforced, the larger social issues that prevent gender equality call for "a multi-stakeholder partnership and the adoption of measures that have a multi-dimensional approach."[230] "The roles of the protection officers and the police need to be buttressed by other factors, such as political will, resources, influencing the socialization processes anchored in patriarchy and increased engagement with men and boys."[231] The first step in tackling the cultural barriers that threaten the effectiveness of the Act is for NGOs to determine what their role will be as service providers under the Act.[232]

The Act allows NGOs to be registered with state governments as service providers.[233] In addition to providing legal aid, medical care, counseling, or other forms of support, service providers can assist women in filing domestic incident reports.[234] NGOs registered as service providers will be permitted to take complaints.[235]

Protection officers are responsible for maintaining the list of registered service providers.[236] To date, no procedures have been put into place for NGOs to become registered.[237] The lack of procedures for registration hampers the objective

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224 *Id.*

225 *Id.*; Lawyers Collective—About Us, http://www.lawyerscollective.org/about_us.asp (last visited May 5, 2007).

226 Lawyers Collective—What We Do, http://www.lawyerscollective.org/^wri/^about_us/what_we_do.asp (last visited May 5, 2007).

227 *Id.*

228 Interview with Dr. Sagar Preet Hooda, *supra* note 181.

229 Interview with Brototil Dutta & Kamolika Dutta, *supra* note 15.

230 Interview with Gita Gupta, Information Officer for South Asia, United Nations Development Fund for Women (UNIFEM), in New Delhi, India (Mar. 9, 2007);

231 *Id.*

232 Interview with Dr. Sagar Preet Hooda, *supra* note 181.

233 Protection of Women Act, ch. 3, §10(1).

234 *Id.* §§ 10(1) & (2)(a); LAWYERS COLLECTIVE, FREQUENTLY ASKED QUESTIONS, *supra* note 61, at 7.

235 Protection of Women Act, ch. 3, § 10(2)(a).

236 *Id.* at §9(1)(e)

237 Interview with Dr. Sagar Preet Hooda, *supra* note 181.

of providing multiple places where women can file complaints.[238] Allowing alternative venues for filing complaints permits women to choose the option with which they feel most comfortable.[239] Until protection officers implement a procedure for registration of service providers, victims of domestic violence will be limited to filing complaints with protection officers, police officers, and magistrates, all of whom victims have historically been reluctant to approach.[240]

Additionally, without a list of service providers, victims are unlikely to know where they can turn for support. A comprehensive list will help victims, service providers, and other key players under the Act by allowing coordination of services.[241] Although NGOs appear connected through workshops and conferences, the organizations, nevertheless, lack overall awareness of service providers other than organizations that contributed to the drafting of the Act.[242] Outside this group are many grassroots and smaller organizations that provide services for women, such as counseling, job skills training, and shelter, which are equally important to the success of the Act.[243] If a victim goes to a service provider to make a complaint, she likely will need more services than that individual service provider can offer.[244] Therefore, for service providers to fully assist and support a victim, they must be able to direct the victim to other NGOs providing services outside their specialty.[245] For example, while the Lawyers Collective predominantly offers legal assistance, with a list of service providers, they could ensure that a victim is also able to get counseling, housing, and education. In addition, a comprehensive service provider directory would connect a victim with service providers in her neighborhood or district, rather than having to travel to the few well-known NGOs.[246]

While many of the organizations will need to continue to provide the same services that they provided prior to the enactment of the Act, some of the women's organizations and NGOs will also need to take on new responsibilities. Therefore, the women's groups and NGOs should reevaluate their roles and responsibilities to determine what services they need to offer to ensure successful implementation of the Act.

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238 Interview with Dr. Sagar Preet Hooda, *supra* note 181.

239 Interview with Brototil Dutta & Kamolika Dutta, *supra* note 15.

240 *Id.*

241 National Secretariat, Protection of Women Act, 2005, *Recommendations Emerging Out of the Second National Women's Conference Held on 18th-20th February 2007 at Delhi for Mechanism for Effective Implementation of the Protection of Women Against Domestic Violence* 2 (available through Action India, email: actionindia1976@gmail.com)

242 Interview with Purnima, *supra* note 29; Interview with Dr. Jyotsna Chaterji, *supra* note 10.

243 Interview with Purnima, *supra* note 29; Interview with Dr. Jyotsna Chaterji, *supra* note 10.

244 National Secretariat, Protection of Women Act, 2005, *supra* note 241, at 2.

245 *Id.*

246 *Id.*

B. Suggestions to Assist in the Implementation of the Act

Despite the Act's potential to assist women experiencing domestic violence, the Act will not be effective in reducing overall levels of violence unless the patriarchal mindset of Indian society is dismantled. Indian women need to be empowered to recognize that violence is unacceptable, and there needs to be training for, sensitization of, and cooperation among police, protection officers, service providers, and magistrate judges in enforcing the Act. The following suggestions will facilitate the achievement of these objectives.

1. Teamwork

First, police, protection officers, service providers, magistrate judges, and government officials must collaborate to determine how best to successfully implement and enforce the Act. Without their joint efforts, the objective of the Act cannot be achieved.[247] If these parties do not work together toward the goal of reducing violence against women, women will continue to fall victim to the abuse and violence will continue to be perpetuated by India's patriarchal society.

2. Sensitization Training

Second, the traditional acceptance of domestic violence in Indian culture is detrimental to successful implementation and enforcement of the Act.[248] This mindset is not limited to those who inflict domestic violence on women; it extends to individuals at all levels and in all positions, including the people who are responsible for ensuring that women are protected under the Act.[249] To dismantle this mindset, NGOs and government officials must assume responsibility for carrying out gender sensitization training for all parties who have any role or responsibility under the Act.[250]

The purpose of gender sensitization training should be to create awareness of discrimination against women, reduce bias against women, and cultivate an understanding of the role of women in Indian society to better address the needs of domestic violence victims. By creating an awareness of biases and prejudices against women, the key players in enforcing the Act will be better aware of actions and decisions which stem from these biases and hopefully work to reduce the effects of these biases.[251] If this Act is to successfully protect women affected by domestic violence, those responsible for enforcing the Act must overcome their own biases to help victims.[252] Should persons of authority continue to react with prejudice and bias toward victims of domestic violence, victims will

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247 Interview with Brototil Dutta & Kamolika Dutta, *supra* note 15.

248 Interview with Dr. Jyotsna Chaterji, *supra* note 10.

249 *See supra* Part I.

250 National Secretariat, Protection of Women Act, 2005, *supra* note 241, at 3–4.

251 Interview with Dr. Jyotsna Chaterji, *supra* note 10.

252 *Id.*

be discouraged by the results of their efforts to seek protection, and they may cease pursuing their rights under the Act.

Because of the deeply ingrained patriarchal mindset, NGOs and the government should conduct multiple training sessions, and the sessions should be conducted on a regular basis and continue far into the future.[253] Limited trainings will not be effective because all Indians grew up in a society permeated by prejudice against women. These stereotypes and prejudices will not be dismantled after only a few sessions of gender sensitization training. In addition, NGOs should employ a variety of methods to combat biases and raise awareness of women's realities in India.[254] Such methods could include role-playing, plays, and discussions. The NGOs must monitor the progress of these trainings and make modifications based on the level of progress. If a method does not appear to be working, the NGOs should experiment with other methods to find the most effective combination. Additionally, NGOs and government officials must work together to coordinate and fund training sessions in order to begin the systematic breakdown of the patriarchal mindset.[255]

One existing program that may be successful is *Walking Wisdom: A Creative Learning Experience*, which was developed by Sakshi.[256] This program, geared toward the sensitization of judges, consists of a book accompanied by compact discs, which can be used by the judge on his or her own time.[257] The objective of the program is to sensitize judges to gender issues so that they may make objective decisions free from biases and stereotypes.[258] While the effectiveness of this program is unknown, it has the potential to be beneficial because it is a self-learning program, which will likely fit into the schedules of busy judges better than other types of training programs. However, the disadvantage to a self-learning program is the difficulty in determining whether judges are actually completing the program and using it in the proper manner. If the organizations could develop a way to monitor judge's compliance and progress, this type of program could be advantageous because of its time benefits and cost-effectiveness.

3. Publicity and Education of the Law

Third, for victims of domestic violence to obtain relief under the Act, the public must become aware of the Act and be educated on how to utilize its protections.[259] As discussed above,[260] a major impediment to the success of the Act is

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253 Interview with Purnima, *supra* note 29.

254 Interview with Dr. Jyotsna Chaterji, *supra* note 10.

255 National Secretariat, Protection of Women Act, 2005, *supra* note 241, at 1, 3–4.

256 SAKSHI, WALKING WISDOM: A CREATIVE LEARNING EXPERIENCE (Sakshi 2005).

257 *Id.*

258 *Id.*

259 National Secretariat, Protection of Women Act, 2005, *supra* note 241, at 3–4; Interview with Purnima, *supra* note 29; Interview with Dr. Jyotsna Chaterji, *supra* note 10.

260 *See supra* Part III.

a lack of knowledge regarding the law's provisions.[261] Formulating a suitable remedy to this problem requires the coordinated efforts of the government, media, and NGOs.[262]

The media can be an effective tool in publicizing the Act and its features.[263] Because the lack of knowledge regarding the Act is so widespread, women's rights organizations have found that even negative news reporting of the Act is valuable because the public is at least becoming aware that a civil domestic violence law exists.[264] Whether positive or negative, news reporting is valuable, and the government and women's rights organizations should continue to seek the media's attention.[265]

In addition to news reporting, additional publicity can be achieved through other outlets, such as television and radio commercials, billboards, newspaper, and magazine advertisements.[266] These outlets reach a wide array of people and draw attention to the Act, while also ensuring that the publicity is positive and informative. However, the drawback to some of these forms of publicity is that they will not reach all groups of people. In particular, these media forms will not likely reach some rural populations, including those who do not have access to radios or televisions and those who are illiterate.[267] In order to bring awareness to these groups, NGOs and the government will need to actively reach out to these people.[268] An active approach may require organizations to travel from village to village and use non-traditional forms of educating the rural public about the law. It may also require providing incentives to get members of these communities to attend presentations and learn about the Act. Street plays, similar to those used by Parivartan, may be effective because they are able to inform audience members whether or not they are educated or literate.[269] Additionally, plays may be able to draw larger audiences than other teaching methods because they are entertaining and appeal to people of all ages and sexes.[270]

Nevertheless, to be beneficial, these street plays or other publicity tools must address the basic components of the Act. The audience must understand what constitutes domestic violence, what rights women have under the Act, and how to enforce these rights.[271] The public must also be told where a victim can go to find assistance in filing a complaint under the Act. Without information regard-

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261 National Secretariat, Protection of Women Act, 2005, *supra* note 241, at 3–4; Interview with Purnima, *supra* note 29; Interview with Dr. Jyotsna Chaterji, *supra* note 10.

262 National Secretariat, Protection of Women Act, 2005, *supra* note 241, at 3–4; Interview with Purnima, *supra* note 29; Interview with Dr. Jyotsna Chaterji, *supra* note 10.

263 National Secretariat, Protection of Women Act, 2005, *supra* note 241, at 3–4.

264 Interview with Dr. Jyotsna Chaterji, *supra* note 10; Interview with Purnima, *supra* note 29.

265 National Secretariat, Protection of Women Act, 2005, *supra* note 241, at 4.

266 *Id.* at 3–4.

267 Interview with Dr. Jyotsna Chaterji, *supra* note 10.

268 Interview with Purnima, *supra* note 29; Interview with Dr. Jyotsna Chaterji, *supra* note 10.

269 Interview with Dr. Sagar Preet Hooda, *supra* note 181; Interview with Purnima, *supra* note 29; Interview with Dr. Jyotsna Chaterji, *supra* note 10.

270 Interview with Dr. Sagar Preet Hooda, *supra* note 181.

271 Interview with Dr. Jyotsna Chaterji, *supra* note 10.

ing these basic provisions of the Act, a victim will not be able to effectively use the Act, and as a result, the Act will not protect women from domestic violence.[272]

4. Legal Representation

Fourth, the Act requires police officers, service providers, and magistrates to inform aggrieved persons of their right to free legal aid.[273] However, although Indian citizens are entitled to free legal aid under the Act, India has relatively few attorneys who work in the public interest field or are willing to provide pro bono legal representation.[274] The deficiency in the number of available legal counsel results in a lack of free or low cost legal representation for victims of domestic violence. Unless more funding is made available, the Act's provision for free legal aid to victims of domestic violence will only add to the work of already overburdened public interest lawyers without adding to the number of public interest attorneys that are available.[275] Those promoting the Act must evaluate how these new claims will affect the current judicial system in terms of capacity and address any areas that are in need of additional support.[276] The government must participate in this area, and in particular, it must ensure that adequate monetary and legal resources are available to address the legal claims. While women's rights organizations have yet to report an increase in complaints since the enactment of the Act, the number of complaints will likely increase if NGOs heed advice to publicize the Act and educate women regarding their rights.

The lack of attorneys willing to work in public interest is a difficult problem to overcome. However, the Indian government could take some steps toward remedying the problem, such as requiring all attorneys to work a certain number of hours per year on pro bono cases and/or providing incentives in the form of student loan forgiveness or subsidies for lawyers working predominately in the public interest field. By increasing the number of attorneys available to provide free legal aid, more victims of domestic violence will have assistance in exercising their rights in the manner intended under the Act. The absence of legal representation available to victims may result in fewer complaints being filed and a failure of victims to follow through with the litigation of claims. Therefore, the government must ensure that funds are allocated and resources are available to provide the necessary legal representation to victims. Additionally, the government should monitor the availability of legal aid and allocate additional resources should the previous estimate prove insufficient to provide adequate free legal aid to all victims.

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[272] *Id.*

[273] Protection of Women Act, ch. 3, § 5(d).

[274] Interview with Subbayamma Nagubadi, in Valaparaiso, Indiana (Feb. 25, 2007).

[275] Mittal, *supra* note 151, at 17–18; National Secretariat, Protection of Women Act, 2005, *supra* note 241, at 4.

[276] Mittal, *supra* note 151, at 17–18; National Secretariat, Protection of Women Act, 2005, *supra* note 241, at 4.

5. *Increase the Number of Shelters*

Fifth, there is a strong social stigma against women living outside the marital home, and, as a result, shelters are rarely utilized by women in abusive relationships.[277] Nevertheless, the availability of shelters is important because shelters provide an option to women who do decide to leave abusive relationships. Shelters are needed in times of emergency when a woman cannot possibly return home and remain safe. Additionally, as women gain more independence, the belief that a woman should not live outside the marital home will likely weaken. This may lead to an increase in the willingness of a woman to leave an abusive relationship and seek out a shelter for protection and housing until she is able to provide for herself.

India currently has few shelters, and those that are available often prohibit the children of victims from accompanying the victim at the shelter.[278] This prohibition contributes to the reluctance of women to utilize the benefits of shelters for fear of being separated from their children. Therefore, their policies should be modified to permit children of victims to live with their mothers at the shelter.[279] Additionally, the location of shelters should be made known to NGOs, protection officers, and police officers.[280]

6. *Empower Women*

Sixth, in order to reduce domestic violence against women, women must be empowered.[281] The empowerment of women will begin to dismantle the patriarchal mindset that is ingrained in Indian society and place women on an equal level with men.[282] One study conducted in rural India found that women whose husbands granted them real property rights were less likely to be victims of domestic violence than those who had no ownership in their husband's property.[283] Therefore, programs encouraging the voluntary granting of property rights to women should be implemented.

While women in India have equal rights to own property, many women are still prevented from owning or inheriting property because of traditional beliefs or because their families stand in their way.[284] Moreover, many women who hold title to property are unaware of their ownership either because they do not understand the title, they were told that they do not own it, or they are illiterate

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[277] Interview with Dr. Jyotsna Chaterji, *supra* note 10.

[278] *Id.*

[279] *Id.*

[280] National Secretariat, Protection of Women Act, 2005, *supra* note 241, at 2.

[281] Interview with Brototil Dutta & Kamolika Dutta, *supra* note 15; Interview with Purnima, *supra* note 29; Interview with Gita Gupta, *supra* note 230; Interview with Dr. Jyotsna Chaterji, *supra* note 10.

[282] Interview with Brototil Dutta & Kamolika Dutta, *supra* note 15; Interview with Purnima, *supra* note 29; Interview with Dr. Jyotsna Chaterji, *supra* note 10.

[283] Gupta, *supra* note 53, at 45–46.

[284] *See supra* Part I.

and did not know what they were signing.[285] To combat this problem, India could enact a law requiring a full explanation of title and the rights of ownership when a woman inherits or otherwise acquires title to real property. A law of this nature would provide protection for women who are illiterate or do not understand the legal language of the title. Additionally, a marital property law should be enacted providing that all property acquired during a marriage is jointly owned by the spouses.[286]

In addition to property rights, women must be educated and given the option and opportunity to work outside the home.[287] Therefore, the NGOs and the government must focus on the education of female children so that every woman has the opportunity to become literate. Furthermore, NGOs should offer job skills training workshops, which could teach a variety of skills enabling woman to find jobs outside the home and contribute to their household income.[288] As women gain a more equal economic status with men, women will hopefully face less domestic violence because their partners will begin to see them as equals.[289] Alternatively, if violence continues, a woman who is educated and has job skills will have the means to live outside of her marital home should she decide to leave an abusive relationship.

7. Monitor and Amend Act as Necessary

Seventh, NGOs and the government must monitor the effectiveness of the Act in reducing rates of domestic violence.[290] In addition, these groups must evaluate the avenues available for women seeking relief and the various remedies available under the Act to determine which provisions are effectively implemented.[291] If certain provisions have not been effective or could not be implemented as intended, protection officers, service providers, and magistrate judges should first try to find alternative ways to make the provision work without amending the Act. However, if this is not possible, the legislature must amend the Act as necessary to ensure successful implementation.

Additionally, even if progress is made initially, NGOs must continually monitor the effectiveness of the Act to determine if new laws addressing domestic violence are needed as society evolves.[292] While the law is considered comprehensive today, women's rights organizations may determine that additional protections are needed in the coming years. Therefore, continuous monitoring and amendment may be necessary to achieve true protection for women against domestic violence.

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285 *See* Gupta, *supra* note 53, at 38; Interview with Purnima, *supra* note 29; Interview with Dr. Jyotsna Chaterji, *supra* note 10; Interview with Gita Gupta, *supra* note 233.

286 *See* LAWYERS COLLECTIVE, ONLY HER WORD, *supra* note 3, at 80–81

287 Interview with Purnima, *supra* note 29; Interview with Dr. Jyotsna Chaterji, *supra* note 10.

288 Interview with Purnima, *supra* note 29; Interview with Dr. Jyotsna Chaterji, *supra* note 10.

289 Interview with Brototil Dutta & Kamolika Dutta, *supra* note 15.

290 *See* LAWYERS COLLECTIVE, ONLY HER WORD, *supra* note 3, at 85.

291 *See id.*

292 *See id.*

8. *Judicial Consideration of International Obligations*

Finally, Indian courts have an obligation to consider international law and India's treaty obligations in formulating their common law. In fact, India's Constitution specifically requires recognition and enforcement of India's international treaty obligations.[293] The Supreme Court has recognized that where domestic legislation does not address an issue, the judiciary should consider international conventions and norms in filling the gaps so long as those international obligations are not in conflict with any existing legislation or the Indian Constitution.[294]

International law mandates gender equality and advocates for the protection of women's rights.[295] Because India has never had legislation comparable to the Act, it is imperative that the judiciary considers India's international treaty obligations in its interpretation of the Act in order to safeguard women's rights to protection from violence. Two such obligations are the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW") and the Beijing Platform for Action of the Fourth World Conference on Women in Beijing.[296] CEDAW is a United Nations Convention that proscribes discrimination against women and mandates equal opportunities, access and benefits to women so that men and women can equally enjoy "all economic, social, cultural, civil, and political rights."[297] India ratified CEDAW on August 8, 1993, and thus committed itself to the protection of the woman's right to be treated equally.[298] In addition to CEDAW, India's government committed itself to adopting a national policy for the protection of women's rights in accordance with the Beijing Platform for Action.[299] The Platform for Action calls for member States to develop "a holistic and multidisciplinary approach to the challenging task of promoting families, communities and States that are free of violence against women."[300] It requires that "equality, partnership between women and men and respect for human dignity must permeate all stages of the socialization process."[301]

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293 *See* INDIA CONST. art. 4, §51(c). It provides in pertinent part: "The State shall endeavor to . . . (c) foster respect for international law and treaty obligations in the dealings of organized people with one another." *Id.*

294 *See Vishaka v. State of Rajasthan*, (1997) 6 SCC 241; *see also Gramophone Co. of India Ltd. v. B.B. Pandy*, AIR 1996 SC 2715.

295 *See* United Nations Convention on the Elimination of All Forms of Discrimination Against Women, India, July 30, 1980, 1249 U.N.T.S. 13 [hereinafter CEDAW].

296 *See* Singh, *supra* note 48, at 82.

297 *See* CEDAW, *supra* note 295.

298 Office of the U.N. High Comm'r for Hum. Rts., Status of Ratifications of the Principal International Human Rights Treaties (June 9, 2004), http://www.unhchr.ch/pdf/report.pdf.

299 *See* Singh, *supra* note 48, at 82; *See also* Further Actions and Initiatives to Implement the Beijing Declaration and Platform for Action, G.A. Res. S-23/3, U.N. Doc. A/Res/S-23/3 (Nov. 16, 2000) [hereinafter Further Actions]

300 United Nations Fourth World Conference on Women, Beijing, China Sept. 4–15, 1995, *Platform for Action*, ¶119, U.N. Doc. A/CONF.177/20/Rev. 1, (Sept. 1995), *available at* http://www.un.org/womenwatch/daw/beijing/platform/violence.htm.

301 *Id.*; *see* Further Actions, *supra* note 299.

Together CEDAW and the Platform for Action recognize that women have rights and those rights should not be ignored. These international covenants reinforce that the once private issue of domestic violence in Indian households should be considered a human rights violation and thus immediately actionable.[302] The tenets of the Platform should be integrated into the judiciary's interpretation of the Act because they recognize and address the fact that domestic violence in India cannot be extinguished overnight—there are cultural undertones that have to be addressed before the Act will be effectively implemented.

Conclusion

The Protection of Women from Domestic Violence Act grants Indian women more rights and protections than have ever been granted to them in the past. Unlike previous domestic violence laws, which provided protection only in cases of dowry death and extreme cruelty, the Act defines domestic violence broadly to include everything from physical violence to emotional injuries to economic threats. Furthermore, the Act provides civil remedies to fill the gap between the restrictive criminal laws and the extreme civil remedy of divorce. Most importantly, for purposes of the women's rights movement in India, the Act grants a specific right to women, the right to reside in the shared household.

The language of the Act is exceptional, and the Act, if implemented properly, has great potential to make a difference in the lives of women victimized by domestic violence. Nonetheless, various characteristics of Indian culture threaten the Act's effectiveness. The main barrier to successful implementation is the deeply ingrained patriarchal mindset of Indian society. Among all classes and levels of society, women are viewed as subordinate to men. The patriarchal mindset does not affect just the general public; it also affects the very people who are supposed to protect women from domestic violence. Therefore, many steps must be taken to promote the effective implementation of the Act.

Specifically, the Act will not be effective in reducing overall levels of violence unless the patriarchal mindset of Indian society is dismantled, Indian women are empowered to recognize that violence is unacceptable, and there is training for, sensitization of, and cooperation among police, protection officers, service providers, and magistrate judges in enforcing the Act. In addition to implementing the requirements specified in the Act, NGOs and the government must take additional steps to ensure the Act is effective in protecting women. These steps include performing gender sensitization training of all protection officers, police, lawyers, magistrate judges, and all other parties involved in the implementation of the Act; providing publicity and education regarding the law; increasing the number of attorneys available to provide legal representation to victims of domestic violence; adding to the number of shelters; empowering women; monitoring and amending the Act as needed; and interpreting the Act pursuant to

302 *See* BARBARA BURTON, NATA DUVVURY, & NISHA VARLA, JUSTICE, CHANGE AND HUMAN RIGHTS: INTERNATIONAL RESEARCH AND RESPONSE TO DOMESTIC VIOLENCE 9 (Int'l Ctr. for Research on Women & The Ctr. for Dev. & Population Activities 2000), *available at* http://www.icrw.org/docs/domesticviolencesynthesis.pdf.

international treaty obligations. Although the Act is a great achievement for Indian women, NGOs and the government must carefully monitor the enforcement of the Act and work together to dismantle the patriarchal mindset that threatens to make the Act ineffective.