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THROUGH THE RUSSIAN LOOKING GLASS: THE DEVELOPMENT OF A RUSSIAN RULE OF LAW AND DEMOCRACY

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I. Introduction

On November 5, 2008, Russia issued a challenge to President-elect Barack Obama.[1] While other world leaders sent messages of congratulations to Obama[2] once it was clear that he had won the U.S. presidential election on November 4, 2008,[3] Russian President Dmitry Medvedev was notably silent[4] in his November 5, 2008[5] annual Address to the Federal Assembly of the Russian Federation (the "Address"),[6] which is somewhat analogous to the State of the Union delivered annually by the U.S. President. President Medvedev neither congratulated nor addressed President-elect Obama directly,[7] even though this would have been an

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[1] Ariel Cohen, *Europe Anti-Missile Defense System: Standing Up to Russia's Threats*, HERITAGE FOUND. (Heritage Found., Washington, D.C.), Nov. 20, 2008, at 1, *available at* http://www.heritage.org/Research/RussiaandEurasia/upload/wm_2139.pdf.

[2] *See Leaders Congratulate Sen. Obama on Election Victory*, GERMANY INFO, Nov. 5, 2008, http://www.germany.info/Vertretung/usa/en/__PR/P__Wash/2008/11/05__Obama__Congratulations__PR, archiveCtx=2028290.html, (stating that on November 5, 2008, German leaders did not hesitate to immediately send messages of congratulation to Senator Barack Obama on his victory and assured President-elect Obama of Germany's support as he prepared to take office. Chancellor Angela Merkel called Obama's victory "historic," while the German Federal President, Horst Köhler wrote: "Allow me to congratulate you warmly, also on behalf of my fellow Germans, on being elected President of the United States of America . . . . Here you can count on Germany as a reliable partner and old friend."). *See also Sarkozy, Other French Leaders Congratulate Obama*, EARTH TIMES, Nov. 5, 2008, http://www.earthtimes.org/articles/show/240161,sarkozy-other-french-leaders-congratulate-obama—summary.html (stating that on Wednesday November 5, 2008, French President Nicolas Sarkozy sent President-elect Obama a congratulatory letter. Sarkozy referred to Obama's victory as "brilliant," and after extending the "warmest congratulations" on behalf of the French people, he wrote that Obama's election "'crowns an exceptional campaign . . . (that) has shown the vitality of American democracy to the entire world' . . . . 'In choosing you, the American people have chosen change, openness, and optimism.' Obama's victory . . . 'raises a great hope in France, in Europe and in the world—that an open, united, and strong America . . . will show a new way, with its partners, by the strength of its example and the adherence to its principles.").

[3] Adam Nagourney, *Obama Wins Election; McCain Loses as Bush Legacy is Rejected*, N.Y. TIMES, Nov. 5, 2008, http://www.nytimes.com/2008/11/05/us/politics/05campaign.html.

[4] *See* President Dmitry Medvedev, Address to the Federal Assembly of the Russian Federation, (Nov. 5, 2008), *in* PRESIDENT OF RUSSIA OFFICIAL WEB PORTAL, *available at* http://www.kremlin.ru/eng/text/speeches/2008/11/05/2144_type70029type82917type127286_208836.shtml [hereinafter Medvedev Address]. In contrast, Russian President Vladimir Putin was one of the first leaders to express solidarity with the U.S. following the terrorist attacks on September 11, 2001. *See* Vladimir Putin, Statement on the Terrorist Acts in the U.S. (Sept. 12, 2001), *available at* http://www.invest2russia.com/usrus.html.

[5] Medvedev Address, *supra* note 4; *see* C.J. Chivers, *Medvedev Takes Oath in Russia, but Putin Dominates Much of Day*, N.Y. TIMES, May 8, 2008, at A16 (discussing the election and inauguration of Dmitry Medvedev as the third President of the Russian Federation) [hereinafter Chivers, *Medvedev Takes Oath*]. Medvedev won the Russian presidential election on March 2, 2008 and was inaugurated on May 7, 2008. He succeeds Vladimir Putin who held the office from 2000 to 2008.

[6] Medvedev Address, *supra* note 4.

[7] *See id.*

> It's no secret that many states, simply due to inertia, look at which way the wind is blowing in relations between Russia and the United States. Yes, today these relations are not the best. And many questions are being raised in Russia, including moral ones. But I would stress that we have no issue with the American people, we do not have inherent anti-Americanism. And we hope that our partners, the new administration of the United States of America, will make a choice in favour of full-fledged relations with Russia.

Id.; *see also* Anatoly Medetsky, *Medvedev Signs Pledge on Tariffs in U.S.*, ST. PETERSBURG TIMES, Nov. 18, 2008, at 1 (reporting that when asked later in November 2008 why he did not mention President-elect

ideal opportunity to do so.[8] Instead, Medvedev threatened to respond to the United States by "deploy[ing] the Iskander missile system in the Kaliningrad Region,"[9] "if Washington proceed[s] with its planned missile defense system in Eastern Europe,"[10] even though Medvedev had previously planned to dismantle those systems.[11] President Medvedev also demonstrated a level of assertiveness, which was highly uncharacteristic of him.[12] Specifically, he recommended that the Russian presidential term be extended from four years to six,[13] and further, he questioned the consolidation of power that was the trademark of his predecessor,[14] Vladimir Putin.[15]

Obama on November 5, 2008, President Medvedev said that he had simply forgotten about the U.S. election).

[8] *See* Medvedev Address, *supra* note 4. Instead, President Medvedev discussed at great length, Russian policy, the Russian Constitution, and various domestic concerns Russia faces, including health care, education, and developing [a] judicial system. *Id.* Medvedev also addressed several international issues facing Russia, such as the 2008 Georgian-Russian Conflict and the ongoing international financial crisis. *Id.*

[9] Medvedev Address, *supra* note 4.

[10] Ellen Barry & Sophia Kishkovsky, *Russia Warns of Missile Deployment*, N.Y. TIMES, Nov. 5, 2008, http://www.nytimes.com/2008/11/06/world/europe/06iht-06russia.17572437.html. *See also* Cohen, *supra* note 1, at 1-2:

> Moscow fiercely opposes the American missile defense system, claiming that the project compromises its national security. Yet Russia's claims fail any objective test: the top Kremlin ballistic missile experts have written that the missile shield in Europe cannot neutralize Russia's overwhelming nuclear arsenal—not even Moscow's second-strike capability . . . .
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> . . . In addition, the U.S. has done much to reassure Moscow that the system is intended only to counter possible strikes from rogue states in the Middle East such as Iran . . . .
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> . . . Russia's threat is indeed a shrewd geopolitical move. By opposing Washington, Moscow is trying to drive a wedge between "old" and "new" Europe, and between Europe and the U.S.

Id.

[11] *See* Medvedev Address, *supra* note 4.

[12] *See id.* (during his November 5, 2008 Address, Medvedev did not once refer to Prime Minister Putin, but instead, set out his own agenda: "I feel it necessary to set out my vision of the fundamental laws . . . . As the guarantor of the Constitution, I will preserve and protect these fundamental provisions.").

[13] *See id.* ("we should increase the constitutional mandates of the President and State Duma to six and five years respectively.").

[14] *See id.*

> [T]he maturity of the democratic institutions and procedures that [the Russian Constitution] guarantees are the source for our continued development. Now, as we come to a new age in our development, we are setting new goals that call for greater participation by our citizens, political parties and other public institutions. . . .
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> . . . But an all-powerful bureaucracy is a mortal danger for civil society. This is why our society must continue calm and steady work to build up its democratic institutions and not delay this work.

Id.

[15] *Putin Becomes Russian PM in Leadership "Tandem,"* CHINA DAILY, May 9, 2008, http://www.chinadaily.com.cn/world/2008-05/09/content_6672476.htm. Vladimir Putin served two terms as Russia's President, from 2000 to May 2008. President Medvedev quickly nominated Putin to be Prime Minister, the position Putin currently holds. *Id.*

Interestingly, until this point, the newly elected Medvedev had demonstrated an unwavering willingness to work with Prime Minister Putin in "tandem,"[16] by indicating that the Prime Minister would continue to serve an important role. Medvedev also said that their "cooperation will only continue to strengthen," implying that this special relationship would continue for some time, if not indefinitely.[17] This posture was particularly newsworthy because the prime minister position is regarded as second to the president, much like the U.S. Vice President to the U.S. President. Moreover, never before has a Russian Head of State conceded or opted to share his power so willingly. However, on November 5, 2008, President Medvedev demonstrated that he alone spoke for Russia and even criticized positions that his prime minister had taken while serving as president.

Soon thereafter, in a diplomatic gesture, the Kremlin announced that Medvedev had sent President-elect Obama a congratulatory telegram.[18] But the message had already been sent to Washington, and it was clear — the Kremlin sought to provide President-elect Obama with his first foreign policy test and it wanted Washington to know that President Medvedev was serious.[19]

Undoubtedly, Americans have become increasingly concerned with Russia's re-emergence on the world stage. Many believe that former President and current Prime Minister Vladimir Putin "has ransacked the hopes the world once had for post-Soviet Russian democracy. He is reviving Russian authoritarianism, and the world's democracies need to prepare for its consequences."[20] American leaders have even emphatically declared that looking into Putin's eyes reveals three letters: K-G-B,[21] suggestive that Russia has already begun to roll back progress at the behest of Putin, a former Soviet spy.[22] Clearly, times have changed since

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[16] *Id.* (Medvedev stating that Putin would serve a "key role" alongside him).

[17] Vidya Ram, *Medvedev Needn't Be Putin's Puppet*, FORBES.COM, May 8, 2008, http://www.forbes.com/2008/05/08/medvedev-putin-russia-face-cx_vr_0508autofacescan01.html.

[18] *Russia's Medvedev Congratulates U.S. President-Elect Obama*, RUSSIAN NEWS & INFO. AGENCY, Nov. 5, 2008, http://en.rian.ru/world/20081105/118142101.html (reporting that in a telegram to President-elect Obama on November 5, 2008, President Medvedev said, "I hope for constructive dialogue with you based on trust and considering each other's interests").

[19] *Getting Medvedev's Message; Russia*, ECONOMIST, Nov. 8, 2008 (stating that "this is the first time since the cold war that Russia has declared its intention to create a military threat to the West.").

[20] *Putin the Great*, WALL ST. J., Oct. 3, 2007, at A18; *see* Masha Gessen, *Dead Soul*, VANITY FAIR, Oct. 2008, at 336 (LEXIS)

> In May of this year, with much fanfare, Putin handed over his post as president of the Russian Federation to a handpicked successor, Dmitry Medvedev, and installed himself as prime minister. . . . But Russians continue to inhabit a country which is Putin's creation and in which his authority is supreme, and they will be living in Putin's Russia for a long time to come.

Id.

[21] Jackie Calmes, *McCain Sees Something Else in Putin's Eyes*, WALL ST. J., Oct. 16, 2007, http://blogs.wsj.com/washwire/2007/10/16/mccain-sees-something-in-putins-eyes/tab/article/ (McCain told the Republican Jewish Coalition, "'I looked into Mr. Putin's eyes and I saw three things—a K and a G and a B.'" Secretary of State Colin Powell stated something similar when he said, "'I looked into President Putin's eyes and I saw the KGB.'"). K.G.B. is the Russian abbreviation for Committee for State Security, which was the Soviet Union's premier intelligence agency, and counterpart to the U.S. Central Intelligence Agency ("C.I.A.").

[22] *See* Gessen, *supra* note 20 (stating that Putin once told reporters, "'I was most amazed by the way that a single person could accomplish something entire armies couldn't'. . . . 'A lone agent could rule the lives of thousands of people.'"). Ten years later, when the K.G.B. colonel suddenly got a chance to

President George W. Bush once described looking into then-President Putin's eyes and stated that he could see into Putin's soul.[23]

Medvedev's November 5, 2008 challenge serves several important functions in this regard. First, it shows that even with Putin out of office, Russian leaders plan to make their presence known. Second, it highlights Russia's newfound significance following many years of appearing irrelevant and unimportant. Indeed, Russia was perceived as having "fallen off of the radar" after the fall of the Soviet Empire. Finally, Medvedev's challenge underscores the urgency with which American leaders must respond (or organize an American position and plan), since it is abundantly clear that Russia is now relevant and very much "back on the radar."

Understandably, Americans may now regard Russia with apprehension, if not fear.[24] After all, it is still unclear what role Russia played in instigating or carrying out the August 2008 Georgian conflict.[25] And if Russia played a part, which is likely, does this necessarily mean that Russia also plans to pursue a more aggressive foreign policy course?[26] Equally disconcerting is that aside from Medvedev's November 5, 2008 challenge, Prime Minister Putin seems to retain a significant amount of power, despite the fact that he is no longer the president.[27] Compounding concerns, President Medvedev recently announced that Russia would begin a "large-scale rearming" by 2011, in response to alleged national security threats.[28]

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reshape his country, Putin remade it in the likeness of what he had known and loved best: a rigidly hierarchical, and tightly controlled system. *Id.*

23 *See* Press Conference, President Bush and Russian Federation President Putin (June 16, 2001), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2001/06/20010618.html ("I looked the man in the eye. I found him to be very straightforward and trustworthy. We had a very good dialogue. I was able to get a sense of his soul . . . .").

24 *See Getting Medvedev's Message; Russia*, *supra* note 19 (stating that President Medvedev's response to the financial crisis has been to become more anti-American).

25 *See* Elise Labott, *U.S. May Seek to Punish Russia for Georgia Conflict*, CNN.COM, Aug. 12, 2008, http://www.cnn.com/2008/WORLD/europe/08/12/georgia.us/index.html.

26 *See* Gessen, *supra* note 20 ("A new war with Georgia signals a return to an era when an aggressive, expansionist Russia threatened all its neighbors."); *see also Getting Medvedev's Message; Russia*, *supra* note 19 (stating that Russia would not back down and in "response to the expansion of NATO and the construction of missile defenses in Poland and the Czech Republic," Russia would place missiles in Kaliningrad as a military threat to the West).

27 Under the Russian Constitution, the President is, "the head of State . . . . [who] shall be the guarantor of the Constitution . . . ." and "represent the Russian Federation within the country and in international relations." Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] art. 80, *available at* http://www.constitution.ru/en/10003000-05.htm. Specifically, "The President . . .shall[ ] govern the foreign policy of the Russian Federation . . ..[And] shall be the Supreme Commander-in-Chief of the Armed Forces . . . ." *Id.* arts. 86-87. The Russian President can also issue normative decrees. *Id.* art. 90. By contrast, the Prime Minister is "appointed by the President of the Russian Federation . . . ," suggesting that because he derives his power from the President, he is necessarily subordinate. *Id.* art. 111. Similarly, it is illustrative that he shares the Governmental Branch of the Russian Federation with deputy chairmen and federal ministers. *Id.* art. 110. Finally, most of the Prime Minister's duties relate to domestic concerns, including ensuring "implementation . . . of a single State policy in the sphere of culture, science, education, health protection, social security, and ecology . . . ." *Id.* art. 114. Certainly, the language of the Russian Constitution indicates that the President possesses superior power and authority, compared to those powers held by the Prime Minister.

28 Clifford J. Levy, *Medvedev to Bolster Military in Russia*, N.Y. TIMES, Mar. 18, 2009, at A9.

However, Russia's recent behavior does not necessarily imply the rise of a burgeoning threat to the United States. Instead, as Medvedev recently said, Russian-American relations are merely going through a "crisis of trust."[29] That he directly acknowledged the existing tensions suggests that Medvedev recognizes the tense situation and the fact that Americans may be growing wary of their supposed ally. The statement also suggests that Medvedev seeks to re-establish America's trust, meaning that he would like to be on good terms with the United States.

This Article argues that now more than ever the United States must adopt a more nuanced approach to Russia. The U.S. must recognize Russia's inherent distinctiveness and unique perspective of the world. Geographic distances illustrate this point. Although Washington D.C. and Moscow are separated by 4,887.40 miles, Moscow is also 4,159.60 miles from the Russian city of Yuzhno-Sukhalinsk. Accordingly, even though Russia and the U.S. are separated by thousands of miles, Russia's size also means that thousands of miles separate its various cities, illustrative of Russia's complexity and diversity. As such, approaching Russia from an American-centric perspective that fails to acknowledge how inherently distinctive Russia is would be misguided at best —misplaced at worst.[30]

This Article focuses on one area where the traditional American-centric perspective has distorted Russian reality — the U.S. failure to appreciate Russia's distinctive vision of the rule of law and democracy. This Article argues that future U.S. policies must recognize Russia's unique worldview. Specifically, Russia's multi-faceted and storied history, and intensely fervent nationalism have formed a unique worldview that provides the lens through which to view Russia's understanding of the rule of law and democracy. It is through this lens that the Russia of today may be reconciled, because although Russian leaders' recent actions may not necessarily comport with an American or western-style rule of law or democracy, such actions do not mean that Russia has abandoned the development of the rule of law or democracy entirely. Rather, this Article contends that Russia is developing a Russian vision of the rule of law and Russian style of democracy that comport with its uniquely Russian worldview.

Part II explores Russia's unique vision of the law. It shows that Russia has historically had a weak legal culture, which necessarily hindered the development of a full-scale western vision of "the rule of law." Part II contends that this historical weakness is actually a strength. Russia's traditional aversion to law has nurtured the development of a distinctly Russian vision of the rule of law. Although this vision of the law may not have all the characteristics or elements emblematic of a western rule of law, several of its features demonstrate that Russia is steadily moving towards a more stable rule of law that is supported and entrusted by the Russian people.

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[29] Medetsky, *supra* note 7.

[30] *See* Doug Struck, *Gorbachev Applauds Putin's Achievements; Ex-Leader Cites Russian "Resurgence"*, WASH. POST, Dec. 5, 2007, at A22 (Mikhail Gorbachev has indicated that "Russia will not be and doesn't want to be a junior partner, a kid brother, that is doing the West's bidding," thereby suggesting that Russia is inherently different and separate from the West).

Part III explores the Russian tradition of having a strong state that has, in turn, seemingly de-emphasized the importance of democracy. Thus, the concern that Russia has suddenly abandoned democracy may be reconciled by examining Russia's tradition of strong leaders, as well as its recent experimentation with western-style democracy. Specifically, Russia's unique understanding of the state has promoted the development of a democracy that seeks to balance both a strong state ideal and more modern democratic values. Accordingly, even though this emerging Russian-style democracy differs from those democracies of western nations, most notably, the United States, it illustrates that Russia is developing a democracy that is consistent with its own heritage, values, and sensibilities.

Ultimately, this Article concludes that the U.S. concern that Russian leadership has constructively "hijacked" Russia is misplaced. Rather, the new American administration must acknowledge that Russian leaders' behavior and actions are actually promising because they indicate the genuine development of a rule of law and democracy, albeit the development of distinctly Russian "hybrid" version.

II. Russia's Vision of the Rule of Law: The Product of a Unique Legal Experience and History

"'The worst legacy we have from the Stalin era is the way we think. And we cannot obtain new thinking on credit.'"[31]

On January 22, 2008,[32] and then again on November 5, 2008,[33] Dmitry Medvedev spoke to the Russian people about the legal nihilism[34] that pervades their country and how it remains a fundamental obstacle to Russia's progress. But before this, President Putin called for "cementing the rule of law in Russia,"[35] suggesting that this issue is neither a new development, nor a modern

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[31] GORDON B. SMITH, REFORMING THE RUSSIAN LEGAL SYSTEM 191 (Cambridge Univ. Press 1996) (quoting Oazug Nantoy) [hereinafter SMITH, REFORMING].

[32] Richard Sakwa, *Dmitry Medvedev's Challenge*, OPENDEMOCRACY.NET, May 7, 2008, http://www.opendemocracy.net/article/governments/dmitri_medvedev_s_challenge.

[33] *See* Medvedev Address, *supra* note 4 ("I note that legal nihilism is not a new phenomenon in Russia but is something that has its roots deep in our distant past. Fifteen years is too short a time to eradicate such deeply-rooted traditions.").

[34] Sakwa, *supra* note 32 (reporting that Medvedev emphasized respect for, and supremacy of the law); *see also* President Dmitry Medvedev, Speech at the V Krasnoyarsk Economic Forum (Feb. 15, 2008), *available at* http://www.medvedev2008.ru/english_2008_02_15.htm ("I have spoken many times about the sources of a legal nihilism in our country that remains a distinguishing feature of our society."); *see also* WILLIAM BURNHAM ET AL., LAW AND LEGAL SYSTEM OF THE RUSSIAN FEDERATION 6 (3d ed. 2004) (Herzen described 19th Century 'legal nihilism' as "continu[ing] to undermine efforts to install legality as a principle on which both society and the state should be based."); *see also* EUR. PARL. ASS. DEB. 27th Sess. 1065 (Sept. 26, 1995) (the Council of Europe has emphasized that one of Russia's major tasks is to develop a legal culture or a "broad awareness of, and respect for, the rule of law . . . in all its aspects: political, legal and administrative - and at all levels: national, regional and local.").

[35] Steven Lee Myers, *What Chance Justice Is Done? Russia's System Is Questioned*, N.Y. TIMES, Nov. 1, 2003, at A1; Jeffrey Kahn, *Vladimir Putin and the Rule of Law in Russia*, 36 GA. J. INT'L & COMP. L. 511, 555 (2008) (stating that generally, the 'rule of law' relates to the concept that the government should remain subordinate to the law) [hereinafter Kahn, *Vladimir Putin*]; *see* Jeffrey Kahn, *The*

concern. Russians have historically entertained a "negative myth"[36] of the rule of law,[37] as evidenced by the numerous Russian folk sayings and proverbs that express discontent with the law and the Russian legal system.[38] This skepticism still resonates more than one hundred years after many of these phrases and proverbs first entered the Russian vernacular,[39] illustrating that Russia remains "a country currently in search of a national identity."[40]

Certainly, Russia is not distinctive in its struggle towards developing a stronger rule of law, which Mikhail Gorbachev referred to as *pravovoe gosudarstvo*—"law governed state."[41] However,

> What makes Russia different from most other countries is historical context. When courts in most other countries reach results that seem to be dictated more by the preferences of the powerful than by the law, observ-

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Search for the Rule of Law in Russia, 37 GEO. J. INT'L L. 353, 360, 363 (2006) [hereinafter Kahn, *The Search*]

> [T]he rule of law requires some level of shared expectations by political elites, lawyers, and laypersons about what *counts* as law, about what are the limits of judicial power, and about into what spheres of life the law may *not* be permitted to intrude. . . .
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> . . . Nearly all scholars agree that the rule of law means the supremacy of law *over* government, or put another way, government *under* law.

Id.; A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 188-203 (E.C.S. Wade ed., London, MacMillan 1961) (1885) (explaining that the rule of law encompasses the belief that the law should be clear, predictable, and general in its application); *see* James L. Gibson, *Russian Attitudes Towards the Rule of Law: An Analysis of Survey Data*, *in* LAW AND INFORMAL PRACTICES: THE POST-COMMUNIST EXPERIENCE 77, 78-79 (Denis J. Galligan & Marina Kurkchiyan eds., Oxford Univ. Press 2003); *see* Vasily A. Vlasihin, *Towards a Bill of Rights for Russia: Progress and Roadblocks*, 17 NOVA L. REV. 1201 (1993); *see* SMITH, REFORMING, *supra* note 31, at 14 (noting that the impetus for the "Golden Age of Russian Law" came from two sources, mainly: "the necessity for new laws to facilitate expanding contacts with other European empires, and lobbying by a Western-educated intelligentsia that viewed adherence to the rule of law as an essential characteristic of civilized European States"). Interestingly, the "backlash" against these new ideas represented a desire "to preserve the uniqueness of Russian society." *Id.*

[36] MARINA KURKCHIYAN, *The Illegitimacy of Law in Post-Soviet Societies*, *in* LAW AND INFORMAL PRACTICES: THE POST-COMMUNIST EXPERIENCE 25, 30 (Oxford Univ. Press 2003).

[37] *See* Kathryn Hendley, *Assessing the Rule of Law in Russia*, 14 CARDOZO J. INT'L & COMP. L. 347, 351 (2006) (stating that the "Law has had a checkered history in Russia. By almost any definition the 'rule of law' has been mostly absent.").

[38] *See* Michael Newcity, *Why Is There No Russian Atticus Finch? Or Even a Russian Rumpole?*, 12 TEX. WESLEYAN L. REV. 271, 271 n.1 (2005) (examples include, "Stand up to God with truth, and to the judge with money," and "He went to Court with his coat and came out stark naked.") [hereinafter Newcity, *Why Is There No Russian Atticus Finch*].

[39] *Id.* at 273 (stating that "[t]he attitudes expressed in the Russian folk saying quoted at the beginning of this paper have not changed and in the nearly ninety years that have passed since the Bolshevik Revolution little has happened to improve those attitudes.").

[40] Frances H. Foster, *Izvestiia as a Mirror of Russian Legal Reform: Press, Law, and Crisis in the Post-Soviet Era*, 26 VAND. J. TRANSNAT'L L. 675, 745 (1993).

[41] Hiroshi Oda, *The Emergence of* Pravovoe Gosudarstvo, 25 REV. CENT. & E. EUR. L. 373, 374; *see* Adi Ignatius, *A Tsar Is Born*, TIME, Dec. 31, 2007, at 46 (LEXIS) [hereinafter Ignatius, *A Tsar Is Born*]; *see* Hendley, *supra* note 37; *see generally* Kahn, *The Search*, *supra* note 35 (explaining that although some legal reform occurred in Russia under Mikhail Gorbachev, corruption and a continued distrust of the law made efforts to develop the rule of law difficult).

> ers tend to dismiss such cases as outliers. For Russians, however, such cases bring back painful memories . . . ."[42]

Therefore, such myths that portray Russian law negatively are reinforced. Furthermore, the rule of law in Russia has historically taken a paternalistic tone, which has effectively prevented or obstructed the development of an independently thinking populace.[43]

It is encouraging that Russia's developing rule of law appears to be shedding the paternalistic overtones of its past. However, Russians remain deeply skeptical of the rule of law, suggesting that any genuine development and progress will necessarily be gradual and uniquely Russian. Russians have been socialized "to expect little of the legal system to the extent that when they have a positive experience, they seek to rationalize it."[44] Thus, the development of the rule of law in Russia must be understood within "the rich context of [Russian] culture,"[45] both past and present.

A. Russia's Historical and Cultural Antipathy Toward Law

Russia and its legal traditions were Christianized and influenced by the Byzantine tradition, which emphasized different values than those espoused by the Roman Catholic Church, which shaped Western Europe.[46] Broadly, Roman culture emphasized "notions of mutual obligation and contract,"[47] and "drawing . . . lines between the different, competing legal systems,"[48] so that Western European culture developed these values and the understanding that "performing one's agreements was a matter of honor regardless of the subject matter of the agreement."[49] Within this context arose "competing legal jurisdictions and a highly rational, scholastic, textual orientation to religion . . . ."[50]

> Perhaps the most distinctive characteristic of the development of Western legal tradition was the coexistence and competition within the same community of diverse jurisdictions and diverse legal systems. It was and is

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[42] Hendley, *supra*, note 37, at 351.

[43] *See* Mikhail Krasnov, *The Rule of Law*, *in* BETWEEN DICTATORSHIP AND DEMOCRACY 195, 212 (Michael McFaul et al. eds., Carnegie Endowment for Int'l Peace 2004).

> The power of a law-governed state lies not in its institutional content, but in its ability to transform the philosophy of public life. The basis of this philosophy is trust in the individual and individual's independence. The actual practice of power, including its methodology of reforms, ought to foster freedom, not paternalism.

Id.

[44] Hendley, *supra* note 37, at 371.

[45] KURKCHIYAN, *supra* note 36, at 25-42.

[46] ORLANDO FIGES, NATASHA'S DANCE: A CULTURAL HISTORY OF RUSSIA 293-300 (Metropolitan Books 2002).

[47] Newcity, *Why Is There No Russian Atticus Finch*, *supra* note 38, at 295.

[48] Michael Newcity, *Russian Legal Tradition and the Rule of Law*, *in* THE RULE OF LAW AND ECONOMIC REFORM IN RUSSIA 41, 48 (Jeffrey D. Sachs & Katharina Pistor eds., Westview Press 1997).

[49] Newcity, *Why Is There No Russian Atticus Finch*, *supra* note 38, at 294.

[50] *Id.* at 298; *see* John Meyendorff, *The Church*, *in* AN INTRODUCTION TO RUSSIAN HISTORY 315, 316 (Robert Auty & Dimitri Obolensky eds., Cambridge Univ. Press 1976).

> this plurality of jurisdictions and legal systems that makes the supremacy of the law both necessary and possible.[51]

This logical and rational value system and framework for the rule of law, however, did not develop in Russia.

The Russian Orthodox Church shaped Russia very differently. As "the central, binding force in Russian culture for thousands of years,"[52] the Russian Orthodox Church emphasized "the mystical and subjective, rather than the objective, formalistic, and rationalistic."[53] Further, instead of accentuating "intellectuality and philosophizing," like the Roman Church, the Russian Orthodox Church accentuated "[t]he beauty of church architecture, painted icons, music, and the liturgy . . . ."[54] Moreover, the Russian Orthodox Church emphasized "the personal 'religious experience,' the mystical versus the intellectual experience," and for centuries, even fostered the development of a theocracy where church and state were one, unlike the Roman Church's "legalistic view of the world,"[55] where the spiritual and secular were entirely separate.[56]

Whereas a strong separation between the church and state and the existence of various competing jurisdictions developed in the West, this was not true for Russia. Russia did not develop a belief in the supremacy of the law or a belief in the supremacy of the rational or logical:

> [T]here can be no doubt that the development of the Russian legal tradition followed a different trajectory from that of the Western legal tradition, that these differences account for profoundly different attitudes toward the law and legal institutions in Russian culture, and that these differences are attributable primarily to the influence of the Russian Orthodox Church.[57]

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[51] Harold J. Berman, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 10 (Harvard Univ. Press 1983).

[52] Newcity, *Why Is There No Russian Atticus Finch*, *supra* note 38, at 292-93.

> Traditionally, in order to be considered Russian, an individual had to be Orthodox and it appears that this traditional view has experienced a resurgence in post-communist Russia. Just as Catholicism and its Protestant offshoots have been extremely important in shaping the Western legal tradition, the Orthodox Church, its doctrine, even its liturgy have been central in the formation of a distinctive Russian legal tradition, which, in turn has colored popular perceptions of legal institutions, law, and its practitioners.

Id. (citations omitted).

[53] *Id.* at 293 (citing FIGES, *supra* note 46, at 293-300).

[54] *Id.* (citing Dmitry S. Likhachev, *Religion: Russian Orthodoxy*, *in* THE CAMBRIDGE COMPANION TO MODERN RUSSIAN CULTURE 41 (Nicholas Rzhevsky ed., Cambridge Univ. Press 1998).

[55] Newcity, *Why Is There No Russian Atticus Finch*, *supra* note 38, 293, 296; *see* SMITH, REFORMING, *supra* note 31, at 2-7.

[56] *See* Newcity, *Why Is There No Russian Atticus Finch*, *supra* note 38, at 297.

> In Western Europe, the church's efforts to establish itself as an entity with authority and jurisdiction separate from secular authority sparked revival of interest in Roman law and stimulated the development of canon law and legalistic methods of analysis. During the law Middle Ages, the universities at Bologna and Paris were especially noted for their study of Roman and canon law. In Russia however, no comparable church-sponsored scholarly movement occurred.

Id.

[57] *Id.* at 295.

B. The Law As Inadequate

Moreover, Russians have historically never respected or much admired the law.[58] The law "does not symbolize morality, honesty, and justice. Rather, it is seen as a tactical game requiring expertise in manoeuvre, influence, and persuasiveness."[59] In this same way, legal institutions have traditionally been perceived as inadequate,[60] and legal officers have never garnered the level of respect or "standing" that their counterparts have received in places like the United States or England.[61] For example, although American judges are perceived as the pillars of western society, Russian judges are viewed at as merely "bureaucrats."[62]

Simply, the law does not represent a moral truth for the Russian consciousness.[63] Instead, it is perceived as rational, formalistic, political, and "the exclusive instrument of the government,"[64] to be wielded as a "weapon of the state."[65] "[P]olitics [is] little more than a corrupt form of warfare waged between equally unappealing clans."[66] As such, because "the Russian state has maintained a paternalistic relationship with its citizens . . . . the spirit of a law-governed state has never existed in Russia, and the idea of obedience to the law is still not particularly popular."[67]

As the Russian proverbs say, "Stand up to God with truth, and to the judge with money," and "He went to Court with his coat on and came out stark naked."[68] Even "[t]oday, this belief resonates strongly in the minds of Russians who largely believe the legal system is unable to resolve their problems in a just

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[58] *See* Vlasihin, *supra* note 35, at 1202, 1208 (1993); *see* W. BRUCE LINCOLN, BETWEEN HEAVEN AND HELL: THE STORY OF A THOUSAND YEARS OF ARTISTIC LIFE IN RUSSIA 58-59 (Penguin Group 1998) (stating that emblematic of Russia's deep-seated sensibility is the story of the Russian Tsar Peter the Great who "famously introduced Western ideas, and culture to Russia at the beginning of the eighteenth century." Though, instead of receiving praise for seeking to westernize Russia, the Tsar was criticized for "sacrificing traditional Russian values on behalf of specious Western ideals." *Id.* What may be gleaned from this story is that Russians distinguish their own culture and values, from the West's conception of the law; western indoctrination is regarded with suspicion.).

[59] KURKCHIYAN, *supra* note 36, at 43.

[60] *Id.* at 28-34.

[61] Newcity, *Why Is There No Russian Atticus Finch*, *supra* note 38, at 280. "[O]ne Russian commentator noted in 1909, 'Here 'judge' is not an honorable calling that attests to impartiality, selflessness, and high service to the law alone, as it does among other peoples.'" *Id. See* RICHARD S. WORTMAN, THE DEVELOPMENT OF A RUSSIAN LEGAL CONSCIOUSNESS 288 (The Univ. of Chicago Press 1976) (stating that Tolstoy and Dostoevsky "expressed a common distaste for members of the judicial profession as officials cold and un-Russian in their rational adherence to legal science.").

[62] Hendley *supra*, note 37, at 358.

[63] ALEXANDER M. YAKOVLEV, STRIVING FOR LAW IN A LAWLESS LAND: MEMOIRS OF A RUSSIAN REFORMER 10 (M.E. Sharpe 1996).

[64] Jessica C. Wilson, *Russia's Cultural Aversion to the Rule of Law*, 2 Colum. J. E. Eur. L. 195, 197 (2008); Kurkchiyan, *supra* note 36, at 39-40.

[65] Gordon B. Smith, *Russia and the Rule of Law*, *in* DEVELOPMENTS IN RUSSIAN POLITICS 5, at 108, 108 (Stephen White et al. eds., Duke Univ. Press 2001).

[66] PETER BAKER & SUSAN GLASSER, KREMLIN RISING: VLADIMIR PUTIN'S RUSSIA AND THE END OF REVOLUTION 381 (Scribner 2005).

[67] Krasnov, *supra* note 43, at 201.

[68] Newcity, *Why Is There No Russian Atticus Finch*, *supra* note 38, at 271 n.1.

manner."[69] Rather, the legal system is perceived as inefficient, arbitrary, and hopeless.[70] Consequently, "many analysts contend that a natural legal nihilism is manifest among Russia's citizens and that striving for a law-governed state is hopeless."[71]

C. Justice, Not Law, as the Truth

Compared to the law, the concept of justice resonates deeply with Russians because it can be reached through "internalization, thoughtfulness and collective consciousness."[72] Justice is connected to the Russian moral and spiritual compass and "is the concentrated expression of the Russian people's awareness of natural law."[73] As the popular saying illustrates: "Judge according to the law or according to the conscience."[74]

In the traditional Russian view, it is through justice that one can reach higher and more valuable truths as well as God,[75] suggesting that justice is more closely aligned with the Russian Orthodox Church and all that it espouses. Indeed, for Russians, justice symbolizes what man can achieve on his own, beyond the deficiencies of government and imperfections of the law.

D. Western Imperialism Through the Law

Russians have also been critical of the law since it has often represented a form of western imperialism. For example, the Judicial Reforms of 1864 introduced many new legal elements to the Russian legal system, but these were considered "western-style" institutions.[76]

> The principal elements of the Judicial Reforms were the introduction of professional judges and lawyers; trial by jury in criminal cases; opening judicial proceedings to the public; replacement of the old inquisitorial legal procedure that emphasized written documents and secrecy with an adversarial system relying on oral testimony in public proceedings.[77]

Russian writers like Dostoevsky expressed great disdain for such legal reforms. Dostoevsky said, "[t]he new legal system is being used by a class of liberal pro-

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[69] Wilson, *supra* note 64, at 196.

[70] *Id.* at 198.

[71] Krasnov, *supra* note 43, at 201.

[72] Wilson, *supra* note 64, at 198.

[73] Krasnov, *supra* note 43, at 202.

[74] *Id.*

[75] *See* YAKOVLEV, *supra* note 63, at 10 (stating that "[i]n Russian people's consciousness, the law has never been associated with moral truth.").

[76] *See* Newcity, *Why Is There No Russian Atticus Finch*, *supra* note 38, at 284.

[77] *Id.* at 279 (citing David Keily, The Brothers Karamazov and the Fate of Russian Truth: Shifts in the Construction and Interpretation of Narrative After Judicial Reform of 1864 (Sept. 24, 1996), 34 (unpublished Ph.D. dissertation, Harvard University)).

fessionals to destroy Russian civilization from within, to accomplish, in effect, what every foreign invasion had failed to do."[78]

E. The Twentieth Century: A Harsh Russian Legal Experience

Marxist thought also perpetuated a deep disdain for the law. Decree No. 1 on the courts of the Bolshevik government, published in 1917, stated: "All laws contrary to the decrees of the Central Executive Committee [of the Bolshevik Party], the workers' and peasants' government, . . . or to the minimum program of the Russian Social Democratic Workers' Party [*i.e.*, the Bolshevik Party] and the Socialist Revolutionary Party shall be considered abrogated."[79] *The Marxist-Leninist General Theory of the State and Law* stated: "The idea that law, whether understood as a supra-class norm of obligation, as an abstract, comprehensive kind of justice, or as a natural right of man, rules *over* the state and *over* the political authority, binding and limiting it, is by its nature a disguise for class dictatorship."[80]

Not surprisingly, Marxist thought viewed law as "the will of the ruling class, expressed in statute."[81] Ultimately, "Marxists also believed that law would die out under communism. Soviet theorists maintained that at the highest level of socialist development the state would rely less on coercion and more on persuasion . . . . Law would be replaced by other means of social control."[82] Thus, the law served a temporary, but necessary, evil role. Mikhail Krasnov suggests that "[s]uch a view clearly directly contradicts the meaning of a law-governed state, and its legacy complicates Russia's ability to construct a law-governed state."[83]

Such Marxist theories were abstract but influenced official and popular attitudes concerning the nature of the law.[84] The Bolsheviks eliminated courts,[85] codes, and the profession of law in all of its manifestations.[86] Indeed, the law was not simply regarded with disapproval, but its study was neglected and conse-

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[78] GARY ROSENSHIELD, WESTERN LAW, RUSSIAN JUSTICE: DOSTOEVSKY, THE JURY TRIAL, AND THE LAW 181 (Univ. of Wis. Press 2005).

[79] IDEAS AND FORCES IN SOVIET LEGAL HISTORY: A READER OF THE SOVIET STATE AND LAW 95-96 (Zigurds L. Zile ed., Oxford Univ. Press 1992) (translating the Decree of the Council of People's Commissars, November 22 (December 5), 1917, "On the Court," *SU* 1917-1918, no. 4, item 50) [hereinafter IDEAS AND FORCES].

[80] Krasnov *supra* note 43, at 195 (quoting MARKSISTSKO-LENINSKAYA OBSHAYA TEORIYA GOSUDARSTVA I PRAVA: ISTORICHESKIE TIPI GOSUDARSTVA I PRAVA [MARXIST-LENINIST GENERAL THEORY OF STATE AND LAW: HISTORICAL TYPES OF STATE AND LAW] 418 (V. Guilev et al. eds., 1971).

[81] *Id.*

[82] BURNHAM, *supra* note 34, at 5.

[83] Krasnov, *supra* note 43, at 195.

[84] BURNHAM, *supra* note 34, at 5 (fueling legal nihilism in state administration and mass consciousness).

[85] Smith, Reforming, *supra* note 31, at 132 ("After the Russian Revolution of 1917, courts were abolished and replaced with informal tribunals to handle various conflicts and administrative disputes. Tribunals were favored because they resolved disputes on the basis of the 'revolutionary consciousness' of ordinary workers, removing decisions from the elite corps of professional jurists.").

[86] IDEAS AND FORCES, *supra* note 79, at 95-96.

quently development of the legal profession was held back for many years.[87] Furthermore, under Communism, the law was used primarily as a "tool" if employed at all.[88] Kathryn Hendley suggests it was used "in a blatantly instrumental fashion"[89] to promote the Communist Party. For example, the freedom of speech was guaranteed – as long as it was consistent with the Party's interests.[90] Above all else stood the Communist Party.[91]

Stalin's "dual state"[92] was characterized by rule of force, illuminating the disconnect between what was required of the masses and what was required of the Communist Party. It was "rule of man," not rule of law, for the majority of Russians.[93] Furthermore, although various iterations of Soviet constitutions contained hundreds of provisions, they were merely illusory.[94] Indeed, "telephone justice," which linked procurators and judges' chambers to party offices, "ensur[ed] that the justice system served the state and not its citizens."[95] Additionally, although legislation was published in official collections, such collections "were poorly indexed and not easily available to lawyers or ordinary citizens."[96]

These various factors facilitated an environment in which Russian leaders "frequently reinterpreted, redefined, and repudiated such terms as constitutionality, democracy, and rule of law."[97] The sense that the law bound everyone, including the political elite, which made up the Communist Party, simply did not

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87 WORTMAN, *supra* note 61, at 288. Writers like Tolstoy considered "members of the judicial profession cold and un-Russian in their rational adherence to legal science. The intelligentsia saw true justice as emanating from a just political, social, or ethical order – the creation of better legislators – and not from a legal process guided by principles of jurisprudence." *Id.*

88 KURKCHIYAN, *supra* note 36, at 39.

89 Hendley, *supra* note 37, at 351.

90 *See* SMITH, REFORMING, *supra* note 31, at 82.

91 Newcity, *Why Is There No Russian Atticus Finch*, *supra* note 38, at 290 n.115.

92 SMITH, REFORMING, *supra* note 31, at 34 (stating that Stalin's Dual-State characterized a political leadership, which was "virtually unchallenged . . . and the law merely reinforce[d] its rule by force and political expediency." In particular, Stalin's 1936 Constitution laid out the powers of the state and the rights and duties of the citizen. The law was intended to reinforce Stalin's dictatorship and much of the terror was carried on outside established judicial institutions.).

93 Frances H. Foster, *Parental Law, Harmful Speech, and the Development of Legal Culture: Russian Judicial Chamber Discourse and Narrative*, 54 WASH. & LEE L. REV. 923, 974 (1997).

94 *See* SMITH, REFORMING, *supra* note 31, at 82.

> Like most constitutions, the Soviet constitutions embodied the highest statement of the goals and principles of the society . . . . however, the constitutions of the former USSR were not binding legal documents in the sense that their articles were cited in court determinations . . . . Many constitutional provisions remained unrealized, due to the absence of implementing legislation.

Id.

95 Louise I. Shelley, *Why a Corrupt State Can't Be a Strong State: Corruption in the Post-Yeltsin Era*, 9 E. EUR. CONST. REV. 70, 72 (2000); *see* Scott. P. Boylan, *The Status of Judicial Reform in Russia*, 13 AM. U. INT'L L. REV. 1327, 1327-28 (1998).

96 Hendley, *supra* note 37, at 363.

97 Foster, *supra* note 40, at 745; *see* Wilson, *supra* note 64.

exist.[98] Rather, the rule of law was administered to the populace by the state in an overtly paternalistic manner.

Russians grew increasingly skeptical of the law and legal institutions during this era.[99] The law was viewed as dishonest, inefficient, arbitrary, and hopeless,[100] which contributed to citizens feeling "uncertain and cynical about whether legal guarantees have any meaning."[101] For example, the Russian writer Alexander Solzhenitsyn delivered a speech at Harvard University in 1978, criticizing Western society's legalistic life. Solzhenitsyn was not an apologist for the Communist regime, but it certainly nurtured his critical view of "the letter of the law:"

> I have spent all my life under a Communist regime and I will tell you that a society without any objective legal scale is a terrible one indeed . . . . [However,] [a] society which is based on the letter of the law and never reaching any higher fails to take advantage of the full range of human possibilities. The letter of the law is too cold and formal to have beneficial influence on society. Whenever the tissue of life is woven of legalistic relations, this creates an atmosphere of moral mediocrity that paralyzes man's noblest impulses. And it will be simply impossible to bear up to the trials of this threatening century with nothing but the supports of a legalistic structure.[102]

Solzhenitsyn's deep distrust of the law illustrates how the paternalistic Soviet system affected the Russian populace. Accordingly, the perpetuation of this legal culture "stymied efforts to reform the legal system."[103] Even when Yeltsin came to power, the public "did not realize the value of freedom."[104]

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[98] *See* SMITH, REFORMING, *supra* note 31, at 129 (stating that "[t]he notion that the crown could be held accountable to the law – a fundamental feature of English law since the Magna Carta in 1215 – was never accepted by the monarchy nor by the Bolsheviks after the Revolution of 1917.").

[99] *See* BURNHAM, *supra* note 34, at 5. Although it is tempting to blame the Communists, Russia's struggle with instilling respect for the law goes back even further. For example, Russian serfs were emancipated in 1861, and the first parliamentary institution to represent the masses, the State Duma, which is the lower house of parliament, was established in 1905. Even then, the Tsar could still adopt laws when the State Duma was not in session, which is illustrative of the limited legal power the Russian people held, compared to that which the Tsar enjoyed. *See* KURKCHIYAN, *supra* note 36, at 37. From a historical perspective it is worth noting that until recently, the Russian people had never had the opportunity to directly engage in their governmental process. During the Soviet era, party leaders exercised control separate from the Russian populace. Before then, Tsars or other entities exercised similar control.

[100] Wilson, *supra* note 64, at 198. *See* Interview with Peter Baker & Susan Glasser, Authors of KREMLIN RISING: VLADIMIR PUTIN'S RUSSIA AND THE END OF REVOLUTION (June 7, 2005), *available at* http://www.washingtonpost.com/wp-dyn/content/discussion/2005/06/03/DI2005060300651.html (stating that the Russian belief that government is inherently corrupt compelled many Russians to accept Putin, simply because others may have been even more tainted than Putin); *see* Myers, *supra* note 35 (describing former President Putin's calls for "cementing the rule of law in Russia" and how law enforcement often falls short of that lofty goal).

[101] SMITH, REFORMING, *supra* note 31, at 228.

[102] Aleksandr I. Solzhenitsyn, *A World Split Apart*, *in* SOLZHENITSYN AT HARVARD: THE ADDRESS, TWELVE EARLY RESPONSES, AND SIX LATER REFLECTIONS 3, 3-20 (Ronald Berman ed., 1980).

[103] Hendley, *supra* note 37, at 352.

[104] Krasnov, *supra* note 43, at 201.

F. Post-Soviet Transition: Failure to Implement Western-Style Law

Russians emerged from the fall of Communism with a skeptical and ambivalent vision of the law; however Russia was not absolutely devoid of all legal tradition. Gorbachev attempted to "change the role of law."[105] He ended rubber-stamp legislatures, invoked *pravovoe gosudarstvo*, and "his policy of glasnost allowed a glimpse into the law-making process for the first time."[106] Thus, following the demise of the Soviet Empire, "Russia [was] not starting from scratch, which certainly has advantages, but it has the disadvantage of a lot of bad legal habits."[107]

To a certain degree, Russians optimistically believed that adopting a western-style rule of law might solve all their problems.[108] Although Russians recognized that transitioning to a western-style rule of law would be difficult, no one imagined how difficult it would be.[109] "It was a grave disillusion, a crushing of ideals,"[110] particularly because outsiders heavily influenced Russian legal reform and the development of a post-Soviet Russian legal system[111] during this period. The "legal scholars associated with the pro-reform Institute of State and Law" who pushed for legal reforms, arrived with "considerable knowledge and expertise about the legal systems in the United States, France, Germany, the Scandinavian countries, as well as the reformist Central European states, such as Poland and Hungary."[112] However, most of these experts and specialists had little or no experience with the Russian legal experience.

Many of these individuals,

> [A]pproached Russia as if it was a *tabula rasa*, disregarding what existed on paper as well as prevailing legal culture. The top-down nature of these reforms and the unwillingness to pay attention to the needs of those who would be impacted felt familiar to Russians, who recognized the *modus operandi* from their Soviet past, albeit under a new banner.[113]

Absent from this dialogue were Russian legal reformers and scholars versed in the Russian legal perspective.[114] Moreover, agencies like the American Bar As-

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[105] Hendley, *supra* note 37, at 352.

[106] *Id.* at 353.

[107] Kahn, *Vladimir Putin, supra* note 35, at 520.

[108] *See* Smith, *Russia, supra* note 65, at 110.

[109] *See* SMITH, REFORMING, *supra* note 31, at 224.

[110] Interview with Alexander Solzhenitsyn, prominent Russian writer and Nobel laureate (July 23, 2007), *available at* http://www.spiegel.de/international/world/0,1518,496211,00.html.

[111] *See* Hendley *supra* note 37, at 353 (stating that "[t]he inexperience of Russian policy makers with market democracy caused them to turn to Western advisors for assistance in writing the new laws and creating the necessary institutions, especially under Yeltsin.").

[112] SMITH, REFORMING, *supra* note 31, at 87.

[113] Hendley, *supra* note 37, at 353.

[114] *See* Ignatius, *A Tsar Is Born, supra* note 41 (explaining that those present were "the legions of Ivy League – and other Western-educated 'experts' who roamed the halls of the Kremlin and the government, offering advice, all ultimately ineffective, on everything from conducting free elections to using 'shock therapy' to juice the economy . . . . ").

sociation and the Federal Bureau of Investigation participated, but had no background in, or experience with, the Russian legal system.[115]

Thus, much of what was instituted and established in Russia during this post-Soviet transitional period was both foreign and unfamiliar to Russians. It is possible that the reforms were not simply incompatible, but also incapable of dealing with an inherently complicated and necessarily distinct citizenry and nation. As Thomas Friedman stated:

> [F]or the first time in history, we all have the same basic piece of hardware — free markets. The question is, which countries will get the economic operating systems (neoliberal macroeconomics) and software (regulatory institutions and laws) to get the most out of those free markets . . . . Russia is the egregious example of a country that plugged into the herd with no operating system and no software, with predictably horrendous results.[116]

Western influences were "often introduced under the aegis of bilateral and multicultural aid and technical assistance programs, and a rising tide of national identity and desire for sovereignty among peoples of the former USSR" developed.[117] Russians soon regarded these foreign legal reformers as imperialists, seeking to indoctrinate them with western beliefs and institute a western system.[118] Stephen Sestanovich, who served as the State Department's special advisor for the new Independent States of the former Soviet Union under President Bill Clinton, said, "the '90s sucked."[119] Ultimately, although Western advisors had good intentions and were eager to help, "most were ill-equipped to fashion laws that met the needs of this transitional polity."[120] Indeed, by the end of the 1990s, although Russians yearned for change, the "new laws felt like more of the same," since they "look[ed] good on paper, but [were] ignored in practice."[121]

G. The Current Development of Russia's Legal Vision: a Hybrid Legal Culture

Putin, like many of his predecessors, seems to use the law as a "tool."[122] Although present-day Russia lacks a western-style rule of law, a uniquely Russian vision of the law is nonetheless, developing. Several recent occasions illustrate this development. Putin stepped down from the Presidency in May 2008 on his

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115 *See* SMITH, REFORMING, *supra* note 31, at 231.

116 Thomas L. Friedman, *A Manifesto For the Fast World*, N.Y. TIMES, Mar. 28, 1999, §6, at 40.

117 *See* SMITH, REFORMING, *supra* note 31, at 228.

118 *See* Ignatius, *A Tsar Is Born*, *supra* note 41.

119 *Id.*

120 Hendley, *supra* note 37, at 368. "For example, the Western advisors who drafted the joint-stock company put protections into place for minority investors that would have worked beautifully in their own countries (*e.g.*, cumulative voting and prohibitions on insider trading), but which did little good in Russia." *Id.* n.65.

121 *Id.* at 368-69.

122 KURKCHIYAN, *supra* note 36, at 39.

own accord, and then Medvedev called to lengthen the presidential term in November 2008, thereby illustrating Russian leaders' newfound willingness to be bound by rules. Consequently, the Russian populace is increasingly optimistic about the developing rule of law in Russia.

1. Putin Steps Down from the Presidency

In May 2008,[123] Putin stepped down from the Russian Presidency after having served two consecutive terms,[124] and handed it to Medvedev. This transition occurred in accordance with Russian law. Importantly, the Russian Constitution states: "One and the same person cannot hold the office of the President of the Russian Federation for more than two terms running."[125] Thus, Putin was constitutionally precluded from serving a third consecutive term. However, Putin never sought to negotiate his way around the term limit, despite much speculation. Rather, Putin accepted that the Constitution precluded a third term.

The fact that Putin willingly handed over power speaks volumes about Russia's developing vision of the law.[126] Few Russian leaders have stepped down from power on their own accord, as Putin did. Moreover, no one who stepped down willingly was as "young, physically able, and politically strong"[127] as Putin. Thus, there was an even greater likelihood that Putin could have potentially refused to step down because he is so politically fit and popular throughout Russia. Indeed, President Putin consistently boasted high approval ratings at around seventy percent,[128] suggesting that the populace may not have responded negatively had he refused to step down.

Supporters pushed Putin to amend the Russian Constitution so that he could remain in power, but Putin "demurred. The Constitution was sacrosanct."[129] Specifically, Putin's decision to abide by the Russian Constitution illustrates how

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123 *See* Chivers, Medvedev Takes Oath, *supra* note 5.

124 *See* Ignatius, *A Tsar Is Born*, *supra* note 41.

125 Konst. RF art. 81.

126 *See* SMITH, REFORMING, *supra* note 31, at 237.

> During this transition phase the laws themselves and their enforcement may be less than perfect, but what is important is that they are functioning, however imperfectly. Laws matter. Rights are now being recognized and new generations of Russians are growing up in a rapidly evolving culture in which justice and rule of law are not empty slogans masking authoritarian rule and the arbitrary exercise of power.

Id.; see SAMUEL HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY 266-67 (Univ. of Okla. Press 1991).

> One criterion for measuring this [democratic] consolidation is the two-turnover test. By this test, a democracy may be viewed as consolidated if the party or group that takes power in the initial election at the time of transition loses a subsequent election and turns over power to those election winners, and if those election winners then peacefully turn over power to the winners of a later election. Selecting rulers through elections is the heart of democracy, and democracy is real only if rulers are willing to give up power as a result of elections.

Id.

127 Kahn, *Vladimir Putin*, *supra* note 35, at 558.

128 Ignatius, *A Tsar Is Born*, *supra* note 41.

129 Megan Stack, *Putin Leads in This Power Dance; Any Talk That His Protégé and Successor Might Upstage Him Has Been Laid to Rest*, L.A. TIMES, Nov. 14, 2008, at A3.

much Russia has developed. Putin showed that he too, was bound by Russian laws and the Constitution — even though he was the president. Again, although few Russian leaders have stepped down when their terms expired, even fewer Russian leaders have recognized that the law binds them. Accordingly, Putin's behavior confirms and validates the Russian Constitution.

2. *Medvedev's Call to Amend the Constitution*

During his Address to the Federal Assembly of the Russian Federation, President Medvedev proposed to amend the Russian Constitution by extending the presidential term from four years to six.[130] Immediately, critics protested this as an unconstitutional proposal intended to facilitate Putin's return to the presidency,[131] as soon as 2009 by some estimates.[132] However, what remains vital, and something that many have failed to recognize or appreciate, is that in seeking to amend the Russian Constitution, Medvedev followed procedure and worked within the established framework of the Constitution — a huge step in the right direction towards solidifying a stronger rule of law in Russia.

To amend the Constitution, the Russian President must submit a draft bill[133] to the lower house of Russia's parliament, the State Duma,[134] which votes on the bill. If a majority of the State Duma votes in favor of the bill, it may then become law,[135] assuming that a majority of the upper house of Russia's parliament, the Council of Federation, also votes for it. Alternatively, according to the Russian Constitution, the bill is assumed to have passed if the upper house does not examine the bill within fourteen days.[136] Assuming the bill passes both Houses, it may be treated as federal law. At this point, it is submitted to the President for signing and promulgation.[137]

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130 Medvedev Address, *supra* note 4 (stating that "we should increase the constitutional mandates of the President and State Duma to six and five years respectively.").

131 *See* Tony Halpin, *Fast Deal May Set up Putin as President for Twelve Years*, TIMES (London), Nov. 13, 2008, at 39 (stating that "[b]y engineering his return to the Kremlin, however, Mr. Putin will strengthen criticism that Russia is sliding into dictatorship."). Interestingly, Medvedev's call to amend the Constitution will not affect him, further evidence that change has taken root in Russia. This contrasts with the time President Yeltsin sought to consolidate his own power in 1993.

132 *Id.* (explaining "[Medvedev] would then resign and call a snap election to make way for his mentor to return. Mr. Putin would govern for two more terms of six years each, until 2021 . . . .").

133 Konst. RF art. 104(1) ("The right of legislative initiative shall belong to the President of the Russian Federation, members of the Council of Federation, deputies of the State Duma, the Government of the Russian Federation, and legislative (representative) bodies of constituent entities of the Russian Federation.").

134 *Id.* art. 84(d) ("The President of the Russian Federation . . . shall submit draft laws to the State Duma . . . .").

135 *Id.* art. 105(1)-(2) ("Federal laws shall be adopted by the State Duma. Federal laws shall be adopted by a majority of votes of the total number of deputies of the State Duma, unless otherwise envisaged by the Constitution of the Russian Federation . . . .").

136 *Id.* art. 105(4) ("A federal law shall be considered to have been approved by the Council of Federation if over half of the total number of members of that chamber have voted for it or if the Council of Federation does not examine it within fourteen days . . . .").

137 *Id.* art. 107(2) ("The President of the Russian Federation shall sign the federal law and promulgate it within fourteen days.").

In amending the presidential term, Medvedev adhered to the process laid out in the Russian Constitution.[138] First, Medvedev submitted his proposed bill to the State Duma shortly after he expressed an interest in amending the presidential term on November 5, 2008.[139] On November 21, 2008, the State Duma voted 392-57 to approve the bill.[140] After the State Duma, the bill went to the Council of Federation, which also passed it.[141] Medvedev then signed the federal law on December 30, 2008, after it passed through the necessary and appropriate legal channels.[142]

The current path to amending the presidential term pursuant to the Russian Constitution, starkly contrasts "those bloody days in Moscow in late 1993"[143] when the Constitution had little or no weight. Indeed, the Constitution could not prevent the 1993 crisis that included some of the most violent street fighting in Moscow since the Bolshevik October Revolution in 1917.[144] Specifically, in October 1993, President Yeltsin[145] confronted the Russian parliament seeking to expand his Presidential powers.[146]

Demonstrators and police clashed, television stations were stormed,[147] and there were "rumors of troop movements."[148] On television, Yeltsin explained that he had no choice: "It is impossible not only to implement difficult reforms, but to maintain elementary order."[149] Ultimately, Yeltsin secured more presidential powers for himself and normalcy eventually returned to Moscow. Those days in 1993, however, stand in sharp contrast to the civility emblematic of Medvedev's 2008 constitutional amendment. Perhaps most striking about the 2008 amendment was the lack of attention paid to such an historic event. It was almost a non-event.

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[138] *See Russia Lawmakers OK Longer Presidential Terms: Bill Could Help Speed Ex-President Putin's Return to the Kremlin*, MSNBC.COM, Nov. 21, 2008, *available at* http://www.msnbc.msn.com/id/27841709/ [hereinafter *Russia Lawmakers OK*].

[139] *See* Medvedev Address, *supra* note 4.

[140] *Russia Lawmakers Ok*, *supra* note 138.

[141] Philip P. Pan, *Russia Lengthens Presidential Tenures*, WASH. POST, Dec. 30, 2008, at A12.

[142] *Id.*

[143] SMITH, REFORMING, *supra* note 31, at 233.

[144] *See id.* at 232-33.

[145] *See* Adi Ignatius, *Boris Yeltsin*, TIME, Apr. 26, 2007, at 27 (LEXIS) (stating that Boris Yeltsin was the Russian Federation's first President. He served from 1991-1999, at which point, he stepped down to let Putin takeover) [hereinafter Ignatius, *Boris Yeltsin*]. It is worth noting that Yeltsin was Russia's first popularly elected President. Although he won fifty-seven percent of the vote, he ultimately left the position with approval ratings in the single digits. Boris Yeltin, Wikipedia, http://en.wikipedia.org/wiki/Boris_Yeltsin (last visited Apr. 16, 2010). *See generally* Gessen, *supra* note 20 (explaining that under Yeltsin, "Russia's larger-than-life first post-Soviet president," the Russian economy and politics careened out of control and into crisis).

[146] *See* Margaret Shapiro, *Yeltsin Dissolves Parliament, Orders New Vote*, WASH. POST, Sept. 22, 1993, at A1.

[147] *Id.*

[148] *Id.*

[149] *Id.*

H. Reasons Why Russia's Unique Vision of the Rule of Law May Endure

Must constitutions be fixed?[150] Few constitutions are static documents that spring into existence fully formed.[151] Instead, strong and successful constitutions possess the ability to develop and evolve over time to respond to changing political, economic, and social conditions.[152] Thus, as Russia continues to develop and evolve, it necessarily demands a constitution that can do so, too.[153] Certainly, it is feasible that Medvedev's call to amend the Russian Constitution was prompted by the various changes that Russia is currently experiencing. Indeed, Medvedev's "eagerness to change the [C]onstitution was rooted in uncertainty over shifting global dynamics, especially Russian wariness of America in the wake of Russia's war with the U.S.-backed Georgia. By ruling longer, . . . Medvedev hopes to create greater stability."[154] Thus, because the Russian Constitution has proven capable of dealing with Russia during this volatile period, its flexibility and legitimacy are confirmed.

Furthermore, some of the U.S. criticism regarding Medvedev's call to amend the presidential term is seemingly hypocritical. For example, in 2008, New York City too, moved to extend its own mayoral term limit from eight years to twelve, due to the city's ongoing financial crisis, thereby allowing New York City's current mayor, Michael R. Bloomberg, to seek a third consecutive term.[155] Supporters of the proposed New York City bill, which subsequently passed, said that the "dire economic situation confronting the city . . . demanded continuity of leadership."[156] Certainly, New York City has had to deal with the financial crisis, but

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150 *See* Norman Stone, *Putin Rescued Russia from Disaster: So Let's Just Let Him Be*, TIMES (London), Oct. 4, 2007, at 5 (suggesting that "[t]here is no real reason for constitutions to be set in tablets of stone."); *see also* Kahn, *Vladimir Putin, supra* note 35, at 555 n.212.

> The Russian [C]onstitution is not a sacred document. Some will argue that the events between October-December 1993, where a flawed referendum followed the use of force against the Russian Supreme Soviet, gives the present [C]onstitution an aura of illegitimacy that anyone concerned with the rule of law cannot help but be troubled by . . . . If [the] United Russia [political party] overwhelmingly controls the State Duma after the next round of legislative elections, then the [C]onstitution should be amended.

Id.

151 *See* Sewell Chan & Jonathon P. Hicks, *Council Votes, 29 to 22, to Extend Term Limits*, N.Y. TIMES, Oct. 23, 2008, *available at* http://cityroom.blogs.nytimes.com/2008/10/23/council-to-debate-term-limits-change/. Again, it is worth noting that in 2008, New York City extended the mayoral term limit to three terms.

152 SMITH, REFORMING, *supra* note 31, at 102-03.

153 *See* Medvedev Address, *supra* note 4.

> [T]he personal freedom and the maturity of the democratic institutions and procedures that [the Constitution] guarantees are the source for our continued development. Now, as we come to a new age in our development, we are setting new goals that call for greater participation by our citizens, political parties and other public institutions.

Id.

154 Stack, *supra* note 129.

155 Michael Barbaro & Fernanda Santos, *Bloomberg Gets His Bill, and a Public Earful*, N.Y. TIMES, Nov. 4, 2008, at A1.

156 Chan & Hicks, *supra* note 151.

so too has Russia.[157] Thus, if New York City can change its term limits, should not Russia be permitted as well? In any event, regardless of the soundness of New York City's plan to amend its own rules, Russia has received significantly more criticism.

Moreover, against these political and economic developments is the Russian "revolutionary consciousness," a term that exemplifies the fact that when Russians seek change, it has all-too-often been both drastic and revolutionary.[158] Russians have historically "desire[d] to do too much too quickly," as opposed to "gradual, more effective methods of reform."[159] By contrast, Russia's political leaders are currently exercising prudence by working within the appropriate legal channels — the Russian Constitution — rather than making sudden, irrational, or radical changes or moves.[160] Compounding this promising behavior are the serious problems Russia is undoubtedly facing.[161] This makes Russia's steady course even more impressive.

Finally, it is easy to forget that the second Russian Revolution of 1991 occurred only nineteen years ago, meaning that Russia has been a democracy for less than two decades.[162] Indeed, the rule of law in Russia today has existed for

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[157] *See* Medvedev Address, *supra* note 4 (stating that "[t]he global financial crisis also began as a 'local crisis' on the U.S. domestic market . . . . [But] when the U.S. economy began to slide it pulled financial markets all around the globe with it in its fall. The crisis has now become global in scale.").

[158] *See* Interview with Peter Baker & Susan Glasser, *supra* note 100 (suggesting that as Russia is the birthplace of revolution, this may be the historical ebb to that flow).

[159] ROBERT B. AHDIEH, RUSSIA'S CONSTITUTIONAL REVOLUTION: LEGAL CONSCIOUSNESS AND THE TRANSITION TO DEMOCRACY, 1985-1996, at 9 (Pa. State Univ. Press 1997).

[160] See SMITH, REFORMING, supra note 31, at 94.

> The course that Yeltsin and Russia was taking had few if any models to follow. The American and French Revolutions toppled colonial or monarchial regimes and sought a clean break from the past. In the Russian case, the revolution was being attempted from the top down. Rather than experiencing a clean break from the past, Yeltsin was attempting a "controlled" and orderly revolution. The stakes were high and there was no guarantee that if one side saw that it was losing the argument, it would not resort to violence to preserve its interests.

Id.

[161] *See* Medvedev Address, *supra* note 4.

> I want you all to know that our goals remain unchanged. The sharp fluctuations in the political and economic situation, the turbulence in the world economy and even the rise in military and political tension will not serve as a pretext for dismantling democratic institutions or for nationalising industry and finance. Citizens' political freedom . . . [is] sacred . . . .
>
> . . .
>
> Those who want to make some "easy" political capital out of the global economic crisis, who have their hearts set on populist chatter and want to destabilise society in order to satisfy their personal ambitions, I advise them to read the Constitution. I consider it my duty to warn those who seek to provoke tension in a political situation. We will not allow anyone to inflame social . . . strife, deceive people and draw them into illegal action. We will continue to maintain Constitutional order through all the legal means.

Id.

[162] *See* SMITH, REFORMING, *supra* note 31, at 234 (stating that democracy took centuries to evolve in Western Europe); *see* Medvedev Address, *supra* note 4.

> I remind you that the Russian Constitution celebrates its fifteenth anniversary in December. What is important is not the date itself of course, but the fact that it is a Constitution that upholds freedom and justice, human dignity and welfare, protection of family and Fatherland, and the unity of our multiethnic people – not just as common values, but as legal concepts. In other words, the Constitution gives them force in practice and supports them with all the resources of

less than "the span of a single generation."[163] Building a federal system and culture of legality takes time and it would be presumptuous to assume that within a few years Russia could abandon its history of legal nihilism[164] and convert an ardently skeptical populace into one with "a mindset that appreciates, responds to, and engages in the exercise of legal self-limitation."[165] Developing a willingness to be bound by the rule of law takes time, particularly in Russia, a country that has historically struggled with the very concept.[166] As Russia necessarily lacks a strong foundation or model rule of law that Putin and Medvedev can rely upon, the Russian peoples' willingness to follow the law is impressive.

Accordingly, instead of rolling back progress, Russia's political leadership has demonstrated its desire to establish a legal culture and rule of law by working through the appropriate channels of Russian law. Such embraces should be commended as progress. To that end, it is misguided to suggest that any mistakes along the way indicate that Russia is not necessarily moving in the right direction. Mistakes are inevitable and perhaps they are signs of democracy at work, since democracies are liable to falter. One might even contend that this revolutionary development means that Russians have finally developed a belief in themselves and their leaders, as they are finally holding themselves accountable. In any event, embracing a stable rule of law free of the paternalistic overtones of past Russian governments will take years to fully develop.

> the state and with all of its own authority. The Constitution forms our social institutions and the way of life of millions of people.

Id.

163 Kahn, *supra* note 35, at 521.

164 *See* Medvedev Address, *supra* note 4. President Medvedev explained that the Constitution is important to develop "a new legal system and independent courts, and in combating corruption and legal nihilism." *Id.* He further noted,

> [L]egal nihilism is not a new phenomenon in Russia but is something that has its deep roots in our distant past. Fifteen years is too short a time to eradicate such deeply-rooted traditions. But it is also true that we have not yet made a deep-reaching systematic attempt to address this problem of disregard for the law.

Id.

165 JEFFREY KAHN, FEDERALISM, DEMOCRATIZATION, AND THE RULE OF LAW IN RUSSIA 280 (Oxford Univ. Press 2002). "Progress in developing a state governed by the rule of law" began during Gorbachev's time in power, and the progress forged "was impressive when viewed against Russian and Soviet legal traditions." However, "For such concepts to take root, they must be institutionalized and inculcated into the legal culture of a society." SMITH, REFORMING, *supra* note 31, at 76.

> These contentious issues had to be resolved in an atmosphere of political and economic turmoil. Furthermore, unlike the American [C]onstitution that was drafted behind closed doors by an elite group of white, well-educated, wealthy, male land-owners, the new constitution in Russia was being worked out in the glare of television lights and involved a vast array of interest groups, factions, political parties, and prominent political figures, seeking to maximize their particular interests.

Id. at 80.

166 Smith, *supra* note 31, at 103.

> It is encouraging that all parties in Russia today – even the extremists on the right – appear to recognize the legitimacy of the new constitution and are operating within its provisions. This is the best indication yet that Russia is on its way to constitutionalism. However, given its centuries-long tradition of dictatorial and arbitrary rule, it will be a long and perilous journey.

Id.

III. Russia's Vision of Democracy: Balancing A Strong State Ideal & Democratic Values

For Russians a strong state is not an anomaly that should be gotten rid of. Quite the contrary, they see it as a source and guarantor of order, and the initiator and main driving force of any change . . . . I am not calling for totalitarianism . . . . A strong state power in Russia is democratic, law-based, workable federative state.

-Vladimir Putin[167]

The Russian mentality needs a baron, a tsar, a president. . .in one word, a boss.

-Valentina Matviyenko[168]

To many Americans, Russia is moving away from democracy, and towards a burgeoning authoritarian regime.[169] However, this is ill conceived. Putin and now Medvedev, have not necessarily rolled back democracy as many fear or suspect. Specifically, the Russian people desire a strong state[170] embodied by a strong leader — the strong-state ideal.[171] Following the Soviet-era, which overemphasized this strong-state ideal, came the post-Soviet era, which overemphasized implanted western-democratic ideals.[172] After having survived both periods, Russia is now developing its own unique hybrid version of democracy, which seeks to balance the traditional Russian strong state[173] with modern democratic values.[174]

A. Components of Russian Democracy: Balancing Strong State and Democratic Ideals.

1. Strong Mother Russia: Derzhavnost

Central to the Russian worldview is the desire for Russia, "the Motherland," to possess international status and influence.[175] "Russians are very patriotic people,

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[167] Stephen Handelman, *Shadows on the Wall: Putin's Law-and-Order Dilemma*, 9 E. EUR. CONST. REV. 88, 88 (2000) (quoting Vladimir Putin, *Rossiya na rubezhe tysyacheletii [Russia on the Threshold of the Millennium]*, NEZAVISIMAYA GAZETA, Dec. 30, 1999, http://www.ng.ru/politics/1999-12-30/4_millenium.html).

[168] BAKER & GLASSER, *supra* note 66, at 371.

[169] *See* Gessen, *supra* note 20 (stating that "[o]nce, [the Kremlin] was the symbol of a nascent Russian democracy. Now it's the command center of an entrenched Russian autocracy."); *see* Struck, *supra* note 30, (stating that Western critics allege that Putin "has throttled democracy," and that former Soviet leader Mikhail Gorbachev disapproves of some of Putin's "moves to consolidate power.").

[170] *See* Thomas F. Remington, *Russia and the "Strong State" Ideal*, 9 E. EUR. CONST. REV. 65, 68 (2000) (quoting an internet article by Vladimir Putin where he stated, the "state's structures and institutions have always played an extremely important role [in Russia].").

[171] *See id.* at 65-69.

[172] *See* SMITH, REFORMING, *supra* note 31, at 228-31.

[173] *See* Remington, *supra* note 170, at 65-69. "Calls to strengthen the state have become widespread in Russia." *Id.* at 65. *See* Handelman, *supra* note 167, at 88-91.

[174] *See* Remington, *supra* note 170, at 65 (stating that people on both sides "t[ook] for granted that Russia's statehood was weakened by the unsuccessful reforms of the 1990s and that the restoration of state strength must now take high priority.").

[175] *See id.* at 69.

they want Russian spoken, they want their views to be the correct ones, and they want a leader who projects these things."[176] In this sense, Russians have historically desired a strong Russia, or *derzhavnost*, the status of being a great world power.[177] Consequently, Russians have accepted leaders who provided a strong image and international status, even if that necessarily resulted in diminished individual rights or the diminution of other principles of western-style democracy.[178]

The Soviet model adhered to this sensibility by overemphasizing the strong state ideal. Arguably, "[n]o political system has ever been more hostile to civil society than the communist totalitarian regime Stalin erected."[179] This ultimately resulted in "[f]lat living standards, the burden of penurious third-world client states, and technological lag," which ultimately "convinced younger Soviet leaders and thinkers that the Soviet model of a strong state had led to a dead end."[180] The Gorbachev years marked the final period of this era, and "new ideas arose that challenged the older, simplistic version of the strong state ideal."[181] Indeed, Russians sought new models, including the concept of *pravovoe gosudarstvo* — a symbolic departure away from the strong-state ideal, and so a period that resembled a "law-governed state" emerged.[182]

2. *The 1990s: The Loss of National Pride*

Although the demise of the Soviet Empire resulted in the development of a western-style democracy,[183] the honeymoon did not last long. Adding to the fact it no longer retained hegemonic status alongside the United States, Russia soon

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[176] Interview with Peter Baker & Susan Glasser, *supra* note 100 (of course this begs the question of whether this characterizes the United States, as well).

[177] *See* Remington, *supra* note 170, at 69, (stating that "Russians have believed for centuries that Russia should be [a great world] power").

[178] *See* Madeline Albright, *The 2008 Time 100: Vladimir Putin*, TIME, Apr. 30, 2009, *available at:* http://www.time.com/time/specials/2007/article/0,28804,1733748_1733757_1735578,00.html (stating that Russians "celebrate national traditions and prize collective glory, not individual freedom."); *see* Remington, *supra* note 170, at 66.

> Peter and Stalin are paired in the minds of many ultranationalists today as heroic figures who expanded the industrial base of the state, increased the state's control over society, and made Russia a mighty and feared military power in the world. The ideal of the "strong state" in the sense of *derzhava* – a great world power – is inseparable, for such self-styled patriots, from the image of a commanding patriarchal leader who, through force of will, defeats all natural and social enemies to build up the state's formidable might.

Id.

[179] Michael McFaul et al., Introduction to BETWEEN DICTATORSHIP AND DEMOCRACY: RUSSIAN POST-COMMUNIST POLITICAL REFORM 1, 14 (Carnegie Endowment for Int'l Peace 2004).

[180] Remington, *supra* note 170, at 67.

[181] *Id.* Mikhail Gorbachev was the last General Secretary of the Communist Party of the Soviet Union. He served from 1985-1991. *See* C.J. Chivers, *Gorbachev, Rebuking Putin, Criticizes Russian Elections*, N.Y. TIMES, Jan. 29, 2008, at A8.

[182] Remington, *supra* note 170, at 67.

[183] *See* SMITH, REFORMING, *supra* note 31, 226-27 (stating that at the beginning of the transition, "Russians openly spoke of joining the ranks of 'civilized' countries . . . . Many unrealistically assumed that economic stabilization and recovery could be achieved in a matter of a few years.").

experienced corruption,[184] the ransacking of national industries by oligarchs,[185] a stock market crash,[186] persistent economic stagnation,[187] declining age expectancy,[188] and a declining population,[189] hardly what Russians envisioned western-style democracy would provide. Ultimately, democracy, or at least the type that the West had imposed on Russians, was not the "savior" for which Russians had hoped.[190]

This post-Soviet era left Russians humiliated and floundering in third-world status[191] and "the perception of the West as mostly a 'knight of democracy' [was] replaced with the disappointed belief that pragmatism, often cynical and selfish, l[ay] at the core of Western policies."[192] Equally important, Russian President Yeltsin was considered a buffoon and fool.[193] Specifically, the Yeltsin years were characterized by an "ailing, intoxicated president who disappeared for weeks at a stretch, while his government failed to pay wages and frittered away billions of dollars of international aid."[194] Not only was President Yeltsin an embarrassment domestically within Russia, he was also regarded as ridiculous abroad, which only compounded Russians' sense of embarrassment and humiliation.[195]

Russians, who had always reveled in the stature of their great nation became disillusioned with "the obvious weakening of state power"[196] at the direction of their first post-Soviet leader, Boris Yeltsin. Russians began to yearn for something other than Yeltsin,[197] and something other than a western-style democracy. "Russians desperately awaited a new leader who would put the 1990s behind them"[198] and restore greatness to their "hobbled nation."[199]

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[184] *See id.* at 235 ("The outbreak of crime in Russia [during the 1990s] [was] a system of the collapse of order.").

[185] *See* Gessen, *supra* note 20.

[186] *See* Handelman, *supra* note 167, at 89 (discussing the 1998 Russian stock market crash and ensuing financial crisis.).

[187] *Id.*

[188] *See* SMITH, REFORMING, *supra* note 31, at 187.

[189] *See* BAKER & GLASSER, *supra* note 66, at 194.

[190] *See supra* note 183 and accompanying text; *see* Fred Weir, *KGB Influence Still Felt in Russia*, THE CHRISTIAN SCI. MONITOR, Dec. 30, 2003, at 6.

[191] Interview with Alexander Solzhenitsyn, in London, Eng. (Aug. 5, 2008), *available at* http://www.independent.co.uk/arts-entertainment/books/features/alexander-solzhenitsyn-his-final-interview-885152.html.

[192] *Id.*

[193] *See* Ignatius, *Boris Yeltsin*, *supra* note 145.

[194] BAKER & GLASSER, *supra* note 66, at 39.

[195] *See id.; see also* Gessen, *supra* note 20.

[196] Remington, *supra* note 170, at 65.

[197] *See* Gessen, *supra* note 20 (Putin had "all qualities for which Russia, exhausted and embarrassed by Yeltsin's provincialism and unpredictability, seemed to yearn.").

[198] BAKER & GLASSER, *supra* note 66, at 39.

[199] *Id.* at 38.

Consequently, the term "democracy" was removed from many presidential speeches by the end of the 1990s because it had become so severely tarnished. "'Democracy' was not [then] — if it had ever been — a goal supported by much of the population, and the very word had been discredited, an epithet that had come to be associated with upheaval rather than opportunity."[200] More than ever, many Russians "believed authoritarianism was the only path for their country."[201] As Peter Baker and Susan Glasser have suggested, Russia was a "country in between" when Vladimir Putin arrived.[202]

3. The Putin Years: Restoration of A Strong Mother Russia and National Pride

Vladimir Putin was Russia's "antidote to Boris Yeltsin."[203] Although he was introduced to his country as "young, energetic, decisive, determined, worldly, reform-minded, [and] dependable,"[204] sobriety alone drew Russians to Putin. Indeed, at that time, it did not take much to impress Russians — the bar had been set quite low. One poll found that when Putin took office, forty percent of Russians expressed that what "they admired most in the new President was that he was sober."[205] "Where past Russian leaders were sometimes bombastic, buffoonish, or fossilized, Putin seemed young and vigorous, cool and detached."[206]

Putin asserted himself not long after taking office in 2000. He exclaimed that "[o]ffending [Russia] will cost one dearly."[207] Without apologies, Putin even stated that "the collapse of the Soviet empire 'was the greatest geopolitical tragedy of the century,"[208] thereby reminding Russians of their inherent greatness and strength — *derzhavnost*.[209] Moreover, Putin "had the gift of seeming to be all things to all people, of uniting an otherwise fractured society with soothing words about stability and order."[210] After the previous decade that had been marked by revolution and chaos, Putin now intended to "end the revolution."[211] He sought to bring order and stability to his people who had not been afforded

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200 *Id.* at 3.

201 *Id.*

202 *Id.*

203 *Id.* at 39.

204 Gessen, *supra* note 20.

205 BAKER & GLASSER, *supra* note 66, at 39-40 (stating that "[s]obriety alone became a major element of Putin's appeal, in contrast to his frequently drunken predecessor"); *see* Gessen, *supra* note 20.

206 BAKER & GLASSER, *supra* note 66, at 40.

207 Otkrytoe pismo Vladimira Putina k rossiyskim izboratelyam [Open Letter from Vladimir Putin to Russian Voters] (2000), *available at* http://www.ticketsofrussia.ru/gov/putin/letter.html [hereinafter Open Letter].

208 *Putin: Soviet Collapse a "Genuine Tragedy,"* MSNBC.COM, Apr. 25, 2005, http://www.msnbc.msn.com/id/7632057.

209 Remington, *supra* note 170, at 69.

210 BAKER & GLASSER, *supra* note 66, at 7.

211 *Id.*

such luxuries. Putin declared: "The time of uncertainty and anxious expectations is past."[212]

Putin "reinterpret[ed] the [strong state] tradition in a pragmatic and modernizing spirit . . .,"[213] which resonated with Russians, young and old. He ordered the return of the Soviet anthem with slightly modified lyrics, decided to leave Lenin's embalmed body in the Red Square, which his predecessor had questioned, and reinstated the Soviet red flag.[214] Putin even encouraged his countrymen to be proud of the accomplishments of the Soviet Union. He posited: "Was there nothing but Stalin's prison camps and repression? What about the achievements of Soviet science, of the spectacular space flight of cosmonaut Yuri Gagarin, of the art and music of cultural heroes like the composer Dmitri Shostakovich?"[215] Russians yearned to hear this "nationalism mixed with Soviet-era symbolism."[216]

Illustrative of Russia's sudden "reemergence," Putin secured a Russian city to host the 2014 Olympic Winter Games,[217] an honor that had not been bestowed on Russia since Moscow hosted the 1980 Summer Games. Indeed, when Russia hosts the 2014 Winter Games, its people will no longer have to "suffer the indignity of watching [their] athletes stand silent on the Olympic medals podium," as was the case during the 2000 Summer Games in Sydney.[218]

Moreover, after years of worshipping all things western,[219] the word *nashe* — Russian for "ours"— has become *en vogue*.[220] As Aleksandr Oslon, a Kremlin pollster exclaimed: "It was very uncool to be Russian in the beginning of the nineties . . . . Every newspaper and television show was obsessed with showing how bad this country [was] and how hopeless we [were] and how good life is in the West. Now it's cool to be Russian again."[221]

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212 *Id.* at 312.

213 Remington, *supra* note 170, at 69.

214 BAKER & GLASSER, *supra* note 66, at 65.

215 *Id.*

216 *Id.*

217 The 2014 Winter Games will be hosted by the Russian city of Sochi. This is the first post-Soviet Olympic Games that will be held in Russia. It must be noted that more than most nations, Russia has historically regarded its athletic accomplishments in the Olympics as a major source of national pride. That their nation has secured the 2014 Winter Games is a huge victory for the Russian people and something to credit Putin with having secured. Certainly, Russia would not have been rewarded with the opportunity to host an Olympic Games if the Olympic Committee thought that Russia was incapable of hosting. Therefore, from an international perspective, Russia is perceived as possessing a certain level of stability and viability, or at least Russians' perception is that the rest of the world perceives it that way. Interestingly, the last time the Olympic Games were held on Russian soil was in 1980, when Moscow hosted the Summer Games, and which the United States boycotted. Much has changed.

218 BAKER & GLASSER, *supra* note 66, at 65.

219 *See id.* at 64.

220 *See id.* Aleksandr Nevzorov, an investigative journalist from St. Petersburg explained the concept of nashi as "a circle of people — let it be enormous colossal, multimillion — to whom one is related by common language, blood, and motherland." *Id.* at 74 (stating that some critics including Nevzorov, contend that nashi has become darker during the previous several years).

221 *Id.* at 64.

Putin has restored Russia[222] to what its people believe is its rightful place alongside other world powers,[223] while also "shepherd[ing] Russia into a bright future of economic reform and stable democracy."[224] Putin certainly brought Russia out of economic despair, following a period in which "the working masses lost their life savings in an economic crash," while "the favored few ripped off state assets in rigged auctions."[225] Almost symbolically, Putin penalized those oligarchs that had pillaged Russia and had come to represent all that was wrong with the 1990s — greed, corruption, rampant capitalism.[226] "The era of the oligarchs [was] over."[227]

Putin instituted a thirteen percent flat tax, advanced new land codes to assist in property purchases and sales, and instituted reforms to overhaul the "famously corrupt and inefficient state electricity and natural gas monopolies."[228] Consequently, conditions for the middle class have improved.[229] As *Business Week's* Moscow bureau correspondent stated: "That's giving a lift to the mood in the country."[230] Indeed, compared to "the basket case" that it was throughout the 1990s, "Russia's economy has grown an average of 7% a year for the past five years."[231] Even more impressive, under Putin, Russia paid off a foreign debt that

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222 *See* Stone, *supra* note 150 (stating that Putin will be satisfied being acknowledged throughout the world as the person who brought economic stability to Russia, and which, consequently, allowed for a democratic renaissance in the country); *see* Richard Stengel, *Person of the Year: Choosing Order Before Reform*, TIME, Dec. 31, 2007, at 42 (discussing Putin's "extraordinary feat of leadership in imposing stability on a nation that has rarely known it and brought Russia back to the table of world power."); *see* Struck, *supra* note 30 (stating that Gorbachev credited Putin because he "pulled Russia out of chaos" and "assured [it] a place in history"). Of course, Gorbachev qualified such statements with an acknowledgement that the news media has been suppressed and that election rules are inconsistent with democratic ideals. *Id.*

223 *See* Daniel Twining, WKLY. STANDARD, Jan. 16, 2006 (LEXIS) (stating that Russia "is reasserting state control, in a concerted strategy to make Russia a great power once again."); *see* John Wendle, *The New Gambit: Moscow's View*, TIME, Aug. 28, 2008, *available* at http://www.time.com/time/world/article/0,8599,1836837,00.html (pro-Kremlin analyst Sergei Markov explains, "[i]f the U.S. and Britain think they are first-level countries and Russia is a second-level country, we don't agree"; this is symbolic of Russians still desiring to be counted as an equal).

224 Gessen, *supra* note 20.

225 BAKER & GLASSER, *supra* note 66, at 39.

226 *See* Gessen, *supra* note 20. Putin "launched an attack on Russia's oligarchs, who were forced to give up their assets to the state or Putin's allies; many . . . now live in exile, and at least two —Mikhail Khodorkovsky and Platon Lebedev, the former owners of the country's largest oil producer, Yukos — are behind bars." *Id.* Putin has even said he wants to continue his campaign against Russian oligarchs from the 1990s. *Id.*

227 Charles Clover et al., *Putin Says There is to be No Review of Privatisations*, FINANCIAL TIMES (London), July 29, 2000, at 7.

228 BAKER & GLASSER, *supra* note 66, at 84.

229 Jason Bush, *Russia: How Long Can the Fun Last?*, BUS. WK., Dec. 7, 2006, *available at*: www.businessweek.com/globalbiz/content/dec2006/gb20061207_520461.htm, (stating that in 2000, only eight million qualified as middle class, but by 2006, this percentage had risen to about thirty-seven percent of the population).

230 *Id.*

231 Ignatius, *A Tsar Is Born*, *supra* note 41.

was once close to 200 billion dollars,[232] the Russian economy grew from about 200 billion dollars in 2000, to about 920 billion dollars by 2006.[233]

Strengthening Russia's economy has provided Russia with a sense of "stability and predictability,"[234] and is a major reason Putin is still regarded as Russia's savior and a "'great Russia[n] Patriot."[235] Indeed, an anti-revolution has occurred in Russia. Ultimately, Putin represents something for which Russians can be proud,[236] and someone who has encouraged Russians to be proud of being Russian again.[237] For these reasons, Putin's presidency, which was marked by "managed democracy,"[238] and "vertical of power,"[239] represents a balance between the traditional strong state ideal and more-modern democratic ideals — a uniquely Russian hybrid-style vision of democracy.[240] This understanding is consistent with former President George W. Bush's description of Russia in 2004. At a summit in Santiago, Chile, an aid to President George W. Bush indicated that the U.S. President understood that Russia needs a "'style of government that [is] consistent with Russian history.'"[241]

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[232] *Id.*

[233] Lilia Shevtsova, *Post-communist Russia: A Historic Opportunity Missed*, 83 INT'L AFF. 891, 894 (2007).

[234] Kahn, *Vladimir Putin, supra* note 35, at 554.

> None of this would matter, of course, if Putin's last eight years had not brought a sense of stability and predictability to most Russians after the upheavals of the 1990s. Those two characteristics are commonly considered to be two of the greatest benefits of the rule of law in a society.

Id.; *see* J.D. Kahn, *Russia's "Dictatorship of Law" and the European Court of Human Rights*, 29 REV. CENT. & E. EUR. L. 1, 1-14 (2004).

[235] Interview with Peter Baker & Susan Glasser, *supra* note 100. According to a poll, 82% of Russians approved of Putin's leadership. Kahn, *Vladimir Putin, supra* note 35, at 554. This is almost a fourteen-fold increase from his starting point in August 1999, when only 6% of Russians knew who he was. *Id. See* SMITH, REFORMING, *supra* note 31, at 228-29, (showing that the most revered institutions in Russia remain the army, the church and the presidency. Although 62% of the populace expressed trust in the army, only 7% expressed trust in political parties); *see* Struck, *supra* note 30 (stating that Gorbachev believes "Putin salvaged the country from the ravages of . . . Boris Yeltsin, whose rule as president of Russia from 1991 to 1999, set the country careening toward capitalism at the cost of great economic and social turmoil . . . .'Now Russia is having a resurgence . . . .'").

[236] *See* Interview with Peter Baker & Susan Glasser, *supra* note 100.

[237] BAKER & GLASSER, *supra* note 66, at 38 (Russians young and old now sing "Russia, Putin, Unity," illustrative of their newfound Russian pride.); *see Duma Approves Old Soviet Anthem*, CNN.COM, Dec. 8, 2000, http://archives.cnn.com/2000/WORLD/europe/12/08/russia.anthem/; *see* Gessen, *supra* note 20 (stating that there remains a minority of critics within Russia, including one of Putin's former economic advisors, Andrei Illarionov, who resigned in December 2005, and stated: "'It is one thing to work in a country that is partially free' . . . . 'It is another thing when the country loses all political freedom . . . . The very nature of the state has changed.'").

[238] McFaul et al., *supra* note 179, at 9. ("Putin's advisors have a term for this transformation of democratic practices without altering formal democratic rules: 'managed democracy.'").

[239] BAKER & GLASSER, *supra* note 66, at 84. This has been described as "a single chain of command with [Putin] at the top." *Id.*

[240] *See* Remington, *supra* note 170, at 68 (explaining that "Russians want a strong state but also value democratic liberties and the rule of law . . . ."). Moreover, Remington described the development of a "'third way,' which is neither the radical neoliberalism of the early 1990s nor the ultranationalist statism of the 'red-brown' extremists, but a reinterpretation of the ideal of a strong state." *Id.*

[241] BAKER & GLASSER, *supra* note 66, at 377.

B. Development of a Unique Russian Hybrid Democracy

Indeed, the balance of a strong state ideal and modern democratic values now characterize Russia's vision of democracy. Specifically, the 2004 presidential election reelecting Putin for a second term; the unique tandem relationship between Medvedev and Putin as President and Prime Minister, respectively; and finally, Medvedev's most recent call to amend the Constitution highlight the development of Russia's democracy. These occasions illustrate the coexistence of Russia's traditional strong state ideal with more modern and open democratic principles.

1. 2004 Presidential Election: Putin, Again

When President Putin won the Presidency in March 2004, he earned more than seventy percent of the popular vote, easily securing a second term.[242] The election results indicated that Russians were generally pleased with Putin. However, the election also highlighted several very important features of Russian democracy. First, it illustrated Russians' newfound ability to directly choose their President.[243] Specifically, Russians have frequently voted since "the first semicompetitive election in the Soviet Union in the spring of 1989."[244]

Russians receive a holiday on election day, unlike Americans, which has compelled some criticism that there exists a "voting tax"[245] in the United States. In any event, Russians are voting more than ever before. Voter turnout has "remained solid even in the late 1990s, averaging more than 60 percent in national elections. Evidently voters believe that these elections matter,"[246] or else they would not be participating. Furthermore, "the major stakeholders in Russia's political and economic system continue to devote major resources to these electoral processes, which suggests that the outcomes are not predetermined and have consequences."[247]

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242 *See* Vladimir V. Putin, Times Topics, http://topics.nytimes.com/top/reference/timestopics/people/p/vladimir_v_putin/index.html (last visited Apr. 16, 2010).

243 Konst. RF art. 81(4) ("The rules of electing the President of the Russian Federation shall [be] determined by the federal law."). Putin has suggested that Russia's presidential election process, by direct vote, is better and more democratic than the American process, which is complicated by an electoral college that no one seems to actually understand.

244 Michael McFaul & Nikolai Petrov, *Elections, in* BETWEEN DICTATORSHIP AND DEMOCRACY: RUSSIAN POST-COMMUNIST POLITICAL REFORM 23, 23 (Michael McFaul et al. eds., Carnegie Endowment for Int'l Peace 2004).

245 *See* Rachel Sklar, *Rachel Maddow Decries "The New Poll Tax," Long Lines*, HUFFINGTON POST, Nov. 3, 2008, *available at* http://www.huffingtonpost.com/2008/11/03/rachel-maddow-decries-lon_n_140455.html.

> This is a poll tax. How much do *you* get paid for an hour of work? Do you have the kind of job that would be delighted to give you an hour, a half-day, a whole day off work because you were waiting in line at your precinct? Even if it won't cost you your job, can you afford to not work those hours? Are you elderly or disabled, do you not have the physical stamina for this kind of exertion? This is a poll tax . . . . Who is not in those lines — because they can't afford to be?

Id.

246 McFaul & Petrov, *supra* note 244, at 52.

247 *Id.*

The 2004 Russian presidential election also illustrated that although Russians willingly embrace features of democracy, such as the right to vote, they still yearn for a strong state. Russians knew Putin and his policies, since he had served as President for the previous four years. Therefore, when Russians went to the polls in 2004, they demonstrated a desire for an additional four years of the strong state ideal, which Putin had clearly embodied during his first term.

2. *Medvedev and Putin's Tandem-Relationship: An Unprecedented Relationship?*

Putin handed the Russian Presidency to Medvedev in May of 2008,[248] and soon thereafter accepted the position of Prime Minister, though it is clear that Putin still retains a significant amount of power. Unquestionably, Putin "became Russia's most powerful prime minister since the post was first established."[249] In many respects, Putin continues to behave like the head of state.[250] Moreover, soon after taking office, Medvedev referenced his tandem arrangement with Putin and indicated his desire to nurture it.[251] Specifically, Medvedev said, "'no one has any doubt that our tandem, our cooperation, will only continue to strengthen."[252]

Thus, a unique and very distinct relationship between the President and Prime Minister has taken root. Although critics argue that Putin's assumption of power is unlawful, as it is unprecedented for the Prime Minister to hold the amount of power that Putin holds, Russians are generally content that he has remained a central figure. Indeed, a November 2008 poll showed that Putin's popularity was at eighty-three percent, while Medvedev's was at seventy-six percent.[253] Russians are not rushing to change the status quo, they enjoy the peace and stability that Putin's rule provides.

Moreover, the tandem relationship between Putin and Medvedev resembles other Russian political relationships of the past. During the Soviet era, the leader of the Soviet Union was constructively the head of state, but the individual with actual power was the head of the Communist Party, illustrative that this "unprecedented" relationship may not actually be so unprecedented,[254] and instead represents the continued desire for a strong state — which Putin embodies.

Putin's assumption of power only underscores the development of Russia's unique democracy. Specifically, Putin was constitutionally precluded from serving as president for a third consecutive term. The Russian Constitution states:

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248 Adrian Blomfield, *Vladimir Putin Could Reclaim Russian Presidency Within Months*, TELEGRAPH.CO.UK, Nov. 6, 2008, http://www.telegraph.co.uk/news/worldnews/europe/russia/3392827/Vladimir-Putin-could-reclaim-Russian-presidency-within-months.html.

249 *Id.*

250 *Putin Becomes Russian PM in Leadership "Tandem," supra* note 15.

251 *See id.*

252 *Id.*

253 Miriam Elder, *Door Opens for Putin to Return to Kremlin; Constitutional Reform Would Allow Ex-President to Make Dramatic Comeback*, INDEPENDENT, Nov. 15, 2008, at 32.

254 *See* SMITH, REFORMING, *supra* note 31, at 225.

"One and the same person may not be elected President of the Russian Federation for more than two terms running."[255] If Putin had sought a third term, it would have violated the Constitution and the democratic values it espouses. The first words of the Russian Constitution are: "The Russian Federation – Russia is a democratic federal law-bound state with a republican form of government."[256] Article 4 of the Constitution adds: "The Constitution of the Russian Federation and federal laws shall have supremacy in the whole territory of the Russian Federation."[257] Thus, Putin could not seek a third term because the Constitution, which necessarily constrains him, precluded him from doing so.

In light of the inherent importance of the Russian Constitution, because Russians regard Putin as symbolic of the strong state ideal, they have willingly accepted and welcomed his continued presence. Specifically, Putin has assumed an unprecedented amount of responsibility and power as prime minister. In particular, although the Russian Constitution provides that "The President of the Russian Federation shall be the Head of State,"[258] and shall "represent the Russian Federation within the country and in international relations,"[259] it was Putin, as the Russian Prime Minister, whom the international community sought during the August 2008 Georgian conflict. By contrast, the Russian Constitution specifies that the duties of the prime minister include developing and submitting to the State Duma a federal budget; implementing a uniform state policy in the sphere of culture, science, education, health social security, and ecology; administration of federal property; and implementing civil rights and freedoms; as well as "other powers vested in [him] by the Constitution."[260]

Accordingly, by permitting this unique tandem relationship between the president and prime minister to develop, Russians are reconciling their historic desire to maintain a strong state system with the democratic values embodied in their Constitution.[261] This relationship is emblematic of Russia's hybrid vision of democracy.

3. Medvedev's Call to Amend the Constitution, November 2008: Civility and Openness

Medvedev requested that the Russian Constitution be amended in November 2008.[262] Generally, there are two ways to change the Russian Constitution.

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255 Konst. RF art. 81(3). It is interesting to note that there is not yet a definitive answer regarding whether Article 81 means that the same person is precluded from holding office for more than two terms generally, or whether the same person is only precluded from serving more than two terms consecutively, but can later return to the presidency.

256 *Id.* art. 1.

257 *Id.* art. 4(2).

258 *Id.* art. 80(1).

259 *Id.* art. 80(4).

260 *Id.* art. 114(g).

261 *See* Ignatius, *A Tsar Is Born*, *supra* note 41 (quoting Strobe Talbott of the Brookings Institute who suggested, "Putin has returned to the mechanism of one-man rule . . . . Yet, it's a new kind of state, with elements that are contemporary and elements from the past.").

262 *See* Medvedev Address, *supra* note 4.

"The first is the convocation of a constitutional convention to make corrections to the main chapters of the constitution or to work out a new draft . . . . The second way is to introduce a few amendments that do not contradict the basis of the constitutional regime. . . ."[263] The first way is long and complex, whereas the "only reasonable way to change the constitution in the midterm and long term is to add amendments gradually as has been done in the United States."[264]

Russian law provides that passage of Medvedev's bill would require a majority of the State Duma to vote for its adoption.[265] Indeed, when Medvedev submitted his bill, the State Duma decisively passed it by a vote of 392 to 57,[266] an example of democratic values at work. Although it may be argued that a majority of those who voted for the bill's passage were members of Putin's own United Russia political party, whereas all fifty-seven members of the minority Communist faction voted against the bill,[267] Russia's leaders abided by democratic principles, nonetheless. Ultimately, the bill was passed by the upper house of Russia's parliament, and on December 30, 2008, Medvedev signed a law extending the Russian presidential term from four years to six.[268]

The passage of the bill illustrates several important points. First, compared to the Soviet era, when only one political party existed, the Communist Party,[269] there are now several political parties, including United Russia Party and the Communist Party.[270] However, these are not the only parties. The very existence of multiple political parties may be attributed to the 1990s when Russians expressed a strong desire to have multiple political parties, each of which could represent different factions or demographics within Russia. The very existence of multiple political parties is itself indicative of democratic progress.

Moreover, although laws were allegedly unanimously passed during the Soviet era, this was because no opposition was permitted[271] and vocal and public dissent was prohibited. The passage of Medvedev's bill illustrates how vocal and public dissent is clearly permitted now. Specifically, the Communist faction responded to the bill's passage with disgruntled comments. Communist Party and State Duma member Viktor I. Ilyukhin said: " 'Why do we have to do this today?'. . . .

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263 Viktor Sheinis, *The Constitution, in* BETWEEN DICTATORSHIP AND DEMOCRACY: RUSSIAN POST-COMMUNIST POLITICAL REFORM 56, 81 (Michal McFaul et al. eds., Carnegie Endowment for Int'l Peace 2004).

264 *Id.* at 82.

265 Konst. RF art. 105 ("Federal laws are passed by the House of Representatives [State Duma]. Federal laws are passed by a majority of votes of all deputies of the House of Representatives [State Duma] . . . .").

266 Matthew Chance & Max Tkachenko, *Russian Parliament Approves Extension of Presidential Term*, CNN.COM, Nov. 12, 2008, http://www.cnn.com/2008/WORLD/europe/11/12/russia.president/index.html.

267 *Id.*

268 *Id.*

269 *See* SMITH, REFORMING, *supra* note 31, at 193.

270 *Id.* at 215.

271 *See generally* Handelman, *supra* note 167, at 88-91 (explaining that the transition to democracy was difficult because of the Soviet government's corruption and criminality, which caused public distrust).

'Why are we in such a hurry? A strict authoritarian regime has already been established in this country. There is already unprecedented concentration of power in one person's hands.'"[272]

Not to be outdone, the Communist Party's President, Gennadi A. Zyuganov "scoffed at the idea that four years was a short period . . . ."[273] Zyuganov stated: "Soviet five-year plans had produced the Magnitogorsk and Kuznetsky metallurgical plants, the Gorky automotive factory and the Stalingrad tractor factory."[274] Finally, several other Communist Party members sarcastically questioned Medvedev's intelligence. In any event, it is unimaginable that this type of dissent would have been permitted, let alone made public, during the Soviet era. Thus, although Medvedev's bill may represent a greater consolidation of power in the presidency, it was democratically passed by the State Duma in an atmosphere of openness and where dissent was permitted. Indeed, this amendment to the Russian Constitution illustrates Russia's vision of both a strong state and democratic values.

C. Will Russia's Hybrid Vision of Democracy Endure?

Putin has effectively restored Russia to a familiar style of government by consolidating power in the presidential branch. Certainly, Russia has historically been ruled with an authoritarian, if not arbitrary, fist,[275] a fact that Putin recognizes:

> "Russia will not soon become, if ever, a carbon copy of, say, the U.S. or England, where liberal values have keep historical traditions. Among us, the state, its institutions and structures, have always played an exceptionally important role in the life of the country and the people. For Russians, a strong state is not an anomaly, not something that must be fought against, but, on the contrary, the source and guarantor of order, the initiator and the main driving force of all change."[276]

In 2000, because Russia was at the brink of third-world status, Putin suggested that Russia needed a strong state power[277] because a Western-style democracy was seemingly not fit for it. In effect, Russia's history and worldview necessitated something better tailored to its needs.

Consequently, because a strong state represents a return to that which Russians are comfortable with, if not well-suited for, it is not surprising that a Russian-style democracy would ultimately incorporate strong state elements. Perhaps Russians still desire a tsar-like ruler. Indeed, Russians have even referred to

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272 Ellen Barry, *Russia Moves Closer to Extending the Presidential Term*, N.Y. TIMES, Nov. 15, 2008, at A8.

273 *Id.*

274 *Id.*

275 *See* KURKCHIYAN, *supra* note 36, at 37; *see supra* note 99.

276 Nikolai Sokov, *Russia's New Concept of National Security*, 9 E. EUR. CONST. REV. 83, 84 (2000).

277 *See id.*

Putin as "the protector of the system."[278] Thus, although "Putin's treatment of the strong-state theme differs from earlier models of state strength in Russian thought by virtue of its insistence on law, democracy, and freedom,"[279] Putin has not forgotten how central a strong state remains.

Putin has also indicated that a consolidation of power in Russia is necessary to ensure a more stable development of the law. As Russia proceeds through this transitional period, Putin has indicated that any divergence from "democracy" may be necessary because Russia is not yet ready for a totally democratic system.[280] Although this type of statement does not comport with certain of Putin's other statements, it suggests that Russia has never been, nor will it ever be able to adopt the type of democracy of America or Britain — and consequently, that it is futile to assess Russian democracy from a western-democratic perspective.[281] Accordingly, it remains unclear whether Russia is necessarily capable of developing the type of democracy found in the U.S. or Britain, or if it is simply beginning the process, such that comparisons are futile.

In any event, a strong Russian state is not necessarily an anomaly, or suggestive of a burgeoning authoritarian state. Rather, a strong-state Russia simply suggests that Russia is nurturing its own distinct hybrid-style of democracy.[282] Ultimately, because Russia is actively working to develop democracy on its own and on its own terms, this hybrid-style of democracy is likely to endure.

IV. Conclusion

"What matters above all is not whether a law is bad or good. What matters is whether or not the law exists. A bad law is nevertheless a law. Good illegality is nevertheless illegal."[283]

If you believe the American rhetoric, Russian leaders have hijacked the rule of law and democracy that was slowly developing in Russia. However, as this Article explains, Russian reality is quite different. Current Russian leaders have actually strengthened, not abandoned, legal and democratic reform.

This Article has offered a new, more nuanced approach. It has reexamined Russian legal and political developments through a Russian, rather than an American-centric lens — through the *Russian* looking glass. This Russian lens has revealed a vision of law and democracy that is uniquely Russian, a hybrid-style

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278 Yuri Zarakhovich, *The New (Old) Russian Imperialism*, TIME, Aug. 27, 2008, *available at* http://www.time.com/time/world/article/0,8599,1836234,00.html.

279 Remington, *supra* note 170, at 65.

280 It is worth noting that this is inconsistent with the author's argument that Russia may not even be a good candidate for western-style democracy. However, it is feasible that Putin would make such statements to suggest that a western-style democracy remains the goal, even if it is not.

281 *See* Eric Kraus et al., *Russia Profile Weekly Experts Panel: An Investment of Diminishing Returns?*, RUSSIA PROFILE.ORG, Mar. 14, 2008, *available at* http://www.russiaprofile.org/page.php?page id=Experts%27+Panel&articleid=a1205517754 , (arguing that the "West is far too smugly secure in its sense of inherent political superiority to consider alternative versions of 'democracy.'").

282 *See* Remington, *supra* note 170, at 68.

283 ALEXANDER ZINOVIEV, THE YAWNING HEIGHTS 306-07 (Random House 1979).

scheme that seeks to incorporate Russian values, as well as the Russian experience.

Russia faces great challenges. The process of creating a new legal and democratic culture will be long, arduous and, at times, stagnant or ineffective.[284] However, if Russia continues to nurture its unique vision of the law through its hybrid-style rule of law and democracy, it will meet these challenges. In the process, it has already introduced a new generation to a distinctively Russian vision of the law and democracy — consistent with Russia's own heritage and values. What is most impressive about Russia's newfound vision of the law is that it seeks to incorporate Russian values that comport with the Russian experience.[285] Indeed, for all of the criticism against Putin, he has nonetheless reinterpreted the Russian tradition of being a world leader and power "in a pragmatic and modernizing spirit . . . ."[286]

The next step for U.S. policymakers, scholars, and citizens is to abandon their American-centric view of Russia and recognize the reality of Russian law and democracy today. With a new U.S. administration, it is time to reconsider the prevailing American-centric view.[287] Through a Russian lens, they will see Russia's current reform program for what it is — progress rather than retreat.

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[284] *See* SMITH, REFORMING, *supra* note 31, at 237 (stating that "[d]uring this transition phase the laws themselves and their enforcement may be less than perfect, but what is important is that they are functioning, however imperfectly. Laws matter.").

[285] An issue beyond the scope of this Article, but worth noting is that Russia's burgeoning legal culture may soon become a source of Russian national pride, in the same way Russians are proud of their ballet or technological developments. Indeed, the development of its hybrid vision of the law may ultimately be a great success and thusly, a source of national pride.

[286] Remington, *supra* note 170, at 69.

[287] *See* Struck, *supra* note 30.

THE HYBRID'S HANDMAIDEN: MEDIA COVERAGE OF THE SPECIAL COURT FOR SIERRA LEONE

Jessica Feinstein[†]

"Today, fortunately, in my view for the criminal justice system, we have television; we have newspapers; we have radio."

— Justice Richard J. Goldstone

"Some of the communities in Sierra Leone that experienced the conflict are hearing over the radio that someone is answering to these accusations."

— Peter Kahler, West Africa Democracy Radio

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In her analysis of Adolf Eichmann's war crimes trial in Israel, Hannah Arendt compared the courtroom in Jerusalem to a theater. The proceedings, she said, "happen on a stage before an audience, with the usher's marvelous shout at the beginning of each session producing the effect of the rising curtain."[1] This observation is critical; Arendt implied that the trappings of a theater – with "orchestra and gallery" and "side doors for the actors' entrance"[2] – abandoned higher principles of justice in favor of a show trial. But it ought to be asked: can there be justice without an audience?

Forty-eight years after Eichmann's trial, the cumulative experience of international criminal trials indicates that the answer is no. Or more particularly: the multiple goals of international trials are frustrated when the intended audience is barred, through distance and a dearth of media coverage, from accessing courtroom proceedings.

As Warren Burger observed in 1980, most people acquire their information about trials through the press: "this validates the media claim of functioning as surrogates for the public."[3] Despite this fact, in most developed countries with well-established judiciaries, an often-antagonistic relationship exists between the third branch of the government and the "fourth estate." Media coverage of trials is viewed as prejudicing defendants[4] and turning prosecutors, defenders, and judges into the "actors" that Arendt abhorred.[5] In the United States, for example, television coverage of the O.J. Simpson trial created an "anticamera backlash;"[6] likewise, one commentator argued that inflammatory media coverage of the so-called Central Park jogger case led to a hasty police investigation and false confessions.[7] In the United Kingdom, cameras are barred from courtrooms altogether.[8]

In the realm of international criminal justice, however, the old adage that justice must be "seen to be done" reigns with particular force. International criminal courts, from the International Military Tribunal at Nuremberg to the International Criminal Tribunal for the Former Yugoslavia (ICTY), have demonstrated that the media's power to publicize is a vital tool in the creation of

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[1] HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 4 (Penguin Classics 2006) (1963).

[2] *Id.*

[3] Richmond Newspapers, Inc. v. Va., 448 U.S. 555, 573 (1980) (holding that the media is entitled to attend criminal trials under the First and Fourteenth Amendments and serves numerous purposes by doing so). Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980).

[4] *See, e.g.*, Sheppard v. Maxwell, 384 U.S. 333, 356 (1966) (holding that news media coverage of a murder prosecution "inflamed and prejudiced the public" against the defendant, influenced the jury, disrupted proceedings, and ultimately denied the defendant due process).

[5] *See, e.g.*, Simone Monasebian, *Media Matters: Reflections of a Former War Crimes Prosecutor Covering the Iraqi Tribunal*, 39 CASE W. RES. J. INT'L L. 305, 307 (2006-07) ("the media influenced the behavior of any subject in front of its lens.").

[6] MARJORIE COHN & DAVID DOW, CAMERAS IN THE COURTROOM: TELEVISION AND THE PURSUIT OF JUSTICE xiii (Rowman & Littlefield 2002) (1998).

[7] Lynnell Hancock, *Wolf Pack: The Press and the Central Park Jogger*, 41 COLUM. JOURNALISM REV. 38, 39 (2003).

[8] Criminal Justice Act, 1925, 15 & 16 Geo. 5, c. 86, § 41 (Eng.).

legitimacy and lasting legacy for nascent legal traditions. Nevertheless, the process of fully engaging the media has been gradual in the international criminal arena, especially given logistical hurdles of distance and resources.

As the first international war crimes court since Nuremberg to be located in the country where the crimes occurred,[9] the Special Court for Sierra Leone (SCSL) has had a unique opportunity to directly impact its primary audience: Sierra Leoneans.[10] This paper examines the interactions between the SCSL and the local West African media (rather than the international media) – in particular, Sierra Leonean journalists. Through interviews with Special Court officials, third-party observers, and West African journalists, I sought to analyze the approach the SCSL has adopted with regard to media relations and its subsequent effect on both local coverage of the Court and the development of journalism in Sierra Leone.

This paper argues that the SCSL has succeeded in its relations with local media where past international criminal courts have failed, largely through the early creation of proactive outreach and public affairs sections. The Court has provided unprecedented access to the local media, facilitating media coverage through both traditional and innovative means. However, there remain areas of improvement for future courts: the SCSL has failed to invest in local media as part of its legacy, overlooking outreach to journalists and leaving the task of training and support to the patchy work of NGOs. In the long run, this undermines the legacy of the SCSL, which remains a predominantly foreign institution in a country facing major issues of corruption and government accountability.

Part I explicates various reasons for the necessity of media coverage of criminal trials; Part II reviews media coverage of preceding war crimes courts; Part III considers the effects of the long war on the media in Sierra Leone, and the current state of journalism in that country; Part IV inspects the SCSL's media strategy and interactions with the local media; Part V examines coverage of the SCSL in the local media; and Part VI discusses the shortcomings of the SCSL's approach to the media.

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[9] The Special Court is based in Freetown, Sierra Leone, where three of its four trials were held; the trial of Charles Taylor was moved to The Hague for security reasons. The ICTY is located in The Hague, Netherlands, while the International Criminal Tribunal for Rwanda is primarily located in Arusha, Tanzania. The Supreme Iraqi Criminal Tribunal, formerly the Iraqi Special Tribunal, was established under Iraqi law.

[10] *See, e.g.*, James Cockayne, *The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals*, 28 FORDHAM INT'L L.J. 616, 644 (2005) ("perhaps the greatest advantage achieved by the move to the 'in theater' prosecution of hybrid tribunals is this immediate effect on public discourse within the affected population."); Nancy Kaymar Stafford, *A Model War Crimes Court: Sierra Leone*, 10 ILSA J. INT'L & COMP. L. 117, 133-34 (2003). "[T]he Court in Sierra Leone will reap immeasurable benefits," among them that

> [T]he local population will have greater access to the proceedings of the Special Court if they are local. Local journalists will be able to provide updates in native languages, in periodicals read by the local population. This is important not only for the successes of the Special Court, but also for the failures.

Id.

I. The Media as 'Surrogates for the Public'

The common law tradition views the media as the "handmaiden of effective judicial administration, especially in the criminal field."[11] There are several reasons frequently offered for the importance of media coverage of criminal trials; these may be grouped under two general roles of the press: 1) as facilitator of public awareness and distributor of information; and 2) as "watchdog," a critical check on abuse of power.

A. Publicity

First, in broadcasting trial proceedings and outcomes to the public, the media enables several of the broader goals of criminal justice: the deterrent effect of ordered justice, the fostering of peace and reconciliation after discord, and the promotion of the rule of law. Each of these applies equally to domestic and international proceedings, although the latter – the promotion of rule of law – is particularly urgent for post-conflict nations. Common sense would indicate that any impact criminal trials may have beyond those actors in the courtroom depends largely on media publicity. Kingsley Moghalu, formerly the Legal Adviser to the International Criminal Tribunal for Rwanda (ICTR), thus wrote, "deterrence and reconciliation – the stated aims of the tribunals – rely on the public's awareness and perception of its work."[12] The deterrent effect of criminal justice on potential criminals depends entirely on public awareness of trial proceedings and outcomes, in particular, of the convictions rendered and punishments administered. In 1996, Justice Richard J. Goldstone, then Chief Prosecutor for the newly created ICTY, acknowledged to Court TV the role that journalism plays in the deterrence of future war crimes, "the media is a partner in the whole criminal justice system. If people in the country are not told what their criminal courts are doing, then there's certain to be the deterrent aspect of criminal justice is going to fail."[13] Although the deterrent effect of criminal trials is difficult to gauge, particularly in an international context, there is some evidence that today, war criminals may be at least aware of the probability of criminal accountability.[14]

In addition to the prevention of future crimes, criminal trials provide catharsis for victims, pacifying anger, grief, and the desire for revenge.[15] Especially after

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[11] *Sheppard*, 384 U.S. at 350.

[12] Kingsley Chiedu Moghalu, *Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda*, 26 FLETCHER F. WORLD AFF. 21, 22 (2002).

[13] Monasebian, *supra* note 5, at 316 (citing an interview with Justice Richard Goldstone, Prosecutor, ICTY & ICTR (1996)).

[14] *Id.* at 317 (noting that a Rwandan genocidaire discussed the possibility of prosecution over the radio before the establishment of the ICTR).

[15] *See, e.g.*, Jenia Iontcheva Turner, *Defense Perspectives on Law and Politics in International Criminal Trials*, 48 VA. J. INT'L L. 529, 542 (2008) (noting that international criminal trials provide closure to survivors of war crimes and genocide, serving as "an enormous national psychodrama, psychotherapy on a nationwide scale") (quoting Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463, 471 (1995)); Antonio Cassese, *Reflections on International Criminal Justice*, 61 MOD. L. REV. 1, 6 (1998) ("justice dissipates the call for revenge").

war, criminal trials can therefore support the restoration of peace as well as reconciliation by laying blame on the few rather than the many.[16] This catharsis, again, depends on public awareness of the trial. Victims must hear and see the processes of justice at work. In *Richmond Newspapers*, Justice Burger wrote that "open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. Without awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful 'self-help'. . . ."[17] The catharsis that criminal justice provides is innately understood. For example, Peter Kahler, Station Manager of West Africa Democracy Radio, thinks victims of the conflict in Sierra Leone must feel some "relief" when they hear about the trial of Charles Taylor on the radio.[18]

Of course, through covering the details of a particular trial the media also promotes knowledge of the generalized criminal justice processes. The media therefore performs a didactic function, informing the public on matters of procedure and punishment otherwise outside the ambit of the average citizen. As Wigmore stated, "The educative effect of public attendance is a material advantage. Not only is respect of the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy."[19] Although in nations with well-established judiciaries there exists a general knowledge of how criminal trials work, many commentators argue that in post-conflict nations, establishment of the rule of law depends on the public demonstration of an often Byzantine criminal procedure. In establishing the SCSL, the U.N. Secretary-General anticipated that

> If the role of the Special Court in dealing with impunity and developing respect for the rule of law in Sierra Leone is to be fully understood and its educative message conveyed to Sierra Leoneans of all ages, a broad public information and education campaign will have to be undertaken as an integral part of the Court's activities.[20]

Although he did not specifically mention media coverage of the Court, this would eventually become a tool in the SCSL's educative mission.

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[16] *See, e.g.*, Cassese, *supra* note 15, at 6 (stating that "trials. . . establish that not all Germans were responsible for the Holocaust, nor all Turks for the Armenian genocide, nor all Serbs, Muslims, Croats, or Hutus, but individual perpetrators . . .").

[17] *Richmond Newspapers*, 448 U.S. at 571.

[18] Telephone interview with Peter Kahler, Station Manager, West Africa Democracy Radio (April 7, 2009).

[19] *Richmond Newspapers*, 448 U.S. at 572 (quoting 6 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1834 (3rd ed., rev. vol. 1976)).

[20] The Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, ¶ 7, 26, *delivered to the Security Council*, U.N. Doc. S/2000/915 (Oct. 4, 2000).

B. Watchdog

Second, while facilitating public awareness of criminal justice, the media may also play the role of watchdog over the judiciary or court. Jeremy Bentham described publicity as the greatest check on abuse of power;[21] the U.S. Supreme Court likewise stated in *Richmond Newspapers* that an open trial "gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality."[22] In a similar vein, media coverage of court proceedings allows the public to monitor the judiciary's performance of its allotted duties, insuring that it is doing so without economic, jurisdictional, or political mismanagement.[23] When the eye of the broader public is trained on a trial through the media, every participant in that process – judges, prosecutors, witnesses, and defense attorneys alike – faces judgment. Simone Monasebian, who served as a prosecutor at the ICTR, noticed that tribunal judges sat straighter when the international media was present; positive press analysis of her own performance ultimately allowed her greater influence on prosecution strategy.[24]

Media coverage therefore amplifies – and in the modern world, is arguably inseparable from – the oft-cited beneficial effects of the public trial; it produces greater judicial accountability, educates on the rule of law, enables deterrence of future crimes, and promotes communal catharsis, peace, and reconciliation. Further, because international courts depend on the cooperation and financing of states, media publicity helps courts insure the continued cooperation and attention.[25] However, while international war crimes courts and tribunals have, to some degree, recognized the significance of the press to the promotion of criminal justice, historically, these institutions have been slow to proactively harness the media as an ally.

II. Local Media Coverage of Preceding International Criminal Trials[26]

International legal institutions have long recognized the power of journalism to stir the public if only because journalists have several times found themselves

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[21] *Richmond Newspapers*, 448 U.S. at 569. "Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small amount." *Id.* at 569 (quoting 1 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (John Stuart Mill ed., Hunt & Clarke 1827)).

[22] *Richmond Newspapers*, 448 U.S. at 569; *see also Sheppard*, 384 U.S. at 350 ("The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.").

[23] *See, e.g.*, Stafford, *supra* note 10, at 134 ("the people of Sierra Leone are present to judge the proceedings and ensure the Special Court does not deviate from its mandate or get bogged down in political issues or mismanagement.").

[24] Monasebian, *supra* note 5, at 307.

[25] Moghalu, *supra* note 12, at 23 (international criminal tribunals "depend largely on the cooperation of the states because they do not possess the automatic enforcement mechanisms of justice that are available to national jurisdictions.").

[26] I have declined to discuss the International Criminal Court in this paper because it commenced its first trials in 2009. The experience of the ICC is thus not part of the precedent on which the SCSL has been built.

defendants in war crimes tribunals. In the International Military Tribunal at Nuremberg, the first international war crimes court, Julius Streicher was sentenced to death for the anti-Semitic articles he published as the editor of the newspaper *Der Stürmer*.[27] Based on Streicher's words and writing alone, the Nuremberg Tribunal found him guilty of incitement to murder and extermination of the Jews.[28] More recently, the ICTR "media trial" convicted three members of the Rwandan press who encouraged the 1994 genocide through their media outlets.[29] In finding this, the ICTR Trial Chamber I warned, "The power of the media to create and destroy fundamental human values comes with great responsibility."[30]

A. Nuremberg

It is a pity that historically, the Tribunals have focused more on the abuse of journalistic power rather than promoting its positive uses. As much as journalism can cause crimes, it may also, as noted above, prevent them. The utility of the media was recognized from the outset at Nuremberg: "The Allies were determined that the Nuremberg trial would resonate with the international public. Explicitly by means of the publicity with which it was carried out, an enlightening and deterring effect, indeed a catharsis, was intended."[31] Coverage of the trials was "prescribed" for the local German media as part of the Allied Occupying Powers' re-education of the German people.[32] The trial was an international as well as a "national news event."[33] Most German news items were produced by centralized German news agencies, in part because this allowed the Allies closer management of the coverage, and in part because few German journalists could attend the trials.[34] Despite this fact, the difficulty of producing consistent, accurate coverage of Nuremberg foreshadowed the experiences of future international courts, including the SCSL. In a pattern repeated in later tribunals, media coverage of and interest in Nuremberg – especially international coverage, since it was not prescribed – was huge at the start of the tribunal, but died down considerably afterward until verdicts were read, ultimately becoming inconsistent.[35] In addition to the difficulty of turning dull proceedings into entertaining news clips, journalists at Nuremberg faced logistical hurdles as well, including a lack of ade-

[27] Prosecutor v. Nahimana, Case No. ICTR 99-52-T, Judgment, ¶ 981 (Dec. 3, 2003). Hans Fritzsche, head of the Nazi Radio Section of the Propaganda Ministry, was also charged with crimes against humanity at Nuremberg, but acquitted. *Id.* ¶ 982.

[28] *Id.* at ¶ 981.

[29] *Id.* at ¶ 943.

[30] *Id.* at ¶ 945.

[31] AKIBA A. COHEN ET AL., THE HOLOCAUST AND THE PRESS: NAZI WAR CRIMES TRIALS IN GERMANY AND ISRAEL 11 (Hampton Press 2002).

[32] *Id.* at 137.

[33] *Id.* at 58.

[34] *Id.* at 71.

[35] *See, e.g.*, Monasebian, *supra* note 5, at 309 ("the Palace of Justice was packed to capacity with hundred of reporters the first week, and dwindled down to a fraction of that as the trial progressed until verdict when interest peaked again"); COHEN ET AL., *supra* note 31, at 61 (coverage was high in the beginning and the end of the trial; however, the middle was marked by overall decline).

quate facilities, transportation, libraries or other research tools.[36] And, as with most war crimes cases, the trials were factually complicated, often requiring detailed knowledge of German history and language that many international reporters lacked.[37]

B. Second Generation Tribunals

Nearly fifty years after Nuremberg, the ICTY and ICTR did not immediately seek to improve upon Nuremberg's journalistic track record. Whereas German coverage of the trials was considerable at Nuremberg, (if only because prescribed),[38] the ICTY and ICTR mostly failed to seek publicity in the media of the former Balkan republics and Rwanda, respectively. This is primarily because neither the ICTY nor the ICTR proceedings were *in locus criminis*, but rather, in foreign countries, a factor consistently criticized by commentators.[39] Tribunal officials initially focused on judicial matters rather than issues of communication and publicity. Although the ICTY was established in 1993 and the ICTR in 1994, neither Tribunal made organized outreach efforts to national populations until years later. Not until 1999 did the ICTY launch a limited outreach program,[40] while Kingsley Moghalu noted that only in 1998 did media coverage of the ICTR increase somewhat due to a prioritization of communications.[41] Of course, the term "outreach," as used by these tribunals, extends beyond traditional notions of publicity, implying much more than interactions with the press; it also incorporates an education of the public-at-large through direct contact with court officials. Nevertheless, the existence of an outreach program indicates general concern with public awareness as well as an organized, proactive strategy to achieve this. It follows that the media is often the most effective way to reach out to the public. The lack of outreach strategies at these tribunals until years after their establishment permanently damaged their image with their primary audiences, indicating that the local media was ignored in the process.

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[36] Monasebian, *supra* note 5, at 309-310.

[37] *Id.*

[38] COHEN ET AL., *supra* note 31, at 137.

[39] Pierre-Richard Prosper, the former lead prosecutor at the ICTR's first trial, commented that experience has shown the Tribunals were too far from the countries where the crimes were committed. Etell R. Higonnet, *Restructuring Hybrid Courts: Empowerment and National Criminal Justice Reform*, 23 ARIZ. J. INT'L & COMP. L. 347, 371 (2006); *see also* William W. Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 TEX. INT'L L.J. 729, 734 (2003) ("The International Criminal Tribunal for the Former Yugoslavia (ICTY) has been much criticized for its lack of connection to the national context of the cases it adjudicates.").

[40] Monasebian, *supra* note 5, at 317. Justice Gladstone, prosecutor for the ICTY and ICTR, tried to establish positive relations with the media. However, these efforts were largely inadequate. It was only after being criticized for not reaching the population for whom they were created to serve that both the ICTY and ICTR launched an official public outreach program. *Id.*

[41] Moghalu, *supra* note 12, at 23 (explaining the improvement in media coverage is attributed largely to more efficient communications operations and strategic initiatives, such as the creation of a news media based permanently at the ICTR).

Both the ICTY and ICTR suffered undeniable "communication failures."[42] At the ICTY, the "failure to publicize its work within Bosnia"[43] – that is, to take early, proactive communications measures – led to harmful, inaccurate, and biased local reporting.[44] The ICTR, meanwhile, "massively failed in its outreach and public relations to Rwandans."[45] In a detailed article on the ICTR's relations with the media, Moghalu noted that, as of 2002, the visibility of the ICTR remained low in both international and Rwandan media and coverage was frequently critical.[46] Thus, while tribunal officials like Justice Goldstone were concerned with media relations from the start, with regard to local media coverage, "war crimes tribunals' efforts in this area were seen to be inefficient."[47]

C. ICTR

It is perhaps worth taking a more detailed look at media coverage of the ICTR in particular because it illuminates some of the challenges facing African media. As of 2002, a significant problem, according to Moghalu, was a lack of original reporting on the tribunal by the African press, with the exception of some outlets in Tanzania and Rwanda.[48] Instead, newspapers and radio reproduced international media reports.[49] The reasons behind the lack of original African media coverage are twofold, according to Moghalu. First, African media organizations lack the financial resources to send their reporters and correspondents to cover the trial.[50] The three main organizations that have correspondents regularly covering the trial (Internews, Hirondelle, and Intermedia) are not African owned.[51] Second, Moghalu argues that the African media suffers from apathy, and "lag[s] far behind the continent's civil society in advocating judicial accountability for mass crimes."[52] Based on my research on Sierra Leone, I think that this is due in part to a lack of training on legal matters and a brain-drain of educated, competent journalists, which results from poor wages. Regardless of the reasons, the lack of original reporting by the African media has had real consequences for the ICTR, resulting in an adoption of international prejudices and misconceptions in the African press due to reproduction of international wire reports.

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42 Higonnet, *supra* note 39, at 363.

43 *Id.* at 423.

44 *Id.* at 423-24. "According to Bogdan Ivanisevic of Human Rights Watch, 'Untruthful and inaccurate reporting about the ICTY's work [largely lies behind] the prevailing negative attitude of the Serbian public toward the Hague tribunal.'" *Id.* (quoting Bogdan Ivanisevic, *The Grapes of Wrath*, HUM. RTS. WATCH, May 7, 2004, *available at* http://www.hrw.org/en/news/2004/05/06/grapes-wrath).

45 *Id.* at 418.

46 Moghalu, *supra* note 12, at 23-24, 27.

47 Monasebian, *supra* note 5, at 317.

48 Moghalu, *supra* note 12, at 27.

49 *Id.* ("African media . . . rely exclusively on the often-cursory newswire reports from Associated Press, Reuters, and Agence France Presse.").

50 *Id.*

51 *Id.*

52 *Id.*

> The lack of original, direct coverage of the tribunal by African media allows the domination of distorted perspectives that do not relate its work to the overall development and promotion of the rule of law in Africa. It robs the ICTR of the sort of profile it should have in the continent in which the crimes it is addressing occurred.[53]

As noted above, local reporting may also include a more nuanced understanding of the factual backgrounds of the cases. Moreover, local reporters also have greater knowledge of what issues are of interest to their audience and can carry feedback to the court. The experience of the tribunals shows that diversity of perspective is lost when there is a dearth of local journalism, while courts lose the opportunity to communicate directly to their target audience.

III. The Media in Sierra Leone

Decades of war and unrest have created serious challenges for journalism in West Africa. In Sierra Leone, one of the poorest nations in the world,[54] lack of capital and basic infrastructure pose major hurdles to fostering local media coverage of the Special Court.

A. History

The war in Sierra Leone lasted more than a decade, from March 1991 until January 2002,[55] during which few in Sierra Leone escaped the violent chaos. Prior to the war, beginning in 1978, a corrupt, one-party system existed in the country[56] that prevented a free press. In the 1980s and early 1990s, Sierra Leone had few regular newspapers which were heavily censored. It was a crime to criticize the government, and journalists were regularly beaten and imprisoned.[57] Thus, for more than a decade prior to the war itself, independent journalism was suppressed in Sierra Leone.

Although citizens and journalists alike suffered during the war, it was a particularly dangerous time for journalists, who found themselves caught between the rebels (the Revolutionary United Front and Armed Forces Revolutionary Coun-

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[53] *Id.* at 37.

[54] In 2009, the United Nations Development Programme ranked Sierra Leone number 180 out of 182 countries on the "Human Development Index," which incorporates factors like GDP, literacy, and life expectancy. UNITED NATIONS DEVELOPMENT PROGRAM [UNDP], HUMAN DEVELOPMENT REPORT 146 (2009), *available at* http://hdr.undp.org/en/media/HDR_2009_EN_Complete.pdf.

[55] Prosecutor v. Sesay, Case No. SCSL-04-15-T, Trial Judgment, ¶¶ 12, 24 (March 2, 2009). In contrast, the SCSL is mandated to try only those responsible for serious violations of international humanitarian law since November 30, 1996, the second half of the war, when the most murders and atrocities were committed. Statute of the Special Court for Sierra Leone art. 1, Aug. 14, 2000, *available at* http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3d&tabid=176.

[56] *Sesay*, Case. No. SCSL-04-15-T, ¶ 8.

[57] Interview with Solomon Moriba, Outreach and Press and Public Affairs Officer, The Hague Sub-Office of the Special Court for Sierra Leone (March 9, 2009). Mr. Moriba worked as a journalist for twelve years prior to joining the SCSL in May 2007. Among other jobs, he has served as a producer, presenter, and news editor at Sierra Leone Broadcasting Service and as Sierra Leone Country Coordinator for West Africa Democracy Radio.

cil) and the government. "It was like being on an airplane with a faulty engine," said Solomon Moriba, who worked as a journalist in Sierra Leone during part of the conflict, "you knew you could crash at any time."[58] Members of the press were vilified by both sides during the war;[59] journalists and media facilities in particular were targets.[60] During the 1999 invasion of Freetown, the invading rebel soldiers harassed and harmed journalists as well as civilians who called into radio shows. Mr. Moriba recalls being forced into hiding during the invasion; he had several colleagues singled out and murdered.[61] In addition to obvious consequences of the loss of life and infrastructure, Sierra Leonean journalists also had few opportunities for proper training in the 1980s and 1990s. Most had to obtain fellowships abroad in order to receive an education.[62]

B. Post-Conflict Media

Since the official end of the war in January 2002, the press in Sierra Leone, as with every sector of society, has slowly begun to rebuild. As Peter Andersen, Chief of Outreach and Public Affairs for the SCSL, explained, "Post-conflict media is like post-conflict anything. You're starting from square one."[63] Government restrictions on the media have relaxed since the end of the war, but, as Reporters Without Borders stated in 2006, "an impoverished and disparate written press has to deal with a society mired in corruption, a heavy legacy of violence and draconian laws."[64] There is still a fair amount of government interference with the press.[65] Nevertheless, most observers report major changes over the past eight or so years. Sierra Leone now has a vibrant – perhaps even overcrowded – media sector, including a proliferation of radio stations as well as

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58 *Id.*

59 *Id.*; e-mail from Isaac Massaquoi, Lecturer in Mass Communications at University of Sierra Leone (April 24, 2009) (on file with author). Mr. Massaquoi is a journalist; among other jobs, he has worked for the Sierra Leone Broadcasting Service and the Open Society Justice Initiative for West Africa, with whom he helped establish twelve community radio stations across Sierra Leone.

60 U.S. Department of State, 1999 Country Reports on Human Rights Practices: Sierra Leone (last visited Mar. 28, 2010), *available at* http://www.state.gov/g/drl/rls/hrrpt/1999/270.htm (finding that journalists and their families were "particular targets" during the January 1999 Freetown invasion); e-mail from Isaac Massaquoi, *supra* note 59; telephone interview with David Tam-Baryoh, Proprietor, Center for Media Education and Technology in Freetown, Sierra Leone (Apr. 4, 2009). Mr. Tam-Baryoh is a journalist and the station director for Citizen FM 103.7, a community radio station in the populous Kissy district. The station also reaches the northern Port Loko area.

61 Interview with Solomon Moriba, *supra* note 57. Mr. Massaquoi also discussed the deaths of journalists and the destruction of media facilities during the war. E-mail from Isaac Massaquoi, *supra* note 59.

62 Interview with Solomon Moriba, *supra* note 57.

63 Telephone interview with Peter Andersen, Chief of Outreach and Public Affairs, Special Court for Sierra Leone (Mar. 23, 2009). Mr. Andersen joined the Special Court in 2003. In 1996, he founded Sierra Leone Web, www.sierra-leone.org, the first online site dedicated to Sierra Leonean news. Archives of news coverage from 1994 to 2003 are available at the site.

64 REPORTERS WITHOUT BORDERS FOR PRESS FREEDOM, 2006 ANNUAL REPORT 30, *available at* http://www.rsf.org/IMG/pdf/report.pdf.

65 Telephone interview with Peter Andersen, *supra* note 63.

a wide range of daily and weekly newspapers in Freetown.[66] Various observers note improvements in the press, including diversification of available media as well as an increase in the quantity and quality of reporting.[67]

The Sierra Leonean media is heavily dominated by radio and print journalism. Television is costly and therefore not widely available.[68] Internet is increasing in popularity, as is the mobile phone network.[69] However, infrastructure, tradition, and high rates of illiteracy[70] make radio by far the most popular journalistic medium in Sierra Leone.[71] Recent surveys by Foundation Hirondelle and the BBC World Service Trust indicate that approximately eighty percent of Sierra Leoneans have access to radios.[72] Foundation Hirondelle reported that in 2008 the daily reach of radio was 48.5 percent of the population, while the weekly reach was seventy-two percent.[73] In 2005, Search for Common Ground listed 23 FM radio stations in Sierra Leone in both Freetown and the provinces;[74] this number has surely increased since then. Mr. Moriba estimated there are as many as 40 smaller community radio stations.[75] Radio stations feature news reports, music, talk shows with phone-ins, and other formats.[76]

In contrast to radio, accessible in most parts of the country, the vast bulk of newspapers are concentrated in Freetown, where the literacy rate is the highest. Freetown features a glutted newspaper market of around 50 newspapers, mostly weekly or bi-monthly, of which about ten to fifteen are daily papers.[77] The most widely read are the *Concord Times*, *Awoko*, *Awareness Times*, *For Di People*, *Standard Times*, and *Premier News*, although only eleven percent of the popula-

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66 SEARCH FOR COMMON GROUND - SIERRA LEONE, KEY FINDINGS FROM 2005 MEDIA SECTOR MAPPING SURVEY 2, *available at* http://radiopeaceafrica.org/assets/texts/pdf/Sierra%20Leone%20Media%20Sector%20Mapping%20Key%20Findings.pdf [hereinafter SEARCH FOR COMMON GROUND].

67 *See, e.g.*, telephone interview with Peter Andersen, *supra* note 63. Mohammed Bangura said that the improvement of reporting in Sierra Leone is "marked" because journalists now enjoy greater freedom of expression. Interview with Mohammed Bangura, Trial Attorney, Office of the Prosecutor, Special Court for Sierra Leone (Mar. 24, 2009). Mr. Massaquoi said that the media in Sierra Leone has "changed considerably" since 2002. "Today there are many newspapers on the streets[,] never mind the small advertising revenue they all depend on. They cover a lot more material than before, pictures and general presentation – improving." E-mail from Isaac Massaquoi, *supra* note 59.

68 SEARCH FOR COMMON GROUND, *supra* note 66, at 3.

69 *Id.*

70 According the United Nations Development Programme, in studies conducted from 1999 to 2007, it was found 38.1 percent of Sierra Leonean adults over the age of 15 years were literate. UNDP, *supra* note 54, at 174. This number is likely much higher in Freetown than in the rural countryside.

71 *See, e.g.*, GRAHAM MYTTON, 2008 MEDIA USE SURVEY: SIERRA LEONE, FINAL REPORT 4 (2008); BBC WORLD SERVICE TRUST, SIERRA LEONE ELECTIONS 2007 SURVEY, *available at* http://www.bbc.co.uk/worldservice/trust/research/reports/2008/03/080320_research_impact_reports_sierra_leone.shtml; SEARCH FOR COMMON GROUND, *supra* note 66, at 2.

72 MYTTON, *supra* note 71, at 5; BBC WORLD SERVICE TRUST, *supra* note 71.

73 MYTTON, *supra* note 71, at 5.

74 SEARCH FOR COMMON GROUND, *supra* note 66, at 2.

75 Interview with Solomon Moriba, *supra* note 57.

76 SEARCH FOR COMMON GROUND, *supra* note 66, at 2.

77 Interview with Solomon Moriba, *supra* note 57.

tion reads newspapers at any time.[78] Indeed, the largest newspaper in Freetown has a circulation of only around 2,000.[79] In general, newspapers are not regarded as the most credible sources of information.[80] Nevertheless, the Chief of the Special Court's Outreach and Public Affairs section emphasized that newspapers are still important because many now have websites that distribute articles farther afield, for example, to foreign governments and other agencies that do not monitor the radio.[81]

C. Challenges

The largest challenge facing journalists in Sierra Leone is economic. In 2009, Sierra Leone's GDP ranked number 180 out of 182 countries. David Tam-Baryoh of the Center for Media Education and Technology in Freetown said that Sierra Leonean newspapers and other media suffer from lack of external investment, in particular, investment by those outside the media sector with business acumen.[82] According to Mr. Tam-Baryoh, nearly all newspapers are owned by journalists who lack solid business models. Scarce advertising revenue and overcompetition barely keeps most papers afloat from day to day. This translates into a low pay scale for journalists.[83] "Journalists often have to struggle to earn a reasonable standard of living," said Anne Bennett, Country Director for Foundation Hirondelle in Sierra Leone.[84] Umaru Fofana, President of the Sierra Leone Association of Journalists, said that his organization is working to establish a minimum wage for journalists to alleviate "the rampant appalling conditions of service. . . ."[85] The poor pay scale, compounded with "enormous" technological hurdles[86] – a lack of basic infrastructure such as electricity, few computers and spotty internet access – means that journalists face basic, every day struggles to research, physically cover events, and then write and distribute their reports. According to Mariama Fornah, a reporter for Cotton Tree News, many reporters

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78 MYTTON, *supra* note 71, at 4, 20.

79 Telephone interview with Peter Andersen, *supra* note 63.

80 SEARCH FOR COMMON GROUND, *supra* note 66, at 3; e-mail from Isaac Massaquoi, *supra* note 59.

81 Telephone interview with Peter Andersen, *supra* note 63.

82 Telephone interview with David Tam-Baryoh, *supra* note 60.

83 *Id.*; telephone interview with Peter Andersen, *supra* note 63; telephone interview with Alpha Sesay, Founder of the Sierra Leone Court Monitoring Progamme & CharlesTaylorTrial.org (April 25, 2009). Mr. Sesay is a Sierra Leonean lawyer with an LLM in international human rights law; he has worked on the Defence Team for Morris Kallon at the Special Court and as a consultant on the issue of the Special Court's legacy. E-mail from Anne Bennett, Country Director, Foundation Hirondelle, Sierra Leone (April 7, 2009) (on file with author).

84 E-mail from Anne Bennett, *supra* note 83.

85 E-mail from Umaru Fofana, President, Sierra Leone Association of Journalists (April 14, 2009) (on file with author). Mr. Fofana has been a journalist for twelve years. From April to October 2008, he worked as the Consultant Coordinator for the BBC World Service Trust's coverage of the Special Court's trial of Charles Taylor in The Hague.

86 Telephone interview with David Tam-Baryoh, *supra* note 60.

lack equipment like digital recorders and laptop computers. This can make sourcing information difficult.[87]

Several problems result from the poor economic situation of journalists and media organizations, among them, corruption as well as a siphoning of talent away from journalism. Several individuals noted that many journalists seek kickbacks for positive reporting and threaten negative press coverage or omission of coverage if they are not paid for their services.[88] Often, NGOs or other agencies will accept the scheme and pay for coverage.[89] Simultaneously, young, talented journalists are quickly lured away from journalism into more lucrative and influential career tracks, such as public relations, work for NGO agencies, or government. This results in a constant "brain drain" away from the media sector.[90]

The preceding years of suppression and war have also affected the quality of reporting produced by Sierra Leonean journalists. In large part, this is due to a lack of basic training on reporting, writing, and ethics. As noted earlier, during the previous twenty years, training opportunities were scarce. Since the end of the war, the University of Sierra Leone has started a communications department, and other opportunities for media education have arisen in the country itself. As will be discussed later, several NGOs, such as Foundation Hirondelle, train journalists as part of their own media organizations. In addition, the Sierra Leone Association of Journalists provides local and international training for its members when resources are available; but Mr. Fofana says that, in general, "resources are few and far between."[91] Three observers who have interacted with Sierra Leonean journalists say that, on average, journalists lack very basic reporting skills.[92] Mr. Andersen recalled a SCSL press conference where many of the younger reporters remained silent, even when solicited for questions.[93] Further, the dearth of training feeds the production of biased and ill-informed reporting.

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[87] E-mail from Mariama Fornah, Reporter, Cotton Tree News (May 2, 2009) (on file with author). Ms. Fornah has worked as a journalist for five years in Sierra Leone and The Hague. She started her career at a community radio station in Kenema district and has reported on the trial of Charles Taylor for the BBC World Service Trust.

[88] Telephone interview with Peter Andersen, *supra* note 63; e-mail from Anne Bennett, *supra* note 83 ("quite a few succumb to the temptation to accept monetary rewards in exchange for favorable reporting.").

[89] Telephone interview with Peter Andersen, *supra* note 63.

[90] *Id.*; telephone interview with David Tam-Baryoh, *supra* note 60; *see, e.g.*, Alie Turay, *Another Journalist Gets Appointed in Sierra Leone*, THE AWARENESS TIMES (Sierra Leone), Dec. 18, 2007 (reporting on a "growing number of local journalists whose skills President Koroma intends to tap into by utilising them as information Attaches to variuous [sic] diplomatic posts.").

[91] E-mail from Umaru Fofana, *supra* note 85.

[92] Interview with Mohammed Bangura, *supra* note 67; telephone interview with Peter Andersen, *supra* note 63; telephone interview with Afua Hirsch, Legal Correspondent, THE GUARDIAN (Mar. 30, 2009). Ms. Hirsch is a barrister with extensive experience in West Africa. *See also* Rachel Horner, *Role of the Media in Fighting HIV/AIDS*, CONCORD TIMES (Sierra Leone), Apr. 14, 2008, *available at* http://allafrica.com/stories/200804141347.html (stating "the general standard of journalism in Sierra Leone is rather low. . . some of the reporters still lack the skills in the areas of writing, editing and effective dissemination of information – especially in the print media.").

[93] Telephone interview with Peter Andersen, *supra* note 63.

Many of the newspapers have overt political leanings or political backing.[94] Articles can lean toward inflammatory, imbalanced speech, rather than careful, fact-based arguments.[95] And, after years of suppression and intimidation by the government – some of which continues today – journalists without political backing are cautious in their criticisms. In an e-mail from Anne Bennett, she cites the "subculture of self-censorship created by a history of authoritarian rule" as one of the ills that plagues the Sierra Leonean press. Afua Hirsch, Legal Correspondent for *The Guardian*, likewise said there is very little investigative journalism in Sierra Leone; instead, journalists tend to reproduce government press releases.[96] The watchdog function of the media in Sierra Leone is thus underdeveloped due to historic and economic factors.

IV. The Special Court's Approach to the Media

Against this journalistic backdrop, beset by economic, infrastructural, and historical challenges, the SCSL has sought to publicize its proceedings. The Special Court's success in this regard has been substantial; the result of a proactive and facilitative attitude toward the media.

The SCSL's particular approach to the media is due in large part to the Court's unprecedented concern with its "legacy." More than any past international tribunal, the SCSL began to pay attention early in its development to the lasting imprint the Court would leave on its host nation. As early as 2002, SCSL Justice Pierre Boutet said, "The main objective of the court is to reestablish the rule of law in this country and then show the people of Sierra Leone that justice can be done in this country."[97] This focus on "rule of law" legacy, rather than solely on adjudication, is arguably the largest contribution the Special Court has made to the area of international criminal law. No doubt, this focus stems from the same impulse that planted the SCSL in the nation where the crimes occurred. In general, the SCSL has placed greater emphasis on the "consumers" of justice than its predecessors.

Over the years, the SCSL has shifted more and more of its energy to legacy building. The Special Court's 5th Annual Report lists legacy as "one of the Court's topmost priorities."[98] To help establish the rule of law, the SCSL seeks

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[94] *Id.; see, e.g.*, Abdul Rashid Thomas, *APC Propaganda Media Sets Low Standards with which They Measure President Koroma's Government Performance: Is this Sycophancy or Blind Loyalty?* THE AWARENESS TIMES (Sierra Leone), Apr. 9, 2009 (discussing the role of the APC government's "sponsored news media").

[95] Telephone interview with Afua Hirsch, *supra* note 92; *see, e.g.*, Christian Foday Sesay, Jr., *Is Journalism in Country a Blessing or a Curse?* THE CONCORD TIMES (Sierra Leone), Apr. 9, 2009, *available at* http://allafrica.com/stories/200904090749.html ("The contents of what we write, the intonations and emotional picture with which we convey the message of our writings, the fiery and inciting dictions we use in proving a point offer no future hope to the land we all claim to love dearly.").

[96] Telephone interview with Afua Hirsch, *supra* note 92.

[97] Stafford, *supra* note 10, at 133 (citing *The National: Recovery* (CBC television broadcast Dec. 26, 2002)).

[98] SPECIAL COURT FOR SIERRA LEONE, 5TH ANNUAL REPORT OF THE PRESIDENT OF THE SPECIAL COURT FOR SIERRA LEONE 6 (2007-08), *available at* http://www.sc-sl.org/LinkClick.aspx?fileticket=hopZSuXjicg%3d&tabid=176.

to make its trials "accessible to people of the West African sub-region, who were most affected by the sub-regional civil conflicts and instabilities."[99] Communication – and hence, involvement of the local media – is a tool necessary to enable this goal. Thus, the SCSL has sought to engage the local media as a means to an end.

A. Outreach and Public Affairs

In his criticism of the ICTR's interactions with the press, Kingsley Moghalu suggested the Tribunal should pursue a "more proactive strategy to building external perceptions of its work."[100] The SCSL adopted this proactive tack very early in its existence, creating a Press and Public Affairs Office under the Registry in 2002. Shortly thereafter, in its first year of existence, the Registry also created an Outreach Office, originally intended to be subordinate to Press and Public Affairs.[101]

Not all went smoothly from the very start. At first, the two sections overlapped and were somewhat antagonistic.[102] Mr. Andersen, who joined the Press and Public Affairs Office in 2003, said that the Court's media policy was disorganized at the beginning; multiple parties – the Prosecution, the Registry, Public Affairs – would speak on behalf of the Court, thereby sending mixed signals.[103] Nevertheless, the very fact that the SCSL created both a press office and an outreach section in its first two years allowed it to sort these difficulties out much more rapidly than the ICTY and ICTR. The SCSL dedicated itself very early to interactions with the local media and public. As Mr. Andersen pointed out, neither the ICTY nor the ICTR had an independent and comprehensive outreach programs until after the SCSL established its own.[104]

Eventually, Outreach and Press and Public Affairs delineated their respective roles:[105] Outreach's goal is to educate Sierra Leoneans and West Africans about the trials, often through direct contact and interactions between Court officials and citizens; Press and Public Affairs more narrowly deals with the media.[106] But the two are ultimately interrelated – educating the populace depends on successful engagement with the media – and in 2008, as part of the Court's winding

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[99] *Id.* at 39.

[100] Moghalu, *supra* note 12, at 40.

[101] Telephone interview with Peter Andersen, *supra* note 63; Charles Chernor Jalloh, *The Contribution of the Special Court for Sierra Leone to the Development of International Law*, 15 AFR. J. INT'L & COMP. L. 165, 185 (2007).

[102] Telephone interview with Peter Andersen, *supra* note 63.

[103] *Id.*

[104] *Id.*

[105] HUMAN RIGHTS WATCH, JUSTICE IN MOTION: THE TRIAL PHASE OF THE SPECIAL COURT FOR SIERRA LEONE pt. VI.A.1 (2005), http://www.hrw.org/en/node/11565/section/1 ("The Registry has helped promote effective implementation of outreach and communications programming by developing an internal policy procedure on coordination of these activities. This procedure clearly delineates responsibilities between the organs of the court, and between the relevant units within those organs.").

[106] Telephone interview with Peter Andersen, *supra* note 63; interview with Solomon Moriba, *supra* note 57.

down, they were fused into the Office of Outreach and Public Affairs.[107] Together, they form a holistic communications strategy. In 2005, Human Rights Watch stated that, "The priority the Court has given to outreach and communications is particularly commendable as these represent one of the most difficult areas for any international justice institution to address."[108] Indeed, the difficulties inherent in a post-conflict media market have made the Special Court's work in this area more challenging, necessitating a creative approach to public relations.

B. Proactive Information Dissemination

Several of the employees of Outreach and Public Affairs formerly worked in the media. Peter Andersen, the section chief, founded the first online website dedicated to Sierra Leonean news. As a result, the SCSL has worked effectively to produce and package information that caters to the needs of journalists.

The Special Court's strategy seems to be one of taking the information to the media sources, rather than waiting for the media to come to the Court. This allows the Special Court to carefully control its image in the press and to aggressively promote itself. In some respects, Press and Public Affairs has actually stepped into a journalistic role. In addition to standard press releases, the SCSL began producing weekly audio/visual summaries of court proceedings – fifteen minutes in English and fifteen in Krio – that were then distributed to radio stations and the state television network, as well as used by Outreach in its town hall meetings.[109] These summaries are meant to contain no editorial content, but are meant to allow those who cannot attend a glimpse inside the courtrooms.[110] Press and Public Affairs has also created and maintained a database of journalists and their contact information, including email and phone numbers. In The Hague, Mr. Moriba said he has amassed a database of roughly 250 journalists; these journalists are "accredited" to cover the Charles Taylor trial once they provide Mr. Moriba with their contact information and affiliation. Through these lists, the SCSL distributes press releases, press kits with timelines and other background information on the Court and trials, and alerts about proceedings and news.[111]

The SCSL's Press and Public Affairs section has done an admirable job anticipating the needs of journalists; for example, it creates witness summaries in ad-

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[107] The Special Court for Sierra Leone, Outreach and Public Affairs, http://www.sc-sl.org/ABOUT/CourtOrganization/TheRegistry/OutreachandPublicAffairs/tabid/83/Default.aspx; Charles Jalloh noted that the Outreach Office "employs both modern and traditional media to broadcast the work of the Court, for example, through community town hall meetings, radio programmes, publications, seminars, and training." Jalloh, *supra* note 101, at 185.

[108] HUMAN RIGHTS WATCH, *supra* note 105, pt. VI.A.

[109] Telephone interview with Peter Andersen, *supra* note 63; interview with Solomon Moriba, *supra* note 57; HUMAN RIGHTS WATCH, *supra* note 105, pt. VI.A.1 ("These summaries provide a crucial way for people who do not have the opportunity to attend trials to hear testimony, follow developments, and in the case of the video summaries, observe the courtroom.").

[110] Interview with Solomon Moriba, *supra* note 57.

[111] *Id.*

vance of testimony so that journalists can plan whether they want to cover the proceedings.[112] According to Human Rights Watch, "the Public Affairs Unit has appropriately used the knowledge of local staff to help identify developments that will likely be of the greatest importance or interest to Sierra Leoneans, and then focuses summaries accordingly."[113] Together, Outreach and Public Affairs have conducted call-in discussions of the Court's work on community radio stations. In addition, the Court has tried to make information remotely accessible through its website, www.sc-sl.org. The website allows access to important court documents, such as the Rules of Procedure and Evidence, indictments and judgments from the various trials, and background on the indicted individuals. For the trial of Charles Taylor, the website offers a live video link to proceedings in The Hague.

C. Flexibility and Accessibility

Successfully promoting the work of the Special Court in a post-conflict environment has required more than the packaging and proactive distribution of information; it also calls for flexibility on the part of the Press and Public Affairs staff. Infrastructural challenges have been the impetus for media management innovations. In 2003, when Mr. Andersen began working for the SCSL, internet and email were too expensive for most Sierra Leonean journalists.[114] Press and Public Affairs at first tried to distribute paper copies of press releases and summaries to media houses, which proved impracticable. Mobile phone networks, however, were rapidly becoming popular in Sierra Leone; texting in particular was often used as a cheap means of communication. Press and Public Affairs therefore began texting reporters with information and press updates. Today, more Sierra Leoneans have email than ever before. Still, in addition to email, the Special Court has continued to use mobile texting as its most effective means of communication with reporters. When I spoke with her, reporter Ndeamoh Mansaray had just received a text from the Special Court informing her about an upcoming international law institute she could attend.[115] In addition to texting, Mr. Andersen said he often employs a method called "flashing:" a journalist will call a member of Press and Public Affairs' mobile phone, let it ring once, and then hang up; the recipient will then call back.[116] In this way, reporters who lack the resources to make expensive phone calls can communicate with the Press and Public Affairs Office. "It's a rapidly changing environment, so we've had to adapt as the landscape has changed," explained Mr. Andersen.[117] Nor has the Special Court shied away from more expensive communications modes, where they are deemed necessary. The SCSL funded Press and Public Affairs' initiative to provide satellite coverage in Sierra Leone of the Prosecution's opening

[112] *Id.*

[113] HUMAN RIGHTS WATCH, *supra* note 105, pt. VI.A.1.

[114] Telephone interview with Peter Andersen, *supra* note 63.

[115] Telephone interview with Ndeamoh Mansaray, Reporter, Cotton Tree News (April 21, 2009).

[116] Telephone interview with Peter Andersen, *supra* note 63.

[117] *Id.*

statement and first witness in the Charles Taylor trial.[118] Outreach and Public Affairs hopes to do the same for the opening of the Defense.[119]

Calling journalists who cannot afford to call the Court is just one example of the facilitative attitude the Special Court has adopted toward the media; the SCSL does its best to give local journalists the information they need. Press and Public Affairs provides reporters with access to phones in the courts in Freetown and The Hague; it also arranges interviews with key Court officials, like Chief Prosecutor Stephen Rapp, and meetings with other Court personnel.[120] In conjunction with the BBC World Service Trust, the Special Court has provided logistical support for Sierra Leonean and Liberian journalists covering the Taylor trial in The Hague by arranging visas and transcribing audio reports for these reporters.[121] "We have not really put any restraints on getting information," said Mr. Moriba in his interview, "[t]here are no bottlenecks."[122]

The Press and Public Affairs office has gradually worked toward forging relationships with local journalists.[123] Learning the profiles of the various local media organizations allows Outreach and Public Affairs to better cater to their needs, as well as to more efficiently target the Court's publicity and resources. Mr. Andersen said that he is a proponent of practicing "beer bottle" diplomacy: "You have to go to the weddings and funerals," he said. "People notice those things. You cannot do your job in a country if you do not interact with the community."[124] Members of the Outreach and Public Affairs Office are well aware of the basic challenges facing journalists in Sierra Leone. Mr. Andersen said that he never turns journalists away if they show up a few minutes late for a meeting – he knows how hard it is for them to get there at all.[125] According to Mr. Andersen, this awareness of the local environment and personalized interaction with local journalists has helped make the SCSL more accessible than either the ICTY or the ICTR, despite the greater resources of those tribunals.[126] It has also helped to establish the SCSL's institutional credibility among reporters. As a largely foreign institution, gaining the trust and respect of the local media is crucial for fostering a positive image for the Court.

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118 Interview with Solomon Moriba, *supra* note 57.

119 *Id.* However, the ICTJ reports that technical problems have upset the SCSL's plans to live-stream proceedings of Taylor's trial. "Taylor's trial is only broadcast in one of the two courtrooms at the court's compound [in Freetown], and few people are there to watch. Even in this case, the live streaming is sometimes interrupted by technical problems." INT'L CTR. FOR TRANSITIONAL JUSTICE & THIERRY CRUVELLIER, FROM THE TAYLOR TRIAL TO A LASTING LEGACY: PUTTING THE SPECIAL COURT MODEL TO THE TEST 15 (2009), *available at* http://www.ictj.org/en/where/region1/141.html (citation omitted).

120 Interview with Solomon Moriba, *supra* note 57.

121 E-mail from Umaru Fofana, *supra* note 85.

122 For criticism of the SCSL's handling of press coverage of the Charles Taylor trial in particular, see INT'LL CTR. FOR TRANSITIONAL JUSTICE &CRUVELLIER, *supra* note 119.

123 Telephone interview with Peter Andersen, *supra* note 63.

124 *Id.*

125 *Id.*

126 *Id.*

D. Relations with Local Journalists

As a result of these efforts, the Press and Public Affairs Office of the Special Court enjoys a mostly positive reputation among local journalists. Given the antagonism sometimes apparent between the local press and the tribunals,[127] this is no small achievement.

The Sierra Leonean journalists I spoke with gave the Press and Public Affairs Office good reviews primarily for the ease with which they receive information from the Special Court. "Largely because of the relatively reasonable proactive churning out of news and information, the relationship between the [C]ourt and local journalists is very cordial," said Mr. Fofana.[128] Isaac Massaquoi, who reported on the Special Court in its early days, said his interactions with Court officials were positive, "from a professional point of view, I got information easily from [C]ourt officials, and the SLBS [Sierra Leone Broadcasting Service] was able to satisfy this hunger for information about the [C]ourt in those early days."[129] Particularly in comparison with national Sierra Leonean courts, Mr. Massaquoi said he was overwhelmed by the organization of the Special Court.[130] Ndeamoh Mansary, who regularly covers the Court in Freetown for Cotton Tree News, said that if she does not understand some aspect of the Court proceedings, she feels comfortable asking the Outreach and Public Affairs Office to provide further explanation.[131] "This Court is very open to every Sierra Leonean," said Ms. Mansaray. "The Court is very supportive of journalists because we are going to tell the people what is going on in the Court."[132] Peter Kahler of West Africa Democracy Radio likewise called the Special Court "very, very supportive" of his work; when he traveled to The Hague, Outreach and Public Affairs arranged his visa and lodging and set up meetings for him with the prosecution, defense, and other Court officers. Mr. Kahler is on the Special Court listserv, and said he receives all the press releases and updates by email.[133]

Of course, not all interactions have been positive. The International Center for Transitional Justice reported that in its early years, relations between the local media and the Public Affairs Office were difficult, but they have improved since then.[134] Mr. Fofana said that he suspects that the Special Court makes judgments and sentences available to "white journalists" before the local media, although he offered no proof of this assertion.[135] And Mr. Andersen admitted that some

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127 Higonnet, *supra* note 39, at 424. "Influential 'reporters and analysts in Serbia who strongly dislike the Tribunal present flagrant untruths about factual and legal aspects of its work . . . in the most prominent media in Serbia. . . .'" (quoting Ivanisevic, *supra* note 44).

128 E-mail from Umaru Fofana, *supra* note 85.

129 E-mail from Isaac Massaquoi, *supra* note 59.

130 *Id.*

131 Telephone interview with Ndeamoh Mansaray, *supra* note 115.

132 *Id.*

133 Telephone interview with Peter Kahler, *supra* note 18.

134 TOM PERRIELLO & MARIEKE WIERDA, THE SPECIAL COURT FOR SIERRA LEONE UNDER SCRUTINY 37 (2006), *available at* http://www.ictj.org/static/Prosecutions/Sierra.study.pdf.

135 E-mail from Umaru Fofana, *supra* note 85.

newspapers that support the ruling Sierra Leone Peoples Party (SLPP) have refused to cover the Court at all because the SLPP is critical of the Court.[136] Nevertheless, given the media environment in which it is operating, the positive comments from journalists I interviewed testifies to the constructive working relationships the Special Court has fostered with members of the local media. This, in combination with an innovative and proactive strategy for bringing information to the media, indicates that the SCSL has attempted more, and as a result accomplished more, in the area of communications management than any previous international criminal court.

V. Local Coverage of the Special Court

Nevertheless, a closer look at local media coverage of the SCSL shows that the Court's successes, while substantial, are only partial. Media coverage of the SCSL still exhibits many of the shortcomings that confronted preceding international courts.

A. Broad Media Coverage

Regardless of whatever other publicity mechanisms the Special Court uses – the principal one being direct outreach – radio and newspapers are the primary means by which Sierra Leoneans hear about the SCSL. These information channels reach, as noted above, upwards of eighty percent of the population and preexisted the Special Court's arrival in Freetown.[137] Since the vast majority of citizens cannot attend court, they learn from the media about the Special Court proceedings: "People [in Sierra Leone] do rely on the reporting for what goes on in Court. The amount of material that the Court produces makes interesting reading, [and] exciting reporting."[138] To that regard, in general there has been a significant amount of reporting on the Special Court in local media outlets. In 2006, Human Rights Watch reported that local media coverage of the SCSL "has been substantial."[139] According to James Cockayne, "Catch a taxi in Freetown in the late afternoon on a day that the Court happens to be sitting, and you are likely to hear Krio and English radio talk-shows – perhaps even talk-back – discussing the day's events at the Court."[140] Indeed, Mohammed Bangura attested to the wide reach of radio coverage of the Court; people he meets have told him they heard him speak about the Special Court on radio shows.[141] Through such media, Mr. Cockayne asserted the proceedings of the Special Court have entered mainstream public discourse.[142]

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136 Telephone interview with Peter Andersen, *supra* note 63.

137 MYTTON, *supra* note 71, at 5.

138 Interview with Mohammed Bangura, *supra* note 67.

139 HUMAN RIGHTS WATCH, TRYING CHARLES TAYLOR IN THE HAGUE: MAKING JUSTICE ACCESSIBLE TO THOSE MOST AFFECTED 10 (2006), http://hrw.org/backgrounder/ij/ij0606/ij0606.pdf.

140 Cockayne, *supra* note 10, at 644.

141 Interview with Mohammed Bangura, *supra* note 67.

142 Cockayne, *supra* note 10, at 644.

There are many examples of good reporting on the Special Court. Newspaper coverage does sometimes offer balanced reports, such as an April 2009 article in the *Concord Times* about reactions to the United Revolutionary Front (RUF) trial sentences: frequent court reporter Ibrahim Tarawallie quoted the Defense counsel, a judge, and the Prosecution; his article also gave context for the sentences handed down ("the longest ever handed down by the UN backed hybrid") and accurate information about the appeals process.[143] Newspapers and radio have offered exclusive interviews with the Prosecution and other court officials, summaries of witness testimony, and victims' reactions to Court decisions.[144] Further, local reporting has provided readers with colorful descriptions of courtroom proceedings. In a piece about the RUF sentencing hearing, Alpha Bedoh Kamara of *Premier News* reported, "[t]here was a sudden burst of wailing from a female observer but was quickly restrained, as the faces of other observers, among them legal practitioners, remained gloomy and tense."[145] Such descriptions allow readers who cannot attend a glimpse inside the courtroom, conveying a sense of the import – both procedural and emotional – of the occasion.

B. Misreporting, Bias, Irregularity, and Lack of Original Coverage

However, press coverage of the Special Court has been hampered by a number of problems, many of them issues confronted by past international criminal courts as well, and all of them stemming from systemic problems in the Sierra Leonean media. These include: 1) inaccurate and biased journalism, 2) irregularity of reporting, and 3) a relatively small amount of original local coverage of the court.

Misreporting often stems from a basic ignorance of legal vocabulary and technicalities.[146] Many members of the press have received little or no training on court reporting. Afua Hirsch, who led a training seminar for Sierra Leonean and Liberian journalists, said that she at first "underestimated how low a level of understanding there is about the judicial system itself."[147] Improper word usage – a failure to employ legal diction properly or at all – often lies at the root of

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[143] Ibrahim Tarawallie, *RUF Sentences Unfair, Says Defense Counsel*, CONCORD TIMES (Sierra Leone), Apr. 9, 2009, *available at* http://allafrica.com/stories/200904090739.html.

[144] *See, e.g.*, Joseph Cheeseman, *Interview: Stephen Rapp Raps on Charles Taylor's 'Hidden Wealth'*, STANDARD TIMES PRESS (Sierra Leone), Oct. 9, 2008, *available at* http://standardtimespress.net/cgi-bin/artman/publish/article_3429.shtml; *Liberian Journalist Could be Forced to Reveal his Source*, STANDARD TIMES PRESS (Sierra Leone), Feb. 5, 2009, *available at* http://standardtimespress.net/cgi-bin/artman/publish/article_3741.shtml (describing the testimony of a Prosecution witness in the Charles Taylor Trial); Byrna Hallam, *Verdict on RUF Trial Today – But Will It Wipe Away the Wounds?* CONCORD TIMES (Sierra Leone), Feb. 25, 2009, *available at* http://allafrica.com/stories/200902250722.html (describing the reaction of forced marriage victim Marion Kargbo to the anticipated verdict).

[145] Alpha Bedoh Kamara, *"Is This the Price for Bringing Peace?"*, PREMIER NEWS (Sierra Leone), Mar. 24, 2009, *available at* http://www.premiernews-sl.com/detail.php?id=754.

[146] Interview with Mohammed Bangura, *supra* note 67; telephone interview with Afua Hirsch, *supra* note 92; e-mail from Isaac Massaquoi, *supra* note 59; e-mail from Anne Bennett, *supra* note 83; e-mail from Umaru Fofana, *supra* note 85; e-mail from Mariama Fornah, *supra* note 87 (stating "many journalists are struggling to cover stories related to court proceedings due to lack of legal training on how to report on court matters").

[147] Telephone interview with Afua Hirsch, *supra* note 92.

inaccuracies. Journalists may use a phrase like "sent away" rather than "convict," thereby miscommunicating what happened in court.[148] As a result, "The [C]ourt sometimes suffers from the general misreporting of issues which is due largely to the technicality involved in court reporting[,] especially of such international jurisprudence."[149] Many articles also lack balance; they quote either the prosecution or defense without interviewing them or subjecting those assertions made to further factual analysis. For example, a recent article about a defense press conference quoted Charles Taylor's lead defense counsel, but offered no rebuttal by the prosecution or explanation of how the defense's version of events differed from that of the prosecution's.[150] Biased reporting is due in part to a need for basic journalism training, but also because many journalists now reporting on the Court were affected by the war themselves. "[Q]uite many people have not forgiven the rebels," said Isaac Massaquoi. "[S]ome of these people are journalists."[151] Defendant Charles Taylor, the former president of Liberia, is a polarizing figure, especially in neighboring Liberia. Few in West Africa regard him with neutrality, and press coverage of his trial has often failed to reflect the presumption of innocence.[152] Indeed, during the three now-completed trials (RUF, AFRC, and CDF), coverage at the time of judgment and sentencing tended to be biased and sensational.[153]

As at Nuremberg and the ICTY,[154] the irregular frequency of trial coverage has proved to be a difficulty for the Special Court. During the first few months of its operations, local media gave "extensive" coverage to the Court, with regular front-page stories in national newspapers.[155] Since then, however, coverage has been "sporadic."[156] Many journalists will only monitor the Court if there is a particularly interesting issue or event.[157] "[I]t is unfortunate that it is only few of us journalists in the country that are really showing interest in reporting the proceedings of the [C]ourt effectively," said regular court reporter Ndeamoh Man-

148 Interview with Mohammed Bangura, *supra* note 67.

149 E-mail from Umaru Fofana, *supra* note 85.

150 Nfa' Alie Koroma, *Who Bears the Greatest Responsibility. . .*, PREMIER NEWS (Sierra Leone), Mar. 25, 2009, *available at* http://www.premiernews-sl.com/detail.php?id=765.

151 E-mail from Isaac Massaquoi, *supra* note 59.

152 Telephone interview with Afua Hirsch, *supra* note 92; *see, e.g.*, Jamila Nuhu Musa, *The Twist in Charles Taylor's Trial*, DAILY TRUST (Nigeria), June 10, 2007, *available at* http://allafrica.com/stories/200706111596.html (reporting that Liberia, Sierra Leone, Africa, and the whole international community have been "anxiously waiting for the trial, which they expect to bring Taylor's guilt to bear on him for the role that he played in the war crimes").

153 E-mail from Anne Bennett, *supra* note 83.

154 Monasebian, *supra* note 5, at 309. Coverage of the ICTR was most likely sporadic as well, although I have found no statement or statistics with regard to that fact.

155 PERRIELLO & WIERDA, *supra* note 134, at 37.

156 E-mail from Isaac Massaquoi, *supra* note 59. Nor has international media coverage of the high-profile Taylor trial proved any more regular; after a week, even the wire services had ceased regular reporting. INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, THE SIERRA LEONE COURT MONITORING PROGRAMME AND THIERRY CRUVELLIER, FROM THE TAYLOR TRIAL TO A LASTING LEGACY: PUTTING THE SPECIAL COURT MODEL TO THE TEST 17 (June 2009), *available at* http://www.ictj.org/en/where/region1/141.html.

157 Telephone interview with Alpha Sesay, *supra* note 83.

saray. "Some [reporters] only turn up when there is going to be a pre-sentence hearing, judgement [sic] or the sentencing itself."[158] Sporadic coverage of the Court is understandable given that day-to-day proceedings do not always make for good reading material; moreover, most media houses have few personnel and cannot afford to dedicate one reporter to the Court.[159] Irregular coverage is nevertheless problematic: effective "watchdog" monitoring – especially of a new and controversial institution like the SCSL – requires constant attention.[160] Articles produced just for the big occasions – like judgment and sentencing – can lack nuance and background because reporters will have missed developments along the way. And, perhaps most importantly for the Court, continuous media attention fosters continued local awareness and support for the SCSL. Over the years, coverage has become more irregular even as the pressure for the SCSL to insure its "legacy" has increased.

Finally, as at the ICTY and ICTR, the SCSL has suffered a dearth of original local reporting. Mr. Tam-Baryoh estimated that fewer than five Sierra Leonean radio stations produce their own, original coverage of the SCSL.[161] Instead, most radio stations and newspapers reproduce the coverage of a few larger content providers. "The print media tend[s] to pick up stories off the wire, rather than provide good ongoing local coverage," said Ms. Bennett in her e-mail. Frequently, media outlets will rely on the Special Court's video and radio segments, with little or no original editorial input. For example, *Cocorioko Newspaper* simply reprinted the SCSL press release and photos from the RUF sentencing.[162] Although some unoriginal coverage is better than no coverage, reliance on external media reports does little to help the SCSL's image as a foreign transplant, alien to Sierra Leoneans, their history, and their daily challenges. "When [Sierra Leoneans] hear on the radio that the program was pre-recorded by the SCSL, then they think that they are hearing propaganda," said Mr. Tam-Baryoh. "If there were greater coverage by local journalists, people would begin to see [the Special Court] as less of a foreign institution."[163] Ms. Mansaray said that local reporters understand better the interests and needs of their target audience:

> I believe with foreign journalists covering the court, it is more for the good of the elite mainly at [an] international level. But with national journalists reporting on the trials, it will benefit the wider Sierra Leonean public at both urban and rural levels. . ..[W]e bring these [sic] informations [sic] to the public in the best way possible that they can be able to

158 E-mail from Ndeamoh Mansaray, Reporter, Cotton Tree News (Apr. 22, 2009) (on file with author).

159 Telephone interview with Alpha Sesay, *supra* note 83. According to Peter Andersen, some newspapers that support the current government have refused to cover the Court at all because the government itself does not support the Court. Telephone interview with Peter Andersen, *supra* note 63.

160 Telephone interview with Alpha Sesay, *supra* note 83.

161 Telephone interview with David Tam-Baryoh, *supra* note 60.

162 Special Court for Sierra Leone Outreach & Public Affairs Office, *Long Sentences for Convicted RUF Leaders*, COCORIOKO NEWSPAPER (Sierra Leone), Apr. 8, 2009.

163 Telephone interview with David Tam-Baryoh, *supra* note 60.

> understand and see the need of having the [C]ourt in post war Sierra Leone.[164]

Peter Kahler agreed that for the Court's version of justice to take root in the region, media coverage must cater to the perspective of the locals: the "BBC would do a good job covering [the Special Court], but local people would not identify, [they would] not see the justice as their own."[165]

C. NGO and Non-Profit Support for Local Coverage

The constant local coverage of the Special Court that does exist is almost entirely supported by international organizations. It is local to the extent that NGOs provide training and infrastructural support to Sierra Leonean journalists, distributing their coverage on NGO-established networks as well as to other subscribing media outlets. Given the difficult economic and journalistic situation in Sierra Leone, "only those [journalists] that are able to obtain some amount of support from NGOs are able to overcome poor practices and unprofessional, shoddy journalism," said Foundation Hirondelle's Anne Bennett.[166] Foundation Hirondelle, a Swiss-based non-profit organization that sets up and operates media services in crisis areas,[167] operates both Cotton Tree News (CTN) in Sierra Leone and Star Radio in Liberia. Roughly a quarter of radio listeners in Sierra Leone listen to CTN's broadcasts, while more than half of all radio listeners have heard CTN programs through some channel.[168] CTN trains its local journalists on newsgathering, reporting, digital editing, and other journalism skills.[169] When the Court was in session in Freetown, CTN reporters like Ndeamoh Mansaray filed daily half-hour radio reports. CTN has also produced live discussions about significant SCSL decisions and special programs on the SCSL and issues of international justice.[170]

When the SCSL moved Charles Taylor's trial to The Hague in the Netherlands, NGOs stepped in to provide funding for West-African-based coverage of the trial. The Open Society Justice Initiative (OSJI) helped finance West Africa Democracy Radio's (WADR) special coverage of the trial.[171] WADR, founded in 2005, offers programming to local community radio stations in the sub-region on issues of government transparency, regional economics, and security, with the aim of fostering open and democratic societies.[172] Station manager Peter Kahler said WADR, with the support of OSJI, employs freelance journalists in The

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164 E-mail from Ndeamoh Mansaray, *supra* note 158.

165 Telephone interview with Peter Kahler, *supra* note 18.

166 E-mail from Anne Bennett, *supra* note 83.

167 Foundation Hirondelle, Who We Are?, http://www.hirondelle.org/hirondelle.nsf/caefd9edd48f5826c12564cf004f793d/a6e5047cb649da7ac1256597007387e6?OpenDocument (last visited Mar, 28, 2010).

168 E-mail from Anne Bennett, *supra* note 83.

169 E-mail from Mariama Fornah, *supra* note 87.

170 E-mail from Anne Bennett, *supra* note 83.

171 Telephone interview with Peter Kahler, *supra* note 18.

172 *Id.*

Hague; these have included one Sierra Leonean and two Liberian journalists.[173] Their trial reports are worked into the daily news and turned into the weekly half-hour radio show "Echoes of a Trial," produced in Dakar, Senegal.[174] These broadcasts are then distributed to five radio stations in Sierra Leone and five in Liberia. WADR also has bureaus in Monrovia and Freetown from which reporters gather local coverage and feedback on the trial. "People see the trial [of Charles Taylor] as a witch hunt," said Mr. Kahler. "Having local reporters covering the trial helps correct that perception." "When you hear a Sierra Leonean or a Liberian reporting from The Hague, that's important."[175] The BBC World Service Trust, the non-profit arm of the BBC, also has funded Sierra Leonean and Liberian journalists like Mariama Fornah to travel to The Hague and cover the Taylor trial.[176] In addition to providing training to these journalists on court reporting and issues particular to the SCSL, as well as laptops and recorders, the World Service Trust then distributes their reporting to nearly every radio station and newspaper in Sierra Leone and Liberia; occasionally, reports have been translated into French and broadcast in Guinea as well.[177] CTN, for example, broadcasts BBC World Service Trust radio reports as its coverage of the Taylor Trial.

Court monitoring projects that are not specifically focused on journalism have unexpectedly filled the void produced by scarce original local reporting. Alpha Sesay, a Sierra Leonean lawyer, helped found the Sierra Leone Court Monitoring Programme (SLCMP, originally the Special Court Monitoring Program) in 2004 with the support of the International Center for Transitional Justice.[178] Mr. Sesay, who had interned with the SCSL, started the project primarily to insure a constant source of accurate information and analysis of the Court's proceedings.[179] The SLCMP put monitors in the courtrooms in Freetown who attended nearly every session; these monitors created detailed summaries that were posted to the SLCMP's website. The SLCMP also aimed to provide feedback to the Court obtained from engaging civil society and the public. Mr. Sesay viewed the lack of consistent media coverage of the SCSL a problem: the media was not fulfilling its role as a check on judicial power. "There had to be a measure to hold the Special Court accountable to the people," Sesay said.[180] As an unexpected consequence of the Project, journalists who did not have time to cover the SCSL themselves began to rely on the SLCMP's posted summaries. Some news outlets reproduced them in their entirety.[181]

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[173] *Id.*

[174] *Id.*

[175] *Id.*

[176] E-mail from Umaru Fofana, *supra* note 85; e-mail from Mariama Fornah, *supra* note 87.

[177] E-mail from Umaru Fofana, *supra* note 85; e-mail from Mariama Fornah, *supra* note 87.

[178] Telephone interview with Alpha Sesay, *supra* note 83.

[179] *Id.*

[180] *Id.*

[181] *Id.*

When the Taylor trial was moved to The Hague, Sesay began hearing expressions of concern from journalists who could not afford to cover a trial so far away. In response, he founded CharlesTaylorTrial.org – part blog, part wire service – with the primary purpose of providing West African journalists information on the Taylor trial.[182] As with the SLCMP, CharlesTaylorTrial.org has monitors post daily summaries and issue analyses. "For some journalists, [the website] has been their sole source of information," said Mr. Sesay in his interview. Some newspapers reproduce the summaries word for word, and the website has become the *de facto* source for information on the trial.[183] Traffic on the website during key witnesses such as former Liberian president Moses Blah is huge, according to Mr. Sesay. Radio stations in Liberia used the website's summary of Blah's testimony as the cornerstone of radio discussions. Mr. Sesay, who has since conducted training for Sierra Leonean and Liberian journalists, said providing content for journalists will achieve a broader goal: "To get information to the public, we need the journalists."[184]

Where courts are not located "in theater," such as the SCSL, websites such as CharlesTaylorTrial.org provide a cheap and efficient means of supplying information to the public and journalists who cannot attend in person. No doubt, given the success of Mr. Sesay's projects, similar monitoring programs will be used for future international courts. However, such independent projects cannot substitute for a fully functional local media; they are only band-aids for a void that will remain once the court disappears.

VI. A Missing Link in the Legacy

Viewing local media as a means to an end – the end being the broader goals of criminal justice – is at once accurate and problematic. It is accurate because, as Mr. Sesay explained, journalism is often the most effective and efficient way to inform the public at large about trial proceedings and the rule of law. It is problematic because it encourages the notion of journalism as the servant of narrow, institutional and time-specific goals. Such a mindset indicates that once verdicts are read and the appeals processed, it does not matter whether a strong, independent media remains or not.

For all its focus on legacy, the SCSL has failed to work journalism into that picture in any way other than as a means. Certainly, the primary legacy of the SCSL should be legal – strengthening the national courts of Sierra Leone and reestablishing the rule of law. But if the media is the handmaiden of justice, then omitting the media from this permanent legacy is more problematic than it may otherwise appear. As Ms. Hirsch explained, an ethical, robust, and legally liter-

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[182] The Trial of Charles Taylor, http://charlestaylortrial.org/ (last visited Mar. 28, 2010). The website is supported by non-profit organizations, including Open Society Justice Initiative, the War Crimes Study Center at Berkeley, and The International Senior Lawyers Project. The Trial of Charles Taylor, Who We are, http://www.charlestaylortrial.org/about/who-we-are/ (last visited Mar. 28, 2010).

[183] *Charles Taylor Order Bocakrie* [sic] *Killed*, THE ANALYST (Liberia), Sept. 10, 2008, *available at* http://allafrica.com/stories/200809101011.html (reproducing the charlestaylortrial.org daily summary and noting that "The Analyst lifts this from the trial website.").

[184] Telephone Interview with Alpha Sesay, *supra* note 83.

ate press is critical for lasting stability, especially in a post-conflict nation like Sierra Leone. A newly revived national judicial system needs to be monitored for corruption and other failures, while the huge influx of aid money and concomitant contracts require close scrutiny so that funds are not mismanaged.[185] If the press is not able to assume these tasks, it is unlikely that they will be fulfilled.

It must be acknowledged that the SCSL has very limited funds[186] and a narrow mandate: to prosecute "persons who bear the greatest responsibility" for the atrocities in Sierra Leone.[187] Within this framework, the SCSL could only devote itself to a very specific set of the problems confronting Sierra Leone. To do otherwise would have been to detract from the Court's central adjudicative mission. Nor, as this paper should have already shown, has the Special Court ignored the role of the media. In fact, as part of its legacy building strategy, the SCSL created the "Strengthened Media Coverage Project," aiming to deploy journalists to The Hague and to train and mentor journalists in the issues of transitional justice.[188]

However, by most accounts, the lasting impact of the SCSL on the media in Sierra Leone will be minimal. Mr. Sesay, who has researched legacy issues as a contractor for the SCSL, said that both in his research and his own interactions with journalists, he found that "The Court has not done so much for the media." On the other hand, many Sierra Leonean journalists have become more familiar with the judicial process through interactions with the Court, said Ms. Hirsch.[189] But Anne Bennett argues that most of the improvement in the media has occurred because of the parallel efforts of the international community – that is, NGOs like Foundation Hirondelle.[190] This appears accurate, given the dearth of original local coverage, as discussed above, and the large role that NGOs have played in what regular coverage does occur. While NGO-support for the local media is important – and necessary given the economic situation in Sierra Leone – it can be problematic in its own right, especially when these organizations produce their own reports in lieu of more traditional local coverage. Such reporting can suffer from conflicts of interest[191] and a restricted view of the issues.

A. The Need for Consistent Training

In sum, the SCSL has failed to *invest* in local media to the same extent as other sectors of society. This may be in part because the Court can attempt to educate the populace about the trial proceedings through direct outreach, thus bypassing

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185 Telephone interview with Afua Hirsch, *supra* note 92.

186 The Special Court is financed primarily through voluntary contributions from U.N. Member States. Cockayne, *supra* note 10, at 630.

187 Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone art. 1, U.N. Doc. S/2002/246/Annex (Jan. 16, 2002), *available at* http://www.specialcourt.org/documents/SpecialCourtAgreementFinal.pdf.

188 SPECIAL COURT FOR SIERRA LEONE, *supra* note 98, at 39.

189 Telephone interview with Afua Hirsch, *supra* note 92.

190 E-mail from Anne Bennett, *supra* note 83.

191 Monasebian, *supra* note 5, at 321.

the need to educate the media. However, the idea that journalism can be skipped as a link in the chain is misguided if only for reasons of long-term stability and the rule of law. Although the SCSL has limited resources, given the funding the Court successfully procured for outreach activities, it would not have required much additional financing or staffing to incorporate frequent training for journalists into the SCSL's legacy-building strategy.

The Court has conducted some training. Outreach and Public Affairs has coordinated a couple two-week training programs for journalists organized in conjunction with the Sierra Leone Association of Journalists.[192] Mr. Moriba said these sessions were well-attended.[193] Further, as noted above, the SCSL has worked with the BBC World Service Trust to coordinate West African journalists' coverage of the Taylor trial in The Hague, including obtaining for them the information, interviews, and the logistical support they need. In addition, office staff are generally available to answer journalists' questions.

But such piecemeal efforts are not enough. Across the board, independent observers and journalists said training for journalists on issues related to the Court has been inadequate.[194] Several individuals specifically said they thought the Court should do more.[195] According to Mr. Sesay, while the SCSL has targeted other specific constituencies with outreach events – in particular, law enforcement, the army, and the legal sector – the Court has not done nearly as much for journalists.[196] "I think the Court should do more not only to engage journalists, but to give them the necessary capacity to be able to be engaged," Mr. Sesay said.[197]

As with local coverage of the SCSL, the training that does take place is spearheaded by non-profit organizations like the Sierra Leone Court Monitoring Programme. These groups will often invite the SCSL to send Court officials to the events. For example, the prosecution sent Mohammed Bangura to a training session for journalists held in Freetown in August 2008; the session was organized by the SLCMP and the BBC World Service Trust.[198] At the training session, Mr. Bangura discussed the role of the prosecution, explained basic legal terms and concepts, and encouraged the journalists to read the Rules of Procedure and Evidence.[199] Although Mr. Bangura praised the BBC World Service Trusts' efforts at educating journalists about the Taylor trial, he said more train-

192 Interview with Solomon Moriba, *supra* note 57.

193 *Id.*

194 Telephone interview with David Tam-Baryoh, *supra* note 60; telephone interview with Alpha Sesay, *supra* note 83; telephone interview with Afua Hirsch, *supra* note 92; telephone interview with Ndeamoh Mansaray, *supra* note 115; e-mail from Isaac Massaquoi, *supra* note 59; e-mail from Anne Bennett, *supra* note 83.

195 Telephone interview with David Tam-Baryoh, *supra* note 60; telephone interview with Alpha Sesay, *supra* note 83; telephone interview with Afua Hirsch, *supra* note 92; telephone interview with Ndeamoh Mansaray, *supra* note 115.

196 Telephone interview with Alpha Sesay, *supra* note 83.

197 *Id.*

198 Interview with Mohammed Bangura, *supra* note 67.

199 *Id.*

ing is needed: "Other institutions should come on board and engage media practitioners so that they will disseminate the message about the trial in The Hague."[200] Ms. Hirsch, who organized a training session for fifty senior Sierra Leonean and Liberian reporters and editors in Monrovia, likewise said the single training session was far from adequate. "A lot of training for journalists is done on a really patchy basis," Ms. Hirsch said. "What they really need is consistent training. The journalists said, '[t]his is great,' but they want this type of training session every month."[201] Ms. Hirsch was spurred to organize the three-day training session because inaccuracies in local coverage of the Taylor trial had lead to widespread misunderstandings about the trial process.[202] In particular, Ms. Hirsch said that it was obvious that Liberian journalists – a prime constituency for coverage of the Taylor trial – in particular lacked basic knowledge and court reporting skills.[203] In fact, her opinion that the SCSL has overlooked Liberian journalists, who have less access to SCSL staff and resources, is shared by Mr. Sesay, who has also conducted training for Liberia journalists, and who stated in his interview: "Liberian journalists have more challenges than Sierra Leoneans; outreach programs have not been effective there; the soul source of information is our website." If the Special Court organized more training for journalists, it would likely see both short term and long term improvements in the accuracy of coverage of the SCSL as well as the national courts and government.

B. Expanding Coordination with NGOs and Non-Profits

If marginalized constituencies like Liberian journalists are not to be overlooked and more frequent training sessions are to have lasting impact on West African journalists, then future courts in post-conflict areas will need to expand their comprehensive communications strategy. This strategy should move beyond increasing coverage of the court itself with an eye toward fostering adaptable skills.

Indeed, it seems that in Sierra Leone, much of the interest and resources for an enlarged media initiative are already there, but have not been organized or efficiently deployed. Greater coordination with international NGOs and local non-profit groups would go a long way toward a more lasting media strategy. In Sierra Leone, Ms. Bennett recommended that the organizations concerned with media development convene with the Special Court to "articulate a common approach to improving coverage of international or transitional justice in the [Sierra Leonean] media." This, she said, would "avoid overlap and gaps and allow for

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[200] Betty Milton, *Journalists Conclude Training on the Taylor Trial*, AWOKO (Sierra Leone), Aug. 22, 2008, *available at* http://awoko.org/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=3617&cntnt01returnid=15 (quoting Mr. Bangura).

[201] Telephone interview with Afua Hirsch, *supra* note 92.

[202] *Id.* The training session ran from April 24 to April 26, 2008, and was coordinated by Advocates for International Development, the International Centre for Media Studies and Development in West Africa, and the law firm Reed Smith Richards Butler, with financial support for Open Society Justice Initiative.

[203] *Id.*

the pooling of resources and greater synergy."[204] Mr. Sesay pointed out that the SCSL could have engaged with the communications schools in Freetown, working coverage of the Court into the educational requirements of the student journalists. Future courts in post-conflict environments can assume a leadership role among the NGOs and other organizations without much expenditure of resources. Simply discussing needs and delegating tasks could, as Ms. Bennett argued, mobilize the resources already available more effectively. Furthermore, the court could then monitor the information communicated to journalists to a greater degree, making sure that accurate information was reaching journalists and the public. And, since courts like the SCSL are short-lived institutions, it could leave behind a better-coordinated non-profit sector to continue to work with the media.

VII. Conclusion

The Special Court for Sierra Leone is already a success story: three completed trials and a slew of convictions in just over six years speak to the effectiveness and efficiency of the "hybrid" court model. Certainly there are many areas for improvement and for new approaches, and not just in providing a more lasting legacy for local journalists. In the end, no one would call the SCSL a failure. The Special Court's communications strategy and approach to the local media is one area in which the SCSL has made major strides over preceding international tribunals. These are due to the early formation of press and outreach sections. The press section proactively sought media coverage by effectively producing and packaging information for journalists and using innovative means of information distribution when confronted with infrastructural challenges. Most importantly, the Special Court adopted a facilitative attitude toward local journalists with the result of making the Special Court more accessible to the Sierra Leonean media and thus encouraging broad coverage of the Court.

The creation of a robust local press in a post-conflict nation is not a small task. Courts cannot and should not take on the project alone. Nevertheless, international criminal courts can take a leadership role in the process. Indeed, their own success depends on it.

[204] E-mail from Anne Bennett, *supra* note 83.

THE SLY RABBIT AND THE THREE C'S: CHINA, COPYRIGHT AND CALLIGRAPHY

Marc H. Greenberg†

Abstract

This article posits that among many different methods available to improve enforcement of Western-style intellectual property (IP) laws in China, ultimately, the most effective of these may be to support and aid the slow but steady shift in Chinese culture away from a collective society view towards an individual ownership view with broader support for the concept of individual rights and freedoms on a variety of fronts, not just the IP arena. Within this context, I note in passing that the movement in China to embrace many of the attributes of Western culture is a mixed blessing, as media coverage of the rise in obesity and lung cancer in China are examples of a by-product of some of the less salutary aspects of Western culture.[1]

The merit of this hypothesis is shown in this article's discussion of the specific example of calligraphy arts, and the more general example of modern art creation and marketing in China. The teaching and marketing of modern art, and of modern calligraphy as an art form, provide a demonstration of my hypothesis. Calligraphy symbols in China are, in essence, pictograms that draw their inspiration from things found in nature – trees, rocks, animals, elements, etc. For most of the history of calligraphy as an art form in China, history supported the view that calligraphy symbols could not, and should not, be protected by copyright – just as in patent law, one cannot obtain a patent for items preexisting in nature.

However, modern calligraphy art uses the symbols of traditional calligraphy only as a jumping-off point. The modern works contain interpretations of these classic symbols that are virtually unrecognizable, and are imbued so deeply with the artist's own vision and perspective that they often bear no visible resemblance to their source symbols at all. Under a Western view these symbols would, by virtue of their age and utilitarian function, be in the public domain, and the new calligraphy artists would face no derivative rights challenges and would be entitled to claim sole ownership of these works.

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[1] *Quarter of Chinese Adults are Overweight: U.S. Study,* AGENCE FRANCE PRESSE, July 8, 2008, *available at* http://afp.google.com/article/ALeqM5iJz_n7mH6q81krzVVURHLvz347SQ.

The first section of this Article examines modern art in China. Two key trends emerge, each of which has a different impact on the recognition and enforcement of copyright law in China. The first trend is the growth of the copy art industry: the use of assembly-line techniques to produce cheap, popular artworks, often copies of traditional and contemporary art, including popular works of European and American artists. The second trend is the unexpected recognition of a burgeoning contemporary art scene in China and how its leading artists have become "rock stars" in their country and beyond, with their work bringing multi-million dollar sales and allowing them to enjoy newfound individual wealth and status, contrary to longstanding tradition for Chinese artists.

The second section provides an overview of the history of copyright in Western European and U.S. law, with greater detail given to copyright in China. Copyright law in China is traced from Imperial age origins, followed by a consideration of how copyright has been implemented during modern times in both the communist nation of the People's Republic of China (PRC) on the mainland, and the Republic of China (ROC) on the island of Taiwan.

The third section of this Article discusses why, despite efforts by both the Chinese government and Western governmental entities, the attempt to import Western-style copyright enforcement mechanisms has been largely unsuccessful to date. This section explores the need for approaches other than those rooted in the law, suggesting that changes in social norms and the migration of China into a "socialist market economy" may provide the solution to the problem of developing a cultural shift in favor of the kind of private ownership approach that best supports a vigorous copyright protection system.

The final section explores how Chinese Calligraphy, a classic and highly traditional art form in China, which eschewed the concept of individual ownership, has, through law, economics and normative social expressions, evolved into a very different contemporary form of artistic expression. It is marked by individual expression and ownership, and offers this evolution as a basis for suggesting that as this and other forms of fine art evolve in China, they present an opportunity to convert those artists into the kind of stakeholders, to borrow the concept articulated by Professors Peter Yu and William P. Alford in many of their published works, which may provide the best opportunity to create an environment more conducive to successful enforcement of copyright protection for members of the Chinese creative community.

Introduction

There is a classic Chinese proverb that reads: *Jiao tu san ku,* or – "a sly rabbit will have three openings to its den." The proverb's meaning has been interpreted to be that in order to succeed one must have several alternatives. Applicable to many circumstances, this proverb aptly describes the approach that the United States and the European Union (referred to herein collectively as the "West" or "Western") need to take in their attempts to develop an effective means for enforcing copyright rights in both Taiwan and the People's Republic of China.

As discussed in greater detail in Section III of this Article, the West has, for at least the past forty years, attempted to foster a stronger climate of enforcement relative to copyright law in the PRC and the ROC by exerting external pressure, primarily in the form of international treaties and trade agreements. While these efforts, along with significant internal economic factors which played an even greater role, contributed to the adoption of Western-style copyright law in both the PRC and ROC, these laws have not been accompanied by a strong enforcement regimen. Both countries remain the source of vast quantities of pirated goods, primarily in the sound recording, motion picture, computer games and software industries. To a lesser, but by no means insignificant degree, this laxity in enforcement has also affected the market for fine art in and from China.

Like the sly rabbit, the West needs to develop alternative approaches to the issue of copyright enforcement in China. This is not to say that the approaches used to date have not had some impact. Without these laws in place there would not be the basic structure necessary to begin the needed process of a cultural and political view that supports private ownership and, therefore, intellectual property rights and the means to enforce those rights. But laws alone do not effect cultural change – one need look no farther than the music downloading history in the United States for support for this view. Cultural change also presents numerous challenges, particularly where the goal of the change is to effect legal reforms. In part, the difficulty of effecting cultural change stems from the reality that culture itself is an enormously complex concept, and within any nation culture is continually changing. The mutability of culture makes it particularly difficult to serve as an engine of legal reforms, since those reforms are generally intended to function in a far more static environment than the cultural one.

Therefore, to effect the kind of cultural change that will, like the sly rabbit, give defenders of copyright rights multiple approaches to successful implementation of an accepted copyright enforcement regime, care must be taken to tailor approaches that incorporate normative change, economic incentives, and a rule of law respectful of the cultural tradition that eschews law as a basis for governance. It is the goal of this article to articulate some of the issues involved in meeting this challenge, and to offer at least one example where internal changes in one area of art – calligraphy – may offer an opportunity to develop one successful new approach.

I. Modern Art in China – From Rock Stars to Art Factories

The death of Mao in 1976 and the concurrent termination of the widely reviled Cultural Revolution began to allow a return of limited rights for authors and creators of intellectual property works. In the Chinese art world, this has manifested itself principally in two trends: the rise of high-profile artists whose work is sought after by local and international collectors and museums, and the growth of factory art "manufactured" in mass quantities and sold at trade fairs like the Canton Art Fair.[2]

[2] Keith Bradsher, *Own Original Chinese Copies of Real Western Art!*, N.Y. TIMES, July 15, 2005, at A1, *available at* 2005 WLNR 11101898.

Artists like Chen Yifei, Zhao Wuji and Wu Guanzhong create contemporary art that sell for hundreds of thousands, and even millions, of dollars.[3] However, the biggest market in the United States for "original" Chinese oil paintings is for the mass-market products, many of which find their way into condominiums in Florida, second homes nationwide, and in hotels and restaurants.[4] In most instances, these mass-produced paintings are produced in a factory, via an assembly line, with hundreds of painters specializing in trees, skies, or flowers, for example.[5] Despite the mechanical nature of these works, which are often copies of famous paintings, both new and old, Chinese exporters claim that since each copy is made by hand, and is therefore slightly different than the original and other copies thereof, these works do not violate copyright – a view vigorously disputed by artists and trade groups in the United States.[6] This argument failed to convince a federal judge in Wisconsin, for example, who authorized the seizure of dozens of paintings displayed in the Gold Coast Gallery in Lake Geneva, Wisconsin, based on a finding that the works directly, and almost literally, were infringing copies of the paintings of wine and wine bottles created by American painter Thomas Arvid.[7]

After years of lackluster sales of traditional calligraphy and historical artworks from Imperial China, the post-Mao growth in contemporary art has been embraced by the Western world with unparalleled enthusiasm, as evidenced by skyrocketing sales and media coverage.[8]

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[3] *Id.*

[4] *Id.* Bradsher profiles 26 year-old artist Zhang Libing, who estimates that he has painted up to 20,000 copies of van Gogh's works. He tells the story of a wholesaler in Manchester, England who went to the Canton Art Fair and placed an order for six 40-foot shipping containers filled with paintings to be delivered to ports in Europe and the United States. Retailers like Pier 1 Imports and Bed, Bath & Beyond are also major customers of this artwork.

[5] *Id.* Bradsher notes that bulk purchase imports of Chinese paintings nearly tripled from 1996 to 2004, with bulk shipments in 2004 reaching $30.5 million.

[6] *Id.* Robert Panzer, then executive director of the Visual Artists and Galleries Association, notes that paintings produced before the 20th century are in the public domain and may be freely copied, but that modern works still under copyright protection may not be copied.

[7] Keith Bradsher, *Arts, Briefly; Paintings Seized*, N.Y. TIMES, Oct. 1, 2005, at B10, *available at* 2005 WLNR 15467796. In an interesting twist, the copy-artist industry has given rise to at least one photographer using it as a basis for creating an artistic series of photographs of the copy-artist's best work. In 2007, Hong Kong-based photographer Michael Wolf created a series of photos exploring the world of these painters, entitled *Copy Art.* He photographed the painters in alleyways in China, displaying their remarkably faithful copies of works by Warhol, Richter, Lichtenstein and other leading Western artists. The series was exhibited at the Robert Koch Gallery in San Francisco in 2007, which the Gallery described as a "development that distinctly reflects the rise of a new global economy and the trend of mass production. The series uncovers the odd and subtle interplay between capitalism and the Chinese tradition of developing artistic skill by copying the works of master artists." Michael Wolf, Robert Koch Gallery, www.kochgallery.com/exhibitions/pr_MWO07.html (last visited Mar. 2, 2010).

[8] *See, e.g.* Barbara Pollack, *The Chinese Art Explosion*, ARTNEWS, Sept. 2008, *available at* http://www.artnews.com/issues/article.asp?art_id=2542; David Barboza, *Chinese Art Is as Hot in the East as It Is in the West*, N.Y. TIMES, Nov. 26, 2006, at E3, *available at* 2006 WLNR 20601856 [hereinafter Barboza, *Chinese Art*]; David Barboza, *Chinese Art Market Booms, Prompting Fears of a Bubble*, INT'L. HERALD TRIB., Jan. 4, 2007, *available at* http://www.nytimes.com/2007/01/04/world/asia/04iht-china.4097207.html [hereinafter Barboza, *Chinese Art Market Booms*]; Wu Jing, *Yearender: Up-and-Down Year for China Art Market, Credibility on the Line*, XINHUA, Dec, 13, 2006, *available at* LEXIS.

An example of the impact these new artists have on the Chinese art world is found in the work of Zhang Xiaogang, whom Barbara Pollack, in a December 2007 *Vanity Fair* article on the new Chinese art scene, labeled an "unlikely rock star figure". In the 1990's, his work was banned by the Chinese government, deemed unfit for public display, and only sold outside of China. Now his works hang in state-approved galleries, and he has become one of China's highest-earning artists. His individual paintings fetch prices between $500,000 and $3 million.[9] An individual artist earning these kinds of fees was unheard of in China until only recently. Now, in the words of one commentator:

> That has all changed. These days, China's leading avant-garde artists have morphed into multimillionaires who show up at exhibitions wearing Gucci and Ferragamo. Wang Guangyi, best-known for his Great Criticism series of Cultural Revolution-style paintings emblazoned with the names of popular Western brands, like Coke, Swatch and Gucci, drives a Jaguar and owns a 10,000-square foot luxury villa on the outskirts of Beijing.[10]

In one of his 2006 *New York Times* articles covering the contemporary art scene in China, David Barboza writes about Xu Beihong, "one of China's best-known early-20th-century painters," whose painting *Slave and Lion* sold at Christie's for $7 million, a record price for any Chinese painting.[11] A Zhang Xiaogang painting entitled *Tiananmen Square* depicting a view of the infamous square devoid of life, but marked by delicate red lines that hint at the 1989 massacre, sold for over $2.3 million in the same Christie's auction.[12]

Pollack concludes her article by noting, "Young Chinese artists are free to think as selfishly as anyone who wields a paintbrush in Brooklyn or on the Lower East Side. It seems the Chinese government has managed to defuse the explosive potential of contemporary art simply by allowing it to flourish."[13]

The current explosion of building activity in China has been accompanied by the creation, for the first time in its history, of many new museums in outlying communities far from the major urban areas of Shanghai and Beijing.[14] There are now more museums than original works of the great masters of Chinese art. The cultural attitude that views replication of these works by pupils as an innocent activity now gives rise to instances where *copies of* works, rather than originals, hanging in the museum, are not identified as copies.

Holland Cotter, writing for the New York Times, summarized this issue:

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9 Barbara Pollack, *Art's New Superpower*, VANITY FAIR, Dec. 2007, at 318, *available at* LEXIS.

10 Barboza, *Chinese Art Market Booms*, *supra* note 8.

11 Barboza, *Chinese Art*, *supra* note 8.

12 *Id.* Similarly, Barboza reports of a sale the previous week at the Beijing Poly Auction, of a huge panoramic painting by Beijing artist Liu Xiaodong, titled *"Newly Displaced Population."* The work sold for more than $2.7 million.

13 Pollack, *supra* note 9.

14 Holland Cotter, *China's Art Museums, Caught in Tension of Past and Future*, N.Y. TIMES, July 4, 2008, at A1, *available at* 2008 WLNR 12565889.

> Even less acceptable from a Western viewpoint is the casual approach some Chinese museums take toward exhibiting copies of artworks in place of originals. Fragile works that cannot survive gallery exposure may be represented by photographs. And when a well-known piece of art is unavailable, it may be considered preferable to display a copy – perhaps not acknowledged as such – rather than disappoint visitors.[15]

As Chinese art has become increasingly popular among Western collectors and museums, problems inherent in the conflicting cultural viewpoints regarding forgery have come to the fore. Frederick Warne Ltd., a London-based division of Penguin Books, brought a copyright infringement claim against the China Social Sciences Press for their unauthorized republication in Chinese of Beatrix Potter's *The Tale of Peter Rabbit*. The suit, while acknowledging that the text had entered into the public domain, claimed rights to protected illustrations and the author's name. The Beijing No. 1 Intermediate People's Court ruled in 2004 that the Chinese publisher had improperly reproduced the drawings, and upheld a government order to confiscate 20,000 copies of the Chinese-language version of the book.[16]

In an unusual case in 2002, the family of a Chinese artist was successful in a copyright action brought against the Museum of Chinese Revolution ("Museum"). Given that the Museum is a state institution, it took unusual bravery for the heirs of artist Dong Xiwen to bring this suit.[17] Dong had painted a work entitled *The Founding Ceremony* in 1949 to commemorate the founding ceremony of the People's Republic of China. The work was immediately collected by the Museum in 1953, shortly after its completion. In 1999, to mark the fiftieth anniversary of the founding of the Republic, the Museum authorized a Shanghai company to issue and sell gold-leaf copies of the painting, without obtaining any right to do so from the Dong family.[18] Adding insult to injury, the Shanghai publisher claimed to have exclusive licensing rights from the Museum, and threatened copyright infringement action against any who copied their print.[19]

After two years of trial, the Beijing No. 2 Intermediate People's Court found against the Museum, ordering it to make a public apology to Dong Xiwen's widow and pay the family 260,000 Yuan (equal to $31,000 USD at that time) in monetary compensation.[20] Hou Yimin, a renowned artist and professor with the Central Academy of Fine Art in China, commented on the ruling:

> "It honors the artist's labor and copyright and is popular among us artists". . ."We artists used to care more about our contributions to society and so long as our paintings make an impact on society and get recog-

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[15] *Id.*

[16] Brian Sisario, *Arts, Briefly*; N.Y. TIMES, Dec. 27, 2004, at E2, *available at* LEXIS.

[17] Zha Xin, *Feature: Lawsuit to Honor Artist's Copyright*, http://www.chinaiprlaw.com/english/letters/letter13.htm (last visited Mar. 2, 2010).

[18] *Id.*

[19] *Id.*

[20] *Id.*

> nized, it is fine". . ."We didn't care so much about who used it and for what purpose. Now we should change this concept of ours."[21]

These new trends indicate support of individual ownership and entrepreneurship in art and are a vast departure from past approaches to art and the role of copyright law in protecting original art in China. To understand how we have arrived at this point, it is worthwhile to consider the evolution of copyright law, both in the West and throughout China's complex and long history.

II. Copyright Law in the West and in China

A. Western Copyright Law: Common Approaches in Europe and the United States

There can be no question that the first copyright laws in the European tradition, such as Britain's Statute of Anne, have as their principal concern the economic well-being of book publishers.[22] While some commentators note that an additional purpose of copyright laws was to provide the government an opportunity to control content and to suppress heretical or anti-government views,[23] what remains inescapably true is that copyright, in its nascent state, had little to do with protecting the rights of the authors of the works involved. Indeed, the first 140 years of copyright protection in the West is notable for its limited scope – initially, only the right to make copies was protected.

This began to change in 1852, when the first steps towards what is referred to as the "proprietarization" of author's rights manifested itself in the decision of some European nations to add translations of works to the scope of copyright.[24] By the time the Berne Convention was revised in 1908, translations as a protected element of copyright law were codified and added to the Convention.[25]

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[21] *Id.* Money was not at the heart of the Dong family claim. Plaintiff Dong Yisha, daughter of the artist, said: "We are not zealous about the money at all. We wanted to make it clear that the painting was the result of my father's hard work and we just asked for respect for his work." *Id.*

[22] An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies, During the Times Therein Mentioned, 8 Ann., c. 19 (1709) (Eng).

[23] This view is discussed in Peter K. Yu, *Three Questions That Will Make You Rethink the U.S.-China Intellectual Property Debate*, 7 J. MARSHALL REV. INTELL. PROP. L. 412, 429-430 (2008). Professor Yu refers readers interested in a more extensive discussion of this viewpoint to AUGUSTINE BIRRELL, SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS (Cassell 1899); CYPRIAN BLAGDEN, THE STATIONERS' COMPANY: A HISTORY 1403-1959 (Harvard Univ. Press1960); and LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 28-77 (Vanderbilt Univ. Press 1968).

[24] I am indebted to Professor Maurizo Borghi for this insight, which was part of the discussion of his work in progress, entitled *Copyright Beyond the Right to Copy; Translations, Adaptations and Creative Reworking in 19th Century Law*, presented at the 8th Annual Intellectual Property Scholars Conference, August 7-8, 2008, at Stanford University. *See* http://docs.google.com/viewer?a=v&q=cache:wbOdWfGrj7IJ:www.stanford.edu/dept/law/ipsc/pdf/borghi-maurizio-ab.pdf+copyright+beyond+the+right+to+copy&hl=en&gl=us&sig=AHEtbRLu-Z7W-n7bHkIiA3eMjEOmuKkHw.

[25] *Id. See also* Berne Convention for the Protection of Literary and Artistic Works art. 2(3), July 24, 1971, 828 U.N.T.S. 221, *available at* http://www.wipo.int/export/sites/www/treaties/en/ip/berne/pdf/trtdocs_wo001.pdf [hereinafter Berne Convention]. "The Berne Convention sets forth the minimum protection to be granted to copyright owners. Each member state of the Berne Convention recognizes works authored by nationals of other contracting states as copyrighted. The Berne Convention eliminates the need for copyright registration or notice, as copyright is now automatically granted." Berne Convention

While this right was not explicitly enumerated in the U.S. Copyright Law of 1909, it is implicitly granted via the right:

> To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art.[26]

The relative harmony between Europe and the U.S. during the first two hundred years of copyright law in the West would begin to crack in this first decade of the twentieth century, as the revisions to the Berne Convention and the adoption of the Copyright Law of 1909 in the U.S. revealed significant differences in approach.

B. Western Copyright Law Divergences – Formalities and Moral Rights

The Berne Convention indicates a strong policy favoring a prohibition against formalities being required as a condition precedent to the grant of copyright protection.[27]

However, the Copyright Act of 1909 created a very strict set of formal procedures, and authors who failed to comply with those procedures suffered the loss of all protection. For example, rights holders were entitled, upon compliance with a formal registration process, to copyright protection for an initial period of 28 years.[28] A right of renewal for an additional 28 years was available, once again upon completion of a formal registration process.[29] This system has been

for the Protection of Literary and Artistic Works, Eisil, http://www.eisil.org/index.php?sid=751561118&id=557&t=link_details&cat=0&having=225338 (last visited Mar. 2, 2010).

[26] Copyright Act of 1909, Pub. L. No. 60-349, §1(b), 35 Stat. 1075 (repealed 1976). The right to protection afforded to derivative works has always been a controversial element of modern copyright law. Critics of this expansion correctly note that most, if not all, artistic expression borrows heavily from the past, and that efforts to limit that practice may be deployed by owners seeking only to protect their own interest, even at the expense of the creative process of their successors. Creators rebut this claim by noting that without derivative rights protection, they are subject to wholesale appropriation of their artistic expression, which can be taken with impunity by merely changing enough of the expression to avoid liability for direct copying. This doctrine did not, as is discussed *infra*, gain acceptance in other parts of the world, and in particular was generally rejected throughout Asia.

[27] Berne Convention, *supra* note 25, art. 5(2). This section provides, "The enjoyment and exercise of these rights shall not be subject to any formality; . . .". *Id.* Various commentators have noted that the definition of "formalities" prohibited by Berne is fluid and expansive:

> Formalities are any conditions or measures – independent from those that related to the creation of the work . . . or the fixation thereof . . . without the fulfillment of which the work is not protected or loses protection. Registration, deposit of the original or a copy, and the indication of a notice are the most typical examples.

MIHALY FICSOR, GUIDE TO THE COPYRIGHT AND RELATED RIGHTS ADMINISTERED BY WIPO: AND GLOSSARY OF COPYRIGHT AND RELATED RIGHTS AND TERMS ¶ BC-5.7 (2003). Formalities are "everything which must be complied with in order to ensure that the rights of the author with regard to his work may come into existence." SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986 at 222 (Kluwer 1987).

[28] Copyright Act of 1909 §23.

[29] Copyright Act of 1909 §23.

characterized as an "opt-in" system since it required affirmative steps by the owner of the rights to secure the benefits of copyright protection. The opt-in nature of the system was criticized over time because the renewal requirement and the requirement for strict compliance with an array of formalities resulted in the loss of protection for many otherwise deserving creators and their heirs.

A further divergence from the Berne Convention found in the 1909 Act was the requirement that notice of copyright, ©, be placed on all published copies of a work. While curative provisions existed for inadvertent failures to place the notice on a work, if the failure was intentional, the work was deemed to have been dedicated to the public domain, and the author lost any right to control its use.[30]

These formalities led, over time, to a considerable number of authors and their heirs losing their rights to works due to a failure to comply with one or more of these formalities. Common reasons for loss of rights included failures to affix notice on the works and allow them to be published for many years without notice (thereby precluding the ability to effect a cure for the error), and failure to renew the work after the first 28-year term expired. Authors voiced these concerns to Congress and sought redress.

C. Western Copyright Law: The Prodigal Child Returns: The U.S. Movement To Harmony With Berne

The 1976 Copyright Act attempted to address those concerns by eliminating most of the formalities required by the 1909 Act and by substituting an automatic protection scheme for the life of the author plus fifty years, thereby eliminating the need for renewal as well.[31] Since protection of the law was afforded to authors and other creators as soon as an original work was fixed in a tangible medium of expression, the 1976 Act has been characterized as creating an "opt-out" system of protection. A rights holder would have to affirmatively renounce claims to some, or all, of the rights afforded under the law, in order to allow third parties unrestricted rights to use the work. The extension of the term to life plus 70 was accomplished by Congress' passage of the Sonny Bono Copyright Term Extension Act of 1998 (generally referred to as the "CTEA"). One of the other principal motivations for this revision of Copyright law was to bring the United States into harmony with the Berne Convention.[32] There is a strong policy in Berne favoring a prohibition against formalities being required as a condition precedent to the grant of copyright protection.[33] In becoming a signatory to the Berne Convention in 1988, the United States committed itself to retain the formality-free approach to copyright embodied in the 1976 Act, and to eschew a return to the formalities that were a hallmark of the 1909 Act.

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30 Copyright Act of 1909 §§18, 20.

31 Copyright Act of 1976, Pub. L. No. 94-553, §302, 90 Stat. 2541 (1976), which paradoxically went into effect January 1, 1978.

32 *See* Berne Convention, *supra* note 25. The U.S. accession to Berne is reflected in the Berne Convention Implementation Act, Publ. L. No. 100-568, §2(3), 102 Stat. 2853 (1988).

33 *See supra* note 27.

D. Copyright Law in China

1. Copyright in Imperial China

Condemnations of China, its people, and its government, as perpetrators of mass copyright infringement are replete in legal, political and economic scholarship and the popular media.[34] Many books and articles also suggest that the American government, acting through the U.S. Trade Representative (USTR), and through the World Trade Organization (WTO), should exert external pressure upon China to bring it into compliance with the West's style of enforcement processes. Other commentators, with whom I join, suggest that this is an approach that has not succeeded in the past, and on its own, is unlikely to succeed in the future.[35]

Professor Alford, in his seminal work To Steal a Book is an Elegant Offense,[36] traces the history of intellectual property protection back to Imperial China, from its first dynasty, the Qin (221-206 B.C.) through its last dynasty, the Qing (A.D. 1644-1911).

Alford posits four broad propositions regarding the development of intellectual property law in Chinese history. He begins by asserting that "imperial China did not develop a sustained indigenous counterpart to intellectual property law, in significant measure because of the character of Chinese political culture."[37] Secondly, he notes that initial attempts by the West to introduce our style of intellectual property law at the turn of the 20th century were unsuccessful because that approach was not relevant in Chinese society – and the West's assumption that it could simply, through foreign pressure, compel widespread adoption and adherence to such laws, was in error.[38] His third proposition is that current attempts to establish and enforce IP laws, both in Taiwan and particularly in the PRC, have been "deeply flawed in their failure to address the difficulties of reconciling legal values, institutions and forms generated in the West with the legacy of China's past, and the constraints imposed by its present circumstances."[39] Lastly, Alford notes that despite all our efforts, we continue to fail to achieve our goals because

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[34] *See, e.g.,* ANDREW C. MERTHA, THE POLITICS OF PIRACY: INTELLECTUAL PROPERTY IN CONTEMPORARY CHINA 118-163 (Cornell Univ. Press 2005); PAT CHOATE, HOT PROPERTY: THE STEALING OF IDEAS IN AN AGE OF GLOBALIZATION 169-192 (Knoph 2005); Bruce Stokes, *The United States Should Force China to Reduce Intellectual Property Theft, in* CHINA: OPPOSING VIEWPOINTS 89, 89-95 (David M. Haugen, Ed., Greenhaven Press 2006).

[35] *See, generally,* WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN Chinese Civilization (Stanford Univ. Press 1995) (arguing that the West's legal values and institutions did not reconcile with China's past and its present circumstances, which therefore resulted in deeply flawed attempts to establish intellectual property law); Peter K. Yu, *From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China,* 55 AM. UNIV. L. REV. 901, 914 (2006) (explaining that external pressure is not the key to the continued development of U.S.-China intellectual property policies).

[36] ALFORD, *supra* note 35.

[37] *Id.* at 2.

[38] *Id.*

[39] *Id.*

we continue to labor under fundamental misconceptions about the nature of legal development in China.[40]

Professor Peter K. Yu also focuses his attention on the history of the development of law and legal systems in China as a means of understanding why copyright doctrine has struggled for acceptance. He suggests that one reason the Western legalistic approach fails is because it evokes both a classic cultural difference in approach between East and West, and more interestingly, is also reminiscent "of the millennia-old debate between the Confucianists and the Legalists in China. In this debate, the Confucianists questioned whether laws were needed or expedient."[41]

Essentially, the Confucian approach is that people should be governed by moral force and ritual, rather than by law. The result of such an approach, Yu writes, is that, "In a Confucian society, people learn to adjust their views and demands to accommodate other people's needs and desires, to avoid confrontation and conflict, and to preserve harmony. Litigation, therefore, is unnecessary."[42] Yu goes on to note:

> The legalists, by contrast, believed it was impossible to teach people to be good. Laws and punishment (fa), therefore, were needed to maintain public order by instructing people what and what not to do. Although Legalism was embraced in a very short period of time in the Qin dynasty (227-221 B.C.) it never dominated the Chinese society until very recently.[43]

From this analysis, Professor Yu concludes: "to many Chinese, laws should be used only as a last resort."[44]

Confucianism, as a driving force in Chinese cultural, religious and political life has a long and deep history. It was during the reign of Emperor Wu of the Former (Western) Han (140-87 B.C.) that Confucianism was officially recognized as the object of study for those who hoped for careers in official positions. He ordered the Legalists and others, but not Confucianists, to be ejected from the Government.[45] A second attempt, during the reign of T'ang Hsuan-tsung (712-755 A.D.) to substitute Taoism in place of Confucianism as the ranking "ism" also failed.[46]

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[40] *Id.* at 3.

[41] Yu, *supra* note 35, at 969-70.

[42] *Id.* at 970.

[43] *Id.* at 970-71.

[44] *Id.* at 971. Professor Yu cites, in support of this view, Jeffrey W. Berkman, *Intellectual Property Rights in the P.R.C.: Impediments to Protection and the Need for the Rule of Law*, 15 UCLA PAC. BASIN L.J. 1, 32 (1996) (explaining that the Confucian ideology "saw law as an instrument of last resort necessary to punish those who could not follow the normative ideal of social harmony arising from the many social relationships within society." *Id.*).

[45] Jack L. Dull, *Determining Orthodoxy: Imperial Roles*, in IMPERIAL RULERSHIP AND CULTURAL CHANGE IN TRADITIONAL CHINA 3, 5 (Frederick Paul Brandauer and Chun-Chied Huang eds., Univ. of Washington Press 1994).

[46] *Id.* at 4. Dull characterizes the role of the Imperial Government in establishing an orthodoxy in Chinese society as "lackluster." *Id.* at 13.

Professor Alford notes that China's Imperial state was organized around the model of an extended family, in which family heads, village elders, and guild leaders provided authority in their localities.[47] Moral suasion, and the desire to honor one's parents and elders, is thus a far more significant driver for conduct than a system of laws. This was the argument which diminished the role of the Legalists in Chinese society – why do we need laws, when all we need to do instead is follow the leadership of our parents and wise elders?

An understanding of Confucianism, and how it differs from Christianity, the dominant religious order in the West, provides a necessary degree of context with which to understand why a Western style of copyright has not gained a foothold in modern China to date. In *Confucianism & Christianity: A Comparative Study*,[48] author Julia Ching describes Confucian society:

> The Confucian society also has its rulers, laws and statutes. But it is more than a society. It is also a community of personal relationships. It is joined together, not by religious belief – although such is also present – but by the acceptance of a common culture, a culture which esteems the person about the law, and human relationships above the state. Culture is the life of the Confucian community. In traditional China, when the Confucian state allegedly embraced the then known world, Confucian culture was also regarded as human culture – that which distinguished the civilized from the barbarian.[49]

Ching later summarizes the critiques of the moral-persuasion base of Confucianism as follows:

> I have discussed the critiques of Confucianism voiced by ancients and moderns, Chinese and Westerners. In examining them, one finds both concurrences and contradictions. Mohists and Legalist decry government by moral persuasion as a form of weakness, not strength; Mohists and Taoists rejoin in attacking an exaggerated, unnatural ritual observance; Taoists and Legalists express a sense of bemused scorn of the Confucian focus on ethics and virtues. Some of these arguments have been reiterated by modern critics, who exalt a government of laws above that of men, and insist upon the separation of ideology and cult from the state. But, until very recently, the moderns have described Confucius himself variously—for praise or blame—as a traditionalist, a reformist or a political revolutionary.[50]

In describing the role Confucianism has played in China's past, Ching notes that it has served as a moderate view:

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[47] ALFORD, *supra* note 35, at 11-12.

[48] JULIA CHING, CONFUCIANISM & CHRISTIANITY: A COMPARATIVE STUDY (Kodansha Int'l 1977).

[49] *Id.* at 101.

[50] *Id.* at 58.

> In the Chinese past, Confucianism has usually appeared as a school of moderation between certain extremes – retreat from society as advocated by Taoism and Buddhism, and complete immersion in the social and political order according to the tenets of Mohism or Legalism. Indeed, the Chinese opted for Confucianism on account of its moderation.[51]

These differing views of Confucianism led, according to Ching, Western and Eastern critics like Russell, Dewey, Ch'en Tu-hsiu, Hu Shih, and Lu Hsun and others, to argue that the social vestiges of Confucianism remained an obstacle to intellectual freedom and social transformation.[52] This criticism was, to a degree, prescient, since Confucianism served as a gateway for the Chinese form of Communism, which was to become the dominant political and cultural system in 20th century China.

Another author has characterized Confucianism as being:

> [C]oncerned primarily with the moral development of individuals and the accepted modes of behavior in a civilized state. It stresses government by education, persuasion, and moral example. According to Confucianism, a formal legal system serves only to make people litigious and self-interested. Morality leads to social order, and group order is more important than individualistic desires. These ideas have created a hostile attitude toward the use of law to protect individual rights.[53]

Another factor which Western analysts must consider is that the impetus for protecting works with copyright laws in China was not the need to protect the interests of either artists or publishers. Instead, Professor Alford notes that historically, focus on control, via registration, of published works was motivated not by a desire to secure property rights for authors, but rather by the state's need to control the content of published works to ensure that works did not challenge the social order or improperly reveal "the inner workings of government, politics and military affairs."[54] A further reason for granting protection to certain works was to ensure that the designs embodied in those works, if used by the Imperial family, would not be available for use by common people.

Continuing this analysis, Alford notes that pre-publication review by the state was "part of a larger framework for controlling the dissemination of ideas, rather than as the building blocks of a system of intellectual property rights, whether for printers, booksellers, authors, or anyone else."[55]

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[51] *Id.* at 61.

[52] *Id.* at 58-59.

[53] June Cohan Lazar, *Protecting Ideas and Ideals: Copyright Law in the People's Republic of China*, 27 LAW & POL'Y INT'L BUS. 1185, 1201 (1996) (citing DERK BODDE & CLARENCE MORRIS, LAW IN IMPERIAL CHINA 27 (Univ. of Pennsylvania Press 1973)); ALBERT HUNG-YEE CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 8-9 (Butterworths Asia 1992).

[54] ALFORD, *supra* note 35, at 14.

[55] *Id.* at 17.

2. Copyright in Communist China

The political revolution in China concluded when the Chinese Communist Party came to power in 1949.[56] To the extent that the preceding political powers, the Northern Warlord and Kuomintang governments, had attempted to develop copyright laws during their regimes, those efforts were repudiated and in their place the newly created People's Republic of China (PRC) enacted Article 17 of the Resolution on the Improvement and Development of Publishing Work, which became known as The 1950 Publishing Resolution.[57] Although the Resolution provided a formula that allowed authors to recover significant sums from infringing publishers in privity of contract with authors, it did not address third party infringers and, in general, lacked enforcement mechanisms.[58] By 1958, however, the launch by Mao Zedong and his adherents of an Anti-Rightist Movement, and the Great Leap Forward, both intended to hasten the adoption of a version of state socialism for China, ended the payment of high royalties under the 1950 and 1952 Acts, and culminated in the total elimination of all royalty payments to individuals via the Great Proletarian Cultural Revolution of 1966.[59]

The anti-intellectualism of the Cultural Revolution led, during its ten-year reign, to the imprisonment, torture and death of many academics, writers and other intellectuals. National policy mandated the reduction of intellectuals' privileges and rights—and copyright protection in any real form ceased to exist.[60]

The death of Mao in 1976 and the concurrent termination of the widely reviled Cultural Revolution allowed for the beginning of the return of limited rights for authors and creators of various works representing intellectual property. The continuity of political and cultural thought between Confucianism to Communism carried with it consistent antipathy to the notion of individual ownership, which is a key component of Western copyright law. Professor Alford notes that although Marxism and Confucianism stem from very different ideological foundations, because each school of thought in its own way saw intellectual creation as fundamentally a product of the larger society from which it emerged, neither elaborated a strong rationale for treating it as establishing private ownership interests.[61]

While Professor Alford is probably correct when he notes that Marxism and Confucianism start from different ideological foundations, it is nonetheless true that there are many similarities, both cultural and political, to be found in these

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[56] Mark Sidel, *Copyright, Trademark and Patent Law in the People's Republic of China*, 21 TEX. INT'L L.J. 259, 261 (1986).

[57] *Id.*

[58] *Id.* at 262. An effort to bolster the enforceability of the 1950 Resolutions was made by passage of the 1952 Regulations on the Editorial Structure and Work system of State-Run Publishing Houses. Although moderately more successful than the 1950 Resolutions, it was still plagued by a lack of control over the actions of third parties. *Id.*

[59] *Id.* at 263. See also ALFORD, *supra* note 35, at 63-64 (noting that during the Cultural Revolution, all theater was banned except for a few revolutionary operas, and virtually all writers' work, and those of other intellectuals, was disrupted).

[60] Sidel, *supra* note 56, at 263-64.

[61] ALFORD, *supra* note 35, at 57.

doctrines. One such similarity is the disdain for the rule of law. In their seminal work, *The Manifesto of the Communist Party*,[62] Marx and co-author Friedrich Engels savagely attack the wealthy and powerful, characterized as the "bourgeois" class, and decry the poverty and reduced circumstances of the proletariat, which they conceptualize as comprised of the working class, the middle class, and the upper-middle (petit bourgeois) class:

> The social conditions of the old society no longer exist for the proletariat. The proletarian is without property; his relation to his wife and children has no longer anything in common with the bourgeois family relations; modern industry labor, modern subjection to capital, the same in England as in France, in America as in Germany, has stripped him of every trace of national character. Law, morality, religion, are to him so many bourgeois prejudices, behind which lurk in ambush just as many bourgeois interests.[63]

June Lazar's description of Chinese Communism under Mao reflects the influence Marx had on Mao's philosophy, and is reflective of how both ideologies echoed Confucianist thought:

> Early socialism as practiced under Mao's leadership viewed law as a tool for oppression of a class of people. . . .
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> . . .Chinese society is geared toward eliminating private property and equalizing the differences among all people, whereas the acceptance of a primarily economic purpose behind intellectual property protection has led modern U.S. courts to expand authors' rights at the expense of society. Such an expansion of individual interest is incompatible with the Chinese practice of putting societal interests before those of individuals.[64]

III. Anatomy of a Failed Planting: The Effort to Graft Western-Style Copyright Protection onto Chinese Society

A. Adding an Economic Incentive to the Legal Enforcement Approach Proves Insufficient

Faced with the challenge of reconciling the principles of Confucianism and Marxism, and battered by the popular rejection of the highly destructive Cultural Revolution, China embarked on the process of creating a national copyright law that would also appease the concerns of both rights holders within the country and the clamor of other nations, which argued that China's lack of copyright law

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62 KARL MARX & FRIEDRICK ENGELS, THE MANIFESTO OF THE COMMUNIST PARTY (Int'l Publishers 1966) (1848).

63 *Id.* at 20.

64 Lazar, *supra* note 53, at 1204-06 (citing LASZLO LADANY, LAW AND LEGALITY IN CHINA: THE TESTAMENT OF A CHINA WATCHER 98 (Univ. of Hawaii Press 1992) and Alfred C. Yen, *Restoring the Natural Law, Copyright as Labor and Possession*, 51 OHIO STATE L.J. 517, 541 (1990)).

was allowing the country to become a nation of pirates, stealing intellectual property throughout the world.[65]

The solution for the Chinese government was the creation and adoption of the Copyright Law of 1990, the first extensive national law of copyright enacted in Chinese history.[66] The law, patterned after the copyright terms of the Berne Convention and American copyright law, had all the right notes, but its music was, for Chinese society, discordant and quickly rejected. Writing five years after its adoption, June Lazar summarizes its failed impact:

> The copyright law China adopted in 1990, after twelve years of preparation and drafting, was heavily influenced by pressure from the United States and Japan. . . . However, the law's attempt to balance the Marxist aims of Chinese society with the economic goals of the United States dissatisfied the Western business community. . . .
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> While the scope of China's copyright law is narrower than the United States would prefer, the real issue in the last five years has been the enforcement of the law. U.S. frustration with Chinese enforcement led the USTR to place China on the Priority Foreign Country list again in 1994. The Chinese were angry with the U.S. because they felt that China had worked very hard to build a copyright system and that the U.S. was not allowing it enough time to produce results. Li Changxu, Chief Director of the China United Intellectual Property Protection Center, analogized the situation to building a house: "You can have the house structure all set up, very beautiful. But then, you need electricity and water pipes. That takes more time."[67]

Director Changxu's wishes notwithstanding, the international community was not willing to be patient in the face of the continued piracy and unauthorized copying of copyrighted works that marked Chinese society following adoption of the 1990 Copyright Law. Old habits and customs, however, die hard. The view held by most of the Chinese that published works belonged to and were for the benefit and unrestricted use of the people has led to China being characterized, in the early 1990's, as "'home to the world's largest gang of CD [compact disc]

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[65] Professor Alford writes that in Taiwan ROC, with a government that rejected the mainland's embrace of state socialism, copyright infringement became a rampant problem in the 1970's. ALFORD, *supra* note 35, at 98. He concludes, "As a consequence, in 1982, *Newsweek* labeled Taiwan the counterfeiting capital of the world, and the *New York Times* soon thereafter described it as being 'to counterfeiting what Miami is to drug trafficking.'" *Id.*

[66] The adoption of this copyright law posed serious challenges for the Chinese government in attempting to reconcile the Confucianist and Marxist/Communist doctrines to what is essentially a private property regime. Professor Alford quotes Jiang Ping, head of the Committee on Legal Affairs of the Standing Committee of the National People's Congress (NPC), who characterized the efforts to adopt a new copyright law as taking "a road as tortuous as that of Chinese intellectuals" (presumably referring to the forced marches imposed on intellectuals during the Cultural Revolution, many of whom were forced to walk from the city into the country, there to engage in forced manual labor). *Id.* at 76.

[67] Lazar, *supra* note 53, at 1188-90 (citing Kim Newby, *The Effectiveness of Special 301 in Creating Long-Term Copyright Protection for U.S. Companies Overseas*, 21 SYRACUSE J. INT'L & COM. 29, 44 (1995)).

pirates,' some of whom the Wall Street Journal suggests are affiliated with the very governmental authorities who should be policing them."[68] In 1994 and 1995, the United States, seeking to protect American companies that claimed to be losing profits in China due to intellectual property piracy, initiated an investigation under "Special 301" (19 U.S.C.A. § 2242) and threatened to impose a one-hundred percent duty on Chinese import as a means of recovering the estimated losses suffered by American companies as a result of this IP piracy.[69] Acting quickly to avoid an all-out trade war, China and the United States negotiated and signed an Agreement Regarding Intellectual Property Rights, followed shortly thereafter in 1996 by another agreement that included a Report on Chinese Enforcement Actions, and an Annex on IP Rights Enforcement and Market Access Accord.[70]

External dissatisfaction with the enforcement of the 1990 Copyright laws was matched by internal concerns as well. Professors Xiaoqing Feng and Frank Xianfeng Juang, in their article *International Standards and Local Elements: New Developments of Copyright Law in China*,[71] described the transformation of their society: "significant social and economic changes have taken place in China since the enactment of the 1990 Copyright Law. The fundamental economic structure of the country has been further transformed from a central planning system ("command economy") into a socialist market economy."[72]

Professor Yu also describes this shift in economic models. Commenting on the development of what is called a "socialist market economy," Yu notes the change in China's Patent Law, which now allows employees the right to obtain a patent on works created while they are employed, provided that there is no contract transferring ownership to their employer. This is, of course, a reverse image and contrary to the presumption of employer ownership found in the prevailing "work for hire" doctrine in the United States, which creates the presumption that ownership vests in the employer unless there is a contract reserving ownership to the employee. Yu explains the context in which this change arose as follows: "This revision reflects the many economic changes in China in the past decade. While state owned enterprises dominated the Chinese economy a decade ago, the number of private enterprises has greatly increased, and a large number of employees of state-owned enterprises are now rushing to enter the private sector."[73]

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[68] ALFORD, *supra* note 35, at 91. Professor Alford notes that the problems of copyright piracy also plagued the Republic of China in Taiwan. He notes that ROC's own Minister of Economic Affairs realized, in the mid-1990's, that greater protection of IP is needed for Taiwan's own research and development activities. *Id.* at 108.

[69] 19 U.S.C. §2242 (2000). This section allows the U.S. Trade Representative to identify foreign countries that are not effectively protecting intellectual property rights or denying fair and equitable "market access to United States persons that rely upon intellectual property protection. 19 U.S.C. §2242(1).

[70] Naigen Zhang, *Intellectual Property Law Enforcement in China: Trade Issues, Policies and Practices*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 63, 74-75 (1997).

[71] Xiaoqing Feng & Xianfeng Juang, *International Standards and Local Elements: New Developments of Copyright Law in China* 49 J. COPYRIGHT SOC'Y U.S.A. 917 (2002).

[72] *Id.* at 917.

[73] Yu, *supra* note 35, at 915.

China's movement to a socialist market economy is consistent with the economic and political analysis that detailed the failure of Marxism as a political doctrine. As early as 1959, it was apparent that the Marxist experiment in the Soviet Union was not going to yield the dissolution of the state in a victory for the proletariat. In his Introduction to the 1959 edition of Marx's seminal work, *Das Kapital*, Serge L. Levitsky wrote:

> . . .Marx could not conceive of a state in terms other than as the power of one class organized for the exploitation of other classes. He would have found the modern "capitalist" state, which sets goals and intervenes to protect the interests of the "proletariat," utterly unbelievable. . ..
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> . . .Nor did Marx foresee that the middle class, far from being reduced to the status of the proletariat by the operation of the laws of capitalist competition, would actually enjoy a remarkable consolidation of its position and broadening of its bases.[74]

It is in this transition to a different economic model, one which, at least in some part (primarily economic rather than political), recognizes the rights of individuals to ownership of private property, that the seeds of a more effective enforcement of copyright infringement may be found.

And so it was in 2001, that the Chinese government enacted a wide-ranging and significant reform of its Copyright law, in recognition of the changes it was undergoing in its society.

The Chinese Copyright Law, as amended in 2001,[75] added new provisions intended to comply with the Agreement on Trade-Related Aspects of Intellectual Property Rights (generally known as the TRIPS Agreement).[76] These new terms expanded the subject matter of copyright to include databases, architectural works and other related works. Public performance rights and rental rights for software and audiovisual rights were also added. Statutory damages were increased to a maximum penalty of RMB 500,000 (about $60,000 USD).[77] Additional terms allow enforcement agencies to confiscate income from infringing parties, and to destroy the tools and manufacturing equipment used to create infringing works.[78]

While many commentators have asserted that these changes in the Chinese Copyright Law were primarily for the purpose of showing the West that China was serious about complying with TRIPS as part of the nation's participation in

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[74] Serge L. Levitsky, *Introduction* to KARL MARX & FRIEDRICH ENGELS, DAS KAPITAL: A CRITIQUE OF POLITICAL ECONOMY ix, xviii (Regnery Gateway 2000) (1970).

[75] Copyright Law (promulgated by the Standing Comm. Nat'l People's Cong., Sept 7, 1990, amended Oct 27, 2001, effective Nov. 1, 2001) (P.R.C.), *available at* http://portal.unesco.org/culture/en/files/30384/11424207963cn_copyright_2001_en_.pdf/cn_copyright_2001_en%2B.pdf.

[76] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 108 Stat. 4809, 869 U.N.T.S. 299, *available at* http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm [hereinafter TRIPS Agreement].

[77] Copyright Law arts. 3(4), 10, 14, 48 (P.R.C.). The increase in maximum statutory damages to RMB 500,000 ($60,000 USD) is just over a third of the maximum statutory penalty in U.S. Copyright Law, which is $150,000 USD. 17 U.S.C. §504(c)(2).

[78] Copyright Law arts. 47, 51.

the World Trade Organization (WTO), other scholars dispute this notion, and suggest that adherence to it is likely to lead to misunderstandings regarding China's desire to adopt enforceable copyright laws. Professor Yu is one such critic. In his article, he confronts and rejects this notion:

> Such a statement would ignore the important changes in the socialist market economy, the internal dynamics of the intellectual property lawmaking process, and contributions of the local stakeholders in the legal reforms. More problematic, by creating a misimpression that external pressure was the key to improved intellectual property protection in the country, the claim would misguide the development of future U.S.-China intellectual property policies.[79]

While most critics of China's intellectual property law felt that the 2001 amendments addressed many of their criticisms, concern over lax enforcement of these laws remained unabated. Yu cites the *2005 National Trade Estimate Report on Foreign Trade Barriers* on the question of laws versus their enforcement, "While China has made significant progress in its efforts to make its framework of laws, regulations and implementing rules WTO-consistent, serious problems remain, particularly with China's enforcement of intellectual property rights."[80]

In his article, Professor Yu addresses the problems of enforcement of copyright rights, and IP rights in general in China, following the adoption of the 2001 amendments to the Chinese Copyright Law. He notes that the political climate in the United States, fueled by exporters' complaints, led the United States to seek assistance from the WTO to enforce IP rights in China:

> Because intellectual property-based goods were considered key exports that helped reduce the deficit, the first Bush and Clinton administrations sought to induce China to strengthen intellectual property protection by threatening the country with economic sanctions, trade wars, non-renewal of most-favored nation status, and opposition to entry into the World Trade Organization ("WTO").[81]

Professor Yu points out, however, that the filing of a WTO complaint may be a risky endeavor for U.S. companies, as the filing of a weak complaint that would ultimately fail may have far-reaching negative consequences for the filing parties and their government.[82] Rather than pursue that risky course, he suggests different approaches to enforcement: "(1) educate the local people; (2) create local

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79 Yu, *supra* note 35, at 914.

80 *Id.* at 935 (citing OFFICE OF THE USTR, 2005 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 95 (2005), http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/2005_NTE_Report/assetupload_file4697460.pdf).

81 *Id.* at 903.

82 *Id.* at 943-45. Profesor Yu points out that the U.S. failed in a 1998 effort to use the WTO process to open the Japanese market for American Films, and that the filing of such complaints strains bilateral relationships between the two countries. *Id.* at 944 nn.211, 213.

stakeholders; (3) strengthen laws and enforcement mechanisms; and (4) develop legitimate alternatives."[83]

Professor Yu suggests that one way to develop a social consciousness supportive of the enforcement of IP law in China is to develop, through education and other means, local stakeholders who will become invested in the benefits they would derive from enforcement:

> Commentators often ignore the impact of local conditions (guo qing) on the Chinese intellectual property system. This Part [of Professor Yu's article] therefore, focuses on these conditions, in particular the Chinese leaders' changing attitude toward the rule of law, the emergence of private property rights and local stakeholders, the increasing concerns about ambiguities over relationships in state-owned enterprises, and the government's push for modernization. By highlighting the local developments, this Part demonstrates the importance of domestic factors in intellectual property lawmaking and suggests that the development of local stakeholders may hold the key to improving intellectual property protection in the country.[84]

I agree with Professor Yu on this point. However, it raises more immediate and practical questions: in the area of fine arts, who are the local stakeholders, how are they to be developed, and how can their development progress in a direction that will lead them to join in the effort to strengthen IP protection in China?

The answer may be that the individual contemporary artists in China, who are reaping the benefits of the right of private ownership of their works, may have become, or are becoming, sufficiently motivated by those benefits to become the kind of local stakeholders who will advocate for more effective enforcement of copyright laws in China.

B. The Third Approach Needed: The Development of a New Social Norm Supporting Private Ownership

Professor Yu notes that the need to educate local people in China regarding copyright law is great, since cultural differences may make even what appear to be simple concepts, like prohibitions on unauthorized use by third parties, the subject of misunderstandings. He cites an example from an article by Pat Chew about the way cultural differences can affect the interpretation of contract language:

> "The contract may prohibit employees of the Chinese joint-venture partner from disclosing the American partner's proprietary information to 'third parties.' The Chinese, however, may define a 'third party' differently than American business practices. In China's collectivist, socialist, relationship-oriented society, the notion of outsider status may be quite

[83] *Id.* at 946 (citing Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 428-37).

[84] *Id.* at 908.

> narrow. For instance, cultural traditions would likely indicate that family members, 'extended family' members, close friends, party members, and state-affiliated companies and their representatives are not outsiders, and hence would not be considered as 'third parties.'"[85]

Professor Alford concurs with the concern that cultural misconceptions may have a negative impact on efforts to develop acceptance of IP enforcement regimes. He notes that these misconceptions begin with our use of IP definitions that are rooted in Western cultural settings and that even if we all use the same terminology, this does not guarantee that those terms will carry the same meaning in different settings. He makes the very important point that discussions about cultural differences must also recognize that cultures are constantly evolving—as he notes, "we must remain mindful that at no time is any society's culture monolithic, given class, gender, ethnic, regional and other differences."[86]

Developing a successful enforcement system for copyright law in China remains a moving target, one which is complicated by the long history of normative antipathy toward ownership of private property. The challenge, then, is to see to what degree the normative standards in Chinese society can be altered so that the protection of individual property, including intellectual property, can become a dominant value in that society.

There is a vast body of social psychology research and scholarship that essentially states, "most people obey the law most of the time because they think it is the right thing to do."[87] In other words, social norms play a large role in securing compliance with the law.[88] And while their impact on law is undisputed, there is no consensus on how to explain the origin of these norms.[89] One thing is clear, however—the intersection of digital technology, with its ease of copying and

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[85] *Id.* at 957 (citing Pat K. Chew, *The Rule of Law: China's Skepticism and the Rule of People*, 20 OHIO ST. J. ON DISP. RESOL. 43, 47-48 (2005)).

[86] ALFORD, *supra* note 35, at 6.

[87] Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People To Obey Copyright Law*, 21 BERKELEY TECH. L.J. 651, 655 (2006).

[88] *Id.* As noted, the literature on the impact of social norms on compliance with the law is vast. A representative sampling includes: Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 458-64 (1997); Lon L. Fuller, *Human Interaction and the Law*, *in* THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON. L. FULLER 211, 234 (Kenneth I. Winston ed., Duke Univ. Press 1981); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 400-07 (1997); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996); Dan Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 619 (2000); ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (Harvard Univ. Press 1991); ERIC POSNER, LAW AND SOCIAL NORMS (Harvard Univ. Press 2000); Mark A. Lemley, *The Law and Economics of Internet Norms*, 73 CHI.-KENT L. REV. 1257 (1998).

[89] *See, e.g.*, Richard H. McAdams & Eric B. Rasmussen, *Norms and the Law*, *in* THE HANDBOOK OF LAW AND ECONOMICS (A. Mitchell Polinsky & Steven Shavell, eds., Elsevier 2007). The authors offer explanations for the origin of social norms from the fields of biology, philosophy, religion and culture. In considering this list and applying it to social norms in China, the role of a virtually homogenous tribal ethnicity should also be considered – although there are fifty-six different ethnic groups in China, the Han group makes up 91.6 percent of the population, a percentage found rarely in other industrialized major countries in the world. *See, e.g.* Edward Wong, *Clashes in China Shed Light on Ethnic Divide*, N.Y. TIMES, July 8, 2009, at A4, *available at* 2009 WLNR 12976322; TravelChinaGuide.com, Chinese Ethnic Groups, http://www.travelchinaguide.com/intro/nationality (last visited Feb. 8, 2010).

distribution, and the desire of copyright owners to protect their interests, has led to a widening gap between normative behavior and the willingness on the part of consumers to accept and enforce copyright protections.[90]

The trick, therefore, is to develop a way to begin to change normative behavior in Chinese society so that acceptance of the principle of private ownership of intellectual property becomes the norm. From that acceptance, one can build a concurrent norm wherein enforcement of copyright ownership is a necessary part of that principle. As Mark Shultz notes, change of this nature is not easily accomplished:

> The difficulty, of course, is that changing social norms is, in reality, a very complex challenge. Building norms is not like building a house. Hard work, strong desire, and resources are not enough. Norms likely arise from a variety of sources, including religion, philosophy, culture, education and biology. There likely is no universal or easy way to establish a social norm.[91]

So why should a society engage in this kind of social engineering, when we retain the ability to enforce copyright through the power of the punitive measures of the law, which include both financial penalties and incarceration? Mark Shultz offers a cogent explanation:

> A strategy based on scaring people into complying with copyright law by ratcheting up enforcement and penalties will quickly surpass the point of diminishing returns. Some enforcement is helpful and necessary, because laws do derive a deterrent effect merely from existing and from being credibly enforced. . ..For some people, this notice [of infringement penalties] alone is enough to change behavior, either because they are unwilling to tolerate any risk of sanctions at all or because illegality represents a symbolic threshold they are unwilling to cross. Nevertheless, increasing penalties or enforcement may not appear to have the direct effect of increased compliance that some lawmakers and music industry advocates seem to assume. Many studies find very little or no deterrent effect at all from increasing the level of enforcement or penalties.[92]

Given the historic antipathy to the use of law to enforce social behavior in China and Confucianism's active discouragement of individual ownership and control, the likelihood of a successful enforcement of copyright law through the legal system alone, regardless of the severity of penalty, is unlikely to succeed.

Thus, we come to the conclusion that while "laws can contribute to the formation and change of community norms and individuals' moral reasoning; laws

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[90] *See, e.g.*, Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331 (2003); Laurence B. Solum, *The Future of Copyright*, 83 TEX. L. REV. 1137, 1148 (2005) (reviewing LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY (2004)).

[91] Schultz, *supra* note 87, at 667-68.

[92] *Id.* at 662.

cannot themselves compel community acceptance."[93] Effecting change in normative behavior becomes a necessary element in developing an environment supportive of copyright protection.

Mark Shultz's Fear and Norms article examines why the jamband community of fans behaves differently from mainstream pop music fans.[94] While a significant subset of mainstream fans willfully engage in illegal downloads, which are often justified by rants against profiteering major music labels, jamband fans accept, observe and even help with enforcement of the copyright rights of the bands. He attributes this atypical conduct to the human behavioral trait of "reciprocity", which he argues "encourages the formation of social norms that support compliance with law."[95]

Reciprocity implies some form of exchange. In the jamband context, the bands allow their live performances to be taped, often setting aside space in the performance venue for the "tapers."[96] The bands also allow, encourage, and facilitate the creation of a fan community, who actively engage in the distribution and trading of these tapes, as well as participate in an online community that reviews and discusses the band's shows and the tapes of them.[97]

In exchange for this generous support (generous indeed, since the bands receive no income from the creation and distribution of these tapes), the jambands present guidelines they ask their fans to follow: fans are asked not to copy or distribute any of the band's commercial releases (generally studio-created works, although these can sometimes include live shows, in which case the band restricts taping at those shows); fans are asked not to commercially profit from their distribution and copying of the live shows they have recorded; and fans are asked to respect the copyright ownership of the writers, performers and publishers in the music.[98]

Shultz documents the effectiveness of this fan community's efforts to adhere to these guidelines:

> Fans pay attention to the rules set by jambands and work diligently to comply. As a result, a culture of voluntary compliance with intellectual property rules pervades the jamband community. Fans carefully track information about bands' rules, communicate with the bands to clarify them, and publicize them to one another. In addition, jamband fans en-

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[93] Robinson & Darley, *supra* note 88, at 473.

[94] Schultz, *supra* note 87, at 653. Jambands, according to Schultz, are pop music groups which often play "jams", long and often meandering improvisations interspersed between the melodies of their songs, and are bands who, with a set of guidelines, allow fans to record their live shows and to distribute copies of those recordings to other fans of the band. The prototypical jamband was the Grateful Dead and its successor band, sans the late Jerry Garcia, which is a band now known simply as The Dead. Successors to the Grateful Dead's jamband legacy include Phish, the String Cheese Incident, and the Dave Mathews Band. *Id.* at 668-74.

[95] *Id.* at 668.

[96] *Id.* at 680-81.

[97] *Id.* at 679.

[98] *Id.* at 680-681 (citing Grateful Dead MP3 Statement, http://www.archive.org/audio/etree-band-details.php?band_id=3 (last visited Mar. 6, 2010)).

> force bands' rules through: (1) informal sanctions such as shaming and banishment; (2) specific rules and policies of fan organizations such as etree; (3) monitoring and reporting illegal activities to band management and attorneys; and (4) software code in file-sharing programs that allow only permitted trading.[99]

Adherence to social norms appears to be motivated by a variety of factors. Sometimes adherents do so out of self-interest, such as economic benefits or social status.[100] In other instances, a sense of fairness and a desire to be seen as cooperative provide the incentive for compliance.[101]

It is important to note that reciprocity theory dictates that people respond in kind, regardless of the nature of the value involved—so kindness is met with kindness in return, value provided is responded to with like value (think of holiday gift-giving among friends as an example), and cooperation yields cooperation in return.[102]

Scholars note that for cooperative behavior and reciprocity to flourish as social norms, people must have a sense that the majority of society is similarly cooperating, and that the results of their cooperation are equitable. If there is a significant number of people who free-ride and take the benefits without reciprocating, the whole structure begins to collapse as people's aversion to inequity kicks in, and people will withhold cooperation.[103] Schultz and others scholars refer to this conduct as "conditional cooperation."[104]

With these principles in mind, the question posed is: how does reciprocity theory apply to the development of a pro-copyright protection social norm in China? Is the jamband fan community a model with broader, if not universal, applicability, or is it limited to those few musical groups who have live performance taping to offer their fans? Is it limited only to music, or does it have a broader applicability in the arts? And, lastly in this string of rhetorical questions, is the limited, finite number of fans of jambands a factor? Can you build a large enough community of dedicated fans to effect a change in social norms in a population as large as China's, which numbers in the billions?

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[99] *Id.* at 681-82. Etree is a volunteer community comprised of websites and email lists that attempts to help tapers and traders to be in compliance with the taping guidelines of bands that allow live performance taping. *See, e.g.* EtreeWiki, http://wiki.etree.org (last visited Mar. 6, 2010).

[100] *Id.* at 691.

[101] *Id.* at 692. Shultz cites Ernst Fehr & Klaus M. Schmidt, *A Theory of Fairness, Competition and Cooperation,* 114 Q.J. ECON, 817, 818 (1999), and quotes from the author's discussion of the sometimes conflicting behavior that supports normative behavior: "Some pieces of evidence suggest that many people are driven by fairness considerations, other pieces indicate that virtually all people behave as if completely selfish, and still other types of evidence suggest that cooperation motives are crucial." *Id. See also* POSNER, *supra* note 88.

[102] *Id.* at 699 (citing Ernst Fehr & Simon Gächter, *Fairness and Retaliation: The Economics of Reciprocity,* 14 J. ECON. PERSP. 159, 159-60 (2000)). Perhaps one of the best examples of how reciprocity seems hard-wired into human conduct is the behavior of infants and small children when you hand them a toy or piece of food, and they want to hand it back to you.

[103] *Id.* at 705.

[104] *Id.* at 710, 712. Mr. Schultz cites as the source for these terms the article by Elinor Ostrom, *Collective Action and the Evolution of Social Norms,* 14 J. ECON. PERSP. 137, 142 (2000).

As an art and entertainment format, popular music groups, who tour regularly and perform live before large audiences of fans, offer a very different level of fan interaction than all other art and entertainment models. Actors in motion pictures do not perform live for their fans, as a general rule. Similarly, actors in television programs, although they are seen in more homes than movie actors, have very few forums in which they appear live for their fans.

Similarly, fine artists tend to only appear at the openings of shows of their works, either at galleries (generally for new work) or at museums (generally for retrospective shows of past works). Writers do promotional appearances at bookstores for signings of new works, and on television and the book fair circuit to promote new works. However, all of these other events differ from the appearances of music groups because the former are not actual performances of the works, whereas the music groups are actually performing for the live audience. In many jamband cases, the live performances are the principal venue for appreciation of the band's artistry, with sound recordings being a secondary form of work for the band. The Grateful Dead is a perfect example of this phenomenon.

The coin of the realm for jambands, and what they primarily have to offer their fans, is the permission to record the live performances of the band, and secondarily, permission to trade those recordings, creating, in the process, a community of fans who can interact with each other via the trading and discussion of the live recordings. As noted, the first element of these offerings, permission to tape live performances, is an offering that artists in other media formats cannot provide. It follows that to the extent this is a core element of the reciprocity offered by jambands, the applicability of reciprocity theory to other arts and entertainment formats is limited.

However, the second element of this reciprocity is more intriguing and may represent a means by which reciprocity theory may be a basis for normative change and may be of assistance in creating a social norm that supports copyright enforcement. The creation of a community of fans by artists offering to share more of their daily lives and creative process, in exchange for setting guidelines for fan behavior, which can include helping the artist protect their ownership rights, is an example of reciprocal behavior which may influence and shape the creation of helpful social norms.

The ever-changing role of technology in our digital age may play a significant role in the creation of this fan community. Artists are increasingly using Twitter, Facebook and other social networking websites to make themselves more accessible to their fans. In the sci-fi and fantasy entertainment communities, the reach of these social networks is enhanced by mega-conventions like ComicCon,[105] where thousands of fans can see, meet and greet actors, artists, and directors in

[105] ComicCon is one of the world's largest conventions of pop culture. Held every July in San Diego, California, the convention attracts over 160,000 participants, and has become a significant factor in generating consumer attention to upcoming films, television shows, books and other media in the fantasy, sci-fi, manga and related animation media. By generating positive buzz among attendees about soon-to-be-released products, media companies hope to create a built-in fan and purchaser base for those products. Reciprocity as a basis for social norms is present at ComicCon, via its rules for fans attending events where they are shown advance clips for upcoming movies. The rules require that no one use a video or audiotaping device to capture these clips. Fans are told explicitly that the studios are willing to

person, and can then spread the word about those celebrities' newest works via countless websites, blogs, and Twitter messages.

The digital revolution is in full bloom in China. Although there have been many publicized efforts made by the Chinese government to control or limit the content available online to Chinese internet users, those efforts have met with very limited success. Moreover, it is unlikely there would be objection to the creation of fan sites and similar sites that would help build communities of artist fans in China.

Thus, it seems that while the jamband analogy may not be applicable to the development of pro-copyright social norms in China, the concept of creating a fan community is one that will translate well in Chinese society and can serve as yet another entrance to that sly rabbit's den.

The next section demonstrates how the evolution of one of China's most traditional art forms, calligraphy, offers an example of how economic benefits and a rejection of the social norms of the past regarding the value of individual artistic expression, combined with legal protections, can serve as a basis for creating a new attitude towards copyright protection in China.

IV. Fertile Ground for a Multi-Level Approach: The Art of Calligraphy and Calligraphy Education in China

Calligraphy is one of the oldest forms of writing known to civilization. In its earliest form, it employed what are called pictograms, symbols painted with a brush, to indicate and communicate ideas.[106] The earliest form of these pictograms is called oracle bone script, or *jiaguwen,* which were developed between the 13th and 11th centuries B.C.[107] These pictograms, over the course of thousands of years, evolved from their root expression into more symbolic script. For example, the oracle bone script for the concept of a mountain looks like a capital "W" with lines down its sides and bottom, so that it ultimately looks like a three-pronged crown. By the time calligraphy had gone through its seven iterations in Chinese history to become Cursive script, the pictogram had become a few lines that bear very little relationship to its original form. Other concepts have seen little change, such as the pictogram for Sun.[108] Because these pictograms depicted elements that occurred in nature, it was the view of Chinese calligraphers that copyright protection could not attach to calligraphy, since no one should exclude others from using these elements of their common heritage.

The third oldest form of Chinese calligraphy is known as seal script, or *zhuan shu*, which was the style of script used on identity seals. The oldest version of

show the clips if the fans agree not to tape them and/or upload them to the Internet. By and large, despite thousands in attendance at these events, the rules are adhered to.

[106] GORDON S. BARRASS, THE ART OF CALLIGRAPHY IN MODERN CHINA 16-17 (Univ. of California Press 2002).

[107] *Id.* at 19.

[108] *Id.* at 18; SHEN C.Y. FU, A BRIEF HISTORY OF CHINESE CALLIGRAPHY (1994), *reprinted in* GORDON S. BARRASS, THE ART OF CALLIGRAPHY IN MODERN CHINA, at 19 (Univ. of California Press 2002). An illustration by Huang Miaozi is reproduced depicting various concepts in seven different styles of calligraphy over the ages. BARRASS, *supra* note 106, at 18.

this form, called large seal script, was found primarily on stone inscriptions from the fifth century through the third century B.C.[109] A later version, small seal script, was adopted by Emperor Qin Shi Huangdi, and was declared by him to henceforth be the standard script for all of China.[110] Emperor Qin standardized calligraphy symbols as a means of uniting the country (a largely successful effort, since despite the existence of numerous different dialects, written Chinese is the same throughout the vast country). Creating the symbols was a difficult task, and required much practice and skill, which included learning the precise sequence of strokes needed to create each of the thousands of characters that made up the language.[111]

It is difficult, from a Western perspective, to appreciate the significance of calligraphy in Chinese culture. As Gordon Barrass notes, one of the reasons calligraphy is so revered in China is that there is no "culture of political oratory" in China, as opposed to the West.[112] Chinese politicians and rulers all expressed their power in written form, rather than political oratory. Finally, as the West does not have a tradition of language based on pictures, but rather based alphabetically, Western scholars find the idea that language can also be art a foreign concept. For the Chinese, however, this dual role calligraphy serves is fertile ground for artistic expression.

By the beginning of the first century A.D., there were at least five different versions of script a calligrapher could choose with which to express ideas as well as communicate information. This was a factor in the development of calligraphy as an art form.[113] Another factor was that although the language used was standardized, and the symbols within each form (*e.g.*; oracle bone, seal script, or clerical script)[114] were also standardized, there was a broad range of artistic expression available through variations in brush size, brush style, calligraphy paper, and types of inkstick, inkstone and ink effect, which can produce differences in brushstroke.[115]

During the Cultural Revolution, Mao developed a simpler, less formal, structure for calligraphy, to make writing more accessible to the peasant classes.[116] By the time the Cultural Revolution ended with his death, so few members of the

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[109] *Id.* at 19.

[110] Anne Farrer, *Calligraphy and Painting for Official Life, in* THE BRITISH MUSEUM BOOK OF CHINESE ART 84, 90 (Jessica Rawson ed., British Museum Press 1992). Farrer points out that Emperor Qin used this standardizing of written language as a means of unifying the "highly diverse feudal states" which preceded the Qin dynasty. Id.

[111] *Id.* at 90; FU, *supra* note 108, at 19.

[112] BARRASS, *supra* note 106, at 17.

[113] *Id.*

[114] FU, *supra* note 108, at 19. Clerical script was developed during the Han Dynasty (206 B.C. – A.D. 220), which followed the Qin Dynasty. This form of writing was used for official documents and public monuments. It was a simplified version of small seal script. *Id.*

[115] BARRASS, *supra* note 106, at 24-25.

[116] *Id.* at 105-06. Gordon Barrass refers to Mao the calligrapher as "The Revolutionary Classicist." Mao, he notes, had to develop his calligraphy style first as a poor student, and then as a revolutionary, while engaged in military operations. As such, he did not have access to a wide array of papers, ink and inkstones, and brushes. His simple style developed, it seems, out of necessity. *Id.* at 105-06.

intelligentsia and former bureaucratic classes were left that a return to the more detailed and formal style of calligraphy was impossible for mass usage, and the simplified version is what remains in use. This change partly set the stage for the prospect of new forms of calligraphy, which would begin to diverge from the formal and rigid style that fostered schools of copiers, and would ultimately give rise to a modern school of calligraphy based on individual expression.[117]

Gordon Barass summarized the impact Mao had on the development of modern calligraphy in China:

> The main message that many young calligraphers have drawn from Mao's style is that they, too, can be a law unto themselves and do not need to follow the "rules" of calligraphy. This would not be a bad influence, had they Mao's poetic inspiration and consummate skill with the brush.[118]

Gu Gan, one of the founders of this new school of contemporary calligraphy, drew inspiration from another key development for Chinese artists in the post-Mao era – the exposure to Western modernist art and artists, such as Picasso.[119] This exposure, which occurred in the late 1950s and early 1960s, fueled the development of modern calligraphy. In an odd sense, it seems that Western influence may indeed lead to a greater acceptance of Western-style IP regimes. However, it is not the influence of our law so much as the influence of our artistic culture which is deeply rooted in the work of the individual, rather than works for the benefit of the state, which will effectuate this acceptance. Although deeply grounded in the traditional styles of calligraphy, Gu Gan has taken those styles and combined them with his extensive knowledge of Western abstract art, to create bold, highly individualistic works of contemporary calligraphy which have brought him great recognition and fame, both in China and in the West.[120]

Modern calligraphy bears little resemblance to the traditional forms and is instead, as articulated by artist and theorist Zhang Qiang, about self-openness, or calligraphic openness. The artists creating these works are challenging official definitions of art and are claiming individual ownership of their work. As their works move beyond China's borders they bring, through the interest shown in their work by collectors, curators and dealers, recognition and fame to China—values prized and desired by the government.[121]

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[117] *Id.* at 117.

[118] *Id.* at 117.

[119] *Id.* at 53-54, 182-93. Professor Zhang Ding, President of the Central Academy of Design in China, met Picasso in Paris in 1956. Picasso remarked, during their meeting, that if he had been born in China, he would have been a calligrapher, not a painter. *Id.* at 53-54.

[120] *Id.* at 192. Gu Gan created a trilogy of works, entitled *The Age of Red and Gold*, which represent a radical departure from traditional calligraphy, and which were widely imitated throughout China. He is viewed as one of the leading figures in China's Modernist art movement. *Id.*

[121] *Id.* at 256-63. Qiang's work is viewed as going beyond Modernism towards Avant-Garde, and is marked by a style he created called "Traceology" in which he works with a female partner creating a new way to collaboratively create calligraphic artworks. *Id.* He notes that the very fact that he is allowed to perform and exhibit this kind of cutting edge work demonstrates how much attitudes in China have changed in the last decade. *Id.* at 262.

Noted art critic and Columbia University Philosophy Professor Arthur C. Danto, in his book of essays, *Beyond the Brillo Box: The Visual Arts in Post-Historical Perspective*, discusses, in an essay in the book entitled *Shapes of Artistic Pasts, East and West*, how the essence of the Modernism movement in art is the rejection of history.[122] Danto tells the story that when Braque and Picasso were co-inventing Cubism, they stopped going to museums, so that they would not be influenced by art movements of the past. Braque was so torn by his desire to avoid those past influences, but at the same time be up-to-date on new material found in museums, that according to Danto:

> There is a story about Braque driving with his wife through Italy, stopping in front of a museum, and saying "Marcelle, you go in and look around and tell me what's good in there." He was anxious not to spoil his eye with old painting (Françoise Gilot tells us) and nothing could more eloquently express the attitude toward the past that is proper to the modernist narrative.[123]

It is precisely this rejection of history by the new wave of artists in Chinese calligraphy, in this case the history of Confucian doctrine which eschewed individual expression and ownership, which, if supported and encouraged, may create in these new artists the kind of local stakeholders who will see the value of implementing a regime of strong copyright protection, and in so doing, achieve internally the goal sought by the West.

Conclusion

Any effort to chart a prospective course for social change among an entire society is fraught with difficulties, chief among them the impossibility of discussing culture and cultural change in broad general terms, since in most cases it is in the details that change is affected and those details are virtually impossible to predict in advance. Add to that the challenge of discussing cultural change in a culture that the author is not born into, and the difficulties are magnified. However, scholars have long embarked on such discussions, and it is hoped that in this article I have been able to explain and illustrate that attempts to create an environment supportive of copyright enforcement and protection in China are more likely to succeed if they take into account the nuanced approaches necessary to nurture such an environment. Like the sly rabbit, we need multiple approaches to achieve this goal, approaches anchored in law, economics and the creation of social norms.

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[122] ARTHUR C. DANTO, BEYOND THE BRILLO BOX: THE VISUAL ARTS IN POST-HISTORICAL PERSPECTIVE (Univ. of California Press 1992).

[123] *Id.* at 128.

VIETNAM'S ELIGIBILITY TO RECEIVE TRADE BENEFITS UNDER THE U.S. GENERALIZED SYSTEM OF PREFERENCES

Alexander H. Tuzin[†]

I. Introduction

The U.S. Generalized System of Preferences (GSP) is a program that encourages economic development through trade. It grants preferential, duty-free treatment to the products of beneficiary developing countries (BDCs), giving these countries' products a competitive advantage in U.S. markets, and lowering costs for American business and consumers.

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In May 2008, Vietnam officially requested to receive these trade benefits under the U.S. GSP.[1] If these trade benefits are granted, both the United States and Vietnam could benefit considerably. However, Vietnam's compliance with the GSP eligibility criteria is problematic. Ultimately, Vietnam's protections for both intellectual property rights and internationally recognized worker rights are inadequate.

This article initially provides a brief background on GSP programs and lays out their legal basis within the World Trade Organization (WTO). The next section gives an overview of the U.S. GSP program and outlines its country and its product eligibility requirements. Finally, this article examines Vietnam's economic background, analyzes Vietnam's prospects for eligibility under the U.S. GSP program, and focuses on key reforms that Vietnam will need to make in order to attain U.S. GSP trade benefits.

II. Generalized System of Preferences Background

The Most Favored Nation (MFN) principle generally prohibits WTO members from granting trade benefits to certain countries while withholding those benefits from others. For a long time, however, developing countries sought an exception to the MFN principle so they could receive preferential trade benefits from more developed countries. It was not until the Enabling Clause was adopted in 1979 that developing countries were allowed significant differential and more favorable treatment under the GATT/WTO system. This, consequently, provides the legal basis for national GSP programs under which many developing countries now receive special trade benefits.

A. Developing Countries and the WTO

Developing countries' interests in the GATT/WTO system have evolved significantly over the years. There has long been tension between developed and developing countries' interests in the GATT/WTO system. Traditionally, developing countries have been unsatisfied with the GATT/WTO system and have felt that they have had only limited leverage and influence in decision-making. In particular, developing countries have been frustrated because the GATT/WTO rules have failed to address some of their major interests concerning agriculture, textiles, and clothing. As a result, many developing countries were reluctant to join the GATT/WTO system up until the 1980s, insisted on limiting imports by imposing high tariffs and quotas, and were generally opposed to liberalizing their trade policies.

By the 1980s, however, many developing countries began to change their outlook on open-trade policies. A growing number of these developing countries liberalized their economies, opened up their markets, and joined the WTO system. Consequently, the multilateral structure of the WTO has enabled develop-

[1] Letter from the Embassy of Vietnam to the United States Trade Representative (May 9, 2008), *available at* http://www.ustr.gov/sites/default/files/uploads/gsp/asset_upload_file29_15061.pdf.

ing countries to join together to leverage their numbers in advancing their interests in trade negotiations.

B. The Most Favored Nation Principle

The MFN principle is a cornerstone of GATT/WTO trade law. It is enshrined in Article I of the GATT and obligates members to treat "like" products of all other member countries no worse than they treat the imports of their most favored trading partner.[2] This fundamental principle prohibits members of GATT/WTO from taxing imports of the same item from different countries at different rates. Consequently, it also prohibits preferential treatment for developing countries.

Nevertheless, developing countries have sought special treatment that would improve their competitiveness in developed countries' markets and promote their economic development through trade. The developing countries persisted in arguing that equal treatment of unequal partners is unfair and ultimately succeeded in persuading GATT members to recognize that the MFN principle should be relaxed to allow wealthier countries to reduce trade barriers on products from developing countries.

Eventually, several GATT articles were designed to provide developing countries with particular trade privileges. However, the first of these articles have turned out to be fairly ineffective: Article XVIII has only rarely been invoked, and Articles XXXVI, XXXVII, and XXXVIII (added to GATT as Part VI) seem to operate more as mere recommendations than as legally binding provisions.

C. The Enabling Clause

Effectively, it was not until the Enabling Clause was adopted as part of the Tokyo Round in 1979 that developing countries were granted significant differential and more favorable treatment under GATT. Paragraph 1 of the Enabling Clause explicitly provides an exception to the MFN principle, asserting that: "Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favorable treatment to developing countries, without according such treatment to other contracting parties."[3]

Ultimately, the Enabling Clause allows GATT/WTO members to provide developing countries with trading preferences that would otherwise violate the MFN principle. As a result, it provides the legal basis for creating formal GSP programs, which establishes the rules on exactly how these trade preferences are provided. Paragraph 2(a) and footnote three of the Enabling Clause provide that a GSP program may only give preferential treatment in accordance with the Preamble to the 1971 Waiver Decision. Consequently, preferential treatment under

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[2] General Agreement on Tariffs and Trade art. I, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, *available at* http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf [hereinafter GATT].

[3] *Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, ¶1, L/4903 (Nov. 28, 1979), GATT B.I.S.D. (26th Supp.) at 203 (1980), *available at* http://www.wto.org/english/docs_e/legal_e/enabling_e.pdf [hereinafter Enabling Clause].

the Enabling Clause must be generalized, non-reciprocal, non-discriminatory, and beneficial to the developing countries.[4]

Over the years, more than twenty-five countries have established their own GSP programs, each consisting of different beneficiaries, products, and types of preferences granted.[5] Currently there are thirteen distinct GSP programs provided by the following countries: Australia, Belarus, Bulgaria, Canada, Estonia, the European Union, Japan, New Zealand, Norway, Russia, Switzerland, Turkey, and the United States.[6]

III. Introduction to the U.S. GSP

The United States first implemented its GSP program in 1976, and has periodically renewed its program since.[7] The program provides preferential, duty-free treatment for 3,448 products from 131 beneficiary developing countries (BDCs). Furthermore, forty-four of these countries have been designated as least developed beneficiary developing countries (LDBDCs), and are given duty-free treatment for an additional 1,434 products.[8] For many beneficiary countries, such as Paraguay, Lebanon, Tunisia, Fiji, and Armenia, exports under the U.S. GSP program represent a major portion of their total exports. In fact, total imports entering the United States under its GSP program in 2008 were worth approximately $31.7 billion.[9]

A. Country Eligibility

The President ultimately decides which countries are eligible for GSP treatment.[10] Title V of the 1974 Trade Act ("GSP Statute") provides the guidelines for eligibility under the U.S. GSP program. The GSP Statute outlines various factors to be considered before granting a country BDC status, including several economic factors[11] as well as certain mandatory and discretionary eligibility criteria.[12]

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[4] *See id.* ¶2(a) n.3.

[5] Office of the United States Trade Representative [USTR], U.S. GENERALIZED SYSTEM OF PREFERENCES (GSP) GUIDEBOOK 16 (2009), *available at* http://www.ustr.gov/sites/default/files/uploads/gsp/asset_upload_file403_8359.pdf.

[6] United Nations Conference on Trade and Development, About GSP, http://www.unctad.org/Templates/Page.asp?intItemID=2309& (last visited Mar. 18, 2010).

[7] USTR, Generalized System of Preferences, http://www.ustr.gov/Trade_Development/Preference_Programs/GSP/Section_Index.html (last visited Mar. 18, 2010) [hereinafter Generalized System of Preferences].

[8] USTR, 2009 TRADE POLICY AGENDA AND 2008 ANNUAL REPORT 221 (2009), *available at* http://www.ustr.gov/sites/default/files/uploads/reports/2009/asset_upload_file937_15405.pdf [hereinafter 2009 TRADE POLICY AGENDA].

[9] Press Release, USTR, Obama Administration Completes 2008 Annual Review of the Generalized System of Preferences (June 30, 2009), *available at* http://www.ustr.gov/about-us/press-office/press-releases/2009/june/obama-administration-completes-2008-annual-review-gen.

[10] Trade Act of 1974, 19 U.S.C.A. § 2462(a)(1) (effective Aug. 6, 2002).

[11] Trade Act of 1974, 19 U.S.C.A. § 2461 (effective Aug. 20, 1996).

[12] 19 U.S.C.A. § 2462(b)-(c).

First, in modifying the GSP list of eligible countries or eligible products, the President is instructed to take into account several economic factors. Such economic factors include: the anticipated effects on the economic development of the country, the country's GSP treatment from other developed countries, the likely impact on U.S. producers, and the country's competitiveness with respect to eligible products.[13]

Second, the mandatory criteria exclude the following from eligibility: communist countries, certain export cartel members, countries that expropriate U.S. property, countries that fail to recognize arbitral awards in favor of U.S. citizens, countries that aid and abet international terrorism, and countries that do not afford internationally recognized worker rights and have not eliminated the worst forms of child labor.[14]

Finally, the President may also consider discretionary criteria, such as: the desire of the country to be a GSP beneficiary, the level of economic development of the country, the country's GSP treatment from other developed countries, the country's assurances of reasonable access to its markets, protections of intellectual property rights, actions taken to reduce trade distorting investment practices and barriers to trade in services, and steps taken to protect worker rights.[15]

B. Eligible Products

Approximately 5,000 products are eligible for duty-free import from LDBDCs, and most of those products are also eligible for duty-free import from the rest of the BDCs.[16] The top U.S. GSP imports in 2008 by trade value were crude petroleum oils, oils from bituminous minerals (which are only eligible for duty-free import from LDBDCs), biodiesel, certain ferrochromium, silver jewelry valued over $18 per dozen, gold necklaces and neck chains, new radial tires for automobiles, aluminum alloys, gold and platinum jewelry (not including necklaces and neck chains), and methanol.[17]

However, several limitations on product eligibility have been established in the U.S. GSP system in order to safeguard the interests of U.S. producers. Certain products are deemed "sensitive" and are excluded from GSP eligibility altogether, including certain textiles, watches, electronics, steel articles, footwear, handbags, luggage, glass products, and agricultural products.[18] In addition, the GSP statute establishes "competitive needs limitations" (CNLs) that automatically suspend GSP eligibility if imports of a particular product from a country reach certain thresholds.[19] Finally, a BDC country may be "graduated" and re-

[13] 19 U.S.C.A. § 2461.

[14] 19 U.S.C.A. § 2462(b)(2).

[15] 19 U.S.C.A. § 2462(c).

[16] *See* Press Release, USTR, *supra* note 9.

[17] 2009 TRADE POLICY AGENDA, *supra* note 8 at 223.

[18] Trade Act of 1974, 19 U.S.C.A. § 2463(b) (effective Dec. 20, 2006).

[19] 19 U.S.C.A. § 2463(c).

moved from GSP eligibility once it becomes more developed or reasonably competitive.[20]

IV. Vietnam's Eligibility Under The U.S. GSP

Although Vietnam and the United States have had a difficult past, times have changed. Now, more than thirty years after the end of the Vietnam War and more than fifteen years since the fall of the Soviet Union and the end of the Cold War, the relationship between the two countries has improved immensely. This section first gives a brief review of Vietnam's economic and political background and then presents a comprehensive analysis of Vietnam's eligibility under the U.S. GSP program.

A. Background on Vietnam

1. Evolution of Vietnamese Politics, Trade Policy, and Economy

The Vietnam War raged on for many years between the communist state of North Vietnam and the anti-communist state of South Vietnam, which was provided a great amount of military support by the United States. When Saigon fell on April 30, 1975 to the forces of North Vietnam, North and South Vietnam were reunified as a single, communist state. The war had finally come to an end, but the Vietnamese economy had been devastated by the many years of bloodshed and destruction.

Once the United States withdrew from Vietnam, it imposed a trade embargo on Vietnam under the Trading with the Enemy Act (TWEA),[21] cutting off all trade.[22] Vietnam was isolated from the United States and its anti-communist allies and became especially dependent upon trade with the Soviet Union.[23] Vietnam also received billions of dollars per year in economic and military aid from the Soviet Union.[24]

In the early 1980s, the Vietnamese Government collectivized land ownership and repressed private business. Sadly, these new policies only seemed to exacerbate Vietnam's economic problems. Industries that had once been stable began to fail, and the population was pushed to the brink of famine.[25] To make matters worse, as the Soviet Union's economy also began to struggle it cut its aid to Vietnam.[26]

In the midst of this crisis and increased isolation, the Vietnamese Government ushered in a dramatic set of reforms in the mid-1980s called "Doi Moi" (meaning

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[20] 19 U.S.C. § 2462(e).

[21] Trading with the Enemy Act of 1917, ch. 106, 40 Stat. 411, 50 U.S.C.A. App. §§ 1-44.

[22] Ky Tran-Tong, *A Would-Be Tiger: Assessing Vietnam's Prospects for Gaining Most Favored Nation Status from the United States*, 38 WM. & MARY L. REV. 1583, 1586 (1997).

[23] WILLIAM J. DUIKER, VIETNAM: REVOLUTION IN TRANSITION 211 (Westview Press 1995) (1983).

[24] U.S. Department of State, Background Note: Vietnam, http://www.state.gov/r/pa/ei/bgn/4130.htm (last visited Mar. 18, 2010) [hereinafter Background Note: Vietnam].

[25] *Half-Way from Rags to Riches*, ECONOMIST, Apr. 26, 2008, at 62, *available at* 2008 WL 7732613.

[26] Tran-Tong, *supra* note 22, at 1587.

renewal). The Doi Moi reforms were similar to the reforms introduced by Deng Xiaoping in China just a few years earlier.[27] Once China had opened its economy in 1978 and focused on export production, it began to experience dramatic growth.[28] Under the Doi Moi reforms, the Vietnamese Government abandoned centralized state planning, permitted free-market enterprises, gave farmers greater control over what they produced, opened the country to foreign investment, and began actively promoting export-led growth.[29]

After the Soviet Union finally collapsed in 1991, Vietnam took even greater steps to open up its markets and assimilate into the rest of the global economy. In fact, Vietnam joined the International Monetary Fund (IMF), the World Bank, the Asian Development Bank in the 1990s; it joined the Association of Southeast Asian Nations (ASEAN) in 1995, and the Asia-Pacific Economic Cooperation forum (APEC) in 1998.[30]

Relations between the United States and Vietnam also improved. The United States finally lifted its trade embargo on Vietnam in 1994. Thereafter, Vietnam entered into a Bilateral Trade Agreement (BTA) with the U.S. in 2001, was granted Normal Trade Relations (NTR) status by Congress in 2006, and concluded a Trade and Investment Framework Agreement (TIFA) with the United States in 2007.

Reforms that Vietnam made in compliance with the U.S. BTA—increasing protections for investments, strengthening enforcement of intellectual property rights, increasing transparency, and reforming trade in goods and services—helped Vietnam to subsequently join the WTO in 2007. To fulfill WTO requirements, Vietnam has revised most of its trade and investment laws, has opened up big sectors of its economy to foreign investors and exporters, and has become even more integrated into the global economy.[31]

2. *Vietnam's Current Trade and Economy*

These reforms have transformed Vietnam dramatically over the years into one of the most open economies in the world. In 2008, exports accounted for a massive seventy-two percent of the Vietnamese GDP,[32] and the sum of Vietnam's imports and exports had risen to 160 percent of its GDP.[33] This boom in Vietnamese exports has, in turn, helped to spur remarkable growth. In fact, because of these reforms, Vietnam's GDP has been growing by an average of approximately seven percent to eight percent annually since 1990.[34]

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[27] *Half-Way from Rags to Riches*, *supra* note 25.

[28] *The Export Trap: Asia's Failing Export-Led Growth Model*, ECONOMIST.COM, Mar. 25, 2009 (Westlaw).

[29] *Half-Way from Rags to Riches*, *supra* note 25.

[30] Background Note: Vietnam, *supra* note 24.

[31] Background Note: Vietnam, *supra* note 24.

[32] Background Note: Vietnam, *supra* note 24.

[33] *Half-Way from Rags to Riches*, *supra* note 25.

[34] Background Note: Vietnam, *supra* note 24.

Vietnam's major exports include garments and textiles, crude oil, footwear, fishery and seafood products, rice (Vietnam is now the world's second largest exporter of rice), wood products, coffee, rubber, and handicrafts.[35] Vietnam will also begin exporting microchips once Intel opens its new one billion dollar factory.[36]

Vietnam's principal imports include machinery, oil and gas, iron and steel, garment materials, and plastics.[37] Many of these primary imports are needed for the production of Vietnam's exports and have increased significantly as well. Indeed, despite Vietnam's historic level of exports in 2008, valued at $62.9 billion, it nevertheless ran a trade deficit of $17.5 billion.[38]

Trade between Vietnam and the United States has burgeoned in particular and Vietnam has become a valuable trading partner to the United States.[39] In fact, Vietnam's exports to the United States increased 900 percent from 2001 to 2007.[40] Vietnamese exports to the United States have steadily increased and came to a total value of $12.9 billion in 2008.[41] The United States is now Vietnam's third biggest trading partner and has become Vietnam's biggest export market.[42] Vietnam's top exports to the United States currently include clothing and textiles, furniture, footwear, and crude oil.[43]

Despite Vietnam's reforms and impressive growth, it remains a very poor country. Vietnam is made up of about 86 million people with a GDP of approximately $85 billion in 2008.[44] According to the most recent World Bank report, the gross national income (GNI) per capita for Vietnam was only $890 in 2008, compared to the estimated 2008 U.S. GNI per capita of $47,580.[45]

The United States has extended BDC status under its GSP program to 131 developing countries.[46] However, many of these countries are more developed and have a much higher GNI per capita than Vietnam. Consider, for example, Croatia, Turkey, and even Vietnam's neighbor, Thailand. In 2008, Croatia's GNI per capita was estimated to be $13,570, Turkey's $9,340, and Thailand's

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35 Background Note: Vietnam, *supra* note 24.

36 *Halfway from Rags to Riches*, *supra* note 25.

37 Background Note: Vietnam, *supra* note 24.

38 Background Note: Vietnam, *supra* note 24.

39 Background Note: Vietnam, *supra* note 24.

40 Know Your Country, Vietnam, http://www.knowyourcountry.info/vietnam.html (last visited Mar. 18, 2010).

41 Background Note: Vietnam, *supra* note 24.

42 Embassy of the United States: Hanoi, Vietnam, U.S.-Vietnam Cooperation on Economic Development, Trade and Investment Fact Sheet, http://vietnam.usembassy.gov/cooperationfactsheet.html (last visited Mar. 18, 2010) [hereinafter U.S.-Vietnam Fact Sheet].

43 U.S. Census Bureau, U.S. Imports from Vietnam from 2004 to 2008 by 5-digit End-Use Code, http://www.census.gov/foreign-trade/statistics/product/enduse/imports/c5520.html (last visited Mar. 18, 2010) [hereinafter U.S. Imports from Vietnam].

44 Background Note: Vietnam, *supra* note 24.

45 WORLD BANK, GROSS NATIONAL INCOME PER CAPITA 2008, ATLAS METHOD AND PPP 1, 3 (2009), http://siteresources.worldbank.org/DATASTATISTICS/Resources/GNIPC.pdf [hereinafter GROSS NATIONAL INCOME].

46 Generalized System of Preferences, *supra* note 7.

$2,840.[47] All of these countries have been granted BDC status, yet Vietnam has not. As a matter of fact, Vietnam even had a lower GNI per capita in 2008 than fourteen countries[48] designated as "least developed" BDCs[49] under the U.S. GSP program.[50]

The GSP Statute stipulates that a country should be "graduated" and removed from GSP eligibility once it becomes a "high income" country (a GNI per capita level defined by the World Bank).[51] In fact, this "high income," graduation level is currently at $11,906,[52] a level that is over 1,200 percent higher than Vietnam's 2008 GNI per capita.[53]

Millions of Vietnamese have very low living standards. In 2007, an estimated 14.8 percent of the population still struggled below the poverty line,[54] and twenty-five percent of children under the age of five suffered from malnutrition.[55] Furthermore, the recent financial crisis and decline in American consumption threaten to reduce Vietnam's exports and slow economic growth. This slowdown may lead to an increase in unemployment and corporate bankruptcies, a decrease in foreign investment, and an exacerbation of poverty in Vietnam.[56]

B. Analysis of Vietnam's GSP Eligibility

The President ultimately decides which countries are eligible for GSP treatment.[57] Title V of the GSP Statute provides the guidelines for eligibility under the U.S. GSP program. The GSP Statute outlines various factors to be considered before granting a country BDC status, including several economic factors[58] and certain eligibility criteria.[59]

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47 GROSS NATIONAL INCOME, *supra* note 45, at 1-2.

48 Angola, Bhutan, Cape Verde, Djibouti, East Timor, Equatorial Guinea, Kiribati, Lesotho, Samoa, Sao Tome and Principe, Solomon Islands, Vanuatu, Republic of Yemen, and Zambia. *Id.* at 2-3.

49 USTR, INFORMATION ON COUNTRIES ELIGIBLE FOR GSP 2, http://www.ustr.gov/sites/default/files/uploads/gsp/asset_upload_file5_14711.pdf.

50 GROSS NATIONAL INCOME, *supra* note 45, at 2-3.

51 19 U.S.C. § 2462(e).

52 World Bank, Data & Statistics: Country Classification, http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:20420458~menuPK:64133156~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html (last visited Mar. 18 2010).

53 GROSS NATIONAL INCOME, *supra* note 45, at 3.

54 Countries of the World, Vietnam Economy 2010, http://www.theodora.com/wfbcurrent/vietnam/vietnam_economy.html (last visited Mar. 18, 2010).

55 UNICEF, The Children in Vietnam, http://www.unicef.org/vietnam/children.html (last visited Mar. 18, 2010).

56 Central Intelligence Agency [CIA], World Fact Book: Vietnam, https://www.cia.gov/library/publications/the-world-factbook/geos/vm.html (last visited Mar. 18, 2010).

57 19 U.S.C. § 2462(a)(1).

58 19 U.S.C. § 2461.

59 19 U.S.C. § 2462(b)-(c).

1. Economic Factors

In modifying the GSP list of eligible countries or eligible products, the President is instructed to take into account: (a) the anticipated effects on the economic development of the country; (b) the country's GSP treatment from other developed countries; (c) the likely impact on U.S. producers; and (d) the country's competitiveness with respect to eligible products.[60]

a. Effect on Economic Development of the Country

First, we consider the effect that BDC status would have on furthering the economic development of the beneficiary country through the expansion of its exports. Much of Vietnam's recent export-led growth has been dependent upon the competitiveness of Vietnamese goods in U.S. markets. In fact, the United States has become Vietnam's biggest export market.[61]

If Vietnam received U.S. GSP benefits, many of its products would be eligible for duty-free entry and would sell at even more competitive prices in U.S. markets. Eligible Vietnamese products would finally compete on a level playing field with the duty-free products from all the other countries that currently receive GSP benefits. Plus, eligible Vietnamese products would gain an advantage over products from countries outside the U.S. GSP system, like China. A competitive advantage for Vietnamese goods over certain Chinese products in U.S. markets may even help to partially offset the rising trade deficit that the U.S. has with China. Ultimately, though, GSP benefits would provide an added boost to Vietnam's exports that would help to encourage further economic development and the alleviation of poverty in Vietnam.

As a BDC, Vietnam would be entitled to GSP trade benefits on over 3,400 products in the U.S. tariff schedule.[62] Vietnamese ceramic and porcelain homewares, non-sensitive electronics (such as space heaters, loudspeakers, and audio frequency products), precious metal and imitation jewelry, sporting equipment, wooden tableware, and office supplies would all receive beneficial GSP treatment.[63] In addition, some of Vietnam's fastest growing, top exports to the United States (such as soaps, plastics and articles made of plastic, machinery, and electrical machinery) would be eligible for duty-free GSP treatment, and may experience even greater growth if Vietnam were to acquire BDC status. Vietnam's machinery and electrical machinery industries may also flourish under the U.S. GSP system, since the Vietnamese government has already been active in promoting these industries.[64]

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[60] 19 U.S.C. § 2461.

[61] U.S.-Vietnam Fact Sheet, *supra* note 42.

[62] 2009 TRADE POLICY AGENDA, *supra* note 8, at 221.

[63] Vietnam Trade Office and Sidley Austin LLP, Frequently Asked Questions: Understanding Vietnam and GSP, http://www.usasean.org/Vietnam/GSP/FAQ.pdf (last visited Mar. 18, 2010) [hereinafter Vietnam Trade Office].

[64] MICHAEL MARTIN & VIVIAN JONES, CRS REPORT FOR CONGRESS: POTENTIAL TRADE EFFECTS OF ADDING VIETNAM TO THE GENERALIZED SYSTEM OF PREFERENCES PROGRAM, RL34702, at CRS-1 (2008), *available at* http://assets.opencrs.com/rpts/RL34702_20081009.pdf.

Moreover, Vietnam's economy is currently fairly vulnerable to economic shocks because its exports are concentrated in a relatively few number of industries and products.[65] GSP treatment would encourage Vietnamese industry to shift into producing goods that are eligible for preferential treatment. This would help to expand and diversify Vietnam's exports, ultimately making the Vietnamese economy more resilient to economic shocks and helping Vietnam sustain its development.

b. GSP Treatment From Other Developed Countries

Next, we consider whether other major developed countries are extending GSP benefits to the country seeking U.S. GSP status. Vietnam's low level of economic development has caused the country to be granted trade benefits under a number of other GSP programs. The European Union, Canada, Japan, New Zealand, Norway, Switzerland, Australia, and even Turkey and Russia have all provided GSP benefits to Vietnam.[66] As a matter of fact, the United States stands alone as the only major developed country with a GSP program that has not extended these benefits to Vietnam.[67]

c. Impact on U.S. Producers

Also to consider is the anticipated impact of such action on U.S. producers of like or directly competitive products. It is unlikely that designating Vietnam as a BDC under the U.S. GSP would have any significant detrimental effect on U.S. producers.

U.S. imports from Vietnam came to a total of $12.9 billion in 2008.[68] However, this is only a tiny fraction of entire U.S. imports, which totaled $2.19 trillion in 2008. Moreover, U.S imports from Vietnam are dwarfed by the U.S. GDP, which was estimated to be $14.3 trillion in 2008.[69] Thus, all U.S. imports from Vietnam count for less than 0.6 percent of total U.S imports, and all U.S. imports from Vietnam are less than 0.1 percent of the total U.S. GDP.

Furthermore, certain products are deemed "sensitive" and are excluded from GSP eligibility, including most textiles, watches, electronics, steel articles, footwear, handbags, luggage, flat goods, work gloves, glass products, and agricultural products.[70] In fact, the top U.S. imports from Vietnam (garments and textiles, furniture, footwear, and crude oil)[71] will not gain much advantage through the U.S. GSP system because they fall under these "sensitive" product

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65 U.S. Imports from Vietnam, *supra* note 43.

66 Vietnam Trade Office, *supra* note 63.

67 Vietnam Trade Office, *supra* note 63.

68 Background Note: Vietnam, *supra* note 24.

69 CIA, World Fact Book: United States, https://www.cia.gov/library/publications/the-world-factbook/geos/us.html (last visited Mar. 18, 2010).

70 19 U.S.C. § 2463(b)(1).

71 U.S. Imports from Vietnam, *supra* note 43.

categories as delineated in the GSP statute.[72] Moreover, crude petroleum is only eligible for duty-free import from LDBDCs.[73] Thus, the GSP system safeguards U.S. producers from the most robust Vietnamese imports.

Ultimately, extending BDC status to Vietnam should benefit the U.S. economy. Vietnamese imports that are eligible for GSP treatment would enter the U.S. markets duty-free, allowing them to compete with similar duty-free products from other BDCs. This increase in competition within U.S. markets should shift production towards those BDC countries with a comparative advantage, driving prices down to the benefit of U.S. consumers and businesses.

Duty-free imports under the U.S. GSP program currently help U.S. consumers save millions of dollars annually on a broad range of products. Indeed, many U.S. businesses are able to benefit greatly from the GSP program by obtaining cheaper raw materials, components, and machinery. Savings on imports from Vietnam may be especially helpful for some U.S. businesses that have been hit by this latest recession.

d. Competitiveness With Respect to Eligible Products

Last to consider is the extent of the country's competitiveness with respect to eligible products. Vietnamese products that would be eligible for GSP treatment are not very competitive with U.S. products and are not imported into the United States in large numbers.[74]

Besides, the GSP Statute establishes "competitive needs limitations" (CNLs) that would restrict the eligibility of any Vietnamese product if it manages to become too competitive. CNLs automatically suspend GSP eligibility when imports of a product from a particular country reach a certain threshold ($135 million in 2008) or when fifty percent or more of total U.S. imports of a particular product come from a single country.[75]

Moreover, if U.S. producers are negatively affected by particular GSP imports, they may petition the USTR to remove these products from GSP eligibility.[76] This occurred, for example, in June 2008, when certain gold jewelry from Turkey and gold necklaces from India were stripped of GSP eligibility because they had become overly competitive under the U.S. GSP system.[77]

2. Eligibility Criteria

The United States uses its GSP eligibility standards to encourage developing countries to embrace certain values and strengthen protections for various rights. The most problematic GSP eligibility criteria for Vietnam include (a) the prohibi-

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[72] 19 U.S.C. § 2463(b)(1).

[73] 2009 TRADE POLICY AGENDA, *supra* note 8, at 223.

[74] U.S. Imports from Vietnam, *supra* note 43.

[75] 19 U.S.C. § 2463(c)(2)(A)(i).

[76] 15 C.F.R. 2007.0(b) (2010).

[77] 2009 TRADE POLICY AGENDA, *supra* note 8, at 224.

tion on communism, (b) the required protections of intellectual property rights, and (c) the required protections of worker rights.

a. Prohibition on Communism

The mandatory eligibility criteria prohibit the President from designating any country as a GSP beneficiary if it engages in certain stipulated activities. The first prohibition in this section provides that a GSP beneficiary may not be a Communist country, unless such country receives Normal Trade Relations (NTR) treatment, is a member of the WTO and the International Monetary Fund (IMF), and is not dominated by international communism.[78]

One might debate whether or not Vietnam should be classified as a "Communist country," because it has transitioned to a market economy, it permits private enterprise, and it protects private property rights. Additionally, the Vietnamese government officially refers to itself as a "*Socialist* Republic" rather than as a "Communist country." On the other hand, Vietnam remains a one-party state run by the Communist Party of Vietnam (VCP), and the Government continues to exert a great amount of control over the economy.

However, whether or not Vietnam is classified as a "Communist country" is not crucial since Vietnam should now satisfy the requirements of the exception to the prohibition, as laid out in the statute above. Vietnam was granted NTR status by Congress in 2006, became a member of the WTO in 2007, and joined the IMF in the 1990s.[79] Finally, the requirement that a country not be "dominated by international communism" seems anachronistic, considering that the Soviet Union collapsed and the Cold War ended over fifteen years ago. Moreover, Vietnam has made effective reforms to open up its markets and has integrated into the rest of the global economy. Thus, it is unlikely that Vietnam could be considered "dominated by international communism." Ultimately, even if Vietnam is classified as a "Communist country," this should no longer prevent it from acquiring BDC status under the U.S. GSP.

b. Required Protections of Intellectual Property Rights

Next, we consider the extent to which the country provides "adequate and effective" protection of intellectual property rights. The Senate Finance Committee Report explained that:

> To determine whether a country provides "adequate and effective means," the President should consider the extent of statutory protection for intellectual property (including the scope and duration of such protection), the remedies available to aggrieved parties, the willingness and ability of the government to enforce intellectual property rights on behalf of foreign nationals, the ability of foreign nationals to effectively enforce their intellectual property rights on their own behalf, and whether the

[78] 19 U.S.C. § 2462(b)(2)(A).

[79] Background Note: Vietnam, *supra* note 24.

> country's system of law imposes formalities or similar requirements that, in practice, are an obstacle to meaningful protection.[80]

The government of Vietnam has made notable progress in passing legislation to protect intellectual property rights. Since 1949, Vietnam has been a party to the Paris Convention for the Protection of Industrial Property ("Paris Convention") and the Madrid Agreement on International Registration of Marks ("Madrid Agreement"). Vietnam has also been a member of the World Intellectual Property Organization (WIPO) since 1976.[81]

When Vietnam entered into the BTA with the United States in 2001, it made important commitments to protect intellectual property and to meet the basic standards of the Agreement on Trade-Related Aspects of Intellectual Property Rights of the WTO ("TRIPS") in the ensuing two years.[82] Since then, Vietnam has become an official party to a number of major intellectual property treaties, including the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention") in 2004, the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms ("Geneva Convention") in 2005, the Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite ("Brussels Convention"), the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks ("Madrid Protocol"), and the International Convention for the Protection of New Varieties of Plants ("UPOV Convention") in 2006.[83]

Finally, upon joining the WTO in 2007, Vietnam became a party to the TRIPS Agreement. Just after joining TRIPS, Vietnam also became a member to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations ("Roma Convention") in 2007.[84]

Alongside these international agreements and commitments, Vietnam has also passed recent national legislation to strengthen protections for intellectual property rights. In particular, Vietnam passed a comprehensive Intellectual Property Law in 2005 that includes protections for copyrights, industrial property rights (consisting of trademarks, inventions and industrial designs), and rights to plant variety. A new Civil Code was also passed in 2005. Together, this Intellectual Property Law and this new Civil Code replaced previous legislation and formed a broad and consolidated system of regulations on intellectual property. Various other decisions and decrees concerning copyrights, industrial property, plant varieties, and the enforcement of intellectual property rights have also been passed since then and have built upon this framework. Furthermore, Vietnamese law

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[80] S. REP. No. 98-485, at 11 (1984).

[81] Working Party on the Accession of Viet Nam, *Report of the Working Party on the Accession of Vietnam*, ¶ 381, WT/ACC/VNM/48 (Oct. 27, 2006).

[82] Embassy of the United States: Hanoi, Vietnam, Protecting Intellectual Property Rights - Why It Is Important for Vietnam, http://vietnam.usembassy.gov/econ6.html (last visited Mar. 18, 2010).

[83] Working Party on the Accession of Viet Nam, *supra* note 81, ¶ 381.

[84] Houssein Boumellassa & Hugo Valin, *Vietnam's Accession to the WTO: Ex-Post Evaluation in a Dynamic Perspective* 16 (CEPII, Working Paper No. 2008-31, 2008), *available at* http://www.cepii.fr/anglaisgraph/workpap/pdf/2008/wp2008-31.pdf.

provides administrative procedures and remedies, compensation under civil procedures, and recourse to criminal prosecution under the 1999 Criminal Code.[85]

Despite these important legislative steps, enforcement of intellectual property rights remains a problem in Vietnam. Consequently, Vietnam remains on the U.S. Trade Representative Special 301 "Watch List."[86] Trademark infringement and copyright piracy are particularly prevalent, and Internet piracy has been on the rise. In fact, according to the International Intellectual Property Alliance (IIPA), eighty-three percent of business software and ninety-five percent of records and music in Vietnam were pirated copies in 2008. Total U.S. trade losses due to copyright piracy in Vietnam were estimated to be approximately $123 million.[87] For the most part, the Vietnamese Government has not proven to be very effective at deterring these violations of intellectual property rights and the penalties remain too lenient.

Nevertheless, Vietnam's problems of enforcing intellectual property rights do not seem terribly uncommon. Actually, a number of developing countries that receive U.S. GSP benefits have significant problems enforcing intellectual property rights. Bolivia, Brazil, Colombia, Costa Rica, the Dominican Republic, Ecuador, Egypt, Jamaica, Lebanon, Peru, the Philippines, Turkey, Ukraine, and Uzbekistan are all on the 2009 "Watch List" with Vietnam, yet they all receive U.S. GSP benefits. In fact, Algeria, Argentina, India, Indonesia, Pakistan, Russia, Thailand, and Venezuela have all earned the dishonorable distinction of being placed on the "Priority Watch List," yet they continue to receive GSP benefits.[88] In Indonesia, for example, it was estimated that eighty-six percent of business software and ninety-five percent of records and music had been pirated. Total U.S. trade losses due to copyright piracy in Indonesia were estimated to be approximately $302 million in 2008. In an even more extreme case, Russia was estimated to have cost the United States almost $2.8 billion due to copyright piracy.[89]

Although some countries retain GSP benefits despite weak protection of intellectual property rights, GSP benefits have been refused because of prevalent trademark infringement and copyright piracy. For example, in 2001, Ukraine's GSP benefits were suspended because it had become the largest producer and exporter of pirated CDs and DVDs. Then, in 2005, Ukraine passed legislation to strengthen its licensing regime and intensify its enforcement efforts. After this legislation was passed, the government of Ukraine actively inspected plants that were licensed to manufacture CDs and DVDs, it conducted raids on distributors of pirated products, and it imposed fines against violators. As a result, the illegal manufacturing and trade of these pirated CDs and DVDs was reduced in Ukraine,

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[85] Working Party on the Accession of Viet Nam, *supra* note 81, ¶ 468.

[86] USTR, 2009 SPECIAL 301 REPORT (2009), *available at* http://www.ustr.gov/sites/default/files/Full%20Version%20of%20the%202009%20SPECIAL%20301%20REPORT.pdf [hereinafter 2009 SPECIAL 301 REPORT].

[87] International Intellectual Property Alliance [IIPA], IIPA 2009 SPECIAL 301 RECOMMENDATIONS at app. A (2009), *available at* http://www.iipa.com/2009_SPEC301_TOC.htm.

[88] 2009 SPECIAL 301 REPORT, *supra* note 86, at 16, 19, 21-22.

[89] IIPA, *supra* note 87, app. A.

and Ukraine's GSP benefits were reinstated in 2006.[90] Vietnam could learn from Ukraine's experience.

Ultimately, Vietnam must take a number of steps to better protect intellectual property rights. Like the Ukrainian Government, the Vietnamese Government should undertake a concerted anti-piracy campaign, and it should impose higher fines and tougher criminal sanctions against large-scale producers and distributors of pirated goods. Vietnam should also enact effective regulations, and should better utilize business license laws and the IP Code to improve its CD/DVD piracy problem. Furthermore, in order to better address Internet piracy, which has increasingly become an issue in Vietnam, the Vietnamese Government should become a party to the WIPO Copyrights Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).[91]

c. Required Protections of Worker Rights

Finally, we must consider the efforts Vietnam has made to afford "internationally recognized worker rights,"[92] which includes freedom of association, collective bargaining, prohibition of forced labor or the worst forms of child labor, a minimum age for child labor, and acceptable working conditions with respect to minimum wages, hours of work, and occupational health and safety.[93]

Since the Doi Moi reforms of the mid-1980s, there have been significant advancements in worker rights in Vietnam. In 1992, Vietnam rejoined the International Labor Organization (ILO). A comprehensive Labor Code was created in 1994 with ILO assistance, and has been updated periodically. This Labor Code establishes a minimum wage, maximum working hours, maternity leave, and overtime pay, it provides workers the right to strike, and it requires that trade unions be established in all enterprises.[94] Vietnam has also ratified eighteen ILO conventions, including five of the eight core conventions of the ILO, covering compulsory labor, income inequality, discrimination, minimum age, and the worst forms of child labor.[95]

Despite these progressive reforms, a shortage of qualified staff, training, and funds make implementation and enforcement of many of these labor laws diffi-

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[90] *USTR Reinstates Generalized System of Preferences Benefits for Ukraine*, Apr. 24, 2009, http://www.ustr.gov/trade-topics/trade-development/preference-programs/generalized-system-preferences-gsp/gsp-documents-4.

[91] Submission from Michael Schlesinger, International Intellectual Property Alliance, to the GSP Subcommittee, Trade Policy Staff Committee, Office of the U.S. Trade Representative, at 5 (Aug. 4, 2008), *available at* http://www.iipa.com/pdf/IIPAVietnamGSPComments080408.pdf .

[92] 19 U.S.C. § 2462(b)(2)(G).

[93] 19 U.S.C. § 2467(4).

[94] MARK MANYIN ET AL., CRS REPORT FOR CONGRESS: VIETNAM'S LABOR RIGHTS REGIME: AN ASSESSMENT, RL30896, at CRS-1-13 (2002), *available at* https://www.policyarchive.org/bitstream/handle/10207/1173/RL30896_20020314.pdf?sequence=2.

[95] International Labor Organization [ILO], List of Ratifications of International Labour Conventions: Viet Nam, http://webfusion.ilo.org/public/db/standards/normes/appl/appl-byCtry.cfm?ctychoice=0940&lang=EN&hdroff=1 (last visited Mar. 18, 2010).

cult.[96] More importantly, Vietnam's labor laws fall short of several key internationally recognized worker rights. In particular, (i) the right to freedom of association, (ii) the right to collective bargaining, and (iii) the right to strike must be better protected.

i. Freedom of Association

Convention 87 on the freedom of association is one of the core ILO conventions. It has been ratified by 149 countries, but not by Vietnam. This convention provides all workers and employers the right to form and join organizations of their own choosing without prior authorization. Of the 131 U.S. GSP beneficiary countries, only nineteen have not ratified this convention, including Afghanistan, Bhutan, Brazil, East Timor, Guinea-Bissau, India, Iraq, Jordan, Kenya, Lebanon, Nepal, Oman, Solomon Islands, Somalia, Thailand, Tonga, Tuvalu, and Uzbekistan.[97]

The Vietnamese Government undermines the right to freedom of association by forbidding independent labor unions. Vietnamese workers are not free to join or form unions unless they are affiliated with and have been approved by the party-controlled Vietnam General Confederation of Labor (VGCL). The freedom of association cannot exist in any meaningful way unless the workers are legally permitted to establish and affiliate with organizations that are free from government control. Despite the Government's policy, by 2004 hundreds of unaffiliated labor associations had been organized by workers who felt that they were not well represented by the official union.[98] However, these unaffiliated labor organizations are not afforded the legal protections that officially recognized unions have.[99] Indeed, according to Human Rights Watch, members of independent trade unions have been often targeted, unfairly harassed, intimidated, and arrested.[100]

ii. The Right to Collective Bargaining

ILO Convention 98 is another core ILO convention that provides the right to collective bargaining, prohibits discrimination against union members, and requires governments to set up a system for voluntary collective bargaining between employers and employees. This core ILO convention has been ratified by

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[96] MANYIN ET AL., *supra* note 94, at CRS-13.

[97] ILO, ILOLEX Database of International Labour Standards: Convention No. C087, http://www.ilo.org/ilolex/english/convdisp1.htm (follow "C87" hyperlink) (last visited Mar. 18, 2010).

[98] U.S. Department of State, 2004 Country Reports on Human Rights Practices: Vietnam, http://www.state.gov/g/drl/rls/hrrpt/2004/41665.htm (last visited Mar. 18, 2010).

[99] AM. FED'N OF LABOR & CONG. OF INDUS. ORG. [AFL-CIO], COMMENTS CONCERNING THE APPLICATION OF VIETNAM TO BE DESIGNATED AS AN ELIGIBLE BENEFICIARY DEVELOPING COUNTY UNDER THE GENERALIZED SYSTEM OF PREFERENCES (GSP) pt. B.1 (2008), *available at* http://www.ustr.gov/sites/default/files/uploads/gsp/asset_upload_file576_15064.pdf.

[100] Sophie Richardson, *The United States and Vietnam: Examining the Bilateral Relationship – Testimony Before the Senate Foreign Relations Subcommittees on East Asia and Pacific Affairs,* HUMAN RIGHTS WATCH, Mar. 12, 2008, http://www.hrw.org/en/news/2008/03/11/united-states-and-vietnam-examining-bilateral-relationship.

159 countries, but has not been ratified by Vietnam. Of the 131 U.S. GSP beneficiary countries, only ten have not ratified this convention, including Afghanistan, Bhutan, East Timor, India, Oman, Solomon Islands, Somalia, Thailand, Tonga, and Tuvalu.[101]

Under Article 153 of the Vietnamese Labor Code, the VGCL is required to organize a union within six months of the creation of any new business. However, only eighty-five percent of state-owned enterprises, sixty percent of foreign-invested enterprises, and thirty percent of private enterprises have been unionized.[102]

Furthermore, only unions affiliated with the VGCL have the right to bargain collectively on behalf of workers. The representatives of these VGCL-affiliated unions, however, often have close ties to management or are management officials themselves. Consequently, many of these unions do not adequately represent the workers' interests and do not effectively bargain with management.[103]

iii. The Right to Strike

Vietnam's Labor Code gives VGCL-affiliated unions the right to strike under certain conditions. However, there are significant restrictions to this right, and most strikes are considered "illegal." To begin with, a strike is prohibited unless an extensive and cumbersome process of mediation and arbitration is completed beforehand.[104]

In addition, a strike is prohibited unless a very high percentage of workers approve of the strike before it is called. Under Vietnamese law, a strike is prohibited in an enterprise with less than 300 workers unless at least fifty percent of workers vote in favor of the strike beforehand. In fact, if an enterprise has 300 workers or more, a strike is prohibited unless at least seventy-five percent of workers vote in approval of the strike beforehand.[105]

Furthermore, the labor code prohibits strikes in fifty-four occupational sectors and in certain businesses that serve the public; the Government prohibits strikes in businesses it considers to be important to the national economy and defense. This is a sweeping restriction that prohibits strikes in enterprises involved in electricity production, post and telecommunications, banking, public works, the oil and gas industry, and railway, maritime, and air transportation. The prime minis-

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[101] ILO, ILOLEX Database of International Labour Standards: Convention No. C098, http://www.ilo.org/ilolex/english/convdisp1.htm (follow "C98" hyperlink) (last visited Mar. 18, 2010).

[102] U.S. Department of State, 2008 Human Rights Reports: Vietnam, http://www.state.gov/g/drl/rls/hrrpt/2008/eap/119063.htm (last visited Mar. 18, 2010) [hereinafter 2008 Human Rights Reports: Vietnam].

[103] International Trade Union Association [ITUC], 2008 Annual Survey of Violations of Trade Union Rights: Vietnam, http://survey08.ituc-csi.org/survey.php?IDContinent=3&IDCountry=VNM&Lang=EN (last visited Mar. 18, 2010).

[104] AFL-CIO, *supra* note 99, pt. C.3, n.10.

[105] ITUC, *supra* note 103.

ter may also forbid any strike he considers to be detrimental to the national economy or public safety.[106]

Despite all of these restrictions on strikes, there were a record 762 labor strikes in 2008. Most of these strikes were "illegal" because they either were not conducted through the VGCL or did not go through the long and burdensome conciliation and arbitration procedures.[107]

In 1990, Liberia had its GSP benefits suspended because it had prohibited the right to strike. Subsequently, the Liberian Government made concerted efforts to improve worker rights. Liberia repealed the decree that prohibited strikes, and worked with the ILO to meet certain ILO obligations that it had neglected. As a result of its reforms, Liberia's benefits under the U.S. GSP program were reinstated in 2006.[108] The Vietnamese Government should take similar steps in order to qualify for GSP benefits.

The freedom of association, the right to collective bargaining, and the right to strike are fundamental labor protections. Vietnam should pass legislation to allow for these rights in practice, it should eliminate the requirement that all unions be affiliated with the VGCL, and it should reform the current, cumbersome process of mediation and arbitration. Unless Vietnam does a better job at providing these rights to its workers, it will continue to be denied U.S. GSP benefits.

V. Conclusion

The Vietnam War ended over thirty-five years ago. Since then, relations between the United States and Vietnam have improved immensely and the two countries have become valuable trading partners. Although Vietnam may still be considered a Communist country, it has made dramatic reforms over the past twenty years that have demonstrated its strong commitment to liberalizing its markets and integrating into the global economy. These reforms have also caused a boom in Vietnamese exports, which have spurred remarkable economic growth.

Despite this recent economic progress, Vietnam remains a very poor country that could benefit considerably from preferential treatment under the U.S. GSP program. Indeed, it is poorer than many of the poorest developing countries that are currently receiving these benefits. Ultimately, the lower tariffs and more competitive prices for Vietnamese products in U.S. markets would help strengthen Vietnam's developing economy and alleviate poverty in Vietnam. At the same time, it would help U.S. consumers and U.S. businesses keep their costs down.

Nevertheless, the primary objective of having the U.S. GSP eligibility standards is to encourage developing countries to strengthen protections for impor-

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[106] 2008 Human Rights Reports: Vietnam, *supra* note 102.

[107] U.S. Department of State, 2009 Investment Climate Statement – Vietnam, http://www.state.gov/e/eeb/rls/othr/ics/2009/117739.htm (last visited Mar. 18, 2010).

[108] Press Release, U.S. Department of State, U.S. Reinstates Trade Preference Benefits for Liberia (Feb. 22, 2006), *available at* http://www.america.gov/st/washfile-english/2006/February/20060222180338IHecuoR0.9499628.html.

tant internationally recognized rights. Vietnam's compliance with several of these eligibility criteria is problematic. Specifically, Vietnam's protections for intellectual property rights and worker rights are inadequate. In order to receive U.S. GSP trade benefits, Vietnam will have to rein in trademark infringement, copyright piracy, and internet piracy. Finally, Vietnam will also have to do more to protect the freedom of association, the right to organize and bargain collectively, and the right to strike.

THE U.S. IS NOT ALONE IN ITS RELUCTANCE TO ADHERE TO SUPRANATIONAL DECISIONS FROM THE INTERNATIONAL COURT OF JUSTICE

Kristin K. Beilke†

I. Introduction

On April 22, 1963, the United Nations Conference on Consular Relations adopted the Vienna Convention on Consular Relations (VCCR) in Vienna, Austria.[1] It entered into force on March 19, 1967 and currently 172 countries are parties to the Convention.[2] The VCCR offers foreign nationals who are arrested or detained consular notification rights. One of the more important elements of the VCCR is Article 36, Communication and Contact with Nationals of the Sending State, which states:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
> (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;
> (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

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1 Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf [hereinafter VCCR].

2 *Id.*; see also the United Nations Treaty Series ("U.N.T.S.") online database for general information relating to the VCCR, http://treaties.un.org/pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=III-6&chapter=3&lang=en#Participants (last visited May 20, 2010) [hereinafter U.N.T.S. Online Database, VCCR].

> 2. The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.[3]

The United States has been party to some high-profile disputes involving Article 36 of the VCCR. The United States first instituted an action based on Article 36 on November 29, 1979 against Iran with the International Court of Justice (ICJ) for the seizure and holding of U.S. hostages.[4] The ICJ held that the Iranian Government, by making no effort to compel or even persuade militants to withdraw from the U.S. Embassy and free the hostages, was in serious violation of Article 36 of the VCCR, in addition to other provisions of international law.[5] The ICJ stated that Iran had an obligation to make reparation for the injury caused to the United States,[6] and further ordered Iran to immediately terminate their unlawful actions.[7] Iran eventually released the hostages approximately eight months later.

Almost two decades later, the U.S. Supreme Court found that VCCR claims could be barred by state default procedures.[8] In *Breard*, a citizen of Paraguay was convicted of attempted rape and capital murder but the authorities did not inform him of his rights under Article 36 of the VCCR.[9] After the conviction was finalized, Paraguay instituted an action with the ICJ against the United States based on violations of the VCCR.[10] The ICJ determined that there was prima facie evidence indicating that it had jurisdiction over both of the parties pursuant to the Optional Protocol to the VCCR Concerning the Compulsory Settlement of Disputes (Optional Protocol),[11] and that the United States should take all measures to ensure that Breard would not be executed pending the final decision of the ICJ proceedings.[12] However, the United States refused to abide by the ICJ's stay and held that Breard defaulted his claim under the VCCR by not raising it in

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[3] VCCR, *supra* note 1, art. 36.

[4] United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 4 (May 24).

[5] *Id.* at 32.

[6] *Id.* at 41-42.

[7] *Id.* at 44-45.

[8] Breard v. Greene, 523 U.S. 371, 375 (1998).

[9] *Id.* at 373-74.

[10] Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248, 248 (Apr. 9) [hereinafter *VCCR*].

[11] The VCCR was accompanied by an Optional Protocol, which committed its signatories to compulsory ICJ jurisdiction. Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, art. 1, 21 U.S.T 325, 596 U.N.T.S. 487, *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963_disputes.pdf [hereinafter Optional Protocol]. The United States withdrew from the Optional Protocol on March 7, 2005 stating that the United States would no longer recognize the jurisdiction of the ICJ reflected in that Protocol. .U.N.T.S. Online Database, Optional Protocol, http://treaties.un.org/pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=III-8&chapter=3&lang=en#Participants (last visited May 20, 2010).

[12] *VCCR*, 1998 I.C.J. at 257-58.

the state courts.[13] The Court went on to say that although ICJ decisions should be given "respectful consideration," the procedural rules of the forum State govern the implementation of the treaty pursuant to Article 36, paragraph 2 of the VCCR, and such rules likewise apply to claims based on the Constitution.[14]

When Germany filed an action against the United States with the ICJ a few years later, the United States once again found itself accused of another Article 36 VCCR violation.[15] In that case, two German citizens were arrested in the United States for attempted armed bank robbery and were never informed of their right to consular notification by the authorities.[16] The ICJ determined that failing to inform the detained of their consular rights was a violation of the United States' obligation to inform the detainees without delay and of the right of the foreign country to render assistance to their nationals, both of which are granted by the VCCR.[17] The U.S. federal court addressed the VCCR claim by finding that there was no cause shown for procedural default that was external to the defense, nor any actual prejudice.[18]

On January 9, 2003, Mexico filed an action against the United States with the ICJ for another violation of Article 36 of the VCCR.[19] In *Avena*, the ICJ held that detaining authorities have a duty to give Article 36 information to the individual once they realize the individual is a foreign national.[20] The ICJ further ruled that although the procedural default rules of the United States in-and-of themselves do not constitute a violation of the VCCR, a violation does occur when that default rule does not allow the detained individual to challenge a conviction and sentence claiming such a violation.[21] Despite the ICJ holding in *Avena*, the United States permitted the execution of one of the Mexican nationals that was named in the *Avena* decision without review or reconsideration, finding that the ICJ holding did not constitute directly enforceable federal law that would pre-empt state procedural limitations and that the VCCR did not provide, nor did the Optional Protocol require, direct enforcement of ICJ decisions.[22] These decisions indicate that the full effect of the VCCR treaty is not being given due weight in the U.S. courts. This article explores this issue and attempts to determine if other sovereigns are following the same trend as the United States.

Article 36 has spawned some controversial issues, especially in the United States, because, as demonstrated above, its compliance with the VCCR has not

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[13] *Breard*, 523 U.S. at 374-75.

[14] *Id.* at 375.

[15] LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 466, 470 (June 27).

[16] *Id.* at 475.

[17] *Id.* at 514.

[18] LaGrand v. Stewart, 133 F.3d 1253, 1261-62 (9th Cir. 1998).

[19] Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 17 (Mar. 31).

[20] *Id.* at 43.

[21] *Id.* at 56.

[22] Medellin v. Texas, 552 U.S. 491, 522-23 (2008).

been strict.[23] Almost twenty-seven percent of the 200,020 federal inmates in the custody of U.S. Bureau of Prisons in 2007 were not U.S. citizens.[24] Considering there are even more inmates in the state systems, there is an indication that thousands of foreign nationals are arrested or detained in the United States. Data indicating how many of those inmates actually receive the benefit of consular notification required by Article 36 of the VCCR is difficult to obtain because of the lack of reporting logs;[25] but a great many of them will not have the benefit of the consular notification as mandated by the VCCR.[26]

As shown by U.S. cases, applying the VCCR raises questions of judicial independence and delegation of authority exercised by domestic governments, and it affects constitutional values of federalism, separation of powers, democratic accountability and procedural fairness.[27] Some of the themes present within U.S. case law that create controversy are whether there is jurisdiction over a violation of the VCCR, whether domestic procedural rules can bar VCCR claims, and whether there is an effective remedy for such a violation. The following sections will analyze in what context such issues have been raised, using the United States as an example. Next, the article will address the legal frameworks and decisions of other countries to determine whether these issues are in controversy across the board internationally. The article will conclude by introducing some policies or models that domestic and international legal systems can implement to make provisions, specifically Article 36, of the VCCR more effective.

II. Issues of Compliance with and Giving Full Effect to the VCCR

A. Jurisdiction

1. Self-executing Nature

Signatories to the Optional Protocol agree to submit to compulsory jurisdiction of the ICJ over disputes arising under the VCCR. However, domestic courts have still found that even signatories to the Optional Protocol are not required to give more than respectful consideration to ICJ decisions resulting from VCCR disputes.[28] On the other hand, without regard to the Optional Protocol, the VCCR still appears to be self-executing, meaning there is direct effect on domestic States without further action from the State's political branches.[29] Due to

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[23] Yury A. Kolesnikov, *Meddling with the Vienna Convention on Consular Relations: The Dilemma and Proposed Statutory Solutions*, 40 McGEORGE L. REV. 179, 181 (2009).

[24] U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, STATE OF THE BUREAU 2007: BUREAU OF PRISONS STAFF: EVERYDAY HEROES 52 (2007), *available at* http://www.bop.gov/news/PDFs/sob07.pdf.

[25] Mark Warren, *Foreign Nationals: Part IV*, DEATH PENALTY INFO. CENTER, Feb. 15, 2005, http://www.deathpenaltyinfo.org/node/1473.

[26] *Id.*; *see Avena*, 2004 I.C.J. at 17 (where 51 Mexican nationals were argued to not have received benefit of VCCR rights to consular notification).

[27] Ernest A. Young, *Toward a Framework Statue for Supranational Adjudication*, 57 EMORY L.J. 93, 94 (2007) [hereinafter Ernest].

[28] *See Breard*, 523 U.S. at 375.

[29] Kolesnikov, *supra* note 23, at 183; Ernest A. Young, *Supranational Rulings as Judgments and Precedents*, 18 DUKE J. COMP. & INT'L L. 477, 510-11 (2008).

reasons relating to sovereignty, the determination of whether a treaty is self-executing in nature is left for the domestic courts to decide. Methods to determine if a treaty is self-executing may vary. For example, a State may look to the preamble to determine if the treaty should be self-executing or allow for individual rights. In the case of the VCCR, the preamble states that the purpose of the privileges and immunities of the VCCR is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States.[30] But as is the case in the United States, when analyzing statutory and legal construction, the preamble and exterior text may only be relied upon when the language of the applicable provision is ambiguous.[31] Therefore, as Article 36 of the VCCR states, "the receiving State shall, without delay, inform the consular post of the sending State if, . . . a national of that State is arrested . . . or is detained in any other manner," the courts may view that as an unambiguous mandate without regard to what is stated in the preamble.[32]

The resistance to creating self-executing treaties is based on interests of sovereignty. The resistance for that reason is curious because even in the case of a determination that the VCCR is not self-executing, it is still unlikely that "walling off" would protect the State's interest of sovereignty or would insulate it from supranational decisions.[33] Violations of a treaty by a State will induce other countries and the international community to put pressure on the violating State's political branches to take the steps needed to bring that domestic law into compliance with the international agreement.[34] So in the case of the VCCR, its self-executing nature would require federal, state, and local law enforcement officers to provide consular notice even without the corresponding State implementing domestic legislation.[35] However, some argue that submitting to jurisdiction is very different from agreeing to be bound by supranational body decisions.[36] However, that seems to be a misleading conclusion. Agreeing to be bound by a supranational body's jurisdiction implies that the judgments created will also bind the State. Otherwise, submitting to jurisdiction would be meaningless without also agreeing to be bound by such decisions.

2. *Conferring Individual Rights*

Even if a treaty is found to be self-executing, the issue remains as to whether the rights are conferred onto individuals or if they are only conferred onto the States party to the international agreement. This is because treaties are usually

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[30] VCCR, *supra* note 1, pmbl.

[31] Ryan D. Newman, *Treaty Rights and Remedies: The Virtues of a Clear Statement Rule*, 11 TEX. REV. L. & POL. 419, 476 (2007); Kolesnikov *supra* note 23, at 194-95.

[32] *But see Medellin*, 552 U.S. at 491-93 (where the U.S. Supreme Court ruled that the ICJ *Avena* decision was not binding, and the VCCR was not self-executing. The Court went on to say that as further support for their holding, the parties did not list any other nations that treat it as directly binding).

[33] Ernest, *supra* note 27, at 103.

[34] *Id.*

[35] Young, *supra* note 29, at 510-11.

[36] Kolesnikov, *supra* note 23, at 208.

viewed solely as contracts between nation states that create international obligations. Creating a private right of action for individual plaintiffs is rare and controversial in international law.[37] Despite that trend, treaties can and do contain provisions that create certain rights for individuals that reside or act within the territorial limits of the signatory states, and are enforceable between private parties in domestic courts.[38] Also, the individual rights are not limited to causes of action between two private parties, but include rights between the domestic state and the individual.[39] Therefore, many scholars believe that the VCCR provides for individually enforceable rights that give rise to a private cause of action.[40] According to the VCCR, an individual who has been detained or arrested in a foreign country has the right to be informed of his or her rights under the VCCR. This ties into the fact that it may not just be a violation of the individual's rights, but also a violation of the country's rights that is a party to the VCCR in that it is deprived of the possibility of providing assistance to the individual.[41]

B. Effects of Domestic Procedure

Another common issue in relation to the VCCR is whether domestic procedural rules bar rights provided by the treaty. Article 36 states that the rights of the treaty must be exercised in conformity with laws and regulations of the receiving state, which usually also is meant to include procedural rules.[42] Although courts should attempt to reconcile the sources of law before precluding the VCCR, it may not always be feasible. For example, in the United States several cases have barred claims relating to the VCCR because they were barred by procedural default. In *Medellín*, the United States violated its VCCR obligations by not providing consular notification but the aggrieved party was prohibited from bringing a claim because he did not argue the issue at the lower court or on direct appeal.[43] The ICJ has held that although the procedural rules in themselves do not violate the VCCR, barring review and reconsideration of convictions and sentences for prolonged detentions and severe penalties is a serious violation of the VCCR because it impermissibly prevents domestic courts from giving VCCR rights full effect.[44]

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[37] Young, *supra* note 29, at 494.

[38] Kolesnikov, *supra* note 23, at 193.

[39] *Id.* at 194.

[40] *See id.* at 183, 191; *see* Newman, *supra* note 31, at 476.

[41] *LaGrand*, 2001 I.C.J. at 515.

[42] *See Avena*, 2004 I.C.J. at 56 (where the ICJ determined that procedural default rules did not themselves violate the VCCR).

[43] *Medellin*, 552 U.S. 491 (2008).

[44] *See, e.g., LaGrand*, 2001 I.C.J. at 513-14.

C. Remedies Permitted by the VCCR

The VCCR does not provide a specific remedy for failure to notify a consulate.[45] This characteristic has given States difficulty because paragraph 2 of Article 36 states that the rights of paragraph 1 must be exercised in conformity with the laws and regulations of the receiving state.[46] It goes on to state that such laws and regulations of the receiving state must enable the full effect to be given to the purposes for which the rights under Article 36 are accorded.[47] Two interpretations can develop from that provision. It may be read to indicate that a country cannot reject every single path for indicating an individual's treaty rights, or it may mean that no domestic law may bar detained individuals from exercising their right to consular notification.[48] The first interpretation is more protective of State sovereignty, whereas the second gives more teeth to enforcement of the VCCR. From ICJ decisions discussing the effects of domestic procedures on the VCCR rights, it appears the ICJ would interpret the treaty to mean that not all methods of review may be denied to an aggrieved party. However, because the VCCR states that when a violation occurs, an aggrieved State may refer the issue to the UN Security Council, some argue that the referral is the only non-judicial remedy required; therefore, it is evident that such supranational judgments are not to be given mandatory enforcement in domestic courts.[49]

D. Other Policy Issues Hindering Full Compliance with the VCCR

With the increase of globalization, there is a movement for more involvement by and the creation of international institutions that have the individual authority to legislate, prosecute and adjudicate.[50] The above referenced issues make it easy for domestic courts to deny rights conferred by international agreements like the VCCR and, therefore, it is even more important for leading nations to emphasize the importance of international law by providing more enforcement.[51] Compliance with international agreements and with supranational decisions, such as those issued by the ICJ, requires some sacrifice by the domestic States.

It is hard to convince States to give more effect to supranational decisions when it appears to be comprehensively good policy to do just the opposite.[52] The duty of the courts to recognize the law of domestic States is at the heart of important interests like sovereignty and accountability.[53] Established legal doctrine indicates that sovereign powers are so important to the international legal system

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[45] *See* VCCR, *supra* note 3; Kolesnikov, *supra* note 23, at 182.

[46] VCCR, *supra* note 3, art. 36.

[47] VCCR, *supra* note 3, art. 36(2).

[48] Newman, *supra* note 31, at 477.

[49] Young, *supra* note 29, at 511-12.

[50] Ernest, *supra* note 27, at 94.

[51] Kolesnikov, *supra* note 23, at 225.

[52] Young, *supra* note 29, at 479.

[53] *Id.*

that surrendering them may not be possible.[54] Limiting the enforcement of supranational decisions would also protect the authority of political branches of domestic States to continually participate in the process of interpreting international law and developing how it should be implemented in the domestic system.[55] A main tenet, and the most important aspect of sovereignty, is that the domestic States are free to choose their own laws.

Another barrier preventing full compliance with international agreements like the VCCR is that newly created supranational bodies often have unproven democratic legitimacy or lack procedural transparency and integrity.[56] They seem to be less accountable for decisions they make.[57] This is in contrast to most democratic domestic courts that have an effective system of checks and balances, such as public deliberation and that the political branches of the domestic States have a stake in ensuring their courts do not treat foreign parties unfairly.[58] Supranational organizations also tend to suppress concurring and dissenting opinions, which may further create issues of transparency and willingness to submit to their decisions.[59]

Even if domestic states heed supranational body decisions from the ICJ, the issue of how much deference to give them arises. The need to respect international bodies for reasons relating to foreign relations and interests of creating uniformity and settled interpretations leads toward awarding supranational body decisions more weight than merely supporting authority, similar to law reviews or briefs.[60] However, there is still hesitancy to give such decisions full binding effect and doing so may be contrary to long-settled legal system procedures of precedence, jurisdiction, or res judicata. For example, in the United States, interpretation of a treaty by a supranational body would not bind federal courts because the foreign decision would not be within some of the domestic courts' jurisdictions.[61] Although domestic States may argue that supranational decisions do not bind them, the need to withdraw from the Optional Protocol that confers jurisdiction on the ICJ shows that the decisions do carry some weight and domestic influence.[62] If States thought the decisions were not binding, nor had any domestic effect, there would be no need to withdraw from the Optional Protocol. Furthermore, the Statute of the International Court of Justice declares that the ICJ's decisions have binding force as to the parties with respect to the particular

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[54] *Id.* at 504.

[55] *Id.* at 507.

[56] *Id.* at 479.

[57] *Id.* at 495.

[58] *Id.* at 494.

[59] Ernest, *supra* note 27, at 111.

[60] Young, *supra* note 29, at 502. *See also Sanchez-Llamas v. Oregon* where the U.S. Supreme Court addressed the degree of deference domestic courts should pay to ICJ interpretations, stating that although the ICJ's interpretation deserved respectful consideration, the Supreme Court has the power to interpret treaties and say what the law is. Sanchez-Llamas v. Oregon, 548 U.S. 331, 333-34 (2006).

[61] Young, *supra* note 29, at 507-08.

[62] *Id.* at 518.

case at bar.[63] This suggests that in cases like *Avena*, where the United States was a party to the case, it would have to accept the ICJ's decisions as binding authority.[64]

III. Are Other Countries Giving the VCCR Full Effect?

A. Australia

Australia appears to be following the example of the United States when it comes to adhering to the VCCR and ICJ decisions. Australia has held the VCCR as not self-executing.[65] In the case of *La Bara v. Minister for Immigration and Citizenship*, an Indonesian citizen came to Australia after the Australian Fisheries Management Authority boarded his fishing vessel, took him and his crew in custody, and destroyed the vessel.[66] Following the expiration of his Indonesian visa, the authorities commenced a removal action.[67] The Indonesian citizen claimed that his removal would contravene the VCCR.[68] The Australian court determined that the VCCR itself cannot be a source of rights under Australian law.[69] It is not self-executing because Article 36 of the VCCR was not incorporated into domestic law under the Consular Privileges and Immunities Act 1972.[70] Similar to the United States Supreme Court, the Australian court found that unincorporated treaties can be used as an extrinsic aid for domestic interpretation and further found that even if the VCCR rights were considered to be customary international law, it would not follow that they are domestically enforceable by the court.[71] This is especially important because Australia has ratified the Optional Protocol.[72] Without giving the VCCR full effect, the Australian court indicated that there is a presumption that the Parliament intended to legislate in conformity with international obligations and that any ambiguities will be construed in favor of the VCCR, if possible.[73]

This indicates that the VCCR does not create individual rights that will permit private causes of action. Without domestic implementation, individuals have no protection under the VCCR. However, this still leaves open the issue of whether ICJ decisions are binding in Australian courts and the types of remedies Australia may provide. Currently there is no ICJ decision with Australia as a direct party

63 Statute of the International Court of Justice art. 59, June 26, 1945, 59 Stat. 1055, 1062.

64 Or at least would have before it withdrew from the Optional Protocol conferring mandatory jurisdiction.

65 La Bara v. Minister for Immigration and Citizenship (2008) F.C.A. 785, ¶ 10 (Austl.), *available at* http://www.austlii.edu.au/au/cases/cth/FCA/2008/785.html.

66 *Id.* ¶ 2.

67 *Id.*

68 *Id.* ¶ 5.

69 *Id.* ¶ 10.

70 *Id.*

71 *Id.*

72 U.N.T.S. Online Database, Optional Protocol, *supra* note 11.

73 *La Bara*, (2008) F.C.A. at ¶ 11.

that addressed violations of Article 36 of the VCCR and, therefore, it is impossible to say if Australia would treat such decisions as binding authority in its courts. Considering Australia's reluctance to implement domestic legislation enforcing the rights under the VCCR, it appears to follow the United States' trend and will not consider ICJ decisions as binding on its domestic courts or provide specific remedies for aggrieved individuals.

B. Canada

In the case of *R. v. Partak*, where a U.S. citizen was accused of murder, the Ontario Superior Court of Justice had an opportunity to analyze the VCCR.[74] After his detention, the U.S. citizen made some incriminating statements.[75] The accused claimed that he was not advised of his rights and that he would have not made such statements if he were in contact with the U.S. consulate.[76] The Canadian court stated that although the VCCR appears to deal with obligations between states as opposed to those owed to individuals, Article 36 of the VCCR does create an obligation on the authorities to advise the foreign national of his or her right of consular notification.[77] The court assumed that the appropriate authorities were obliged to fulfill the requirements contemplated by Article 36 of the VCCR.[78] Such a right, similar to the U.S. interpretation, arises at the time the authorities know or reasonably ought to know that the detainee is a foreign national.[79] This is remarkable because Canada has not signed or ratified the Optional Protocol.[80] At first glance, it appears that the Canadian court is willing to give full effect to the VCCR. However, the opinion goes on to state that denying the U.S. citizen of his VCCR rights was not so crucial that its omission rendered the situation oppressive. Therefore, the fact that he was not notified of his rights under the VCCR was nothing more than an oversight.[81]

A case from Alberta reached the same result, albeit through a different analysis. In *R. v. Van Bergen* the accused was never informed of his right to notify the Canadian consulate by U.S. authorities upon his arrest.[82] The Canadian court found that the VCCR creates obligations between states, not attributable to independent rights for nationals.[83] The court then determined that the purpose of Article 36 is to ensure that foreign nationals who are detained receive equal treatment to that of domestic nationals, with no disadvantage because they are not

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[74] R. v. Partak, [2001] 160 C.C.C. (3d) 553, ¶¶3-4 (Ont. Super. Ct.).

[75] *Id.* ¶¶ 7-11.

[76] *Id.* ¶ 21.

[77] *Id.* ¶ 25.

[78] *Id.* ¶ 26.

[79] *Id.* ¶¶ 28-29.

[80] U.N.T.S. Online Database, Optional Protocol, *supra* note 11.

[81] *Partak*, 160 C.C.C. (3d) at ¶¶ 47-48.

[82] R. v. Van Bergen, [2000] 261 A.R. 387, ¶ 13 (Alta. Ct. App.).

[83] *Id.* ¶ 15.

familiar with or do not understand the proceedings against them.[84] The court held that the accused needed to establish serious prejudice in the process of the foreign state; thus, not relaying the foreign national's right to consular notification did not establish serious prejudice in the process.[85]

These different analyses underscore not only the fact that different countries vary as to the interpretation of the effect of Article 36 of the VCCR, but also that individual states within a federal framework of the same country also come to different conclusions. One nation state finds that the VCCR creates individual rights, whereas the other does not. Because the ICJ has not directly addressed a case based on Article 36 of the VCCR, Canadian decisions have been silent on the effect of ICJ decisions regardless of Canada being a direct party in the dispute. However, both of the decisions above did reach a similar result, the same result that U.S. courts have reached: that domestic procedural bars prohibit remedy of VCCR violations.

C. China[86]

Advocates of a more enforceable VCCR may not be surprised to find that China's stance on strict enforcement of Article 36 of the VCCR is murky.[87] Article 4 of Order 76 of China's Ministry of Justice states that for a country that has not specifically entered into a consular treaty with China, but is a member of the VCCR, interviews or communications of their diplomatic or consular officers must be handled in accordance with the VCCR.[88] The provisions of that Order do not specify what action Chinese officials should take when a foreign national is detained in China but does not apply for a consular interview.[89] That is consistent with Article 36 of the VCCR,[90] but may not be consistent with ICJ decisions that state consular information must be given to detainees even without their request. China is not a signatory to the Optional Protocol,[91] but nonetheless the case of Hiroshi Kato indicates that China's treatment of Article 36 may be promising. Kato, a Japanese citizen, was detained in China and even though Kato had not requested notification of his consulate, the appropriate authorities still noti-

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[84] *Id.* ¶ 16.

[85] *Id.* ¶¶ 16-17.

[86] Published Chinese case law translated into English is difficult to obtain. This section is not based on explicit case law, but on articles that have been published referencing the particular cases.

[87] *See* Hu Qian, *Chinese Practice in Public International Law: 2002*, 2 CHINESE J. INT'L L. 667 (2003).

[88] Provisions Concerning the Interview of and the Communications with Foreign Criminals of Foreign Nationalities art. 4 (promulgated by the Order of the Ministry of Justice, Nov. 26, 2002, effective Jan. 1, 2003) LAWINFOCHINA (last visited May 20, 2010) (P.R.C.).

[89] *See id.* arts. 6-9.

[90] *See id.* (The VCCR states that if the national of the sending State so requests, competent authorities without delay will inform the consulate officials of the sending State.).

[91] U.N.T.S. Online Database, Optional Protocol, *supra* note 11, n.2 (while China's signature is on the Optional Protocol, it was never ratified, and a subsequent letter stated that the signature by the Chiang Kai-shek clique "usurped the name of China and is illegal, null and void").

fied the Japanese embassy at an early date.[92] This is an encouraging practice but, technically, visits by consular officers are subject to approval and discretion is left to provincial authorities responsible for prison administration, even though processing of the request is supposed to be done in accordance with the VCCR.[93]

This law may leave room for doubt about the level of Chinese compliance with the VCCR. The case of Huseyin Celil provides evidence of China's non-compliance.[94] Celil, a Canadian citizen, was detained in China and two months after his detention Chinese officials refused to allow Canadian diplomats to meet with him.[95] Even after a personal intervention by the Foreign Minister, Peter MacKay, China only informed MacKay that they would not seek the death penalty but did not provide details of Celil's status or allow MacKay to meet with Celil.[96]

China has not been a direct party in a case before the ICJ and therefore, it is uncertain if they will abide by such a supranational decision. However, because China's laws say that approval of communication with consular officials is discretionary and there is anecdotal evidence that they do not strictly comply with obligations imposed by Article 36 of the VCCR, it is on a similar path as the United States. China will most likely not adhere to supranational decisions and continue to allow their domestic rules to trump supranational interpretation of the VCCR.

D. Germany

Germany has ratified the VCCR and is a party to the Optional Protocol;[97] on September 19, 2006, the German Bundesverfassungsgericht (German Federal Constitutional Court) made its first judgment on the issue of interpretation of the VCCR.[98] In that case, a Turkish citizen residing in Germany was charged with murder.[99] The police did not apprise the Turkish citizen of his rights under Article 36 of the VCCR; his claims based on the violation of the VCCR were unsuccessful in ordinary courts and the Federal Court of Justice, which held that Article 36 does not grant any additional protection for the individual and could not possibly affect the outcome of the case.[100] The German court, on review, then held that Germany is under a constitutional obligation to adhere to the inter-

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92 Qian, *supra* note 87, at 693.

93 Chen Qiang, *Chinese Practice in Public International Law: 2003(II)*, 3 CHINESE J. INT'L L. 591, 604 (2004).

94 Editorial, *The Pacts China Signed*, GLOBE & MAIL, Aug. 30, 2006, at A14, *available at* LEXIS.

95 *Id.*

96 *Id.*

97 U.N.T.S. Online Database, VCCR, *supra* note 2; U.N.T.S. Online Database, Optional Protocol, *supra* note 11.

98 Jana Gogolin, Avena *and* Sanchez-Llamas *Come to Germany – The German Constitutional Court Upholds Rights under the Vienna Convention on Consular Relations*, 8 GERMAN L.J. 261, 261 (2007) (original decision 2 BvR 2115/01 (Sept. 19, 2006) in German of the Federal Constitutional Court *available at* http://www.bundesverfassungsgericht.de/en/decisions/rk20060919_2bvr211501.html).

99 *Id.* at 264.

100 *Id.*

pretation of treaties by competent international courts.[101] It further held that the only limitation on that obligation was in relation to violations of Basic Rights, or if the international court exceeds its authorized power.[102] Similar to the United States, German ratified international treaties have the status of federal law—the German court found the VCCR to be specific enough to qualify as self-executing.[103] Germany still maintains that domestic sovereignty cannot solely be overruled by ICJ decisions, but that the interrelation of ICJ decisions with German Basic Law obliges German Courts to follow ICJ interpretations.[104] The ICJ decisions are furthermore inextricably binding when Germany is a party to the actual dispute.[105] Furthermore, because German courts attempt to avoid judgments against them, they will comply with ICJ decisions against other states as well because those interpretations are consistent with the VCCR.[106] The German courts require review of the VCCR violation but the domestic courts still have the authority to determine if the procedural error was harmless.[107] Therefore, like almost all other countries, the issue of procedural default and remedy is still wide open for domestic courts to decide.

This dramatically different result in the case of Germany may be due to the culture and its participation in the European Union (EU). Western European countries are accustomed to being a part of a supranational organization and have more experience in deferring to such judgments. Geographical, historical, and cultural experiences may account for Germany's willingness to broadly incorporate Article 36 interpretations.

E. United Kingdom

Article 36 of the VCCR is not a provision that has the force of law within the United Kingdom,[108] but the United Kingdom is still a signatory to the Optional Protocol.[109] The United Kingdom takes the stance that international treaties, specifically the VCCR, do not generate individual rights capable of being declared and enforced in domestic courts.[110] However, "Her Majesty's Government" does note that the United Kingdom has the right to raise matters of consular protection with the foreign State even if there is no international treaty right or even if there is no clear right in customary international law.[111] However, even the right to

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101 *Id.* at 263.

102 *Id.*

103 *Id.* at 265.

104 *Id.* at 269.

105 *Id.*

106 *Id.* at 270.

107 *Id.* at 273-74.

108 *See* Consular Relations Act, 1968, c. 18, § 1 (Eng.).

109 U.N.T.S. Online Database, Optional Protocol, *supra* note 11.

110 Regina (Abbasi & Juma) v. Sec'y of State for the Foreign & Commonwealth Office, [2002] EWHC Admin. 651, ¶ 21 (Eng., High Court, Q.B.D.) (finding on March 15, 2002 that a bilateral treaty between the U.S. and the U.K. trumped the VCCR).

111 *Id.* ¶ 23.

raise the issue is a matter of policy and non-justiciable, including in cases where a clear treaty right exists.[112] This interpretation is consistent with principles of sovereignty.

The United Kingdom has not been directly involved in a case before the ICJ concerning Article 36 of the VCCR, but it nevertheless has found that the VCCR does not create individual rights.[113] This is an indication that if the issue were to arise in the United Kingdom, it would likely find that the individual would not have standing to bring a VCCR violation claim in their domestic courts. The United Kingdom differs dramatically from Germany's interpretation even though they are also part of the EU, a supranational organization. This is unsurprising considering the United Kingdom has a strong history of maintaining its sovereignty, as demonstrated when it opted to keep its own currency when joining the EU. The United Kingdom holds great individual power even as a member of the EU and, unfortunately, will most likely not give supranational decisions of the ICJ interpreting Article 36 of the VCCR full effect.

IV. What Can Be Done to Create Better Uniformity and Enforcement?

After a brief examination of treatment of the VCCR and ICJ decisions in other countries, it is apparent that the full effect envisioned during the drafting of the VCCR has not been uniformly effected in practice. One of the first things that domestic countries could do to better enforce the VCCR is amend their international agreements to create domestic direct effect.[114] This would include giving deference to applicable ICJ decisions.[115] That could be done by a single statute that gives binding authority to all ICJ determinations or drafting a specific statute for each decision that is issued in order to comply with the ICJ findings.[116] As demonstrated in the *Avena* and *LaGrand* decisions, domestic courts should allow review and reconsideration of conviction and sentencing when a violation of the VCCR has occurred.[117] In order to protect sovereignty, the method of review and reconsideration, and the determination as to whether the accused was prejudiced under the VCCR will be left up to the domestic courts, but it should not be subject to procedural defaults.[118]

Another implementation would be to allow concurrent jurisdiction of the domestic courts and the ICJ.[119] This method would emphasize that international agreements are shared law and that no single court has precedence over VCCR interpretation.[120] It would maintain interests of sovereignty because domestic

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[112] *Id.*

[113] *Id.* ¶ 21.

[114] Ernest, *supra* note 27, at 102.

[115] *See* Kolesnikov, *supra* note 23, at 218-225.

[116] Kolesnikov, *supra* note 23, at 218-20.

[117] *Id.* at 204.

[118] *Id.* at 205-06, 220.

[119] Ernest, *supra* note 27, at 102.

[120] *Id.*

courts would be able to influence the development of international treaty interpretation.[121] Leaving it solely to the supranational body of the ICJ may leave such decisions vulnerable to interests that do not have the same perspectives as the domestic courts' interests and, in addition, would be a departure from historic practice.[122] The international community could create a procedural system whereby the domestic courts would be able to certify questions to the ICJ and would agree to defer to its determinations.[123] This would give the ICJ independent weight although it would not be conclusive in the outcome of particular domestic cases. It would also honor the need of the domestic courts to prohibit the ICJ from acting with the force of law.[124] However, this approach would still have the problem of creating uniformity over international treaties and may encourage parochialism.

The VCCR could also be amended to prohibit opting out of compulsory jurisdiction. If the text explicitly stated that the VCCR was self-executing and immediately enforceable in the domestic courts, it would create more clarity for States. Furthermore, it could make it explicitly clear that individuals do have rights under the treaty and that the provisions are not just for signatory States. Specific text could also be drafted to provide the possibility for appropriate remedies. Simply allowing domestic courts to decide whether filing an action with the ICJ is enough does not give full effect to the VCCR. Specifically stating that any violation of the VCCR provisions requires the host countries to provide an adequate remedy at law within the domestic framework, however, would create more effective results.

V. Conclusion

The application and adherence to Article 36 of the VCCR has varied over time and among the several nations. The United States' interaction with the VCCR is a prime example of the controversial issues that may arise in domestic courts stemming from the manner in which the supranational institutions interact with domestic systems. On the other hand, Germany is a great example of how domestic courts could give supranational decisions more binding effect. However, many States need to make changes within their domestic legal systems to give greater effect to supranational institutions such as the ICJ. Drafting a more specific text of the VCCR in order to guide domestic courts as far as applicability of the rights and what remedies may apply in the case of violations will encourage States to not see Article 36 of the VCCR as a meaningless text but, rather, as a mandate that prescribes action.

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[121] *Id.* at 103-04.

[122] *Id.*

[123] *Id.* at 107.

[124] *Id.* at 108.

EXPLORING POWER POLITICS AND CONSTITUTIONAL SUBVERSIONS IN PAKISTAN: A POLITICAL AND CONSTITUTIONAL ASSESSMENT OF INSTABILITY IN PAKISTAN

Furqan Mohammed[†]

Introduction

Pakistan's recent history can be labeled as anything but stable. From its very inception, Pakistan has had trouble agreeing on the nation's constitutional framework. Pakistan's first constitution was not instituted until nine years after the country gained independence from Britain and partitioned itself from India.[1] Even then, the debate as to what type of government Pakistan should have remained unsettled. In its short history, Pakistan has had three different constitutions (1956, 1962, and 1973) interspersed with periods of martial law.[2] The Constitution of 1973, although a significant step towards democratization, has become a battleground for presidents and prime ministers, who have added amendments solely to solidify their positions in office. The struggle between the two heads of state is apparent: the Constitution of 1973 has undergone thirty-six amendments, many of which pertain to the same few articles that delegate power to the heads of state.[3] The power struggle has made Pakistan an unstable nation. This instability is especially disconcerting since Pakistan has nuclear capabilities and is already engaged in a war within its boundaries to eradicate terrorism in accordance with the United States' war on terror. The consequences of Pakistan's instability could be disastrous not only for Pakistan but for the entire world.

The initial focus of this paper is to analyze the constitutional amendments which have caused instability in Pakistan. This paper will first examine the Eighth Amendment passed by President Zia ul-Haq in 1985, which allowed a president to dissolve Parliament and dismiss the prime minister. This power has been invoked by multiple presidents to overthrow elected prime ministers based on largely unsubstantiated claims. Next, this paper will address Prime Minister Nawaz Sharif's Thirteenth and Fourteenth Amendments, which were ratified in 1993. These amendments not only reduced the president's powers but also increased those of the prime minister. Finally, this paper will discuss former Presi-

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[1] *See* HAMID KHAN, CONSTITUTIONAL AND POLITICAL HISTORY OF PAKISTAN 102 (Oxford University Press 2001) (2005) (explaining that Pakistan gained independence in 1947, yet the first Constitution did not become effective until 1956).

[2] Omar Sial, *A Legal Research Guide to Pakistan*, GLOBALEX, Jan. 2009, http://www.nyulawglobal.org/Globalex/Pakistan1.htm#_Legal_Research.

[3] S.A. Rabbani, *List of Amendments in the Constitution of Pakistan*, http://nationalassembly.tripod.com/am.htm.

dent Pervez Musharraf's Seventeenth Amendment, which was ratified in 2003. This amendment once again restored the presidential powers created by the Eighth Amendment and reduced the prime minister's powers.

Pakistan's structural instability demands analysis of the underlying political and constitutional problems which prevent it from becoming a stable nation. First, Pakistan's presidents and prime ministers have adopted a form of "power politics" in which one office has exclusive decision-making power and does not share it with the other. Moreover, the presidents and prime ministers have not been willing to allow a checks-and-balances system on their authority. Second, the Pakistani Constitution is easily subverted and remains subject to the whims of Pakistan's leaders. Current President Asif Ali Zardari recognizes the damaging effects of these amendments and has promised to ratify an Eighteenth Amendment by March 30, 2010, which would restore the balance of powers between the heads of state as originally envisioned in the Constitution of 1973. However, his proposal only addresses the first cause of instability (*i.e.*, the political cause). Until the second cause (*i.e.*, the constitutional cause) is also addressed, Pakistan cannot ensure stability. Accordingly, this paper will argue that President Zardari's Eighteenth Amendment must address Article 239, the clause that governs how the Pakistani Constitution is amended. To this end, amendment formulas, as most recently adopted by the Canadian Constitution, are one possible route that Pakistan could take.

I. Pakistan's Modern History

A. The Constitution of 1973 and the Ratification of the Eighth Amendment

Pakistan's modern history began in 1971 after the civil war between East and West Pakistan.[4] East Pakistan seceded to become Bangladesh while West Pakistan became Pakistan.[5] After this war, Zulfikar Ali Bhutto ("Z. Bhutto") was elected president of Pakistan and he ratified the Constitution of 1973.[6] This Constitution was different than its predecessors (*e.g.*, the Constitutions of 1956 and 1962) because it adopted a parliamentary system in which the prime minister was to retain most of the power while the president was more of a ceremonial head.[7] Immediately after ratification, Z. Bhutto assumed the office of prime minister.[8] The Constitution of 1973 contained numerous clauses that reflected the prime minister's powers in relation to the president. For example, Article 48(1) stated, "In the performance of his functions, the President shall act on and in accordance

[4] Robert LaPorte, Jr., *Another Try at Democracy, in* CONTEMPORARY PROBLEMS OF PAKISTAN 171, 176 (J. Henry Korson ed., Westview Press 1993) (explaining how civil war broke out between East and West Pakistan over issues related to how the states would be governed, and climaxed when the Awami League, a political party from East Pakistan, won a majority of seats in the National Assembly).

[5] *Id.*

[6] *Id.* at 176-77.

[7] IAN TALBOT, PAKISTAN: A MODERN HISTORY 229 (St. Martin's Press 1998) (explaining how unlike the newly-enacted Constitution of 1973, the Constitutions of 1956 and 1962 vested most of the decision-making power in the president).

[8] La Porte, Jr., *supra* note 4, at 177.

with the advice of the Prime Minister and such advice shall be binding on him."[9] In addition, Article 48(3) stated, in relevant part, "the orders of the President shall require for their validity the counter-signature of the Prime Minister."[10] But the President did have some authority. For example, Article 101(1) provided: "There shall be a Governor for each Province, who shall be appointed by the President."

Z. Bhutto's government lasted until 1977, when nation-wide allegations of rigged elections and corruption prompted Chief of Army Staff Mohammed Zia ul-Haq ("Zia") to arrest political party leaders, suspend the Constitution, and declare martial law.[11]

Zia eventually appointed himself president and elected Mohammad Khan Junejo as prime minister.[12] However, before lifting martial law, he ratified the Eighth Amendment.[13] The purpose of the Eighth Amendment was threefold: First, it legalized all of Zia's actions in regards to martial law.[14] Second, it restored the powers of the president which had been taken away by Z. Bhutto. For example, Article 48(1) stated: "In the exercise of his functions, the President shall act in accordance with the advice of the Cabinet *or* the Prime Minister."[15] This essentially allowed the president to make decisions without input from the prime minister. Article 48(3), which required the counter-signature of the prime minister, was omitted.[16] Finally, Article 101(1) stated: "There shall be a Governor for each Province, who shall be appointed by the President [*in his discretion*] [after consultation with the Prime Minister.]"[17] While Zia allowed some input from the Prime Minister, he still gave himself unilateral authority to appoint the Governor for each of the provinces. Third, it bestowed several new powers upon the President. For example, Article 112(2)(b) allowed the president to dissolve the Provincial Assembly if "[a] situation has arisen in which the Government of the Province cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary."[18] Similarly, Article 58(2)(b) allows the president to dismiss the prime minister and dissolve the National Assembly if "[a] situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary."[19]

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[9] THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN art. 48(1) n.24, [hereinafter CONSTITUTION OF PAKISTAN], *available at* http://www.pakistani.org/pakistan/constitution/.

[10] *Id.* art. 48(3) n.26.B.

[11] LaPorte, Jr., *supra* note 4, at 177.

[12] *Id.* at 179-80.

[13] IFTIKHAR H. MALIK, THE HISTORY OF PAKISTAN 171 (Greenwood Press 2008).

[14] CONSTITUTION OF PAKISTAN art. 270(a).

[15] *Id.* art. 48(1) (emphasis added).

[16] *Id.* art. 48(3) n.24.

[17] *Id.* art. 101(1) (emphasis added).

[18] *Id.* art. 112(2)(b).

[19] *Id.* art. 58(2)(b).

Prior to the passage of the Eighth Amendment, the only way for a prime minister to be ousted was by a vote of no confidence by the National Assembly.[20] However, Articles 112(2)(b) and 58(2)(b) allowed a president to dissolve Parliament and the prime minister on a subjective basis—specifically, if the president felt "a situation had arisen."[21] Missing from this clause was an evidentiary requirement; instead, entire elected governments could be dismissed on nothing more than unsubstantiated claims or mere whims.[22] These powers were invoked on four occasions – 1988, 1990, 1993, and 1996 – and generally involved allegations of ineffectiveness, corruption, and nepotism.[23]

However, the underlying reasons why these Articles were invoked were markedly different. For example, Zia had initially picked Mohammed Khan Junejo as prime minister because they shared similar views.[24] However, Junejo began to assert himself shortly after becoming prime minister.[25] He first revived the political-party system of politics, which Zia had banned.[26] He also tried to control military promotions, a power Zia had reserved for himself.[27] Not surprisingly, Junejo was removed from office shortly after taking power.[28]

Similar discord existed between later presidents and prime ministers, which led to the removal of Benazir Bhutto ("B. Bhutto") in 1990,[29] Nawaz Sharif in 1993,[30] and B. Bhutto again in 1996.[31]

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[20] *Id.* art. 58(1).

[21] *See* KHAN, *supra* note 1, at 382 (Zia initially stated that these powers would only be invoked if the people seemed to lose faith in the government, the prime minister, and the National Assembly).

[22] *See, e.g.*, M.M. Ali, *In Pakistan Benazir Bhutto's Dismissal is Deja Vu All over Again*, WASH. REP. ON MIDDLE E. AFF., Jan.-Feb. 1997, 11, *available at* http://www.wrmea.com/backissues/0197/9701011.htm (Benazir Bhutto was dismissed because the "public faith in the integrity and honesty of the government has disappeared.").

[23] *See* KHAN, *supra* note 1, at 394 (dismissal of PM Mohammed Khan Junejo by President Zia ul-Haq in 1988 on charges of ineffectiveness, corruption, and patronization), 412-413 (dismissal of PM Benazir Bhutto by President Ghulam Ishaq Khan in 1990 on charges of ineffectiveness, corruption, and nepotism), 429 (dismissal of PM Nawaz Sharif by President Ghulam Ishaq Khan in 1993 on charges of corruption and maladministration), 452 (dismissal of Benazir Bhutto in her second term by President Leghari in 1996 on charges of ineffectiveness, corruption, and attempts to undermine the Supreme Court of Pakistan).

[24] LaPorte, Jr., *supra* note 4, at 180.

[25] TALBOT, *supra* note 7, at 263.

[26] *Id.*

[27] *Id.*

[28] KHAN, *supra* note 1, at 394.

[29] *See* TALBOT, *supra* note 7, at 310-11 (disagreements over whether President Khan or Prime Minister B. Bhutto had the authority to appoint the Chief of Staff, and B. Bhutto's refusal to allow the army to quell ethnic riots in the province of Sindh, alienated her from President Khan).

[30] Samina Yasmeen, *Democracy in Pakistan: The Third Dismissal*, 34 ASIAN SURVEY 572, 577 (1994) (Sharif's independent initiatives on issues such as Kashmir and Afghanistan, and his attempt to decrease presidential powers, alienated him from President Khan).

[31] *See* KHAN, *supra* note 1, at 450 (disagreement about which of them had the authority to make judicial appointments alienated her from President Leghari).

B. Nawaz Sharif's Thirteenth and Fourteenth Amendments to the Constitution

After the dismissal of B. Bhutto in 1996, Nawaz Sharif returned as prime minister.[32] He took advantage of the strong majority he held in the Parliament and passed the Thirteenth Amendment, which curtailed the president's power under the Eighth Amendment.[33] For example, Articles 112(2)(b) and 58(2)(b), which had allowed the president to dissolve the Parliament and dismiss the prime minister, respectively, were omitted from the Constitution.[34] In addition, the words "after consultation with" were replaced by the words "on the advice of" in Article 101(1).[35] This latter change allowed the prime minister to indirectly appoint a governor, rather than merely playing a supporting role which may or may not have influenced the president's appointment.

Rather than restoring the balance of power, Sharif added the Fourteenth Amendment, which increased the prime minister's power.[36] For example, Article 58(1) governed the process of securing a vote of no-confidence, which was the only way a prime minister was to be removed from office.[37] However, the Fourteenth Amendment made this nearly impossible.[38] The newly enacted Article 63(A) states:

> If a member of a Parliamentary Party defects, he may by means of a notice in writing addressed to him by the Head of the Political Party, be called upon [to] show cause, . . . as to why a Declaration under clause (2) should not be made against him.[39]

The Fourteenth Amendment goes further to explain what constitutes a defect:

> (a) . . . [A] breach of party discipline which means a violation of the party constitution, code of conduct and declared policies, or
> (b) . . . [A] vote contrary to any direction issued by the Parliamentary Party to which he belongs, or
> (c) . . . [A]bstain from voting in the House against party policy in relation to any bill.[40]

This allowed party leaders to dismiss party members if they failed to vote as they were told. This made it nearly impossible to dismiss a prime minister by a motion of no-confidence since any dissenters within the majority party could be dismissed for voting against the party to which they belonged. In effect, this

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[32] *Id.* at 464.

[33] Pakistan Muslim League Website, Biography of Nawaz Sharif, http://www.pmln.org.pk/profile.php (last visited May 19, 2010).

[34] CONSTITUTION OF PAKISTAN amend. 13 (amended 1997).

[35] *Id.* art. 101(1).

[36] CONSTITUTION OF PAKISTAN amend. 14 (amended 1997).

[37] *Id.* art. 58(1).

[38] *Id.* amend. 14.2.

[39] *Id.*

[40] *Id.*

amendment removed the checks-and-balances on the prime minister's power, since they could not legally be dismissed once elected.

C. The Rise of Pervez Musharraf and the Seventeenth Amendment

Prime Minister Sharif initially appointed Pervez Musharraf for Chief of Army Staff in 1998.[41] Sharif picked Musharraf because he felt Musharraf could be controlled and was not a threat to his power.[42] However, when the country seemed beyond control, Musharraf led a bloodless coup in October 1999 and declared martial law.[43] Eventually, he was voted into the presidency by an emergency national referendum.[44] Realizing that he could be removed from office because of the illegal manner in which he attained power, Musharraf moved quickly to pass the Seventeenth Amendment.[45] The purpose of the Seventeenth Amendment was threefold. First, Musharraf legalized his ascent to power and his actions during the period of martial law, as Zia had done before him.[46] Second, it limited the application of Article 63(A) so that the prime minister was not invulnerable to a vote of no confidence.[47] Finally, it restored the presidential powers that had been taken away by the Thirteenth Amendment. It re-inserted presidential discretion as the means of appointing governors under Article 101(1).[48] More importantly, Articles 58(2)(b) and 112(2)(b) were reinserted into the Constitution.[49] However, although these Articles were not invoked by President Musharraf, they remained in the Constitution because he felt they ensured a "unity of command."[50]

D. Asif Ali Zardari and the Proposed Eighteenth Amendment

After Musharraf's resignation in August, 2008, Asif Ali Zardari was elected into office and proposed the Eighteenth Amendment.[51] This new amendment is aimed at repealing the Seventeenth Amendment and assigning power to the prime minister and president as was originally envisioned in the Constitution of 1973.[52] President Zardari promised to institute this amendment no later than

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41 SARA LOUISE KRAS, MAJOR WORLD LEADERS: PERVEZ MUSHARRAF 50 (Chelsea House Publishers 2004).

42 *Id.* at 50-51.

43 KHAN, *supra* note 1, at 486.

44 *Id.* at 495.

45 *Musharraf Plan to Bolster His Power*, CNN.COM, June 27, 2002, http://edition.cnn.com/2002/WORLD/asiapcf/south/06/26/pakistan.presidency/index.html [hereinafter *Musharraf Plan*].

46 CONSTITUTION OF PAKISTAN arts. 270A-270AA.

47 KHAN, *supra* note 1, at 497-98.

48 CONSTITUTION OF PAKISTAN art. 101(1).

49 *Id.* amend. 17.3.A-4.A (amended 2003).

50 *See Musharraf Plan*, *supra* note 46.

51 *17th Amendment to go in Dec: Zardari*, DAILY TIMES (Pak.), Nov. 28, 2009, *available at* LEXIS (Zardari had initially planned to pass the Eighteenth Amendment in December, but this date was postponed).

52 *Id.*

March 30, 2010.[53] However, merely repealing the Seventeenth Amendment does not adequately address Pakistan's current instability, and is, therefore, only a temporary fix.

II. The Political and Constitutional Root Causes of Pakistan's Instability

There are two root causes of instability which can be extracted from Pakistan's recent history: the first political, and the second, constitutional.

A. Addressing the Political Root Cause of Instability in Pakistan

First, political leaders in Pakistan have adopted a type of "power politics" in which power cannot be balanced between presidents and prime ministers. Moreover, neither office has been willing to accept any type of checks-and-balances on their power by the other office. These conflicts are evident in light of the number of times Articles 48, 58(2)(b), 63A, 101(1), and 112(2)(b), have been changed in the Constitution. It also seems Pakistan's leaders are not interested in merely restoring the status quo. For example, Sharif could have restored the balance of powers by passing the Thirteenth Amendment only, but he used his majority in Parliament to pass the Fourteenth Amendment as well.[54] Similarly, Musharraf could have only repealed the Fourteenth Amendment but took a step further by ratifying the Seventeenth Amendment.[55] These leaders were not interested in long-term solutions for Pakistan's political instability, but rather, wanted to assure their terms in office.

Moreover, this concept of "power politics" also extends to current and prospective prime ministers. Even when a prime minister is in office, prospective prime ministers from the opposition parties do not have to accept defeat. They are fully aware that a president will dismiss the current prime minister if there is a disagreement between the two. These prospective ministers stir resentment for the current prime minister and side with the president whenever a dispute arises between the heads of state. For example, B. Bhutto had been dismissed as prime minister after a bitter disagreement with President Ghulam Khan in 1990.[56] After the dismissal, she denounced Khan's dismissal of her government as "undemocratic."[57] However, she enthusiastically endorsed Khan's dismissal of Nawaz Sharif in 1993, opining that the move was a "democratic" solution.[58] A similar scenario existed in 1996, when B. Bhutto was prime minister. The relationship between her and President Leghari eventually deteriorated, and led to

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[53] *Zardari Ready to Shed Grabbed Powers, Conveys Plan to Gilani*, THAINDIAN NEWS (Bangkok), Nov. 16, 2009, http://www.thaindian.com/newsportal/south-asia/zardari-ready-to-shed-grabbed-powers-conveys-plan-to-gilani_100275356.html.

[54] *See* discussion *supra* Part I.B.

[55] *See* discussion *supra* Part I.C.

[56] *See* TALBOT, *supra* note 7, at 310.

[57] Edward Gargan, *President of Pakistan Dismisses Premier and Dissolves Parliament*, N.Y. TIMES, Apr. 19, 1993, at A3.

[58] *Id.*

President Leghari making a secret pact with Nawaz Sharif.[59] Not surprisingly, B. Bhutto was eventually dismissed, and Sharif was made prime minister.[60]

The passage of the Eighteenth Amendment will likely address this political instability. First, by restoring the articles that have caused a power struggle between the prime minister and the president, such as Article 101(1), there is an assumption that the two heads of state will work together to resolve issues.[61] Second, with the repeal of Articles 58(2)(b) and 112(2)(b), there is hope that persons vying for the position of prime minister will not try to stir resentment between the heads of state since the president will not be able to unilaterally dismiss a prime minister. Therefore, the Eighteenth Amendment may be successful in addressing this political cause of instability in Pakistan.

B. Addressing the Constitutional Root Cause of Instability in Pakistan

However, repeal of the Seventeenth Amendment does not address the constitutional cause of instability: namely, the ease with which a leader can subvert the Constitution. All that is required is a two-thirds majority in both Houses of Parliament – the Senate and the National Assembly.[62] For example, when Nawaz Sharif returned to the office of prime minister in 1996, he was able to pass the Thirteenth Amendment *within a matter of minutes* on April 4, 1997.[63] This is a very easy threshold to attain and creates a constitution subject to the whims of Pakistan's political leaders.

The ease with which Pakistan's Constitution can be subverted is especially disconcerting considering approximately twenty years since the ratification of the Constitution of 1973 have been dominated by military personnel.[64] These leaders can pass amendments by threats rather than political sway. For example, when Zia assumed power, he threatened to dissolve both houses of Parliament if he was not given blanket authority over the nation.[65] This threat led to the ratification of the Eighth Amendment.[66]

Even if the Seventeenth Amendment is repealed, it does not prevent a future military dictator or leader with a strong majority in Parliament from simply ratifying a Nineteenth Amendment that would restore those powers. In order to stabilize Pakistan, the Eighteenth Amendment must address Article 239, which governs how the Constitution can be amended.[67] Until this occurs, Pakistan's leaders will always have the option of subverting the Constitution in order to

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[59] KHAN, *supra* note 1, at 458.

[60] MALIK, *supra* note 14, at 189.

[61] *See* discussion *infra* Part II.B.

[62] CONSTITUTION OF PAKISTAN art. 239.

[63] KHAN, *supra* note 1, at 464.

[64] CBC News, In Depth: Pakistan Timeline, http://www.cbc.ca/news/background/pakistan/ (last visited May 19, 2010) (Zia retained office from 1977 to 1988, and Musharraf retained office from 1999 to 2008).

[65] Malik, *supra* note 14, at 171.

[66] *Id.*

[67] CONSTITUTION OF PAKISTAN art. 239.

maintain their term in office. Thus, the Eighteenth Amendment, as currently proposed by President Zardari, is only a temporary fix for Pakistan's instability.

III. Amending Article 239 of the Pakistani Constitution

A. Current Procedure of Ratifying the Pakistani Constitution

Article 239 of the Pakistan Constitution states:

> (1) A Bill to amend the Constitution may originate in either House and, when the Bill has been passed by the votes of not less than two-thirds of the total membership of the House, it shall be transmitted to the other House.
>
> (2) If the Bill is passed without amendment by the votes of not less than two-thirds of the total membership of the House to which it is transmitted under clause (1), it shall, subject to the provisions of clause (4), be presented to the President for assent.
>
> (3) If the Bill is passed with amendment by the votes of not less than two-thirds of the total membership of the House to which it is transmitted under clause (1), it shall be reconsidered by the House in which it had originated, and if the Bill as amended by the former House is passed by the latter by the votes of not less than two-thirds of its total membership it shall . . . be presented to the President for assent.[68]

In accordance with Article 239, amending the Pakistani Constitution is a three-step process. First, it must be presented and passed by two-thirds of either the Senate or the National Assembly.[69] Next, it will be transmitted to the other House, where it must also pass by two-thirds majority.[70] Finally, the amendment will be proposed to the President who can assent or refuse to sign the proposed amendment.[71]

However, as Pakistan's modern history has already shown, this allows leaders who have a strong majority in both Houses to pass amendments that serve no other purpose but to secure their terms in office.

B. Adopting Canada's Amendment Formulas

In order to prevent leaders from subverting the Constitution, Pakistan should adopt an amending formula that would analyze the subject matter of the proposed amendment to determine the requirements of ratification.[72] Numerous countries

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[68] *Id.* art. 239(1)-(3).

[69] *Id.* art. 239(1).

[70] *Id.* art. 239(2).

[71] *Id.* art. 239(3).

[72] Currently, Pakistan has an amendment formula; however, it is only limited to situations where the territorial limits of the province would be affected. In such cases, the affected province would have to approve the amendment by two-thirds majority before the president can assent to the change. *Id.* art. 239(4). However, this was not at issue in any of the amendments discussed above.

have adopted this method, such as Paraguay,[73] Switzerland,[74] Spain,[75] and most recently, Canada.[76] Canada's establishment of different thresholds for different types of amendments serves as one model which Pakistan could adopt.[77] Canada's Constitution Act of 1982 provides five ways in which the Constitution of Canada can be amended, depending on the subject matter of the proposal.[78] First, Section 38 lays out the general procedure for amending the Constitution of Canada, which requires a majority in both Houses (the Senate and the House of Commons), as well as majorities in legislative assemblies of at least two-thirds of the provinces which represent at least fifty per cent of the total population.[79] The general procedure is the default procedure and is also specifically applied to certain subject matter, such as representation issues in the House of Commons and the powers of the Senate.[80] Second, the Constitution of Canada can be amended by unanimous consent, this requires a majority in both Houses, as well as in the legislative assembly of *each* individual province.[81] Most notably, unanimous consent is required when the amendment relates to the powers of a particular office, such as the Queen or the Governor General of Canada.[82] Third, if the proposed amendment applies to only one or a few provinces, it must be passed by both Houses, as well as any and all provinces which would be affected by the amendment.[83] Fourth, either House may amend the Constitution where the subject matter relates to the executive government or the Senate and the House of Commons.[84] However, this method applies only to a narrow class of changes[85] which are not at issue here. Finally, a province can amend its own constitution by having a majority in its province.[86]

If Pakistan were to adopt a similar amendment formula, then the heads of the Pakistani Government could no longer adjust Articles 48, 63A, 101, 58(2)(b), and 112(2)(b) by simply possessing a majority in both Houses. Instead, a Pakistani leader wanting to amend Articles 101(1) and 112(2)(b) would have to meet the requirements of the third amendment method in Canada since Article 101(1)

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[73] Constitución de la República de Paraguay [Constitution] arts. 289-90.

[74] Bundesverfassung der Schweizerischen Eidgenossenschaft [BV], Constitution féedérale de la Confédération suisse [Cst] [Constitution] April 18, 1999, SR 101, RO 101., arts. 138-40 (Switz.).

[75] Constitución arts, 166-68 (Spain).

[76] Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch.11, §§ 38-49 (U.K.) [hereinafter Constitution Act].

[77] *See* William C. Hodge, *Patriation of the Canadian Constitution: Comparative Federalism in a New Context*, 60 WASH. L. REV. 585 (1985) for a discussion of Canada's adoption of the amending formulas within the Constitution Act of 1982.

[78] Constitution Act §§ 38, 41, 43-45.

[79] *Id.* § 38.

[80] *Id.* § 42.

[81] *Id.* § 41.

[82] *Id.* § 41(a).

[83] *Id.* § 43.

[84] *Id.* § 44.

[85] Richard Albert, *Nonconstitutional Amendments*, 22 CAN. J. L. & JURIS. 5, 15 (2009).

[86] Constitution Act § 45.

relates to the appointment of the Governor of the provinces[87] and Article 112(2)(b) relates to the ability of the president to dissolve the Provincial Assemblies.[88] Accordingly, amending these Articles would require not only a majority in the Senate and the National Assembly but also a majority in each individual province.[89] This would provide a much higher threshold since very few, if any, provincial assemblies would be obliged to allow a president to directly control the appointment of their governor or dissolve their elected assembly.[90]

In addition, a president or prime minister of Pakistan could not change Articles 63A,[91] 48,[92] and 58(2)(b)[93] if Pakistan adopted these amendment formulas. All three of these Articles concern the powers of the prime minister and the president, which would fall under the second amendment method. Accordingly, ratification of these amendments would require unanimous consent; both Houses would need to pass this amendment as well as all four provinces of Pakistan. This would be an even more difficult threshold to reach for a head of state hoping to subvert the Constitution.

Moreover, while dictators could still threaten the Houses to pass their amendments, such tactics would likely be ineffective at the provincial level because the provinces are largely autonomous and governed by internal mechanisms.[94] Thus, the Eighteenth Amendment will only address both causes of instability in Pakistan if it amends Article 239 to include amendment formulas.

IV. Conclusion

Pakistan's recent history has been characterized by instability. Pakistan's presidents and prime ministers have been unwilling to share power and, accordingly, have taken turns subverting the Constitution to accomplish their short-term goals. Recognizing the instability these subversions have created, President Zardari has proposed an Eighteenth Amendment to be instituted by March 2010. This amendment would restore the balance of powers between the president and prime minister as originally envisioned in the Constitution of 1973. However, in its current state, the proposal only addresses one of the causes of Pakistan's insta-

87 *See* discussion and text of Article 101(1) *supra* Part I.A, B, & C.

88 *See* discussion and text of Article 58(2)(b) *supra* Part I.A, B, & C.

89 Pakistan Ministry of Information and Broadcasting, Government Structure http://www.pak.gov.pk/structure_government.aspx (last visited May 19, 2010) [hereinafter Government Structure] (Pakistan has four separate provinces: Balochistan, North-West Frontier Province, Punjab, and Sindh).

90 Attempts by the federal government to exert control over provincial governments have always been met with strong opposition. *See, e.g.*, TALBOT, *supra* note 7, at 299 (the federal government's appointment of General Tikka Khan as the new governor of the Province of Punjab increased hostility between the federal and provincial governments).

91 *See* discussion and text of Article 63A *supra* Part I.B & C.

92 *See* discussion and text of Article 48 *supra* Part I.A.

93 *See* discussion and text of Article 58(2)(b) *supra* Part I.A, B, & C.

94 *See* KHAN, *supra* note 1, at 284-85 (the provincial legislatures were designed to be "small replicas" of the federal government, and a province was obliged only to exercise its executive authority in such a way as to ensure consistency with the Acts of Parliament, and comply with federal direction in a narrow class of issues); *see also* Government Structure, *supra* note 90 (explaining that most of the services in areas such as health, education, agriculture, and roads, are provided by the provincial governments).

bility. Zardari's Eighteenth Amendment does not address the constitutional cause of instability since Pakistan's Constitution can still easily be subverted. Accordingly, there is nothing to stop a future president or prime minister of Pakistan from simply ratifying a Nineteenth Amendment to reinsert those amendments which have caused instability in Pakistan. To address this concern, Pakistan should adopt amendment formulas similar to the ones utilized by Canada. Specifically, Pakistan should assess the subject matter of the proposed amendment to determine what the requirements should be for that amendment to be ratified. Therefore, unless President Zardari addresses the constitutional cause of instability, his Eighteenth Amendment will be unsuccessful in the long run because Pakistan's Constitution has been, and will continue to be, subject to the whims of its leaders.

The old saying that "those who do not learn from history are doomed to repeat it" is especially pertinent to Pakistan. In light of Pakistan's nuclear capabilities and prominence on the global scene, its instability may not fit so neatly within its borders in the future.