INDIANA INTERNATIONAL & COMPARATIVE LAW REVIEW

VOLUME 8

1997-1998

Indiana International & Comparative Law Review

Vol. 8 No. 1 1997

Indiana University
School of Law—Indianapolis
735 West New York Street, Indianapolis, Indiana 46202-5194

Cite this publication as IND. INT'L & COMP. L. REV.

The *Indiana International and Comparative Law Review* publishes professional and student scholarly articles in the fields of international or comparative law. The *Review* welcomes submissions of scholarly legal articles on those topics.

The ideas, views, opinions, and conclusions expressed in articles appearing in this publication are those of the authors and not those of the *Review* or of Indiana University School of Law—Indianapolis.

Currently, the *Review* is published twice per year. The cost of single issues is $9.00, and the subscription rate is $18.00 per volume. The annual subscription rate for a foreign subscriber is $21.00.

Inquiries regarding submission of articles and comments or subscription information may be directed to:

Indiana International & Comparative Law Review
735 W. New York St.
Indianapolis, IN 46202-5194
(317) 274-1050
(317) 274-8825 (fax)

The *Review* is printed and distributed by Western Newspaper Publishing Company, Inc., 537 E. Ohio St., Indianapolis, IN 46204-2173.

INDIANA
INTERNATIONAL & COMPARATIVE
LAW REVIEW

VOLUME 8 1997 NUMBER 1

TABLE OF CONTENTS

ARTICLES

Law and Governance Affecting the Resolution of Academic and Disciplinary Disputes at Scottish Universities: An American Perspective ..... *Fernand N. Dutile* 1

Noncompliance with TRIPs by Developed and Developing Countries: Is TRIPs Working? ..... *John E. Giust* 69

ADDRESS

The Russian Courts and the Russian Constitution ..... *Peter B. Maggs* 99

COMMENTS

Squatters' Rights and Adverse Possession: A Search for Equitable Application of Property Laws 119

The United States and the World Need an International Criminal Court as an Ally in the War Against Terrorism 159

Discretion and Valor at the Russian Constitutional Court: Adjudicating the Russian Constitutions in the Civil-Law Tradition 189

LAW AND GOVERNANCE AFFECTING THE RESOLUTION OF ACADEMIC AND DISCIPLINARY DISPUTES AT SCOTTISH UNIVERSITIES: AN AMERICAN PERSPECTIVE

*Fernand N. Dutile**

I. INTRODUCTION

At the entrance to St. Mary's College, a part of the University of St. Andrews in Scotland, one encounters the opening words of the Gospel of St. John: "*In principio erat verbum.*"[1] Eschewing the usual translation,[2] students there irreverently render the passage thus: "The Principal has the last word."[3] The existence of the position of Principal in a university and the substantial power of that official cause only part of the fascination experienced by the American observer of universities in Scotland. This article will assess, from an American perspective, the law and governance affecting the resolution of academic and disciplinary disputes involving students at Scottish universities. This analysis will reflect the many ways in which the treatment of such disputes in Scotland both differs from and resembles their treatment in the United States.[4] In a compromise of manageability and comprehensiveness, the eight (of thirteen)[5] Scottish universities first constituted provide the focus for this Article.[6] Among those

---

* Associate Dean and Professor of Law, Notre Dame Law School; A.B., Assumption College, 1962; J.D., University of Notre Dame, 1965; Admitted to the Maine Bar, 1965.

The author did much of the research for this article as a Senior Visiting Fellow at the University of Aberdeen (Scotland) during the summer of 1996. He is deeply indebted to Christopher H. W. Gane, Professor of Scots Law and Dean of the Faculty of Law at the University of Aberdeen, for making that appointment possible and the period in residence both productive and enjoyable. The author thanks as well all those who provided information, oral or written, to this project; many of them are cited in footnotes to this piece. Thanks go also to my secretary, Nancy Beaudoin, for her good help. A research grant from the Notre Dame Law School greatly facilitated my work in Scotland.

1. *St. John* 1:1.

2. "In the beginning was the Word."

3. Interview with Frank Quinault, Hebdomadar, Univ. of St. Andrews, in St. Andrews, Scot. (July 18, 1996).

4. For a similar study regarding Australian universities, see Fernand N. Dutile, *Law, Governance, and Academic and Disciplinary Decisions in Australian Universities: An American Perspective*, 13 ARIZ. J. INT'L. & COMP. L. 69 (1996).

5. *See infra* text accompanying note 18.

6. The eight universities are St. Andrews, with 5,414 students in 1994-95, UNIVERSITY OF ST. ANDREWS, PROSPECTUS 1996 ENTRY, at 8; Glasgow, with 16,555 students in 1994-95, UNIVERSITY OF GLASGOW, FACTS AND FIGURES: 1995; Aberdeen, with 9,650 students, EDUCATION YEARBOOK 1995/96, at 349; Edinburgh, with 15,208 students, UNIVERSITY OF EDINBURGH, FACTS AND FIGURES: 1995; Strathclyde, with 12,600 students in 1994-95, interview with Susan Mellows, Academic Registrar, Univ. of Strathclyde, in Glasgow, Scot. (July 5, 1996) [hereinafter Mellows Interview]; Heriot-Watt, with 4,500 students in 1995-96, interview with Ralph Parkinson, Senior Assistant Secretary, Heriot-Watt Univ., in Edinburgh,

eight, the University of Aberdeen, at which the author did most of the research for this piece, garners particular attention.

Scotland is the northern constituent part of the United Kingdom. This resulted from the union of its Parliament with that of England under the Treaty of Union in 1707, just over a century after the union of the crowns of these two countries.[7] Though not a state, to this day most Scots consider Scotland a nation.[8] Today, Scotland has a population well over 5,000,000.[9]

Three of Scotland's universities, recognized as such by papal decree,[10] date from before the Reformation: St. Andrews, founded in 1411; Glasgow, founded in 1451; and Aberdeen, founded in 1494. Because, early on, Scots tended to seek higher education on the Continent rather than in the south of Britain, Scottish education took on a European rather than an English tradition; accordingly, these three universities reflected the "student-led pattern of Bologna rather than the master-dominated pattern of Oxford."[11] This pattern builds on the idea of an academic community, with students as full-fledged members carrying rights and responsibilities.[12] King James VI of Scotland—later to be James I of England—chartered the University of Edinburgh, founded in 1583 as the first post-Reformation university in the country.[13] These four so-called "ancient universities"[14]

Scot. (July 19, 1996) [hereinafter Parkinson Interview]; Dundee, with 6,498 students, EDUCATION YEARBOOK 1995/96, at 349; and Stirling, with 5,200 students, interview with Dennis Farrington, Deputy Secretary and Clerk to the Court, Univ. of Stirling, in Stirling, Scot. (July 4, 1996) [hereinafter Farrington Interview].

Comparisons with specific American universities appear principally in the footnotes. These comparisons focus on two large public universities—the University of Michigan and Indiana University (at Bloomington). In the fall of 1994, the University of Michigan enrolled 36,543 students, the fourteenth largest enrollment in the United States; Indiana University enrolled 35,594, the seventeenth largest enrollment in the United States. CHRON. OF HIGHER EDUC.: ALMANAC ISSUE, Sept. 2, 1996, at 16. Much of the information relating to the University of Michigan and to Indiana University first appeared in Dutile, *supra* note 4, *passim*.

7. THE CAMBRIDGE ENCYCLOPEDIA 987 (David Crystal ed., 2d ed. 1994).

8. ROBIN M. WHITE & IAN D. WILLOCH, THE SCOTTISH LEGAL SYSTEM 6 (1993).

9. THE CAMBRIDGE ENCYCLOPEDIA, *supra* note 7, at 986.

10. At Aberdeen, for example, "the Papal Bull of February 10, 1495 granted by Pope Alexander VI (Roderigo Borgia) on the petition of King James IV of Scotland erected a *studium generale* and university for the study of, *inter alia*, civil law." Michael C. Meston, *The Civilists of Aberdeen: 1495-1995*, 1995 JURID. REV. 153, 153.

11. COLLINS ENCYCLOPAEDIA OF SCOTLAND 346 (John Keay & Julia Keay eds., 1994).

12. UNIVERSITY OF STIRLING, HANDBOOK FOR STUDENTS 3 (1995-96) [hereinafter STIRLING HANDBOOK].

13. ASSOCIATION OF COMMONWEALTH UNIV., 2 COMMONWEALTH UNIVERSITIES YEARBOOK 1290 (1995-96).

14. Charles Henderson & Frank Mattison, *Universities and the Law, in* CONFERENCE OF UNIVERSITY ADMINISTRATORS, UNIVERSITIES AND THE LAW 9 (Dennis Farrington & Frank Mattison eds., 1990). They are referred to as "the older Universities" in THE UNIVERSITIES

stood alone until well into the twentieth century. In the 1960s, four new universities were constituted (the University of Strathclyde in 1964, Heriot-Watt University in 1966, and both the University of Dundee and the University of Stirling in 1967). These four universities are controlled by Royal Charter.[15] Only one of these four, the University of Stirling, was wholly new,[16] the other three having evolved from pre-existing institutions.[17] Finally, in 1992-93, five new universities, all descendants of former colleges, emerged (Abertay, Napier, Robert Gordon, Paisley and Glasgow Caledonian).[18] For the 1993-94 academic year, Scotland boasted a total of 68,004 full-time university students, of whom 58,637 were undergraduates.[19] Some universities have faced enormous growth; the student population at St. Andrews, for example, grew over fifty percent from 1986 to 1996.[20]

Until 1988, the government did not exert control over universities legislatively; usually, Parliament applied to universities the laws pertaining to any large public employer or occupier of land.[21] Rather, it exerted its control through the power of the purse and through advice to the University Grants Committee (UGC).[22] The UGC played a formidable role in the history of universities in the United Kingdom, operating as a buffer between

---

(SCOTLAND) ACT 1966, § 16(1).

15. STIRLING HANDBOOK, *supra* note 12, at 3. The remaining universities find themselves subject to either Parliamentary control (Aberdeen, Edinburgh, Glasgow and St. Andrews, which were reformed in the nineteenth century), or to government Order pursuant to the Further and Higher Education (Scotland) Act of 1992 (the others). *Id.* Higher education in the United Kingdom now manifests about "ten different and distinct models for governance . . . ." Dennis J. Farrington, Students as Customers of UK Higher Education 1 (1996) (unpublished manuscript, on file with author). Schools and colleges fall within the control of the Scottish Education Department, one of five departments of the Scottish Office, which the Secretary of State for Scotland heads. ENID MARSHALL, GENERAL PRINCIPLES OF SCOTS LAW 252 (6th ed. 1995).

16. *See* STIRLING HANDBOOK, *supra* note 12.

17. DENNIS FARRINGTON, THE LAW OF HIGHER EDUCATION 7-8 (1994).

18. *See* STIRLING HANDBOOK, *supra* note 12.

19. UNIVERSITIES' STATISTICAL RECORD, 1 UNIVERSITY STATISTICS 1993-94: STUDENTS AND STAFF 15. (Of course, thousands of students study at other higher-education institutions, beyond universities, in Scotland. *See* COLLINS ENCYCLOPAEDIA OF SCOTLAND, *supra* note 11, at 345.) In the universities, women are less well represented at the graduate level than at the undergraduate. Of the 9,367 graduate students, 3,301—or 35%—were women. At the undergraduate level, 27,685 (or 47%) of the 58,637 students were women. 1 UNIVERSITY STATISTICS 1993-94, *supra*.

In Scotland, undergraduates generally earn, as their first degree, a master's degree with honours, a course of study which normally spans four years; the three-year ordinary (or general) pass degree forms the main exception. 2 COMMONWEALTH UNIVERSITIES YEARBOOK, *supra* note 13, at 1295.

20. Frank Quinault, A Review of Student Support at St. Andrews 1 (1996).

21. FARRINGTON, *supra* note 17, at 86-87.

22. Henderson & Mattison, *supra* note 14, at 13.

the government and academe. Thus could it, over a long period of time, minimize governmental interference into the scholarly world. Moreover, the UGC exercised enormous leadership in supervising the extraordinary expansion of higher education after World War II. Ultimately, however, the UGC became "increasingly intrusive" through extensive questionnaires and investigations regarding university finances and other matters and through actions based on the ensuing findings.[23] Established in 1989 as the successor to the UGC, the Universities Funding Council (UFC) has wielded a less peremptory style, though perhaps not substance; it has made its pronouncements "in the form of 'advice,' but the explicit penalty for not adopting them was loss of funds."[24]

British universities secure their financing, directly or indirectly, largely under governmental auspices.[25] This funding appears in three forms: 1) external research income; 2) the block grant, provided to universities by the Department for Education through national funding councils; and 3) tuition fees, set by government and paid by students' local authority.[26] Means-tested maintenance grants remain available to students, but their real value has eroded over the years and the government has decided to replace these grants with low-interest loans.[27] In light of the overall reduction in the government's willingness to support universities, some educational officials have proposed that universities charge students extra fees, a proposal the government has seriously studied.[28] Nonetheless, a better-than-expected budget for 1997-98, a reflection of the government's recognition of the funding crisis facing British universities, probably puts off the necessity for tuition charges at British universities.[29]

Universities in the United Kingdom have no formal organization through which to present "the university view." The Committee of Vice-Chancellors and Principals (CVCP), however, has informally established itself as the sole player of this role, which it secured more "by default than by intention."[30] Its membership (still theoretically voluntary) of over one hundred comprises the chief executives of universities in England and Wales (Vice-Chancellors) and in Scotland (Principals). This committee operates in three important ways: 1) as a forum for discussion of universities' common

---

23. 2 COMMONWEALTH UNIVERSITIES YEARBOOK, *supra* note 13, at 1293.

24. *Id.* at 1292-93.

25. Roughly 80% of the universities' funding comes from the government through the UFC. COLLINS ENCYCLOPAEDIA OF SCOTLAND, *supra* note 11, at 346. "[Universities'] resources, and thus their policies, are therefore largely dependent on national will . . . ." *Id.*

26. 2 COMMONWEALTH UNIVERSITIES YEARBOOK, *supra* note 13, at 1294.

27. *Id.*

28. *Id.* at 1294-96.

29. CHRON. OF HIGHER EDUC., Dec. 13, 1996, at A46.

30. 2 COMMONWEALTH UNIVERSITIES YEARBOOK, *supra* note 13, at 1293.

problems; 2) as a collector and distributor (including with regard to lobbying and other public relations) of information for and about universities; and 3) as a service center for universities.[31]

II. UNIVERSITY GOVERNANCE

A. *The Governing Boards*

1. *The University Court*

Ultimate power in Scottish universities lies with the university Court,[32] as it has for well over a century.[33] The Universities (Scotland) Act of 1858 established university Courts[34] to "counterbalance the power of the generally very conservative Senates . . . ."[35] Generating greater university accountability to the public also drove the creation of these Courts.[36] The 1858 Act gave university Courts, among other things, power to review all decisions of the university Senate and to "effect improvements in the internal arrangements of the University . . . ."[37] The Universities (Scotland) Act of 1889 brought additional power to the Courts, including the power to administer "the whole revenue and property" of the university[38] and to appoint members of the academic staff.[39] Later legislation added to and

---

31. *See id.* Through specialized agencies, it collects and processes statistics, provides admissions support, conducts collective bargaining with trade unions, and does many other things. *Id.*

32. *See, e.g.*, CHARTER § 8(1), *in* UNIVERSITY OF STIRLING, CALENDAR 64 (1995-96) ("There shall be a Court . . . which . . . shall be the governing body of the University."); CHARTER § 7(1), *in* UNIVERSITY OF DUNDEE, CALENDAR 150 (1994-96) ("There shall be a Court . . . which . . . shall be the Governing Body of the University.") To the same effect, see CHARTER OF HERIOT-WATT UNIVERSITY § 8(1) (1966) (amended 1981).

33. Of course, some of its actions must be approved by the Crown. *See, e.g.*, THE UNIVERSITIES (SCOTLAND) ACT 1966, § 4(1)(e). So too with regard to some actions at universities created in the twentieth century by Royal Charter. *See, e.g.*, CHARTER OF HERIOT-WATT UNIVERSITY § 24(1).

34. COLLINS ENCYCLOPAEDIA OF SCOTLAND, *supra* note 11, at 347.

35. E. J. Powell, The History of the Rectorship § 2.2 (1993) (unpublished manuscript, on file with author).

36. *Id.*

37. THE UNIVERSITIES (SCOTLAND) ACT 1858, § 5.

38. THE UNIVERSITIES (SCOTLAND) ACT 1889, § 6(1).

39. *Id.* § 6(4). The legislation also empowers the Court to "take proceedings against" any member of the academic staff and to call any member of the University to give evidence in the matter. *Id.* § 6(6).

The governing board of the University of Michigan has "general supervision of [the] institution and the control and direction of all expenditures from the institution's funds." MICH. CONST. art. VIII, § 5. (The same applies to Michigan State University and Wayne State University. *Id.*) *See also* MICH. COMP. LAWS ANN. § 390.3 (West 1995). The board

refined the powers of Courts at the older universities.[40] Royal Charters created the Courts and their powers at some later universities.[41]

At the University of Aberdeen, the University Court, created by the 1858 legislation, at first comprised the Rector,[42] the Principal,[43] and assessors (four in all) nominated—one each—by the Chancellor,[44] the Rector, the Senate,[45] and the General Council.[46] The 1889 legislation enlarged the Court's membership to include the Lord Provost of Aberdeen and the Town Council's assessor. Raising the membership of the Court to fourteen, the Act provided three additional assessors to the Senate and three additional assessors to the General Council. The Universities (Scotland) Act of 1966 added to the governing board a number of members drawn from the non-professorial staff. In 1975, the nominees of the District Council of the City of Aberdeen and of the Grampian Regional Council, respectively, replaced the Lord Provost of Aberdeen and the Town Council's assessor in the

---

of regents of the University of Michigan has the entire control and management of university affairs. Indeed, its control over expenditures is quite remarkable; the legislature may attach conditions only upon the money it appropriates to the University and, although these conditions bind the governing board once it accepts the money, such conditions may not interfere with the regents' management of the University. Sprik v. Regents of the Univ. of Mich., 204 N.W.2d 62 (1972).

For more specific allocations of power, see MICH. COMP. LAWS ANN. § 390.5 (West 1995) (power to enact ordinances, by-laws, and regulations and to appoint academic staff and set their salaries); § 390.6 (power to remove the President or any professor or tutor); and § 390.891 (power to establish parking, traffic, and pedestrian ordinances).

For the plenary powers of the board of trustees at Indiana University, see IND. CODE ANN. §§ 20-12-1-1 *et seq.*, and §§ 20-12-23-2, -7 (West 1995). The board acts in the dual capacity of directors and managers of the University and as trustees of the trusts created by private donors. Sendak v. Indiana Univ., 260 N.E.2d 601 (1970).

40. *See* THE UNIVERSITIES (SCOTLAND) ACT 1932, § 2; and THE UNIVERSITIES (SCOTLAND) ACT 1966, § 3(1) and Schedule 2. For a good summary of the current power of the University Court at Glasgow, see UNIVERSITY OF GLASGOW: HISTORY AND CONSTITUTION viii (1977). *See also* UNIVERSITY OF EDINBURGH, CALENDAR, A-23 (1995-96) [hereinafter EDINBURGH CALENDAR].

41. *See, e.g.*, CHARTER OF HERIOT-WATT UNIVERSITY §§ 8, 21, 22, 24; CHARTER (SCHEDULE) § 9(5), *in* UNIVERSITY OF DUNDEE, CALENDAR 160-63 (1994-96) [hereinafter DUNDEE CALENDAR]; CHARTER § 8(1), *in* UNIVERSITY OF STIRLING, CALENDAR 64 (1995-96) [hereinafter STIRLING CALENDAR]; CHARTER OF HERIOT-WATT UNIVERSITY (SCHEDULE), STATUTE IX, § 8.

42. *See infra* text accompanying notes 125-78 for more information on the office of Rector.

43. *See infra* text accompanying notes 119-24 for more information on the office of Principal.

44. *See infra* text accompanying notes 108-18 for more information on the office of Chancellor.

45. *See infra* text accompanying notes 68-91 for more information on the Senate.

46. *See infra* text accompanying notes 92-103 for more information on the General Council.

Court's membership. Finally, subsequent changes brought to the Court three Vice-Principals, two additional assessors elected from among its membership by the Senate, the President of the Students' Representative Council, and up to six co-opted members, of whom not more than one may hold an appointment in the University.[47]

Despite the relatively broad representation, the Court at Aberdeen—unlike the governing boards at many American universities[48]—boasts a strong campus presence; even some of the members who themselves do not hold campus positions may be selected by campus constituencies. The Rector, for example, who chairs the Court at Aberdeen,[49] is elected by the students.[50] The concentration of campus influence within the Court enables it to remain attuned to, and interested in,

---

47. UNIVERSITY OF ABERDEEN, CALENDAR 7-9 (1995-96) [hereinafter ABERDEEN CALENDAR]. For the membership of the Court at other "older" universities, see UNIVERSITY OF ST. ANDREWS, CALENDAR 2.2 (1994-95) [hereinafter ST. ANDREWS CALENDAR]; EDINBURGH CALENDAR, *supra* note 40, at A-23.

At the University of Stirling, a newer university, the Court comprises up to twenty-three members: the chair (a layperson); four academic members appointed by the Academic Council; two academic members appointed by the Academic Assembly; the Principal and two Vice-Principals, *ex officio*; and laypersons appointed by local government, the Conference of the University, the Graduates' Association, the Chancellor, and the Court itself. The President and the Honorary President of the Students' Association represent the students. UNIVERSITY OF STIRLING, HANDBOOK FOR STUDENTS 3 (1995-96). For the membership of the Court at other "newer" universities, see, *e.g.*, CHARTER (SECOND SCHEDULE) § 9, *in* STIRLING CALENDAR, *supra* note 41, at 74-77; CHARTER (SCHEDULE) § 9, *in* DUNDEE CALENDAR, *supra* note 41, at 158-59; CHARTER OF HERIOT-WATT UNIVERSITY (SCHEDULE), STATUTE XII, § 1.

The newer universities may apply a formula to the membership of their governing boards, for example requiring a certain number of industrialists. Interview with Ellis John Powell, Regent, Univ. of Aberdeen, in Aberdeen, Scot. (Aug. 1, 1996) [hereinafter Powell Interview].

48. At the University of Michigan, the only campus person specified by law for the governing board is the President, who has no vote. *See* MICH. CONST. art. VIII, § 5. (The same holds true for Michigan State University and Wayne State University. *Id.*) Indeed, students may be ineligible to stand for election to the Michigan board, even as members of the general public. 4679 Op. Mich. Att'y Gen. 98 (1968) (since student has contractual relationship with University, service on governing board would constitute conflict of interest). At Indiana University only one student—and no member of the administration, faculty or staff—is legally specified for service on the board. IND. CODE ANN. § 20-12-24-3.5 (West 1995).

49. The President of the University of Michigan presides over the board of regents, though without a vote. MICH. CONST. art. VIII, § 5. The formal distribution of power between the regents and the President at the University of Michigan seems anything but clear: The President (and the respective faculties) exercise the "immediate government of the several departments," but the regents have the power to "regulate the course of instruction, and prescribe, under the advice of the professorships, the books . . . to be used . . . and also to confer . . . degrees . . . and diplomas . . . ." MICH. COMP. LAWS ANN. § 390.11 (West 1995).

50. Powell, *supra* note 35, § 2.1.

campus events and to provide the relatively "hands-on" governance demanded of a Court. As one commentator put it, "it was essential that academics should be the largest single group, with enormous influence beyond its own numbers, on the Court, the body charged with managing and distributing resources and employing staff."[51] The typical presence on the Courts of Scottish universities of a heavy component of people from the campus and from the academic life of the university would strike most American observers as strange, indeed. The trustees of public colleges and universities in the United States tend either to be appointed by the Governor or by the Governor and legislative leaders, or to be elected by popular vote.[52] At the University of Michigan, the general public elects all voting members of the governing board.[53] At Indiana University, the Governor appoints six members and the alumni elect the other three.[54] At private universities in the United States, new trustees are chosen by sitting trustees. These members often try to "clone" themselves, choosing people with "the same educational, business or social background" and people who are "wealthy or have access to affluent potential donors."[55]

The heavy campus representation within Scottish Courts makes it more difficult for the chief executive officer of the university (the Principal) to control the flow of information to the board and, consequently, its agenda, as often happens, at least absent some crisis, in American universities.[56] Stories abound of trustees at American universities remaining unaware of crucial academic issues on campus.[57] In one instance, members of a board

---

51. T.B. Skinner, *University Government: A Comment, in* ABERDEEN UNIVERSITY 1945-81: REGIONAL ROLES AND NATIONAL NEEDS 104 (John D. Hargreaves & Angela Forbes eds., 1989).

52. Roberta P. Haro, *Choosing Trustees Who Care about Things that Matter*, CHRON. OF HIGHER EDUC., Dec. 8, 1995, at B1. At the University of Michigan, Michigan State University and Wayne State University, for example, the State Governor makes appointments to fill vacancies on the governing board, but those appointed serve only until an election can be held. MICH. CONST. art. VIII, § 5. The Governor of Michigan has recommended the termination of all direct election of trustees in favor of gubernatorial appointments. Patrick Healy, *Mich. Governor Would End Direct Election of Trustees*, CHRON. OF HIGHER EDUC., Oct. 20, 1995, at A30.

53. MICH. CONST. art. VIII, § 5. Michigan is "one of four states in which voters elect members of university boards . . . ." *Ways & Means*, CHRON. OF HIGHER EDUC., Nov. 15, 1996, at A35.

54. IND. CODE ANN. §§ 20-12-24-2, -3, -5 (West 1995).

55. Haro, *supra* note 52, at B1.

56. The board of trustees at the University of West Virginia, for example, vetoed a plan providing benefits to partners of homosexual and other unmarried employees. The administration had earlier adopted the plan but suspended it due to the concern of the trustees. CHRON. OF HIGHER EDUC., Nov. 17, 1995, at A23.

57. This is not to say that all close management by such boards is precluded. The regents of the University of Michigan have the formal power to choose the "books and authorities" used in instruction, MICH. COMP. LAWS ANN. § 390.11 (West 1995), although

of trustees first learned from the public media that the institution had ceased using the Scholastic Aptitude Test to screen student admissions; later the President informed one board member who questioned the change that the issue was not "a board matter."[58] Unsurprisingly, some have bemoaned American trustees' preoccupation with "issues related to money, institutional prestige, and presidential searches, rather than issues involving academic quality or educational access."[59] Indeed, trustees often see their duties as limited to raising funds and supporting the administration.[60]

There are some indications that the willingness of trustees of American universities to become more aggressively involved in the life of the university has increased, thus inevitably reducing the control of the President.[61] As one trustee of a public university recently wrote, "[m]any trustees have ceded too much of their statutory authority for overseeing public higher education to campus presidents and faculty councils."[62] To some, the status of "outsider" presents not a disadvantage, but the distinct plus of neutrality and accountability to the public.[63]

Today, the Scottish university Court is a "body corporate" with both a common seal and the power of perpetual succession. It administers the property and revenues of the university, provides review of any decision of the Senate, receives reports from the Senate and the General Council, makes appointments, fixes fees, and, on the recommendation of the Senate, prescribes regulations for academic courses of study.[64] University Courts, however, do not exercise unbridled power. Often their authority, while the ultimate one, gets exercised only as the result of an initiative at a lower level. For example, the Court may have the authorization to make appointments to the academic staff, but only those *initiated* by the Senate.[65] In a very real

---

one trusts that the board does not often exercise that power. There are some signs that boards are becoming increasingly active. *See U. of Mass. Trustees Reject Tenure for 3 Professors*, CHRON. OF HIGHER EDUC., Sept. 8, 1995, at A27: "[B]eing recommended for tenure by the president no longer means that approval by the Board . . . is a *fait accompli*." *See also* "State Notes," *id.* at A52.

58. Candace de Russy, *Public Universities Need Rigorous Oversight by "Activist" Trustees*, CHRON. OF HIGHER EDUC., Oct. 11, 1966, at B4.

59. Haro, *supra* note 52.

60. de Russy, *supra* note 58.

61. *See, e.g., U. of Nebraska Regents Overturn Tenure Denial*, CHRON. OF HIGHER EDUC., Nov. 8, 1996, at A13; and Patrick Healy, *Activist Republican Trustees Change the Way Public Universities Seek Presidents*, CHRON. OF HIGHER EDUC., Aug. 9, 1996, at A19. ("With the advent of tough-minded managers and Republican activists on governing boards, public-university leaders often must choose between swallowing controversial policies made by devoted ideologues or risk losing their jobs." *Id.)*

62. de Russy, *supra* note 58, at B3.

63. *Id.*

64. ABERDEEN CALENDAR, *supra* note 47, at 9.

65. At the University of Aberdeen, during the middle of this century, "the Court itself

sense, the Court has the power of the purse,[66] and this power drives the others. Also in a very real sense, the Court is the last, and supreme, source of authority before any recourse to the civil courts. As a result, although university Courts may come down on one side of an issue, they may eschew "siding" with one faction within the university; surely they will hesitate to initiate tension within the university.[67]

2. *The University Senate*[68]

Until the university Courts were created in the nineteenth century, the Senatus Academicus, or the Senate, remained the ultimate power at the four universities then in existence.[69] Even today, however, the Senate, sometimes called the "supreme academic body,"[70] exerts formidable authority over Scottish universities, driving both in theory and in fact a dramatic part of the academic life of the institution. Regardless of the "constitutional niceties," the Senate controls the university's academic affairs insofar as they can be separated from issues of resources.[71] At the University of Aberdeen, for example, "[t]he Senate is charged with the regulation and superintendence of the teaching and discipline of the University, and with the promotion of research."[72] Moreover, no degree may be conferred except upon the authority of the Senate.[73] At the University of Stirling, the Senate parallel

---

was still active in making appointments. . . . At some point custom changed, and by the late 1960s it was well established practice for the Court simply to accept the recommendations of appointing committees." Jennifer Carter, *Structures and Processes of Internal Government, in* ABERDEEN UNIVERSITY 1945-81: REGIONAL ROLES AND NATIONAL NEEDS, *supra* note 51, at 102.

66. Interview with Peter Clark, Proctor, and Frank Quinault, Hebdomadar, Univ. of St. Andrews, in St. Andrews, Scot. (July 18, 1996) [hereinafter Clark & Quinault Interview].

67. Powell Interview, *supra* note 47.

68. The nomenclature among Scottish universities is not inevitably uniform; at the University of Stirling, for example, the Academic Council serves as the parallel to the Senate at other universities. *See, e.g.*, CHARTER § 9(1), *in* STIRLING CALENDAR , *supra* note 41, at 64.

69. *See supra* text accompanying notes 10-14. Conflict between groups on campus, however, predated the development of the Court. At the University of Glasgow, the Principal and the holders of the thirteen chairs created prior to 1761 deemed themselves alone to be "the Faculty;" they further maintained that the "new Professors," though holders of "Regius" Chairs, were merely members of the Senate with no say in the administration of the "College" and especially its revenues. The 1858 legislation, see *supra* text accompanying notes 34-37, even as it created the Court and the General Council, dissolved the distinction between the Senate and the Faculty. UNIVERSITY OF GLASGOW, HISTORY AND CONSTITUTION vii (1977) [hereinafter GLASGOW HISTORY].

70. UNIVERSITY OF ST. ANDREWS, PROSPECTUS 1996 ENTRY, at 6 (1996).

71. FARRINGTON, *supra* note 17, at 182.

72. ABERDEEN CALENDAR, *supra* note 47, at 9.

73. *Id.*

(called the "Academic Council") "acts as the authoritative body for purely academic matters . . . ."[74] To be sure, the Court, formally at the top of the power list, controls the purse and thus may preclude virtually any exercise of power on the part of the Senate. Nonetheless, the latter, by virtue of its academic prerogatives—including its exclusive power to initiate some changes on campus[75] and its right at least to be consulted about others[76]—exercises fairly exclusive control over the academic aspects of the university.[77]

Despite these general points, the relationship between the Court and the Senate at Scottish universities varies. In the four ancient universities and in the post-1992 universities, the Courts retain considerable formal and direct control over the Senates' actions; in fact, in the newer universities, the Court appoints the members of the Senate. In the four chartered institutions, the powers of the Courts are set out separately from those of the Senate. In these institutions, the Court's power over the Senate is indirect, but real: The Court may withhold the resources necessary to any undertaking of the Senate.[78]

---

74. STIRLING HANDBOOK, *supra* note 12, at 3. For the powers of the Senates at the four ancient universities, see THE UNIVERSITIES (SCOTLAND) ACT 1889, § 7; and THE UNIVERSITIES (SCOTLAND) ACT 1966, § 8. For the powers of the Senates (or parallel body) at other universities, see *e.g.*, CHARTER § 9(1), *in* STIRLING CALENDAR, *supra* note 41, at 64 ("responsible for the academic work of the University, both in teaching and in research, and for the regulation and superintendence of the education, discipline and welfare of the students . . . ."); STATUTE 10, § 4, *in* STIRLING CALENDAR, *supra* note 41, at 77; CHARTER OF HERIOT-WATT UNIVERSITY § 9(1) ("responsible for the academic work of the University, both in teaching and in research, and for the regulation and superintendence of the education and discipline of the students . . . ."); CHARTER OF HERIOT-WATT UNIVERSITY (SCHEDULE), STATUTE XIII, § 4. *See also* CHARTER § 8(1), *in* DUNDEE CALENDAR, *supra* note 41, at 150; *and* CHARTER (SCHEDULE), STATUTE 10, § 5, *in* DUNDEE CALENDAR, *supra* note 41, at 164.

75. For an example of the extent to which a Court might be limited by the Senate's exclusive power to initiate—or at least to approve—certain actions, including academic appointments, see CHARTER OF HERIOT-WATT UNIVERSITY (SCHEDULE), STATUTE XII, § 8(b), (c), and (d); CHARTER OF HERIOT-WATT UNIVERSITY § 22(2); CHARTER OF HERIOT-WATT UNIVERSITY (SCHEDULE), STATUTE XIII, § 4(e); CHARTER (SCHEDULE), STATUTE 9, § 5(m), *in* DUNDEE CALENDAR, *supra* note 41, at 162.

At the University of Dundee, the Senate recommends persons for appointment to the academic staff only when requested by the Court. CHARTER (SCHEDULE), STATUTE 10, § 5(l)(iii), *in* DUNDEE CALENDAR, *supra* note 41, at 164.

76. *See, e.g.*, CHARTER §§ 16(3), 17(2), 19(1), *in* DUNDEE CALENDAR, *supra* note 41, at 152.

77. *See, e.g.*, CHARTER § 22(2), *in* STIRLING CALENDAR, *supra* note 41, at 66 (the Court may not by ordinance deal with such matters as courses of study, diplomas, degrees, academic distinctions, and examinations, except on the recommendation or concurrence of the Academic Council—the Senate parallel at the University of Stirling). *See also* CHARTER § 9(1), *in* DUNDEE CALENDAR, *supra* note 41, at 150.

78. FARRINGTON, *supra* note 17, at 177.

The relationship between the two bodies may be tightened but also complicated by membership common to both bodies. At the University of Aberdeen, for example, the Principal and three Vice-Principals sit on both bodies. Moreover, the Court also includes six assessors elected by the Senate from among its own membership.[79] Thus, at least ten individuals serve on both bodies;[80] one can only speculate as to how the loyalties of these members line up.

The complementary powers and reciprocal relationship of these two bodies promote a mutual check on each other's exercise of authority. For example, the Senate's academic expertise may be protected through its exclusive power to recommend the appointment of a member of the academic staff;[81] conversely, however, the Court may limit the nature and number of these appointments through its funding power.

Despite the advantages of complementary powers, problems have arisen due to the interplay between Courts and Senates. A fairly close working relationship becomes of paramount importance when, in effect, each of the two bodies can stymie the other. Moreover, planning becomes very difficult for any body wholly dependent upon another for effectiveness. Not long ago, at the University of Aberdeen, "academic objectives were prioritized by faculties and Senatus, and costed by Court, but there were only fitful attempts to link Court and Senatus in a central planning process."[82] From the 1940s to the 1980s, the University reportedly remained excessively centralized, with the Court holding the crucial powers over finance, external relations, and appointments. The Court, consistent with governing law, looked to the Senate to give shape to the University, but until the early 1980s, the Senate "lacked full knowledge of financial matters and external circumstances" and was "too incoherent a body itself to" contribute effectively to the planning process.[83]

Committees to serve as a liaison have developed to promote the smoother operation—including the planning—of this tandem. At the University of St. Andrews, for example, the Planning and Resources Committee (PARC) works to bridge the inevitable gap between the controller

---

79. ABERDEEN CALENDAR, *supra* note 47, at 8-9. "It could indeed be argued that the Senatus Assessors on the Court, while they are there as Assessors not Representatives, have a weighty responsibility for the academic policy and discipline of the University, and for putting forward the views of the Senate even when those views are not their own." Powell, *supra* note 35, § 3.6(5).

80. At the University of Edinburgh, the Principal sits on both the Court and the Senate. The Court also includes four Senate assessors, bringing to at least five the membership common to both groups. *See* EDINBURGH CALENDAR, *supra* note 40, at A-6 to A-7.

81. *See, e.g.*, CHARTER OF HERIOT-WATT UNIVERSITY (SCHEDULE), STATUTE XII, § 8(c).

82. Carter, *supra* note 65, at 97.

83. *Id.* *See also* Skinner, *supra* note 51, at 131.

of the purse, on the one hand, and the highest academic body in the institution, on the other.[84]

While campus personnel find themselves well represented on university Courts,[85] only such personnel populate the Senates.[86] As such, what has been said about academic, internal influence within university Courts—as compared with boards of trustees in the United States—echoes many times more loudly with regard to the Senates. At the University of Aberdeen, for example, the Senate comprises the Principal; the Vice-Principals; established (chaired) professors and Heads of Department, together with—if not otherwise members—the Deans of the Faculties and Conveners of the Boards of Studies; the Librarian; the Convener of the Committee of Wardens of Halls of Residence; the Director of the University Computing Center; elected personal (non-chaired) professors, readers, and lecturers (who must number no fewer than one-half the number of *ex officio* members); the Principals (or their nominees) of the colleges whose degrees the university validates; and nine student members.[87] This list yields an enormous body that includes more than 165 members when all chairs are occupied[88]—a common, though not inevitable, situation in Scottish universities.[89] The Principal of the university typically presides over the Senate.[90] Despite its many and important responsibilities, the university Senate may not meet all that often; at the University of Edinburgh, the Senate meets six times a year.[91]

---

84. Clark & Quinault Interview, *supra* note 66.

85. *See supra* text accompanying notes 42-51.

86. As envisaged in the 1858 legislation reorganizing Scottish universities, the Senates were composed solely of the Principal (or Principals) and the "whole professors." THE UNIVERSITIES (SCOTLAND) ACT 1858, § 5.

87. ABERDEEN CALENDAR, *supra* note 47, at 9. *See also* UNIVERSITY OF ABERDEEN, ORDINANCE NO. 122 (AMENDMENT OF THE COMPOSITION OF THE SENATUS ACADEMICUS) (1980). Senate assessors to the University Court who are not otherwise members of the Senate may attend Senate meetings. ABERDEEN CALENDAR, *supra* note 47, at 9.

88. *See* ABERDEEN CALENDAR, *supra* note 47, at ix-xvi.

89. *See, e.g.*, ST. ANDREWS CALENDAR, *supra* note 47, at 2.4-2.7 (110 members); EDINBURGH CALENDAR, *supra* note 40, at A-7 through A-9 (over 300 members). *See also* SCHEDULE, STATUTE 8, § 1 and CHARTER, STATUTE 10, § 1, *in* DUNDEE CALENDAR, *supra* note 41, at 160. The Academic Council (the Senate parallel) at the University of Stirling is much smaller, with well under thirty members. *See* STATUTE 10, § 1, *in* STIRLING CALENDAR, *supra* note 41, at 77.

90. *See, e.g.*, ST. ANDREWS CALENDAR, *supra* note 47, at 2.4; ABERDEEN CALENDAR, *supra* note 47, at 9; EDINBURGH CALENDAR, *supra* note 40, at A-24; STATUTE 10, § 3, *in* STIRLING CALENDAR, *supra* note 41, at 77; and CHARTER (SCHEDULE), STATUTE 10, § 3(a), *in* DUNDEE CALENDAR, *supra* note 41, at 164.

91. EDINBURGH CALENDAR, *supra* note 40, at A-24.

3. *The General Council*

Since 1858,[92] Scottish universities have included in their hierarchy of governance a large,[93] unwieldy group, usually called the General Council, made up of virtually everyone who has ever had contact with the university. The General Council at the University of Aberdeen, for example, includes: 1) all graduates of the University, 2) the Chancellor of the University during his tenure, 3) all present and past professors and members of the University Court, 4) all readers and lecturers who have held office in the University for more than a year, and 5) all former readers and lecturers who have remained part of the University staff until retirement.[94] Understandably, and perhaps fortunately, not all show up for meetings; as one commentator noted, the Council, at least during part of its history, has consisted "in theory of all graduates, and in practice of professional men in Aberdeen who had the time and interest to attend its meetings."[95] The Council holds two statutory meetings annually and may hold special meetings as prescribed by its rules.[96]

These bodies were intended to involve graduates formally in the universities' business and to increase the universities' public accountability.[97] Although the General Council may exercise considerable moral suasion, its formal powers, despite enlargement under the Universities (Scotland) Act of 1889, remain limited, indeed. In a very real sense, its major impact comes not through its own deliberations, but through its impact on the deliberations of the University Court, to which the Council elects four assessors. The Council also elects the Chancellor, the titular head of the university and the President of the Council.[98] At one time, interestingly, the General Councils of the four "ancients" jointly returned three representatives to Parliament. The Representation of the People Act of 1948, however, abolished university constituencies.[99]

---

92. *See* GLASGOW HISTORY, *supra* note 69, at vii. The Universities (Scotland) Act of 1858 established two new bodies: The University Court and the General Council. *Id.*

93. At the University of Edinburgh, as of May 1995, the General Council had 93,884 members. EDINBURGH CALENDAR, *supra* note 40, at A-23.

94. *Notes on the Constitution of the University*, *in* ABERDEEN CALENDAR, *supra* note 47, at 7, 9. The memberships of the Councils at the University of Glasgow and at the University of Edinburgh reflect this arrangement. *See* GLASGOW HISTORY, *supra* note 69, at ix; EDINBURGH CALENDAR, *supra* note 40, at A-7, A-23.

95. R. D. ANDERSON, THE STUDENT COMMUNITY AT ABERDEEN: 1860-1939, at 27 (1988).

96. *Notes on the Constitution of the University*, *in* ABERDEEN CALENDAR, *supra* note 47, at 7, 9. The same situation prevails at the University of Glasgow. *See* GLASGOW HISTORY, *supra* note 69, at x. *See also* EDINBURGH CALENDAR, *supra* note 40, at A-24.

97. Powell, *supra* note 35, § 2.2.

98. *Notes on the Constitution of the University*, *in* ABERDEEN CALENDAR, *supra* note 47, at 7-9. For more on the Chancellor, see *infra* text accompanying notes 108-18.

99. GLASGOW HISTORY, *supra* note 69, at x.

The Council may consider any question affecting the "well-being and prosperity" of the university.[100] During the late nineteenth century, discontent with Aberdeen's curriculum found expression primarily through the Council.[101] The Council, however, has no dispositive power regarding such issues; it may only "make representations" to the University Court concerning these matters, and thus force the Court to consider them and "return to the Council their deliverance thereon."[102] Finally, the University Court must present to the Council each year a report on the work of the university and an audited financial statement.[103]

4. *Other Bodies*

Faculties, schools, departments, and Boards of Studies—in no predictable pattern—round out the groups forming part of the hierarchy in Scottish universities.[104] The University of Aberdeen boasts four faculties: Arts and Divinity, Medicine and Medical Sciences, Science and Engineering, and Social Sciences and Law.[105] The University deploys six Boards of Study: Arts and Social Sciences, Science, Engineering, Divinity, Law, and Medicine.[106]

---

100. THE UNIVERSITIES (SCOTLAND) ACT 1858, § 6.

101. ANDERSON, *supra* note 95, at 27.

102. THE UNIVERSITIES (SCOTLAND) ACT 1858, § 6.

103. THE UNIVERSITIES (SCOTLAND) ACT 1966, § 12(1). For more on the role of the General Council at other universities, see GLASGOW HISTORY, *supra* note 69, at vii, ix-x; *History and Constitution, in* EDINBURGH CALENDAR, *supra* note 40, at A-23. Heriot-Watt University has a General Convocation, *see* CHARTER OF HERIOT-WATT UNIVERSITY § 7, and (SCHEDULE), STATUTE XI; and an Academic Congress, *see* CHARTER OF HERIOT-WATT UNIVERSITY § 13 and (SCHEDULE), STATUTE XVIII. The University of Dundee has a Graduates' Council, *see* CHARTER § 12(1), *in* DUNDEE CALENDAR, *supra* note 41, at 151; and SCHEDULE § 20, *in* DUNDEE CALENDAR, *supra* note 41, at 184; and an Academic Council, *see id.* at 185; *see also* CHARTER § 13(1), *in* DUNDEE CALENDAR, *supra* note 41, at 150; SCHEDULE § 15, *in* DUNDEE CALENDAR, *supra* note 41, at 168. The University of Stirling has a Conference, *see* CHARTER § 7, *in* STIRLING CALENDAR, *supra* note 41, at 4; STATUTE 8, *in* STIRLING CALENDAR, *supra* note 41, at 71. The University of Stirling also has an Academic Assembly and a Staff Assembly. *See* STATUTES 13 & 14, *in* STIRLING CALENDAR, *supra* note 41, at 81.

104. FARRINGTON, *supra* note 17, at 183.

105. Each Faculty has an Advisory Committee, a Planning Committee, and an Academic Board. *Notes on the Constitution of the University, in* ABERDEEN CALENDAR, *supra* note 47, at 7, 10.

106. *Id.* Each Board of Study is comprised of all heads of department, plus representatives of both faculty and student body. The Senate delineates the responsibilities of each Board of Study. *Id.*

B. *The Major Officers*

1. *General*

The Chancellor, the Principal and the Rector—three very different positions—sit atop the hierarchy of individuals at Scottish universities. Parliamentary legislation has remained "curiously silent" about these major offices, a silence that may account for their survival into the twentieth century.[107]

2. *The Chancellor*

The Universities (Scotland) Act of 1858 provided for a Chancellor at each of the ancient universities. Under the legislation, the Chancellor, elected by the "other" members of the General Council,[108] holds office for life. The Chancellor has power to confer degrees and to appoint a Vice-Chancellor[109] for that purpose only.[110] The Chancellor presides over meetings of the General Council and, at those meetings, exercises both a deliberative and a casting vote.[111] Despite these relatively meager duties, the

---

107. Powell, *supra* note 35, § 3.60.

108. For details on this election at the University of Aberdeen, see ORDINANCE NO. 123, *in* UNIVERSITY OF ABERDEEN, THE ACTS, ORDINANCES AND RESOLUTIONS AFFECTING THE UNIVERSITY OF ABERDEEN: 1858-1990, at 115 (1991) [hereinafter ABERDEEN ACTS, ORDINANCES & RESOLUTIONS]. The Senatus Academicus formerly elected the Chancellor, but the Universities (Scotland) Act of 1858 transferred the power to the newly created General Council. Powell, *supra* note 35, § 1.2.

109. The office of Vice-Chancellor today commonly falls to the Principal. *See, e.g., Notes on the Constitution of the University*, *in* ABERDEEN CALENDAR, *supra* note 47, at 8; GLASGOW HISTORY, *supra* note 69, at xii; STIRLING HANDBOOK, *supra* note 12, at 5.

110. THE UNIVERSITIES (SCOTLAND) ACT 1858, § 2.

111. *Id.* § 6. For descriptions of the office at particular universities, see, *e.g., Notes on the Constitution of the University*, *in* ABERDEEN CALENDAR, *supra* note 47, at 8; GLASGOW HISTORY, *supra* note 69, at xii; *History and Constitution*, *in* EDINBURGH CALENDAR, *supra* note 40, at A-22; CHARTER OF HERIOT-WATT UNIVERSITY § 4; CHARTER OF HERIOT-WATT UNIVERSITY (SCHEDULE), STATUTE III; CHARTER § 4, *in* DUNDEE CALENDAR, *supra* note 41, at 149, and SCHEDULE, STATUTE 3, *in* DUNDEE CALENDAR, *supra* note 41, at 155; STIRLING HANDBOOK, *supra* note 12, at 5.

At Heriot-Watt University, the Chancellor presides over the General Convocation and holds office for seven years. The Convocation appoints the Chancellor on the nomination of the Court and the Senate sitting in joint session. *See* CHARTER OF HERIOT-WATT UNIVERSITY §§ 4(1) and (3) and (SCHEDULE), STATUTE III. At the University of Dundee, the Chancellor, appointed by the Court, presides over the Graduates' Council. CHARTER § 4(1), *in* DUNDEE CALENDAR, *supra* note 41, at 149; and SCHEDULE, STATUTE 3, *in* DUNDEE CALENDAR, *supra* note 41, at 155. At the University of Stirling, the Chancellor presides over the Conference, STIRLING HANDBOOK, *supra* note 12, at 5, and holds office for seven years, STATUTE 4, § 1, *in* STIRLING CALENDAR, *supra* note 41, at 71.

Chancellor is the titular head of the university.[112] This sharp contrast between appellation and power seems best captured by the description of the office set out in a "Handbook for Students" at the University of Stirling: "The Chancellor is Head of the University, but has no direct powers . . . ."[113] The Chancellor, therefore, exercises some of the ceremonial duties of the American university President, who combines the functions of both Scotland's Chancellor and Principal. One can see in the Chancellor-Principal arrangement some echo of the United Kingdom's Monarch-Prime Minister arrangement.

Despite the current lag between title and formal power, some early Chancellors exerted enormous influence over their institutions. Bishop Elphinstone, the founder of the University of Aberdeen, exercised as Chancellor a "uniquely powerful" position. He not only selected the entire teaching staff and the student body, but also determined the structure of the institution's constitution, though with some required advice. In this respect, his influence loomed larger than that of his fellow Chancellors at the Universities of St. Andrews and Glasgow. In imparting upon the University its basic structure and direction, however, he clearly intended no such overall control for his successors; the University's most important offices were thereafter to be elective. This said, he saw the Chancellor's role not as merely honorific, but as one demanding "active leadership, vigilance and prudence."[114]

Despite the power exercised by Elphinstone, the Chancellor has almost always been a university "outsider." At one of the University of Aberdeen's predecessor institutions, King's College, the Bishop of Aberdeen served as Chancellor for two centuries.[115] From the eighteenth century, a Scottish nobleman usually held the office; more lately still, a "public man from the worlds of politics or administration" has exercised the role. Defending the university and often serving as a link between the institution and royal or central government, the Chancellor exercised "visitorial" powers over the university, powers the position might still carry.[116] The selection of a Chancellor often reflects more glory on the University than on the person selected: The first Chancellor at the University of Dundee was "Our most

112. *See, e.g., Notes on the Constitution of the University, in* ABERDEEN CALENDAR, *supra* note 47, at 9; GLASGOW HISTORY, *supra* note 69, at xii.

113. STIRLING HANDBOOK, *supra* note 12, at 5.

114. LESLIE J. MACFARLANE, WILLIAM ELPHINSTONE AND THE KINGDOM OF SCOTLAND 1431-1514: THE STRUGGLE FOR ORDER 348 (1995).

115. Powell, *supra* note 35, § 1.2. At the University of Glasgow, similarly, the office was held by Bishops and Archbishops of Glasgow until the Reformation and thereafter during the establishment of the episcopacy. GLASGOW HISTORY, *supra* note 69, at xii.

116. Powell, *supra* note 35, § 1.2.

dearly beloved Mother, Queen Elizabeth, the Queen Mother";[117] at the University of Edinburgh, the Chancellor is His Royal Highness Prince Philip, Duke of Edinburgh.[118]

3. *The Principal*

In Scotland the Principal, paralleling the university President in the United States and the Vice-Chancellor[119] in England and Australia, operates as the chief executive officer of the University. At the University of Aberdeen, for example, the Principal serves as both the resident head and the president of the Senate. Moreover, the position of Principal carries with it membership on the Court, the main policy-making body of the University, and on the General Council, over which the Principal also presides in the absence of the Chancellor and the Rector.[120] Why does the Principal, who has always been the person "in day-to-day charge of the university,"[121] chair the Senate[122] but not the Court? This seems best explained by the fact that the Senate, until the creation of university Courts in 1858, constituted the governing body of the university.[123] The importance of the Principal even

---

117. CHARTER § 4(2), *in* DUNDEE CALENDAR, *supra* note 41, at 149.

118. *See* EDINBURGH CALENDAR, *supra* note 40, at A-5.

119. At Scottish universities, the Principal is also commonly Vice-Chancellor, *see, e.g., Notes on the Constitution of the University*, *in* ABERDEEN CALENDAR, *supra* note 47, at 8; CHARTER § 5.1, *in* STIRLING CALENDAR, *supra* note 41, at 64; CHARTER OF HERIOT-WATT UNIVERSITY § 5(1); and CHARTER, § 6(1)(a), *in* DUNDEE CALENDAR, *supra* note 41, at 150, but as Vice-Chancellor exercises extremely limited powers; legislation in 1858 limited the Vice-Chancellor to conferring degrees, and then only in the absence of the Chancellor. *See* Powell, *supra* note 35, § 1.3; and THE UNIVERSITIES (SCOTLAND) ACT 1858, § 2.

120. *Notes on the Constitution of the University*, *in* ABERDEEN CALENDAR, *supra* note 47, at 8. Other universities follow suit; *see, e.g.*, UNIVERSITY OF GLASGOW, CALENDAR 687-88 (1995-96) [hereinafter GLASGOW CALENDAR] (Principal serves on University,Court and chairs Senate); and, to the same effect, EDINBURGH CALENDAR, *supra* note 40, at A-6, A-7, and *History and Constitution*, *in* EDINBURGH CALENDAR, *supra* note 40, at A-23. For the Principal's duties at other universities, see CHARTER § 5.1, *in* STIRLING CALENDAR, *supra* note 41, at 64 (chief academic and administrative officer); CHARTER § 6(1)(a), *in* DUNDEE CALENDAR, *supra* note 41, at 150 (chief academic and administrative officer); and CHARTER OF HERIOT-WATT UNIVERSITY § 5(1) (chief academic and administrative officer).

121. Powell, *supra* note 35, § 1.3. At the University of Aberdeen, "by 1514 the overriding responsibility for the efficient day to day running of the University, in all its administrative, academic and disciplinary aspects, rested with the Principal . . . ." MACFARLANE, *supra* note 114, at 356. Until the current century, the Principal at Aberdeen was required to teach, as well as govern. Powell, *supra* note 35, § 1.3.

122. At the ancient universities, eighteenth-century legislation made the Principal the President of the Senate and allocated to the position both "a deliberative and a casting vote." *See* THE UNIVERSITIES (SCOTLAND) ACT 1858, § 5.

123. Powell, *supra* note 35, § 1.3.

since that time, however, becomes starkly apparent in one account of Aberdeen's recent history:

> The Principal, as head of the "Establishment[,]" had an increasingly hard job in this period [1945-81], not only with a mounting workload within the university, but with ever increasing demands for external contacts, especially with the UGC and CVCP. . . . [I]t remained true throughout the period that the principal was the single most important person in the university. He bridged crucial areas—internal-external affairs, Court-Senatus relations, and the connection of academics with administrators. . . . In a list of 69 committees, most [were] chaired by the principal . . . .[124]

4. *The Rector*

Five of Scotland's universities list, among their very top officers, a Rector.[125] If, to an American, the Visitor occupies the oddest university position in Australia[126] or England,[127] surely, to that same American, the Rector occupies that position in Scotland. The Universities (Scotland) Act of 1858 provided that the Rector should preside over the newly created university Court—the institution's governing board—with both a deliberative and casting vote.[128]

---

124. Carter, *supra* note 65, at 101. Not much has changed for the university Principal; at the University of Stirling, for example, the Principal is an *ex-officio* member of every Committee or Joint Committee of the Court (except the Audit Committee) and of the Academic Council (Stirling's equivalent of the Senate). CHARTER (SECOND SCHEDULE), STATUTE 12, §§ 3-4, *in* STIRLING CALENDAR, *supra* note 41, at 80.

125. Henderson & Mattison, *supra* note 14, at 22. The other seven universities and the other higher-education institutions have no Rector. The University of Stirling does have a parallel, the Honorary President of the Students' Association, who serves as a full member of the University Court. FARRINGTON, *supra* note 17, at 220. Heriot-Watt University also has no Rector but does have the Honorary President of the Students' Association, who serves on the Court but does not chair it. Parkinson Interview, *supra* note 6.

126. *See* Dutile, *supra* note 4, at 78-84.

127. Scottish universities have no "Visitor" because that concept developed during the reign of Henry VIII in England, before Scotland "came on board." Farrington Interview, *supra* note 6.

128. THE UNIVERSITIES (SCOTLAND) ACT 1858, § 4. This was continued in later legislation. *See* THE UNIVERSITIES (SCOTLAND) ACT 1889, § 5(5). Interestingly, the University of Dundee has the position of Rector, CHARTER § 5, *in* DUNDEE CALENDAR, *supra* note 41, at 155, but the Rector, though a member of the Court, is not *ex officio* its chair; the chair is elected by the Court from among certain of its members. CHARTER (SCHEDULE), STATUTE 9, *in* DUNDEE CALENDAR, *supra* note 41, at 159. The term is three years. CHARTER § 5(a), *in* DUNDEE CALENDAR, *supra* note 41, at 156. The University of Stirling has no Rector; the Court elects its chair from among those members who have no academic

Though in its modern appearance the office of Rector dates only to the mid-nineteenth century, its history traces back to the beginning of universities in Scotland. At Aberdeen, for example, the Rector assumed executive functions early on in the University's history;[129] the Chancellor, being a bishop, often found himself away from the institution and therefore in need of someone to preside over university business and represent corporate authority. Thus, the Rector carried the Chancellor's commission to oversee all university affairs and report annually to the Chancellor, who retained overriding responsibility.[130] Originally charged with visitatorial powers and presiding over a rectorial court,[131] the Rector heard grievances and addressed matters of discipline and administration.

Unlike their European parallels, however, the Scottish Rectors apparently "did not become the effective heads of their universities."[132] Although the Rector's current seniority falls somewhere between those of the Chancellor and the Principal, the Rector's function resembles more closely that of the former.[133] The job falls upon outsiders today; relatively late legislation makes clear that no university employee, academic or otherwise, should occupy this position at any of the "ancients."[134] As well, students are barred from the office.[135]

The Rector in Scotland was always elected, sometimes by students exclusively and sometimes with staff participating.[136] Indeed, the central role

---

appointment at the University. CHARTER (SECOND SCHEDULE), *in* STIRLING CALENDAR, *supra* note 41, at 80. Heriot-Watt also has no Rector; the court there elects its chair from among "such of its members as are not members of the staff or students of the University . . . ." CHARTER OF HERIOT-WATT UNIVERSITY (SCHEDULE), STATUTE XII, § 10(1).

129. The position of Rector appears in Aberdeen's Foundation Bull of 1495; the office of Principal gets no mention until 1505. MACFARLANE, *supra* note 114, at 349.

130. MACFARLANE, *supra* note 114, at 348-49.

131. Early Scottish Rectors held courts "to which students could be summoned to answer any civil or criminal charges . . . ." *Id.* at 351.

132. Powell, *supra* note 35, § 1.6. *But see* GLASGOW HISTORY, *supra* note 69, at xiii, reporting that the Rector "was originally the active head of the University, exercising jurisdiction over all its members . . . ." For a thorough history of the early rectorship at Aberdeen, see MACFARLANE, *supra* note 114, at 348-56.

133. Powell, *supra* note 35, § 1.4.

134. THE UNIVERSITIES (SCOTLAND) ACT 1966, § 11(a) ("No person holding an appointment in any of the older Universities shall be eligible to be elected as rector of that University . . . ."). *See also* UNIVERSITY OF EDINBURGH, ORDINANCE OF THE UNIVERSITY COURT NO. 180, § 6 (1977).

135. At the University of Edinburgh, for example, no student, full-time or part-time, may seek the rectorship. UNIVERSITY OF EDINBURGH, ORDINANCE OF THE UNIVERSITY COURT NO. 180, §§ 6, 7 (1977). The University of Dundee bars both staff and students from serving as Rector. CHARTER (SCHEDULE), STATUTE 4, § 3, *in* DUNDEE CALENDAR, *supra* note 41, at 155.

136. Powell, *supra* note 35, § 1.5.

played by students in the election of the Rector would most surprise Americans. At the University of Aberdeen, for example, the Rector, who serves a three-year term,[137] is elected by—and only by—the students.[138] In other words, the person chairing the University's governing board takes that office not through the votes of the general public, or of other members of the Court, or even of the faculty; the students control the position—so too at St. Andrews, Glasgow, and Dundee.[139] At the University of Edinburgh, which did not have the position until 1858,[140] the Rector is now elected by both "fully matriculated students" and staff members holding full-time appointments.[141] Aberdeen has witnessed strong sentiments toward extending the rectorial electorate to the academic staff.[142] Indeed, in the early 1970s, some of the "ancients" thought the position should be changed from student-elected to Court-appointed, but the effort failed.[143] Still, some continue to see the concept of Rector as incongruous with the modern framework of public accountability.[144]

Unsurprisingly, in view of the electorate, the Rector traditionally has represented the perspectives of the students, whether as a group or individually.[145] Indeed, the sweeping university legislation of 1858 retained the office of Rector "as a safeguard of student interests."[146] The Student

---

137. UNIVERSITY OF ABERDEEN, ORDINANCE NO. 115 (Election of Rector) § 4 (1972).

138. *Id.* § 2; *Notes on the Constitution of the University*, *in* ABERDEEN CALENDAR, *supra* note 47, at 8. The Senate sets out the regulations for the election. *Id.* For the election procedures, see UNIVERSITY OF ABERDEEN, ORDINANCE NO. 115 (Election of Rector) (1972).

139. *See* UNIVERSITY OF ST. ANDREWS, PROSPECTUS 1996 ENTRY, at 6; GLASGOW HISTORY, *supra* note 69, at xiii; and CHARTER § 5, *in* DUNDEE CALENDAR, *supra* note 41, at 149.

140. Powell, *supra* note 35, § 1.5.

141. UNIVERSITY OF EDINBURGH, ORDINANCE OF THE UNIVERSITY COURT NO. 180, § 1 (1977); *History and Constitution*, *in* EDINBURGH CALENDAR, *supra* note 40, at A-22. The Rector serves a three-year term. *Id.* For an example of the regulations under which a rectorial election takes place, see University of Edinburgh, Regulations for the Conduct of the Rectorial Election on Friday, 1st March, 1991.

142. *See* University Court of the University of Aberdeen, Working Party Anent the Rectorship, Final Report § C(1) [hereinafter Aberdeen Court Final Report].

143. Powell Interview, *supra* note 47. The government stated that it would not support the proposed change unless all four ancients agreed. On this issue, they did not—at least not at the same time. *Id.*

Controversy over the make-up of the rectorial electorate occurs early in Scotland's history. *See, e.g.*, the eighteenth- and nineteenth-century conflict between students and professors at the University of Glasgow, recounted at GLASGOW HISTORY, *supra* note 69, at vi.

144. FARRINGTON, *supra* note 17, at 220.

145. Henderson & Mattison, *supra* note 14, at 22. One historian of the position notes that the Rector came to be appointed by the students to defend their rights. Powell Interview, *supra* note 47.

146. COLLINS ENCYCLOPAEDIA OF SCOTLAND, *supra* note 11, at 347.

Charter at the University of Aberdeen notes that the Rector "has a special responsibility to look after student interests."[147] This view of the position, however, has not been without doubt or disagreement.[148] Nonetheless, unlike the Visitor in other countries and despite significant visitatorial powers in the office's ancient history,[149] the Rector carries no legal power to settle disputes except through membership on the university Court.[150] But as president of the Court—and appointer of others to the Court[151]—the Rector is clearly in a position to exert *de facto* power and, both within and without the Court, therefore, to be quite influential.[152]

The office presents a mixture of good and bad. Rectors can occasionally be troublesome.[153] Moreover, students have not always taken the office, or the attendant elections and inaugurals, seriously. Occasionally students have used the election merely to make a political point.[154] In one recent election at Glasgow, only eighteen percent of the students voted, despite the fact that the Rector serves as the students' voice at the Court.[155] One account speaks derisively of Aberdeen's selection of "two media-men and an actor" during the 1970s.[156] Another recounts the rowdiness attending the installation of various rectors.[157] Of course, many Rectors

---

147. UNIVERSITY OF ABERDEEN, STUDENT CHARTER: SESSION 1995-96, at 5.

148. One document at the University of Aberdeen states that "the Rector does have responsibilities for the welfare of the university as a whole," even as it recognizes the "special connection between the Rector and the student body." Powell, *supra* note 35, § 3.7(4). *See also* Aberdeen Court Final Report, *supra* note 142, § C(2) ("The Rector should at all times defend and advance the interests of the entire community of the University").

149. *See* MACFARLANE, *supra* note 114, at 350 (Rector at Aberdeen carried out annual visitations, "perhaps his most important task"). At Glasgow, the Rector "occasionally exercised visitatorial functions" until the eighteenth century. GLASGOW HISTORY, *supra* note 69, at xiii.

150. Henderson & Mattison, *supra* note 14, at 22.

151. *See, e.g., History and Constitution, in* EDINBURGH CALENDAR, *supra* note 40, at A-22 (Rector appoints assessor to the Court).

152. Interview with Janet Rennie, Assistant Secretary, Univ. of Edinburgh, in Edinburgh, Scot. (July 19, 1996) [hereinafter Rennie Interview]; and Clark & Quinault Interview, *supra* note 66.

153. Rennie Interview, *supra* note 152.

154. Clark & Quinault Interview, *supra* note 66.

155. Interview with Lawrence C. Reynolds, Assistant Clerk of Senate, Univ. of Glasgow, in Glasgow, Scot. (July 5, 1996) [hereinafter Reynolds Interview].

156. Colin McLaren, *The Student Experience 1945-1978, in* ABERDEEN UNIVERSITY 1945-1981: REGIONAL ROLES AND NATIONAL NEEDS, *supra* note 51, at 78.

157. *See* ANDERSON, *supra* note 95, at 26-28, 30 (by the latter part of the eighteenth century, "there was a tradition of licensed disorder at rectorials"). The author tells of one installation at which:

> [u]proar drowned all the proceedings, including the opening prayer . . . ; missiles were thrown, including dried peas, sticks, and broken pieces [of wood], and one splinter drew blood on [the new Rector's] face. The noisiest students were ejected, but they then threw stones through the windows and

themselves—"'ornamental' Rector[s]"—have not taken the position seriously either, often attending few if any meetings of the Court.[158] Even though the 1858 legislation made the Rector chair of the Court, until recently very few twentieth-century Rectors have chosen to so serve in practice, many remaining "virtual absentees."[159] Each of the ancients, at varying times, has moved for the separation of the rectorship from the Court's presidency, but the *simultaneous* unanimity indispensable for the required Act of Parliament continues to elude.[160]

Clearly the quality of service has varied greatly, and some Rectors have made little impact on their institutions.[161] Rectors inevitably bring varying skills to the office,[162] and the value of the rectorship depends, unsurprisingly, on the particular person elected.[163] This indictment stands although, or perhaps in some cases because, holders of the position have included famous persons[164] such as Adam Smith and Benjamin Disraeli (at Glasgow),[165] and T. H. Huxley (the students had wanted Charles Darwin, but he declined), Andrew Carnegie, and Winston Churchill (at Aberdeen).[166] Although students sometimes expected politicians to be "working rectors,"[167] national figures, in general, were unlikely to possess the detailed interest in university matters called for by the position.[168] Toward the time of the Second World War, the rectorial fashion at Aberdeen turned to "theatre and media people."[169]

Nonetheless, Rectors have played an important role at Scottish universities.[170] At Aberdeen, following the legislation of 1858, several active

---

eventually stormed the hall again.

Id. at 26.

158. *Id.* at 26-28. *See also* Aberdeen Court Final Report, *supra* note 142, § C(5). *See infra* note 168.

159. Powell, *supra* note 35, § 3.4.

160. *Id.*

161. *See, e.g.*, Carter, *supra* note 65, at 101.

162. Reynolds Interview, *supra* note 155; and Rennie Interview, *supra* note 152.

163. Interview with Trevor Webb, Deputy Academic Registrar, Univ. of Aberdeen, in Aberdeen, Scot. (July 22, 1996) [hereinafter Webb Interview]; and Powell Interview, *supra* note 47 (Rector is as good or bad as the person in the position).

164. *See* ANDERSON, *supra* note 95, at 26 (noting famous Rectors who "appeared once to give an inaugural address but otherwise did nothing").

165. *See* UNIVERSITY OF GLASGOW, FACTS AND FIGURES (1995).

166. Powell, *supra* note 35, §§ 3.1, 3.2. The earliest Rectors had been members of the aristocracy. Powell Interview, *supra* note 47.

167. Powell Interview, *supra* note 47. Politicians elected as Rector tended to come to their installation, chair the first meeting of the Court, then vacate the chair in favor of the Principal, perhaps never to attend a Court meeting again. *Id.*

168. Powell, *supra* note 35, §§ 3.1, 3.2.

169. *Id.* § 3.2.

170. ANDERSON, *supra* note 95, at 26-30 ("[T]he distinctive feature of Aberdeen in the 1870s and 1880s was the role of the rectorship in questions of university reform . . .").

Rectors attended Court proceedings faithfully and helped modernize the curriculum. There is some suggestion that the move towards less-active Rectors there followed the creation in 1884 of the Students' Representative Council, an organization that might have made the Rector's advocacy for students seem more superfluous.[171] Still, some signs indicate that students have recently begun to take the office more seriously and to expect the Rector to show up at the Court and to represent the student view.[172] Efforts are being made to increase the "commitment and consistency"—and therefore the effectiveness—of the Rector.[173] It is still seen as important that the university's governing board be chaired by one directly elected from outside the university—and "thus susceptible to neither professional nor sectional pressure"[174] and totally independent by law.[175]

Individual students have had recourse to the Rector in connection with individual conflicts with the university.[176] But the Rector could play a much more important role in deflecting an increase in litigation against Scottish universities, just as a strengthened position of Visitor might at Australian universities.[177] Especially as an "outsider," the Rector, over time, could establish a reputation as a fair, disinterested arbiter of disputes internal to the university. This could be brought about through legislation, agreement between the disputing parties—much like arbitration—or the accumulated perception of wisdom and persuasiveness, in the nature of an ombudsman. The benefits are obvious: more-informal, quicker, cheaper, less-divisive, and less-intrusive settlements of controversies.[178]

III. INTERNAL PROCEDURES

A. *Academic*

It is important to note that procedures for academic appeals at Scottish universities build upon a system of assessment that makes heavy use of

---

171. Powell, *supra* note 35, § 3.2.

172. This has been the case at St. Andrews, for example. Clark & Quinault Interview, *supra* note 66. At Aberdeen, university officials will henceforth make it a point to remind both the students and the Rector of the position's responsibilities. Powell Interview, *supra* note 47.

173. *See* Aberdeen Court Final Report, *supra* note 142, § C(5).

174. *See id.* § B(2).

175. Powell Interview, *supra* note 47.

176. Clark & Quinault Interview, *supra* note 66. This apparently has not been the case at Aberdeen, however. Webb Interview, *supra* note 163.

177. *See* Dutile, *supra* note 4, at 83-84, 116.

178. Interestingly, one official commented that at Scottish universities the availability of the Rector obviated the need for either an ombudsman or a Visitor. Reynolds Interview, *supra* note 155.

external examiners, that is, examiners from other universities.[179] Undoubtedly, these external assessments themselves provide a strong dosage of fairness to the academic process. Procedures for academic appeals at some Scottish universities are set out rather briefly. The University of Aberdeen, for example, spells out the process in less than two pages of text.[180] The document, "Academic Appeals—Guidance Note," unselfconsciously states that "[n]o detailed rules about the conduct of an appeal are to be laid down, so that each individual appeal may be heard in the manner most appropriate to its particular facts and circumstances, and so that justice may be done, and may also be seen to be done."[181]

The document covers appeals against academic decisions rendered by heads of departments (including refusal to award certain certificates or to grant admission to a higher-level course); by examiners (including refusal to award "a pass," an award of an unacceptable "class of Honours," or failure to award Honours); or by a Committee appointed by the Senate to examine a thesis for a higher degree. (The document does not address academic dishonesty, which is, not atypically,[182] treated under the University's disciplinary procedures.)[183] Recognizing that "[s]pecific rights of appeal are very limited," the document nonetheless notes the Senate's authority over the teaching of the University and the Court's power to review any decision challenged by a member of the University.[184]

The Guidance Note requires that such appeals be lodged with the Academic Registrar within fourteen days of the challenged decision.[185] The Guidance Note observes that student appeals lie first with the Senate.

---

179. FARRINGTON, *supra* note 17, at 24.

180. *See also* University of Strathclyde, Reg. 6.10 (Regulations Governing the Hearing of Student Appeals by the Appeals Committee of Senate) (also less than two pages of text).

181. University of Aberdeen, Academic Appeals—Guidance Note § 4 (Extract from Senate Minutes of 6 March 1985; amended by Minute 241 of 8 June 1988, Minute 46 of 25 October 1989, and Minute 25.2 of 13 October 1993) [hereinafter University of Aberdeen, Academic Appeals—Guidance Note].

182. Dennis Farrington, *The Law Governing Students, in* UNIVERSITIES AND THE LAW, *supra* note 14, at 73. *See* UNIVERSITY OF GLASGOW, CALENDAR: UNIVERSITY FEES AND GENERAL INFORMATION FOR STUDENTS 18 (1995-96) [hereinafter GLASGOW CALENDAR: FEES & INFORMATION] (Board of Examiners may refer cases of academic dishonesty "to the Clerk of Senate, for action under the Code of Discipline, where there is *prima facie* evidence of an intention to deceive" and more serious penalties seem appropriate); and University of Strathclyde, Guidelines and Procedures for Formal Examinations § 11 (1996) (plagiarism and collusion may be referred to Senate Discipline Committee).

183. *Rules for the Conduct of Prescribed Assessments and Written Examinations for Degrees or Diplomas, in* ABERDEEN CALENDAR, *supra* note 47, at 29, 30; *see also* University of Aberdeen, Code of Practice on Student Discipline §§ 1.1.8, 4.1—4.4.

184. University of Aberdeen, Academic Appeals—Guidance Note, *supra* note 181, § 1.

185. *Id.* Compare the two-month period provided for appeals at Heriot-Watt University. Heriot-Watt University, Reg. 36 (Student Appeals), § 5.3.7.

Appeals to the Senate actually are heard by a committee on its behalf, with that committee's decision "deemed to be the decision of the Senate itself."[186] The Senate committee considers all representations made to it "by any interested parties."[187] Students who appeal receive copies of all written statements considered by the committee and are entitled to be present during the taking of all testimony. At such hearings, students may choose any person to accompany or represent them. Written notification of the committee's decisions goes to the students involved and to the Senate.[188]

Unsurprisingly,[189] appeals against the decision of the Senate go to the Court. Neither body will consider the academic content of the challenged decision; rather, each will limit its consideration to the procedures employed in arriving at the decision.[190] Nonetheless, either body may, in its discretion, order a reassessment of the "subject matter" rather than allow or reject the appeal.[191]

Appeals to the Court must be lodged in writing with the Secretary of the University, also within fourteen days.[192] Although the appeal to the Court comes before a committee specially appointed by the Court, such appeals clearly get serious treatment: The Principal normally chairs such committees. The Court committee generally follows the procedures set out for appeals to the Senate.[193]

The procedures specified for academic challenges at the University of Glasgow provide more detail. Under its duty to "superintend" the teaching of the University, the Senate at Glasgow authorized Faculty Appeals Committees to "hear appeals in the first instance."[194] Each Faculty appoints such a committee, made up of the Dean and no more than twelve members

---

186. University of Aberdeen, Academic Appeals—Guidance Note, *supra* note 181, § 5.

187. *Id.* § 6.

188. *Id.* §§ 6, 7.

189. *See* Henderson & Mattison, *supra* note 14, at 22.

190. University of Aberdeen, Academic Appeals—Guidance Note, *supra* note 181, § 3. *Compare* STIRLING HANDBOOK, *supra* note 12, at 10 ("There is no appeal against the professional judgment of examiners . . .").

191. University of Aberdeen, Academic Appeals—Guidance Note, *supra* note 181, § 3.

192. *Id.* § 7. This feature reflects a nineteenth-century ordinance. *See* Limitations of Time for Appeals and Representations, Ordinance No. 5 (Gen. No. 2), Ordinances of the Commissioners under the Universities (Scotland) Act of 1889 (1891). Appeals to the Court at Heriot-Watt University must occur within twenty-eight days of announcement of the decision that is being appealed. Heriot-Watt University, Reg. 36 (Student Appeals), § 6.3.

193. University of Aberdeen, Academic Appeals—Guidance Note, *supra* note 181, at § 7. For procedures relating to appeals to the Court at Heriot-Watt University, see Heriot-Watt University, Reg. 36 (Student Appeals), § 6. At Heriot-Watt, the Court appoints an *ad hoc* committee containing at least three Court members. The committee follows procedures "similar to" those provided for appeals to the Senate. *Id.* §§ 6.5.4, -5.

194. GLASGOW CALENDAR: FEES & INFORMATION, *supra* note 182, at 21.

of the Faculty, which exercises full power to decide any academic[195] appeal; three members constitute a quorum.[196]

A student wishing to appeal must so notify the Faculty Clerk in writing, setting out the grounds of the appeal and the remedies sought, within fourteen days of "intimation or publication" of the decision.[197] The Dean, after consulting with two other members of the Committee, may make a preliminary determination that no competent grounds have been stated, that the appeal is not timely, or that the appeal should be referred to the Committee. The Committee generally meets within ten days of the appeal's lodging. The appellant, who is entitled to be heard upon request,[198] may be accompanied or represented by another at any hearing. The appellant is entitled to the names of witnesses and any report not certified as confidential.[199] At any hearing, the appellant may make (or have made by another) opening and closing statements and may examine witnesses. The Committee examines the appellant. The Committee decides the case, by majority vote, at the conclusion of its consideration of the appeal (or as soon thereafter as practical). The Convener of the Committee, in writing, informs the appellant and the appropriate University authorities of the decision. If the appeal succeeds, the Committee orders whatever relief it finds appropriate and notifies the Senate of the result, along with both reasons for the result and any recommendations.[200]

The student may appeal to the Senate against a decision of the Faculty Appeals Committee through a request to the Clerk of Senate. The rules limit the appeal, however, to allegations that new evidence has emerged that could not reasonably have been presented to the Faculty Appeals Committee; that a defective procedure tainted consideration at the Faculty level; or that

---

195. The committee's jurisdiction includes all academic decisions affecting students, but not proceedings under the Code of Discipline. *Id.* at 22.

196. *Id.* at 21-22.

197. *Id.* at 23. The student appealing may already have had a significant process within the Faculty in connection with the appealed decision. *See, e.g., id.* at 60. The suspension or exclusion of students in the Faculty of Arts must be confirmed by the Progress Committee of the Faculty. *Id. See also* University of Strathclyde, Reg. 9.11 (BA Regulations—Faculty of Arts and Social Sciences), § 9.11.27; and University of Strathclyde, Reg. 20.10 (Regulations for Certificates, Diplomas and Postgraduate Diplomas), § 20.10.11.

198. *Compare* STIRLING HANDBOOK, *supra* note 12, at 10 (Section 3.1 states: "In all appeals at undergraduate and at postgraduate level the Appeals Committees consider only written submissions; there is no provision for the appellant or other persons . . . to be present at the meeting of the Appeal Committee"). At Stirling, the decision of the Appeal Committee is final. *Id.* at 10, 11.

199. The Committee may not base its decision upon a confidential report unless the appellant has been informed of its substance. GLASGOW CALENDAR: FEES & INFORMATION, *supra* note 182, at 24.

200. *Id.* at 23-25.

"disposal at the Faculty level was clearly unreasonable."[201] The procedures before the Senate mirror those before the Faculty Appeals Committee. The grounds relied upon and the relief sought must be set out in the letter of appeal, due within fourteen days following the "intimation or publication" of the decision being appealed. The Clerk of Senate may, after consultation with two other members of the Senate Appeals Committee, dismiss the appeal as untimely or unworthy of consideration; refer the appeal to the appropriate Faculty Appeals Committee; or forward the appeal to the Senate Appeals Committee.[202]

The Senate Appeals Committee comprises the Clerk of Senate (the "Convener") along with ten members of the Senate ("persons of experience").[203] The Committee, of whom five constitute a quorum, may not include any members of the Court or anyone involved in making the original decision. The Senate, which has vested the Committee with full powers to hear and decide the appeal,[204] merely receives a report of the Committee's decision.[205]

The Senate Appeals Committee meets within ten days of the appeal's noting, or as soon thereafter as practical. The appellant may insist upon a hearing and be accompanied there by a member of staff or other person whose representation the Committee may allow. The appellant may name those persons whom the appellant wishes the Committee to examine; may, in the event of a hearing, have access to any reports not certified as confidential;[206] or may make a final statement or have a statement made on the appellant's behalf, final or not. The Committee examines the appellant or any other person deemed by the Committee as potentially helpful. Both

---

201. *Id.* at 25-26. The student must allege not only that the decision was clearly unreasonable, but also why. *Id.* at 26.

For the grounds of appeal at the University of Stirling, see STIRLING HANDBOOK, *supra* note 12, at 10, 11. For the grounds of appeal before the Undergraduate Appeals Committee at the University of Dundee, see *Undergraduate Appeals Procedure—Regulations* § 6(3), *in* DUNDEE CALENDAR, *supra* note 41, at 231-32.

202. GLASGOW CALENDAR: FEES & INFORMATION, *supra* note 182, at 27.

203. *Id.* at 26. The Dean of each faculty nominates one member; the Academic Development Committee nominates two others. *Id.* At Heriot-Watt University, appeals to the Senate are handled by an *ad hoc* committee appointed by the Principal and the Deans Committee and including at least three members of the Senate. Heriot-Watt University, Reg. 36 (Student Appeals), § 5.3.5. The *ad hoc* committee submits its report, including recommendations, to the Senate for its approval. *Id.* § 5.3.6(e).

204. At Heriot-Watt University, the Senate has delegated to the Student Progress Committee all appeals relating to student progress. Heriot-Watt University, Reg. 36 (Student Appeals), § 3.2.

205. GLASGOW CALENDAR: FEES & INFORMATION, *supra* note 182, at 26.

206. *Id.* at 28. Like the Faculty Appeals Committee, the Senate Appeals Committee may not base its decision on a confidential report unless the appellant has had access to its substance. *Id.*

the appellant and members of the university staff may interview witnesses through the Committee. The Senate Appeals Committee may remand the case to a Faculty Appeals Committee if evidence available to the Senate committee had not been made available to the faculty committee or if the procedure before the faculty committee had been defective.[207]

The Committee, which decides cases upon a majority vote, may dismiss even a meritorious appeal if the student has suffered no material disadvantage. The Clerk notifies the student and the appropriate university authorities of the decision. If the appeal is upheld, the Committee so notifies the Senate, giving its reasons for that result.[208]

Under Parliamentary legislation,[209] the University Court may review Senate decisions appealed by any "member" of the university. Accordingly, students aggrieved by a decision of the Senate Appeals Committee may challenge that decision in the Court. That appeal must be lodged with the Secretary of the University Court no later than twenty-eight days after promulgation of the decision.[210] The University Calendar specifies no further procedures for such an appeal.[211]

B. *Disciplinary*

University Courts have the power to set by resolution the disciplinary codes of universities for offenses punishable by "expulsion or rustication." But that power, at least in the "older" universities, can be exercised only on

---

207. *Id.* at 28-29. In the second situation, a newly formed faculty committee hears the remand. *Id.* at 29.

208. *Id.* at 29.

209. THE UNIVERSITIES (SCOTLAND) ACT 1889, § 6(2).

210. GLASGOW CALENDAR: FEES & INFORMATION, *supra* note 182, at 29-30.

211. For information on academic appeals at other universities, see ST. ANDREWS CALENDAR, *supra* note 47, at 4.11; EDINBURGH CALENDAR, *supra* note 40, at B-5 (Faculty of Arts), C-3 (Faculty of Divinity), D-3 (Faculty of Law), and G-8 (Faculty of Science and Engineering); University of Strathclyde, Reg. 20.10 (Regulations for Certificates, Diplomas and Postgraduate Diplomas), § 20.10.11; and University of Strathclyde, Reg. 6.10 (Regulations Governing the Hearing of Student Appeals by the Appeals Committee of Senate); Heriot-Watt University, Reg. 36 (Student Appeals); and STIRLING HANDBOOK, *supra* note 12, at 10-11.

At the University of Dundee, students appeal to a committee of the Senatus Academicus entitled the Termination of Studies (Appeals) Committee. (Its name suggests the limitation of its jurisdiction.) Upon receipt of an appeal, the Secretary of the University refers it to the appropriate Faculty Board or Faculty Committee for consideration and recommendations. The decisions of the Committee are final, though reports go to the Senatus Academicus and to the appropriate Faculty Board. *Termination of Studies (Appeals)* §§ 1, 7, 12, *in* DUNDEE CALENDAR, *supra* note 41, at 227-28. Other appeals go to a separate Undergraduate Appeals Committee. *Undergraduate Appeals Procedure—Regulations* §§ 1, 6(1), *in* DUNDEE CALENDAR, *supra* note 41, at 231.

the recommendation of the Senate.[212] The net effect vests primary responsibility for student discipline in the Senate, with appellate functions located in the Court.[213] Scottish universities have devoted significant energy to developing such codes. Interestingly, most such codes in the United Kingdom today derive "from work done at the height of the period of student unrest in Europe and the United States from 1968 to 1974, occasioned by a variety of contemporary issues such as the Vietnam War . . . [and] civil rights . . . ."[214] During that period, nonetheless, Aberdeen remained relatively calm.[215]

Attitudes toward university discipline have been much influenced by the so-called *Zellick Report,* named for Graham Zellick,[216] who chaired the committee that produced it in 1994. More formally known as the *Final Report of the Task Force on Student Disciplinary Procedures*, the document does not purport to constitute a model code of procedure, though it proffers some model provisions regarding the central issues confronted. Rather, the *Zellick Report* puts forth a set of commended principles, along with a suggested definition of misconduct, for universities in the United Kingdom.[217]

Importantly, the document makes clear that universities no longer stand *in loco parentis* "in any legal sense."[218] Searching for the permissible scope of universities' disciplinary authority, the Zellick Committee found no

---

212. THE UNIVERSITIES (SCOTLAND) ACT 1966 (SCHEDULE 2), § 4. *See also* CHARTER § 9(1), *in* STIRLING CALENDAR, *supra* note 41, at 64; CHARTER (SECOND SCHEDULE), STATUTE 10, § 4(e) and (f), *in* STIRLING CALENDAR, *supra* note 41, at 78; CHARTER OF HERIOT-WATT UNIVERSITY (SCHEDULE), STATUTE XIII, § 4(p). For more on the sources of disciplinary power at universities in the United Kingdom, see Eduardo Ustaran, *Discipline and the Internet,* 1 U. & C. EDUC. L. NETWORK REP. 4, 5 (1996).

213. University of Edinburgh, General Statement on Student Discipline § II (1994).

214. Farrington, *supra* note 15, at 7.

215. At Aberdeen, in common with most British universities, but in sharp contrast to many universities in Europe and America, these [decades, from 1945 to 1981,] were peaceful decades. "Outside political pressures and the great protest movements of the 1960s and 1970s made very little impression here, while the internal challenge to traditional staff hierarchies was also muted." Carter, *supra* note 65, at 95. Perhaps some of the reticence stemmed from parochialism or introversion. *See id.* at 130. Reports of nineteenth-century graduation ceremonies betray no such reticence: "[E]ven the principal's prayers and sermon were interrupted by ribaldry and songs," and "running jokes and humorous sallies" bombarded the graduands. ANDERSON, *supra* note 95, at 30.

216. At the time, Graham Zellick was Principal of Queen Mary and Westfield College, University of London.

217. COMMITTEE OF VICE-CHANCELLORS AND PRINCIPALS OF THE UNIVERSITIES OF THE UNITED KINGDOM, FINAL REPORT OF THE TASK FORCE ON STUDENT DISCIPLINARY PROCEDURES 1 (1994) [hereinafter *Zellick Report*].

218. *Id.* ¶ 1.

answers in the statutes, charters, or the like; it has been left to the institutions themselves to define that scope.[219]

The Committee therefore turned to the three fundamental principles that, in its view, support institutional exercise of disciplinary power: 1) a university is a community, a fact requiring certain standards of conduct and placing on that institution duties of care and responsibility toward its members; 2) a university is an organization committed to certain standards and values inherent to its mission; and 3) a university, like other organizations, is entitled to protect its good name and reputation.[220]

The Zellick Committee urges that disciplinary codes combine fairness with simplicity and efficiency; the codes should not imitate criminal law, either substantively or procedurally.[221] Interestingly, the Committee discourages "plea bargaining" or negotiation during university disciplinary proceedings.[222] Serious penalties should be imposed only under the disciplinary code and therefore the codes should incorporate by reference serious violations of other campus provisions, for example, the library's rules or a campus sexual-harassment policy.[223]

Disciplinary codes should not deal with misconduct arising from mental ill-health.[224] Nor should the code address conduct occurring prior to the student's matriculation unless its seriousness raises serious question regarding the student's fitness 1) to remain a member of the community, for example, with regard to the safety of others; or 2) to practice the profession targeted by a vocational course undertaken by the student.[225]

The Committee appended to the *Zellick Report* "suggestions" for disciplinary codes, some of which implement points made in the *Report* itself. Rules of evidence applicable in the courts need not apply to disciplinary proceedings and proof by a preponderance of the evidence—not beyond a reasonable doubt—should underlie the hearing's conclusions.[226] Students should be entitled to be accompanied, assisted, or represented at hearings or appeals. More serious offenses should be dealt with not by a university official, but by a "small committee of no more than three,"[227]

---

219. *Id.* ¶ 2.

220. *Id.* ¶ 3.

221. Perhaps the Committee had in mind codes like that at Strathclyde, which speak of appeals "on a point of law or fact or on a point of mixed law and fact." *See* University of Strathclyde, Reg. 5 (Regulations for Student Discipline), § 5.7.19.

222. *Zellick Report, supra* note 217, ¶¶ 34-35.

223. *Id.* ¶¶ 36-37. For an example, see *Code of Discipline* § 4, *in* GLASGOW CALENDAR: FEES & INFORMATION, *supra* note 182, at 38.

224. *Zellick Report, supra* note 217, ¶ 38.

225. *Id.* ¶ 40.

226. *Id.* at app. V, § A(2).

227. *Id.* § C(6). Under this definition, the only alternative to a committee of three would seem to be a committee of two, awkward even without the need to have both students and staff

containing student and staff members. One appeal (but not a re-hearing) should be permitted for more serious cases. The appeal should be heard by a committee no larger than the hearing committee, and the decision should be final.[228]

A separate appendix provides a model definition of "misconduct." The provision first broadly states the essence of misconduct: "improper interference . . . with the proper functioning or activities of the institution, or those who work or study [there], or which otherwise damages the institution." Any finding of misconduct must be shown to fall under this general rubric. The statement then lists fourteen more specific categories of conduct of which the university might take notice, including sexual or racial harassment, certain conduct that constitutes a criminal offense, and behavior bringing the university into disrepute.[229]

Except in one major respect, the code of discipline[230] at the University of Aberdeen does little violence to the suggestions of the *Zellick Report*, which prompted the code's revision in June 1996.[231] Aberdeen's general definition of misconduct mirrors that proffered by the *Zellick Report*: "improper interference . . . with the proper functioning or activities of the institution, or with those who work or study [there], or action which otherwise damages the institution."[232] The code goes on to cite fourteen specific categories included in, but not exhaustive of, the general definition.[233] These fourteen virtually replicate the list of specifics set out in

---

represented.

228. *Id.* § C(7).

229. *Id.* at app. VI; §§ 1-4.

230. *See* University of Aberdeen, Resolution No. 196 of 1996 (Code of Practice on Student Discipline).

231. Webb Interview, *supra* note 163. Mr. Webb noted that one would expect in Aberdeen's new code little serious disagreement with *Zellick* since the latter issued under the auspices of the Committee of Vice-Chancellors and Principals. *Id.*

232. University of Aberdeen, Resolution No. 196 of 1996 (Code of Practice on Student Discipline), § 1.1. *Compare Ordinance 40: Discipline* § 3(2)(ii), *in* DUNDEE CALENDAR, *supra* note 41, at 198-210 (prohibiting conduct, on- or off-campus, that "is prejudicial to the peace, order, good government or reputation of the university").

233. The code at Glasgow states that there is "no definitive enumeration of disciplinary offenses," and then provides nine "examples." *Code of Discipline* § 3, *in* GLASGOW CALENDAR: FEES & INFORMATION, *supra* note 182, at 38. The St. Andrews code first lists nine relatively specific categories, then states that the list "is demonstrative only and must not be taken as exhaustive or exclusive." University of St. Andrews, Resolution of the University Court 1992 No. 4, § 4. The University of Edinburgh lists five quite general categories but has no language suggesting the list to be merely illustrative. University of Edinburgh, General Statement on Student Discipline § III. *See also* University of Strathclyde, Reg. 5 (Regulations for Student Discipline), §§ 5.1.8 and 5.4.1 (examples are "demonstrative only"). A student who "uses offensive or improper language or behaves in an offensive or improper way" may violate Strathclyde's code. *Id.* § 5.4.6. *See also* Heriot-Watt University, Ordinance 9 (Student Discipline), § 2.3 (list of offenses is "demonstrative only"). For sheer

the *Zellick Report* and include violent, indecent, "disorderly, threatening or offensive behavior or language";[234] "sexual or racial harassment of any student, member of staff, other employee, or . . . visitor";[235] "breach of the provisions of any University Code of Practice, rule or regulation" specifying that breach to be a violation "under this Code;"[236] "examination offences, including cheating . . . [and] plagiarism";[237] and certain criminal conduct.[238]

---

unpredictability, the University of Stirling perhaps trumps all other Scottish universities: After listing seven categories of misconduct—some general, others more specific—the code warns that the "University Secretary with the agreement of the Assessor . . . may determine what may in addition and in exceptional circumstances constitute an offence [sic]." Ordinance 2: Code of Student Discipline, *General Statement on Disciplinary Offences* § 7, *in* STIRLING CALENDAR, *supra* note 41, at 125.

234. University of Aberdeen, Resolution No. 196 of 1996 (Code of Practice on Student Discipline), § 1.1.3.

235. *Id.* § 1.1.6.

236. *Id.* § 1.1.7. *Compare* University of Edinburgh, General Statement on Student Discipline § II; and *Ordinance 40: Discipline* § 3(1) and (2), *in* DUNDEE CALENDAR, *supra* note 41, at 198.

237. University of Aberdeen, Resolution No. 196 of 1996 (Code of Practice on Student Discipline), § 1.1.8.

238. *Id.* § 1.1.11. For the definition of misconduct at other universities, see University of St. Andrews, Resolution of the University Court 1992 No. 4, § 4; *Code of Discipline* § 2, *in* GLASGOW CALENDAR: FEES & INFORMATION, *supra* note 182, at 38; University of Edinburgh, General Statement on Student Discipline § III; Ordinance 2: Code of Student Discipline, *General Statement on Disciplinary Offences, in* STIRLING CALENDAR, *supra* note 41, at 125. It should be noted that student unions reserve to themselves the right to discipline students regarding misconduct occurring on union premises, at union meetings, or related to union elections. FARRINGTON, *supra* note 17, at 197. For procedures attending such discipline, see *id.* At the University of Michigan, "violations," that is, "behaviors which contradict the essential values of the University community," comprise fourteen categories of conduct that cover, among other things, physically harming ("including killing"); sexual assault; stalking; certain conduct relating to firearms, explosives, and drugs; theft; disruption of the University's instructional or research program; falsifying university documents, including identification and meal cards; violating state or federal law if the conduct has a "serious impact" on the University community; and violating University computer policies. University of Michigan, Code of Student Conduct (1996). "Student Misconduct" at Indiana University includes three categories. "Academic misconduct" is defined as "any activity which tends to compromise the academic integrity of the institution and undermine the educational process." Academic misconduct includes cheating, fabrication, plagiarism, interference with another student's work, violation of course rules, and facilitating academic dishonesty. Indiana University, Code of Student Ethics, Part III, § A. The second category, "Personal Misconduct on University Property," sets out 24 subcategories of proscribed conduct, themselves including disorderly conduct, arson, unauthorized possession of firearms, sexual harassment, verbal abuse and violations of federal or state law. *Id.* § B. The third category, "Personal Misconduct Not on University Property," applies to off-campus acts that occur during University activities or that "relate to the security of the University community or the integrity of the educational process." *Id.* § C. This wonderfully broad definition includes—but is not limited to—arson, battery, fraud, and sexual assault. *Id.* Interestingly, the category also includes "altering academic transcripts" and "trafficking in term papers,"

The code sets out a relatively simple, though comprehensive, procedure.[239] Anyone—staff member, student, or member of the general public—may file a complaint with the Secretary of the University.[240] Formal complaints that appear to involve a matter of discipline go to an Investigating

---

id., conduct which might better fit within "academic misconduct."

239. At the University of Michigan, any student, faculty member or staff member may submit a complaint alleging a violation of the Code of Student Conduct. Unless violence is involved, both parties may agree to mediation; if violence is involved, the University's Resolution Coordinator must also agree to mediation. Mediated agreements may not be appealed. If the matter is not resolved through mediation, it is arbitrated, according to the accused student's choice, by a University Resolution Officer or a Student Resolution Panel. Arbitrated resolutions go to the Dean of Students, who may accept or modify the recommendations but may not increase a sanction to suspension or to expulsion. Each party may appeal from this result on the basis of a failure to follow procedures, insufficient evidence, insufficient or excessive sanction, or new evidence. The Appeals Board is comprised of one student appointed by the Michigan Student Assembly, one faculty member appointed by the Faculty Senate, and an administrator appointed by the President. The Board recommends to the Vice President for Student Affairs one of three courses of conduct: confirm the decision reached by the arbitration process, alter the sanctions, or submit for re-arbitration. The Vice President may accept or modify the recommendation, but may not increase a sanction to suspension or expulsion. University of Michigan, Code of Student Conduct (1996).

At Indiana University, proceedings relating to allegations of personal misconduct or of "misconduct unrelated to a particular course" may be initiated by any student or any member of the University faculty, administration, or staff. Such complaints come before the Dean of Students, who decides whether disciplinary proceedings should ensue. Full notice of the charges are provided to the student, who is ordered to appear before the Dean for an informal conference. The student may be accompanied by an advisor, whose participation at the conference is severely limited. The student's choice not to answer questions will not be taken as an admission of guilt. If the Dean of Students does not dismiss the charge, the Dean proposes a penalty, which may range from a simple reprimand through expulsion from the University. The student may accept that penalty or, by rejecting it, elect to take the case to a hearing commission, made up of one student and two faculty members. This formal hearing carries with it full due-process protections: renewed notice of the charges, discovery of witnesses' names (the student must in turn furnish a list of witnesses the student might offer), the right to a public hearing on request, the right to representation at the hearing, the right to examine and cross-examine witnesses, and a privilege against self-incrimination. A transcript of the hearing is made. The University has the burden of proof—"clear and convincing evidence"—and a majority of the hearing commission must agree. If the commission finds the student guilty, it may choose any of the sanctions that had been available to the Dean of Students. (These procedures do not govern the alleged violation of campus motor-vehicle or residence-hall regulations.) Indiana University, Code of Student Ethics, Part IV, §§ C, D (1995).

240. University of Aberdeen, Resolution No. 196 of 1996 (Code of Practice on Student Discipline), § 2.1. Nonetheless, complaints of cheating "in a prescribed degree assessment should normally be made through the Head of Department (and should not be dealt with as part of academic assessment). The Head of Department normally investigates the matter prior to filing a complaint." *Id.* § 4.1.

Officer,[241] appointed by the Senate.[242] After investigation, that officer may dismiss a complaint or find the matter a minor breach suitable for direct disposition by the Investigating Officer.[243] In the latter case, the Investigating Officer may, for non-academic cases, impose a written or oral reprimand, restitution, compensation, fine (of up to approximately $375), suspension from the University for up to four weeks, or a combination of these.[244] The student may appeal the finding or penalty to a Disciplinary Committee, which may waive, uphold, reduce, or increase the penalty.[245]

---

241. For non-academic matters, the Regent normally serves as Investigating Officer. *Id.* § 2.1.

242. *Id.*

243. *Id.* § 6.1. *Compare Ordinance 40: Discipline* § 7, *in* DUNDEE CALENDAR, *supra* note 41, at 200. With regard to the treatment of minor cases at other universities, see *Code of Discipline* § 12, *in* GLASGOW CALENDAR: FEES & INFORMATION, *supra* note 182, at 40; *Ordinance 40: Discipline* §§ 7, 8, *in* DUNDEE CALENDAR, *supra* note 41, at 200-01.

244. For the parallel penalties at St. Andrews, see University of St. Andrews, Resolution of the University Court 1992 No. 4, § 6(a); at Edinburgh, see University of Edinburgh, Code of Student Discipline § 2(b); at Stirling, see Ordinance 2: Code of Student Discipline, *Summary Powers to Impose Penalties* § 2.4, *in* STIRLING CALENDAR, *supra* note 41, at 114-15 (providing, *inter alia*, for sureties guaranteeing future behavior); at Heriot-Watt, see Heriot-Watt University, Ordinance 9 (Student Discipline), § 5.11; at Dundee, see *Ordinance 40: Discipline* § 15(1), *in* DUNDEE CALENDAR, *supra* note 41, at 209. In traffic cases at Dundee, an interesting penalty applies to the second offense: "[A]n inconvenient sticky notice will be fixed to the wind-screen of the car, which the offender will have the task of removing." *Car Parking Regulations* § 14(b), *in* DUNDEE CALENDAR, *supra* note 41, at 221.

245. University of Aberdeen, Resolution No. 196 of 1996 (Code of Practice on Student Discipline), § 7.1. For the penalties in academic cases, see *id.* §§ 4.2—4.4.

Although the Aberdeen system allows an increase of penalty on appeal, that apparently has not happened. Nonetheless, letters informing the student of the right to appeal at least impliedly point out the risk. Webb Interview, *supra* note 163. So, too, at Stirling, where penalties are subject to increase on appeal, no such increase has taken place in at least the last ten years; nonetheless, students there are reminded of the possibility in order to dissuade appeals. As it turns out, 90% of students choose not to appeal. Farrington Interview, *supra* note 6. At the University of Strathclyde, penalties may be increased on appeal, but that has never happened. In any event, the Clerk of the Senate informs students of that possibility before they decide whether to appeal. Mellows Interview, *supra* note 6. Heriot-Watt allows penalties to be increased on appeals to the Discipline Committee and to the Discipline Appeals Board, *see* Heriot-Watt University, Ordinance 9 (Student Discipline), §§ 5.17, 5.39, but apparently not in appeals to the Court. *See id.* § 5.40. At Heriot-Watt, penalties have never been increased on appeal; the provision for such increases, however, has been invoked to dissuade appeals. Parkinson Interview, *supra* note 6. *See also* University of Edinburgh, Code of Student Discipline §§ 4(b)(xi), 5(b)(xi).

For the parallel rights of appeal at Edinburgh, see University of Edinburgh, Code of Student Discipline § 4(b); at Heriot-Watt, see Heriot-Watt University, Ordinance 9 (Student Discipline), § 5.13—5.17; at Dundee, see *Ordinance 40: Discipline* §§ 11, 13, *in* DUNDEE CALENDAR, *supra* note 41, at 203-04, 2-6. Dundee also allows the committee hearing the appeal to increase the penalty. *Id.* § 13(6)(ii). Appeals at Dundee are decided by majority vote. *Id.* § 13(9). Stirling uses a "Minor Offenses Appeal Board." Ordinance 2: Code of

If, after investigation, the Investigating Officer finds a major breach of discipline, or a minor one inappropriate for direct disposition by the Investigating Officer, the matter goes to a Disciplinary Committee.[246] A Disciplinary Committee may impose an oral or written reprimand, restitution, compensation, fine (up to approximately $1500), exclusion from specified facilities, suspension or expulsion from the University, or any combination of these.[247] In exceptional cases presenting danger to the University community, the Principal may take immediate action to exclude a student temporarily from the University (or from certain aspects of it) pending a disciplinary hearing or a criminal trial.[248]

Student Discipline, *Minor Offences Appeal Board* § 3, *in* STIRLING CALENDAR, *supra* note 41, at 115. The Board may increase penalties, and its decisions are final. *Id.* §§ 3.2.4, 3.2.5. For proceedings before this Board, see *id.* § 7.2, *in* STIRLING CALENDAR, *supra* note 41, at 119.

246. University of Aberdeen, Resolution No. 196 of 1996 (Code of Practice on Student Discipline), §§ 2.2, 6.1. In any event, cases reflecting "any doubt or difficulty" should be referred to a Disciplinary Committee. *Id.* § 6.1.

At the University of Edinburgh, a "Principal and Deans' Committee" stands between the Authorized Officer and the disciplinary committee; after the Authorized Officer refers the case to the Principal and Deans' Committee, that Committee may remand the case to the Authorized Officer for disposition. University of Edinburgh, Code of Student Discipline § 5(a)(I).

247. University of Aberdeen, Resolution No. 196 of 1996 (Code of Practice on Student Discipline), § 9.1. For the penalties available to the disciplinary committee at St. Andrews, see University of St. Andrews, Resolution of the University Court 1992 No. 4, § 6(b); at Edinburgh, see University of Edinburgh, Code of Student Discipline § 3(c); at Stirling, see Ordinance 2: Code of Student Discipline, *Powers to impose penalties* § 4.3, *in* STIRLING CALENDAR, *supra* note 41, at 116; at Strathclyde, see University of Strathclyde, Reg. 5 (Regulations for Student Discipline), §§ 5.4.11—5.4.18; at Heriot-Watt, see Heriot-Watt University, Ordinance 9 (Student Discipline), § 2.5; at Dundee, see *Ordinance 40: Discipline* § 15(2), *in* DUNDEE CALENDAR, *supra* note 41, at 209. Decision-makers at Dundee may publicize as they see fit any penalties they assess. *Id.* § 15(3).

248. University of Aberdeen, Resolution No. 196 of 1996 (Code of Practice on Student Discipline), §§ 11.1, 11.2. In the Principal's absence, a Vice-Principal may so act. *Id.* §§ 11.1, 11.2. For the limitations and procedures attending such situations, see *id.* §§ 11.1 to 11.10. The action must be "urgent and necessary," and the justification set out in writing and provided to the student. *Id.* § 11.6. The student has the right to a personal appearance before the Principal, usually prior to the exclusion, *id.* § 11.7; to an appeal, if the exclusion lasts more than four weeks, *id.* § 11.9; and to periodic review by the Principal, *id.* § 11.10.

In "major cases" at St. Andrews, the Authorized Officer (the Hebdomadar) may suspend a student from all or part of the University until disciplinary procedures terminate. University of St. Andrews, Resolution of the University Court 1992 No. 4, § 5(a)(ii). *See also* STIRLING HANDBOOK, *supra* note 12, at 13; and Ordinance 30: Exclusion from University Campus, *in* STIRLING CALENDAR, *supra* note 41, at 144.

See also University of Strathclyde, Ordinance 12 (Student Discipline), § 2; and Heriot-Watt University, Ordinance 9 (Student Discipline), § 1.6 (Principal may exclude student from all or part of the University "without assigning any reason," but student may appeal to Senate).

A Disciplinary Committee comprises a senior member of the Senate, who chairs it, and four other members of the Senate—two staff and two student members—selected by the Secretary of the University from the Disciplinary Committee Panel.[249] The student under investigation may insist that no student be included on the Committee. Moreover, for cause shown, that student may challenge any particular person's appointment to the Committee.[250]

Hearings before an Investigating Officer[251] resemble closely those before a Disciplinary Committee.[252] Before either decision-maker, the student is entitled to be informed in writing of the allegations and of the time and place of the hearing.[253] The student may be accompanied or represented by any person chosen by the student.[254] All oral evidence must be taken in the presence of the student or, with the student's approval, of the student's representative. The student receives copies of all written submissions.[255] The student (or representative) may address questions to the Investigating Officer or to the Convener of the Committee, as the case may be, and to any

249. University of Aberdeen, Resolution No. 196 of 1996 (Code of Practice on Student Discipline), § 8.1. This Panel comprises in turn twelve staff and seven student members of the Senate appointed by the Senate. *Id.* For the composition of the disciplinary committees at other Scottish universities, see University of St. Andrews, Resolution of the University Court 1992 No. 4, § 3; *Code of Discipline* § 7, *in* GLASGOW CALENDAR: FEES & INFORMATION, *supra* note 182, at 39; University of Edinburgh, Code of Student Discipline § 3; *Ordinance 40: Discipline* §§ 5(2), 5(3), and 12(1), *in* DUNDEE CALENDAR, *supra* note 41, at 199, 205; Ordinance 2: Code of Student Discipline, *Discipline Committees* § 4, *in* STIRLING CALENDAR, *supra* note 41, at 116; University of Strathclyde, Reg. 5 (Regulations for Student Discipline), § 5.2; and Heriot-Watt University, Ordinance 9 (Student Discipline), § 4.

250. University of Aberdeen, Resolution No. 196 of 1996 (Code of Practice on Student Discipline), § 8.1.

251. *See id.* § 12.

252. *See id.* § 13.

253. *Id.* §§ 12.2, 13.1. The notice period should normally be at least seven days during term-time and fourteen days out of term. *Id.*

254. So, too, with regard to the disciplinary committee at Glasgow. *See Code of Discipline* § 16, *in* GLASGOW CALENDAR: FEES & INFORMATION, *supra* note 182, at 40. At St. Andrews, the student may be accompanied by another member of the University. University of St. Andrews, Resolution of the University Court 1992 No. 4, § 5(c)(iv). At hearings before the disciplinary committee at Dundee, the student may be represented "by a member of the academic staff, or by a member of the Graduates' Council, or by a solicitor or advocate . . . ." *Ordinance 40: Discipline* § 9(3)(ii), *in* DUNDEE CALENDAR, *supra* note 41, at 199. At Strathclyde and at Heriot-Watt, students may be legally represented or accompanied by a person of their choice. University of Strathclyde, Reg. 5 (Regulations for Student Discipline), § 5.7.14; Heriot-Watt University, Ordinance 9 (Student Discipline), § 5.18(c).

255. University of Aberdeen, Resolution No. 196 of 1996 (Code of Practice on Student Discipline), §§ 12.1.3, 13.2.4.

witnesses regarding their statements or written submissions. The student (or representative) may give a concluding statement.[256]

In a major and surprising departure from the *Zellick Report* and the practice at some universities,[257] the burden of proof applied by the Investigating Officer or by the Disciplinary Committee is "beyond a reasonable doubt."[258] Decisions of the Investigating Officer, unless appealed by the student, and, in any event, of the Disciplinary Committee are deemed decisions of the Senate itself.[259] Students disciplined under these procedures

---

256. *Id.* §§ 12.1.3, 13.2.4, and 13.2.5. *Compare Code of Discipline* §§ 20, 21, *in* GLASGOW CALENDAR: FEES & INFORMATION, *supra* note 182, at 41-42. At Glasgow, the student is entitled, but cannot be required, to give evidence. *Id.* § 20(f).

For proceedings before the disciplinary committee at St. Andrews, see University of St. Andrews, Resolution of the University Court 1992 No. 4, § 5(c). The committee may decide on a majority vote of the members present. *Id.* § 5(c)(x).

For proceedings before the disciplinary committee at Edinburgh, see University of Edinburgh, Code of Student Discipline § 5(a). At Edinburgh, both the student, *id.* § 5(a)(v)(2), and the University, *id.* § 5(a)(ix), must give advance notice of documents and witnesses to be used. The student is entitled to a full, written explanation of the Committee's decision. *Id.* § 5(a)(xvi).

For proceedings before the disciplinary committee at Dundee, see *Ordinance 40: Discipline* § 12, *in* DUNDEE CALENDAR, *supra* note 41, at 205. At Dundee, the Presenting Officer may examine the student, *id.* § 12(6); the panel may decide by majority vote, though it may not "find an allegation against a student proved unless at least four members are of that opinion," *Id.* § 12(11).

For proceedings before the disciplinary committee at Strathclyde, see University of Strathclyde, Reg. 5 (Regulations for Student Discipline), § 5.6. The code provides for reciprocal discovery of names of witnesses. *See id.* § 5.7.14.

For proceedings before the disciplinary committee at Heriot-Watt, see Heriot-Watt University, Ordinance 9 (Student Discipline), §§ 5.18—5.30. The code provides for reciprocal discovery. *Id.* § 5.19.

For proceedings before the disciplinary committee at Stirling, see Ordinance 2: Code of Student Discipline, *Major offences procedure* § 8, *in* STIRLING CALENDAR, *supra* note 41, at 120-21. At Stirling, the student may be accompanied by a legal representative "or by another person." *Id.* § 8.1.1(c), at 121. Both sides must provide advance notice of documents and witnesses. *Id.* §§ 8.1.1(d) and 8.1.7, at 121. Decisions are by majority vote. *Id.* § 8.1.11, at 122. At Stirling, decision-makers, where no provision of the code covers a matter, must proceed according to the rules of natural justice. *Id.* § 1.3(c), at 112.

257. *See, e.g., Code of Discipline* § 20(I), *in* GLASGOW CALENDAR: FEES & INFORMATION, *supra* note 182, at 41 ("balance of probabilities").

258. University of Aberdeen, Resolution No. 196 of 1996 (Code of Practice on Student Discipline), § 3.1. The University of Edinburgh also applies a "beyond a reasonable doubt" standard. *See* University of Edinburgh, General Statement on Student Discipline § I.

The Code at the University of Michigan specifies no burden of proof for any of the decision-makers involved in its procedures. *See* University of Michigan, Code of Student Conduct (1996). The hearing commission at Indiana University applies a "clear and convincing" standard. Indiana University, Code of Student Ethics Part IV, § D(5)(g).

259. University of Aberdeen, Resolution No. 196 of 1996 (Code of Practice on Student Discipline), § 14.1.

may appeal to the University Court by filing with the Secretary of the University, within fourteen days of the decision appealed, a written statement of the grounds underlying the appeal.[260] At universities in the United States, the provision of such a routine appeal to the governing body would be rare indeed.[261]

Certain alleged minor breaches may be reported to or resolved by a Warden of a Hall of Residence, the Librarian, the Director of the computing center, or the Director of Physical Education. Penalties imposed by these officials, however, are limited to a fine (up to approximately $150),

---

260. *Id.* § 15.1. For the process attending appeals to the court at St. Andrews, see University of St. Andrews, Resolution of the University Court 1992 No. 4, § 7 (appeals normally heard by a court committee comprising the three most senior lay members of the Court available; "fresh" evidence to be heard only on showing of good cause; penalty can be raised).

For the process attending such appeals at Glasgow, see *Code of Discipline* §§ 22-29, *in* GLASGOW CALENDAR: FEES & INFORMATION, *supra* note 182, at 42. At Glasgow, the Court may, "on cause shown," hear additional evidence. *Id.* § 27. The Court may not increase the penalty. *Id.* § 28.

For the process attending such appeals at Edinburgh, see University of Edinburgh, Code of Student Discipline § 5(b). The Court may sit as a full Court or as a committee reporting to the Court. *Id.* § 5(b)(ii). The appellant may be legally represented or accompanied by a member of the University. *Id.* For "cause shown," the appellant may present additional evidence, whereupon the same right falls to the University. *Id.* § 5(b)(5).

For the process attending such appeals at Dundee, see *Ordinance 40: Discipline* § 14, *in* DUNDEE CALENDAR, *supra* note 41, at 207-09. The Court may rehear certain cases in their entirety; in such cases, it follows, in large measure, the proceedings specified for the disciplinary committee. *Id.* § 14(6). The Court may increase a penalty appealed against. *Id.* § 14(10)(ii).

See also CHARTER (SECOND SCHEDULE), STATUTE 18: APPEALS BY STUDENTS, *in* STIRLING CALENDAR, *supra* note 41, at 97. Stirling has an Appeal Board, whose decision is final. *Id.* § 4. The Appeal Board may increase the penalty imposed by the discipline committee. Ordinance 2: Code of Student Discipline §§ 5.2.6. and 8.2.12, *in* STIRLING CALENDAR, *supra* note 41, at 117, 124. Strathclyde has a Discipline Appeals Board. University of Strathclyde, Reg. 5 (Regulations for Student Discipline), § 5.1.10. For its composition, see *id.* § 5.3. For procedures before that Board, *see id.* § 5.8. Heriot-Watt has a Discipline Appeals Board. *See* Heriot-Watt University, Ordinance 9 (Student Discipline), § 5.31. For its composition, see *id.* § 4.10. Students unhappy with the result there may appeal, yet again, to the Court. *Id.* § 5.40.

For the appeals process at Indiana University, *see supra* note 239. At Indiana University, appeals from decisions of the hearing commission lie with a "review board," consisting of one student, one faculty member, and one administrative officer, who presides. No additional evidence is taken. Decisions are by majority vote and are final. Indiana University, Code of Student Ethics, Part IV, § D(6).

261. At Indiana University, for example. Telephone interview with Pamela Freeman, Assistant Dean of Students and Director of Student Ethics and Anti-Harassment Programs, Indiana Univ. (Dec. 5, 1995) [hereinafter Freeman Interview]. A former President said Indiana's board would not get involved in 99.9% of such cases. Telephone interview with John Ryan, President Emeritus, Indiana Univ. (Dec. 7, 1995) [hereinafter Ryan Interview].

expulsion from the residence hall, or suspension of rights with regard to the library, the computing center, or the department of physical education, as appropriate.[262] If the student rejects the disposition, the case goes to an Investigating Officer or to a Disciplinary Committee.[263]

IV. THE COURTS AND THE CULTURE

A. *The Paucity of Litigation Regarding University Decisions*

As in Australia,[264] university students in Scotland do not bring their academic and disciplinary quarrels to the courts. To be sure, hard data on this point remain elusive. Reporting of cases in Scotland has been sporadic at best; very few cases heard by Scottish courts and tribunals are considered worthy of reporting. In any event, much of the reporting has fallen far behind.[265] In fact, a computer-based search of cases decided since 1950 revealed only seven Scottish cases (two implicating the same controversy) that reflected academic or disciplinary disputes between students and universities;[266] in only four did a student directly challenge an academic decision.[267]

---

262. *See also* University of Strathclyde, Reg. 5 (Regulations for Student Discipline), § 5.1.5.

263. University of Aberdeen, Resolution No. 196 of 1996 (Code of Practice on Student Discipline), §§ 5.1, 5.2.

For the disciplinary procedures at other Scottish universities, see *Code of Discipline, in* GLASGOW CALENDAR: FEES & INFORMATION, *supra* note 182, at 38-42; CHARTER (SCHEDULE), STATUTE 18: DISCIPLINE, *in* DUNDEE CALENDAR, *supra* note 41, at 182; *Ordinance 40: Discipline, in* DUNDEE CALENDAR, *supra* note 41, at 198-210.

264. Dutile, *supra* note 4, at 96-99.

265. WHITE & WILLOCH, *supra* note 8, at 212.

266. University of Aberdeen v. Dow, 1995 Sess. Cas. (Outer House, Nov. 22, 1995); Re Conor Reilly, 1995 Sess. Cas. (Outer House, Aug. 22, 1995); Re Alistair Joobeen's Application, 1995 S.L.T. (Notes) 120, 1994 Sess. Cas. (Outer House, July 28, 1994); Ahmed Saleh v. University of Dundee, 1994 Sess. Cas. (Inner House—Extra Division, June 8, 1994); Naik v. University of Stirling, 1994 S.L.T. 449, 1993 Sess. Cas. (Outer House, June 22, 1993); Re Elaine Parks Carlton, 1994 S.L.T. (Notes) 549, 1993 Sess. Cas. (Outer House, Sept. 24, 1993); Re Ahmed Saleh, 1992 Sess. Cas. (Outer House, Nov. 6, 1992). Indeed, the first of these, *Dow*, grew out of an academic dispute (the University failed Mr. Dow's thesis) but directly involved the lodging by the University and others of a petition and complaint averring a breach of interim and permanent interdicts entered against Mr. Dow in connection with disruption and defamation. The court found Mr. Dow guilty of breaching both interdicts. University of Aberdeen v. Dow, 1995 Sess. Cas. (Outer House, Nov. 22, 1995).

267. Two of the other three involved primarily a dispute over the payment of fees. Re Alistair Joobeen's Application, 1995 S.L.T. (Notes) 120, 1994 Sess. Cas. (Outer House, July 28, 1994); Naik v. University of Stirling, 1994 S.L.T. 449, 1993 Sess. Cas. (Outer House, June 22, 1993) (the court found judicial review appropriate and held for the student, noting

Perhaps, in this connection, anecdotal evidence serves just as well to reflect the relative lack of litigation between students and Scottish universities regarding academic and disciplinary quarrels. At the University of Aberdeen, over the last twenty-five years, only one civil matter involving a student made it to the courts.[268] In fact, the University has no general counsel.[269] Perhaps as a harbinger, however, students there frequently threaten suit in dealing with the University.[270]

Officials at St. Andrews, with over 5,400 students, recall no litigation against the University, though "a few" students and one parent have threatened suit. Indeed, St. Andrews has no campus police and no University attorney. Although the fact that the current Clerk of the University Court is a lawyer may have played a role in the appointment, the position itself is not a legal position.[271] No student in memory has sued the University of Edinburgh over an academic or disciplinary matter, and threats of suit are rare. The University employs no full-time attorney.[272] Students at Glasgow, though over 16,000 strong, "very rarely" sue and rarely threaten suit; such threats would be met with a firm "Go ahead!"[273] Strathclyde has not been sued "in at least five years."[274] The same absence of litigation characterizes other universities in Scotland.[275] That there is no journal dedicated to the law of education in Scotland[276] reflects in part the

---

that the attempted termination for nonpayment of fees may have been conduct-related, thus implicating the protections of the code of discipline, not just the regulations relating to fees). The third addressed a petition and complaint averring a breach of interim and permanent interdicts entered against a student. University of Aberdeen v. Dow, 1995 Sess. Cas. (Outer House, Nov. 22, 1995).

268. Powell Interview, *supra* note 47. Another Aberdeen official also remembered but one such court case. Webb Interview, *supra* note 163.

269. Webb Interview, *supra* note 163.

270. Powell Interview, *supra* note 47.

271. Clark & Quinault Interview, *supra* note 66.

272. Rennie Interview, *supra* note 152.

273. Reynolds Interview, *supra* note 155.

274. Mellows Interview, *supra* note 6.

275. *See, e.g.*, Farrington Interview, *supra* note 6 (no lawsuits in memory specifically regarding academic or disciplinary matters, although litigation there has involved the argument that failure to pay a fee was a disciplinary matter, not a contractual one, calling for a different procedure; University has no full-time counsel); and Parkinson Interview, *supra* note 6 (no such lawsuit in memory and no University counsel).

276. Of course, this lack is offset by publications relating to the law of education in the United Kingdom, which generally applies in Scotland. Farrington Interview, *supra* note 6. The United States publishes many journals dealing exclusively with the law of education; these range from the standard scholarly magazine to the newsletter. *See, e.g.*, BYU EDUC. & L.J. (Provo, Utah); J.C. & U.L. (Notre Dame, Ind.); J.L. & EDUC. (Columbia, S.C.); and SCH. L. BULL. (Chapel Hill, N.C.). To be sure, such publications reflect the larger U.S. population as well as litigation rates there.

paucity of litigation there involving not only university students, but students at all levels.

Even allowing for the great differences in volumes of students, the rate of student litigation in the United States far exceeds that in Scotland. Students and litigation are not strangers in the United States; as one campus official confirmed, "We get sued all the time, or at least threatened with a suit."[277] In the fall of 1994, the United States had 14,278,790 students,[278] compared with Scotland's 68,004.[279] Case reporters from 1980 through 1996 contain at least 231 academic or disciplinary cases brought by students against American institutions of higher education. Indeed, this number undoubtedly understates the American student's willingness to sue. About twenty-three percent of American higher-education students—thirty-three percent if only four-year institutions are considered—attend private institutions. Since decisions of such institutions tend not to be "state action" under the U.S. Constitution, possible causes of action against them remain relatively limited. The two countries' relative disparity in recourse to a litigative remedy may more accurately be reflected in their levels of threats to sue, lawsuits filed but not pursued, settlements and the like; statistics regarding these matters, however, are still more elusive than reports on actual litigation. Even allowing for the small sample of cases in Scotland and the differing reporting practices in the two countries, the relative disinclination to sue among students in Scotland seems manifest not only from these data, but also from interviews with campus officials.

B. *The Reasons for the Paucity of Litigation Regarding University Decisions*

It is difficult, of course, to account fully for the fact that Scottish students, in the face of adverse academic and disciplinary decisions, sue much less readily than their American counterparts. Nonetheless, several reasons suggest themselves.

1. *Restrained Exercise of Jurisdiction and Sanctions by Universities*

Despite broadly and vaguely written definitions of misconduct,[280] Scottish universities do not loosely exercise their jurisdiction over student matters and, even when they do, tend to keep sanctions minimal enough to avoid court action. Unlike many American universities, universities in

277. Freeman Interview, *supra* note 261.

278. CHRON. OF HIGHER EDUC.: ALMANAC ISSUE, Sept. 2, 1996, at 9. This figure reflects enrollment for the fall of 1994.

279. *See supra* text accompanying note 19.

280. *See supra* text accompanying notes 232-38.

Scotland feel little responsibility to exert moral influence over student conduct. The *Zellick Report* does not cite moral development as one of the bases for the exercise of university jurisdiction over student misbehavior.[281] At Aberdeen, no "overt duty" of moral inculcation seems felt; because of the heavy moral influence of the church in the institution's history, no need to codify moral matters arose. Moreover, the University never adopted an *in loco parentis* regimen although, because of its smaller student population, it could be relatively more caring.[282] At St. Andrews, moral inculcation, while not irrelevant, does not play an important role in the institution's mission; the principal purpose of dealing with student misconduct is to preserve order. Any former *in loco parentis* influences disappeared with the lowering of the age of majority to eighteen.[283] Mission statements at Aberdeen, Edinburgh, Stirling, and Heriot-Watt make no mention of moral character or student conduct.[284] This situation works side-by-side with a relatively new de-emphasis in the United Kingdom of disciplinary rules, constraints, and controls; institutions and students bring more concern to bear on what can, rather than on what cannot, be done.[285]

Indicative of Scottish universities' reticence to exert authority over student conduct is their attitude toward alleged conduct violating both university regulations and the criminal law. Perhaps the central issue confronted by the *Zellick Report* concerns the exercise of university jurisdiction when the student's alleged misconduct also constitutes a crime. The Zellick Committee notes four such situations that might justify an institution in investigating and deciding what action to take: 1) the conduct closely relates to the academic or other work of the university, for example damaging library books; 2) the conduct occurred on university property; 3) the conduct involved other university members; or 4) the conduct manifested none of these aspects.[286] With regard to the first two, the Committee finds that the university is entitled, and in at least some cases will feel compelled, to take disciplinary action. The third, a "slightly less straightforward" one, presents adequate grounds for assertion of university jurisdiction, but the Committee urges careful thought regarding whether the interests of the university and its members call for disciplinary action in any individual case.[287]

---

281. *See Zellick Report*, *supra* note 217, ¶ 3.

282. Powell Interview, *supra* note 47.

283. Clark & Quinault Interview, *supra* note 66.

284. *See* University of Aberdeen, Student Charter: Session 1995-96, at 1; UNIVERSITY OF EDINBURGH, FACTS AND FIGURES: 1995; STIRLING HANDBOOK, *supra* note 12, at 2; and Heriot-Watt University, Student Charter: Sources of Information, at 1.

285. FARRINGTON, *supra* note 17, at 22.

286. *Zellick Report*, *supra* note 217, ¶ 6.

287. *See id.* ¶ 7.

The fourth situation presents the most difficulty. The only bases for the exercise of jurisdiction here would be a threat (or damage) to the university's good name, or concerns that the student allegedly involved endangers other members of the community or its good order (for example, by committing a sexual assault). The university's obligation to its members will require action whenever necessary to protect them from danger. Moreover, the university's failure to act could prompt serious criticism from students, parents, the press or others, especially if that failure occasions later incidents of misconduct.[288]

The *Report* urges special caution when the basis for disciplinary action lies only in the protection of the university's reputation, but it stops short of calling such action always unjustified. Student conduct that harms the university's relationship with the local community, for example offensive behavior affecting the neighbors of an off-campus student residence, offers an appropriate rationale for university action. Nonetheless, the institution should not invoke its disciplinary process merely to enforce contractual obligations of students to landlords or others. In all situations involving possible violations of the criminal law, in short, the university should proceed with great care.[289]

The *Zellick Report* suggests that the chief executive officer of the institution, or a delegate, be given the power early on to rule out campus proceedings.[290] If the crime involved would not be serious, the committee sees no problem in proceeding with campus discipline; police, prosecutor, and court will have little interest in pursuing such situations.[291] In Scotland, although police must report all offenses to the Procurator-Fiscal (the prosecutor), this official may send a warning letter or invite the alleged offender to pay a small fine as an alternative to prosecution. Moreover, conduct that is not serious to the police might be serious from a campus perspective—damaging a library book, for example.[292]

For serious offenses, however, the *Report* urges that universities defer campus proceedings—except temporary exclusion when the student presents imminent and serious danger to the community[293]—until local authorities have acted. Indeed, internal action should not take place even if the complainant refuses to report the matter to, or cooperate with, local authorities. In no serious case, in short, should the university take action

---

288. *Id.*

289. *See id.* ¶¶ 7, 8.

290. *See id.* ¶ 9.

291. *See id.* ¶ 10. If local authorities do become involved, the institution may choose to await resolution of those proceedings, despite the long delay possible. *Id.*

292. *Id.* ¶¶ 10, 11.

293. For the committee's recommendations regarding suspension and exclusion pending prosecution, see *id.* ¶¶ 26-30, and its model clause, *id.* at app. IV.

prior to police investigation and prosecutorial consideration. If the prosecutor ultimately decides not to proceed with a case, only in exceptional cases should the university do so.[294] Offenses of intermediate seriousness raise a presumption that campus authorities should not proceed with them before police and courts have done so.[295]

Once a criminal conviction takes place, the university may continue its own proceedings, with the criminal verdict accepted as far as relevant. The criminal penalty does not preclude imposition of a penalty by the university, though the university system should take into account the penalty imposed by the court system. The university should be especially careful about proceeding when the public prosecution resulted in acquittal.[296]

With regard to a somewhat overlapping category, off-campus misbehavior, the *Zellick Report* sets out no brief for comprehensive jurisdiction. The *Report* does concede, however, that exercise of extra-campus jurisdiction by the university can be appropriate—for example, regarding conduct occurring on field trips, in other institutions to which the student had access by virtue of being a student at the university, or on work assignment.[297]

Scottish universities tend to share the Zellick Committee's apparent distaste for university jurisdiction over allegedly criminal or off-campus conduct. Aberdeen generally allows the criminal courts to address alleged conduct that constitutes a crime, even though neither the *Zellick Report* nor institutional rules preclude the possibility of campus charges in such cases.[298] Aberdeen's provision requiring that serious matters normally be reported to, and that complainants cooperate with, the police prior to any internal action surely suggests the University's preference for outside disposition of such cases. So, too, does the mandate that, "insofar as it is relevant," the University accept the verdict of any court proceedings.[299]

St. Andrews also adheres to the *Zellick* recommendations. The University notifies the police of any drug situations, though virtually all of these have been minor ones. Still, the more contacts an off-campus matter has to the institution, the more likely the institution itself will bring charges. Officials there recognize the public's ambivalence on this issue: The

---

294. *Id.* ¶¶ 12-15. In Scotland, university officials may not be able to learn why local authorities failed to prosecute; the Procurators Fiscal may not disclose such information. *Id.* ¶ 15.

295. *Id.* ¶ 16. For the *Zellick Report's* discussion of whether university officials should report misconduct to the police, see *id.* ¶¶ 17-25.

296. *Id.* ¶¶ 31-33. For more on university proceedings following public trial, see *id.*

297. *Id.* ¶¶ 40, 41.

298. Powell Interview, *supra* note 47. *See* University of Aberdeen, Resolution No. 196 of 1996 (Code of Practice on Student Discipline), §§ 1.1.11, 1.2, 1.3, 1.3.1, 1.3.2, 6.1.

299. University of Aberdeen, Resolution No. 196 of 1996 (Code of Practice on Student Discipline), § 1.3.2.

institution came to rely on police treatment of criminal-type allegations because the public thought internal treatment unduly favored students. Faced with noisy student neighbors, however, citizens complain when the University deems the matter a police problem. As a result, the University may begin to take a greater interest in off-campus student disruption or vandalism.[300] In any event, the disciplinary code precludes University charges regarding any matter successfully defended in a court of law. Internal proceedings may follow a guilty verdict in a court of law, but only to decide the student's fitness to continue as a member of the University community or as a resident in University housing.[301]

Edinburgh claims no off-campus jurisdiction; any situation serious enough should be reported to the police. Moreover, the University avoids "double jeopardy," that is, taking action in addition to that of local authorities.[302] Its disciplinary code specifies that there is generally "no reason why a student's appearance in a criminal court should be followed by disciplinary proceedings."[303] Despite its adherence to the *Zellick* principles, the University might take action if faced with real danger, such as a hard-drug sale or sexual assault, especially if the situation had several University "contacts" (for example, if both the alleged perpetrator and victim were members of the University community).[304] Glasgow takes notice of even off-campus conduct that reflects on the University. Nonetheless, with regard to alleged criminal conduct, campus officials await the result of civil proceedings before deciding whether to take action; neither acquittal nor conviction bars University charges.[305]

At Stirling, pursuant to the *Zellick* guidelines, the one or two serious cases arising each year go to the police. Although a serious threat would cause the University to act before the courts, generally campus charges would be brought, if at all, only after any judicial proceedings.[306] Strathclyde, which adheres to the *Zellick Report* "not because it's written, but because it makes sense," would take action early in a seriously threatening situation despite the possibility of action in the courts.[307] Heriot-Watt, which modeled its code on the *Zellick Report,* steers clear of any incident in which the police are involved unless the University community

300. Clark & Quinault Interview, *supra* note 66.

301. University of St. Andrews, Resolution of the University Court 1992 No. 4, § 4(b) and (c).

302. Rennie Interview, *supra* note 152.

303. University of Edinburgh, General Statement on University Discipline (undated).

304. Rennie Interview, *supra* note 152.

305. Reynolds Interview, *supra* note 155.

306. Farrington Interview, *supra* note 6.

307. Mellows Interview, *supra* note 6.

is threatened.[308] The University of Dundee asserts a fairly broad reach, stating that all students are subject to its disciplinary jurisdiction regarding conduct "both on and off University property."[309]

By way of comparison, the University of Michigan claims possible jurisdiction over conduct 1) that violates state or federal law when the conduct has "serious impact" on the University community; or 2) that takes place in Ann Arbor, its municipal site, and even beyond Ann Arbor if the behavior "poses an obvious and serious threat or harm to the University community."[310] Ongoing criminal or civil proceedings will put off campus proceedings relating to the same conduct only if the accused student accepts suspension from the University.[311] Indiana University does not await action by the court. It addresses not only on-campus situations, but most likely even an off-campus sexual assault if it comes to the attention of campus authorities. When the alleged conduct also constitutes a crime, the campus authorities try to accommodate the request of a student's lawyer to await the trial's outcome. Nonetheless, if danger to the community is involved, the campus process addresses the situation without delay.[312]

The data seem to bear out the relatively rare exercise by Scottish universities of authority over student misconduct, whether the rarity stems from university reticence, better student behavior,[313] student reluctance to pursue remedies such as appeals, or, as seems likely, a combination of these. At Aberdeen, with its 9,650 students, only sixteen "academic disciplinary" cases went to a hearing during the 1995-96 academic year; in only ten of these were the allegations upheld.[314] Only one of these went beyond a one-person disposition to an appeal before the disciplinary committee.[315] At St. Andrews, with over 5,700 students—about 3,000 of whom reside in campus housing,[316] no case has gone to the discipline committee in at least two years. Most misconduct has been minor and alcohol-related.[317] Usually, "wardens"

---

308. Parkinson Interview, *supra* note 6.

309. *Ordinance 40: Student Discipline* § 2, *in* DUNDEE CALENDAR, *supra* note 41, at 198.

310. University of Michigan, Code of Student Conduct (1996).

311. *Id.*

312. Freeman Interview, *supra* note 261.

313. Interestingly, St. Andrews—like, apparently, most other Scottish universities—has no true campus-security force, although it retains a private security firm for nighttime protection of its property. Clark & Quinault Interview, *supra* note 66.

314. Letter from Trevor Webb, Deputy Academic Registrar, Univ. of Aberdeen, to the author (June 12, 1997) [hereinafter Webb Letter] (on file with author).

315. Webb Interview, *supra* note 163.

316. UNIVERSITY OF ST. ANDREWS, PROSPECTUS 1996 ENTRY, at 35, 37.

317. Student unions in the United Kingdom took in 44 million British pounds (about $66 million) through sales of alcohol during the 1994-95 academic year, despite relatively low prices. David Charter, *£44m Bar Bill of Student Drinkers Who Won't Go Far,* TIMES (London), July 22, 1996, at 3.

in the residence halls dispose of such matters through the use of fines. Perhaps twenty to thirty cases a year go beyond the residence halls, most on appeal to the Hebdomadar. Cheating cases are rare, with very few going to a disciplinary committee.[318]

At Edinburgh, with over 15,000 students, the disciplinary committee has not conducted a hearing for over three-and-one-half years. Cheating cases are "outstandingly rare."[319] At Glasgow, with over 16,000 students, only one case goes to the disciplinary board in a two- or three-year period.[320] At Stirling, with 5,200 students and 3,030 University-owned or leased housing units,[321] no case has gone to the Serious Offenses Board in over five years; ninety-five percent of the fifty or sixty disciplinary cases a year relate to alcohol, and most go to summary procedures to be met with warnings or fines. The half-dozen cheating cases that arise annually get resolved by examiners through grade reduction or loss of credit.[322] The disciplinary committee at Heriot-Watt, which has 4,500 full-time students on its campus and another 4,500 at three affiliated campuses, saw slightly more action than its counterparts at most Scottish universities—four or five cases in the last two years. Only two alcohol-related cases have gone to the committee in the last five years, but presumably "wardens" dispose of many such cases at the student-housing level. Two student appeals have gone to the University court in the last year.[323]

Strathclyde, where cheating is the "most popular" offense, has used its top-level disciplinary procedure (a one-person decision-maker) but once in five years.[324] Proceedings before the University's discipline committee, for which good data are available, provide a good picture of the disciplinary situation there. From June 1968 through June 1996, fifty-two matters, some of which involved more than one student and five of which involved appeals from lower levels, came before that committee. This represents an average of 1.9 cases per year.[325] Of these fifty-two alleged violations, twenty-nine (fifty-six percent) involved academic dishonesty, nine involved disorderly conduct or alcohol, four involved misuse of computers, three involved

---

318. Clark & Quinault Interview, *supra* note 66.

319. Rennie Interview, *supra* note 152.

320. Reynolds Interview, *supra* note 155.

321. STIRLING HANDBOOK, *supra* note 12, at 18.

322. Farrington Interview, *supra* note 6. Even the Minor Offenses Board has not met in a year. *Id.*

323. Parkinson Interview, *supra* note 6.

324. Mellows Interview, *supra* note 6.

325. Letter from Susan Mellows, Academic Registrar of the Univ. of Strathclyde, to the author (July 26, 1996) [hereinafter Mellows Letter] (on file with author). The trend is moderately upward: from June 1982 through June 1996, thirty-six cases (or 2.6 per year) came before the committee. *See id.*

library offenses, and the rest a potpourri of miscreance.[326] Although differences in populations, procedures, and availability of data make comparisons difficult, these numbers make those at representative American universities seem robust, indeed.[327]

On the academic side, statistics are less complete. Nonetheless, we know that students tend to disagree with the university more often regarding academic decisions than regarding disciplinary ones. This seems natural, of course, since, unlike disciplinary decisions, academic decisions emanate regarding all students; there is simply more to disagree with on the academic side. In the Engineering Faculty at Strathclyde, for academic years 1993 through 1995, approximately 5,550 academic "decisions"[328] spawned 120 appeals. In the five-year period from 1990 through 1995, the Arts and Social Sciences Faculty found 193 of its academic decisions appealed.[329]

---

326. *Id.*

327. At the University of Michigan, from January 1, 1993, to April 1, 1995, a total of 434 "contacts and inquiries" were reviewed by the Judicial Advisor. No action was undertaken regarding 134 of these. In 97, the complaint was referred to other University units; in 16, after consultation with the Judicial Advisor, the complainant decided not to file a complaint; in 59, a "substance abuse warning letter" was sent; and in 128, the Office of the Judicial Advisor formally investigated. There were 203 allegations of misconduct in these 128 cases, including 31 allegations of "harassment"; 29 allegations of "unauthorized taking or possessing of property/services"; and 27 allegations of "physical assault, battery or endangerment."

Ultimately, 150 violations were charged (46 alleged violations were dropped during the investigation and 7 remained under investigation). Of the 150 violations charged, 75 yielded a finding of "responsible"; 28 yielded a finding of "not responsible"; and 26 were mediated (21 charged violations were yet unresolved). University of Michigan, Summary of Judicial Activity: Statement of Student Rights and Responsibilities (Jan. 1, 1993 to Apr. 1, 1995).

At Indiana University, during the 1994-95 academic year, 2497 cases of *personal* misconduct were processed through the campus judicial system. These cases represented 3183 alleged violations of the Code of Student Ethics (some cases involved more than one such violation—for example disorderly conduct and assault). (There were 2022 alleged "Residence Hall Handbook Violations.") Sixty of these 2497 cases ended up before a Hearing Commission (all others reached final resolution in other fora).

Of the 3183 violations, the greatest number, 1107, involved "alcohol." In second place, with 393 violations, are "actions which endanger." In third place, with 357 violations, is "failure to comply."

Interestingly, there were no cases of racial or sexual harassment. There were 144 cases of "dishonest conduct"; 46 cases of "physical abuse"; 131 cases of "unauthorized possession of drugs"; and 208 "violations of any Indiana/Federal Criminal Law." Indiana University, 1994-95 Comparative Report on Personal Misconduct by Academic Year.

During the 1994-95 academic year, Indiana University processed 68 cases of *academic* misconduct, reflecting 83 instances: cheating (43); plagiarism (24); and other academic dishonesty (16). *Id.*

328. "Final grade/award" and "progress decisions." Mellows Letter, *supra* note 325.

329. *Id.*

From all this, we see that Scottish universities address relatively few disciplinary and academic disputes and resolve at relatively low levels of the hierarchy those disputes they do address. This principle of subsidiarity manifests itself often, in documents and interviews, at Scottish universities.[330] At times, a violator may be formally summoned before a high university official and merely given an intimidating warning.[331] Also, disciplinary boards are sometimes reluctant to convict.[332] Moreover, the evidence suggests that these universities treat relatively leniently those cases ultimately resolved against the student. Meaningful statistics are hard to come by, either because records are not kept or not divulged, or because the numbers at a particular institution are so small as to be unrevealing.

A look at Strathclyde's profile nonetheless suggests that litigation in Scotland remains relatively unused by students in part due to the low sanctions imposed, sanctions that provide little incentive to sue. Of the nineteen allegations of academic dishonesty coming before the discipline committee between June 1982 and June 1996,[333] only one resulted in a student's expulsion; another yielded the revocation of a degree; and still another resulted in a one-year suspension (coupled with a discounting of the "exam diet"). Four cases were effectively dismissed for lack of evidence (though in two of these the student still earned a warning). In two others the student's examination attempt was voided, and in eight others the student was given a reprimand plus some discounting of academic work. Two additional reprimanded students received other academic penalties—one the voiding of an "honours attempt" with no allowance of a "resit"; the other a voiding of the examination coupled with the loss of one class of "honours" in the final "honours" classification. A sampling of other cases reveals reprimands for assault, for transmitting offensive pictures through the computer system, for drunkenness on a field trip, and for drunk and disorderly conduct. Expulsion did attach to a serious computer offense and expulsion from a residence hall due to the triggering of a false fire alarm.[334] Nonetheless, these results, overall, fall far short of the draconian and, for that reason, seem generally unlikely to prompt litigation.[335]

---

330. *See, e.g.*, Heriot-Watt University, Student Charter: Sources of Information 4 (undated); Powell Interview, *supra* note 47; Rennie Interview, *supra* note 152; and Mellows Interview, *supra* note 6.

331. At Edinburgh, this process is called "carpeting." Rennie Interview, *supra* note 152.

332. Mellows Interview, *supra* note 6.

333. The penalties for the cases coming before the committee from 1968 though 1982 are not available.

334. Mellows Letter, *supra* note 325.

335. At the University of Michigan, sanctions imposed in 89 cases, by either a student panel hearing or an administrative hearing officer, included 28 "community services"; 27 "restitution"; 14 "class attendance"; 3 "suspension from the University"; and 2 "expulsion" (one of which was reduced, on appeal, to "suspension"). University of Michigan, Summary

2. *Students' Ample Access to Information and Extra-judicial Redress*

Clearly among the reasons for the relative lack of litigation by students against universities are the generous internal procedures of these institutions.[336] These procedures provide students who have real or potential grievances against universities with both information and wide avenues of redress. We have already seen the procedures generally applicable in Scottish universities to such students, procedures replete with protections, including access to layers of appeals.

Clearly, Scottish universities make both the academic and personal welfare of their students an important commitment.[337] Officials at St. Andrews, for example, unabashedly allude to their "caring university."[338] In addition, user-friendly universities find strong encouragement from the government itself. As part of a broad "citizen's charter" movement in the United Kingdom,[339] the Education Department of the Scottish Office issued *The Further and Higher Education Charter for Scotland.* This document essentially sets out a "students' bill of rights." The *Charter* treats students largely as consumers,[340] even though it avoids the explicit consumer language

---

of Judicial Activity: Statement of Student Rights and Responsibilities (Jan. 1, 1993 to Apr. 1, 1995).

At Indiana University, where all 2497 cases were processed through the campus judicial system, the disposition included 527 "not responsible"; 46 "administrative error dismissal"; 717 "reprimand and warning"; 757 "disciplinary probation"; 108 "restitution"; 4 "expulsion from University housing"; 24 "suspension from the University"; and 2 "expulsion from the University." Indiana University, 1994-95 Comparative Report on Personal Misconduct by Academic Year.

336. Though to a different extent, the procedures at Indiana University also manifest a "student-friendly" approach. The disciplinary set-up, for example, appears in a statement that stresses rights as well as responsibilities. *See* Indiana University, Code of Student Ethics, Part I (1995). The procedures for determining violations and sanctions were "designed to provide students with the guarantees of due process and procedural fairness. . . ." *Id.* at Part IV.

337. 2 COMMONWEALTH UNIVERSITIES YEARBOOK, *supra* note 13, at 1294.

338. Clark & Quinault Interview, *supra* note 66.

339. *See* British Prime Minister John Major's Citizens' Charter Initiative—Raising the Standard, CM 1599, July 22, 1991. The Initiative spawned "some forty Charters, broad statements of what citizens can expect, in the public sector and privatized utilities governing standards of service in such varied areas as prisons, hospitals, railways, law courts, schools and universities." Farrington, *supra* note 15, at 1 n.2. *See also* FARRINGTON, *supra* note 17, at 31.

340. *See* Ian Lang, *Foreword* to THE FURTHER AND HIGHER EDUCATION CHARTER FOR SCOTLAND 2: "This Charter sets out what you—as a current or prospective student . . . can reasonably expect of colleges and universities as providers of education and training; and what you can do if you are dissatisfied."

It has been noted that the student status of consumer may be difficult to reconcile with the increased student representation in governance conceded by the universities during the 1960s and 1970s. FARRINGTON, *supra* note 17, at 366.

found in the *Charter for Higher Education in England*.[341] The *Charter*, which clearly contemplates the development of individual university charters based on its principles, sets a framework for the "standards of service" that students can expect from universities, including access to information and avenues of complaint.[342] The *Charter* tells students they may expect courteous and prompt handling of their enquiries, efficient and appropriate assessment procedures, thorough and timely investigation of their formal complaints, information concerning student representation on course and other committees, information regarding student participation in academic decision-making and institutional management, and information on the institution's academic regulations and disciplinary procedures.[343] The right to object to an academic decision should be formally set out in the institution's academic-appeals procedure.[344]

This national *Charter* has received mixed reviews.[345] As it contemplated, individual universities, including Aberdeen, have adopted their own charters, codes of practice, or other expressions of intent concerning their standards of service.[346] These pursue the principles outlined in the parent *Charter*. To both applicants for admission and matriculated students, Aberdeen's charter provides a guide to the University's services and to information about them. It informs students specifically how to appeal adverse academic decisions. It informs students as well about the services provided by the Students' Representative Council (SRC), about making views known to the University, and about how to contact the Rector or the Rector's Assessor.[347] At Heriot-Watt, the student charter specifies the University's interest in settling "complaints promptly, fairly, courteously and as near as possible to the point of origin."[348] Strathclyde sensed itself already in compliance with the national *Charter's* prescriptions, save for informing students how to pursue complaints; a simple sheet did the trick.[349] Some university officials consider student charters "political claptrap" and look to other avenues, like the traditional student handbook, to address many of the same concerns.[350]

Students' feelings of ownership with regard to the institution undoubtedly stem in part from their wide participation in its governance. At

---

341. *See* FARRINGTON, *supra* note 17, at 320.

342. *Id.* at 4, 5, 20.

343. *Id.* at 5, 16.

344. *Id.* at 20.

345. "It has not had great impact here." Reynolds Interview, *supra* note 155.

346. *See* FARRINGTON, *supra* note 17, at 320.

347. *See* University of Aberdeen, Student Charter: Session 1995-96.

348. Heriot-Watt University, Student Charter: Sources of Information, at 4 (undated).

349. Mellows Interview, *supra* note 6. *See* University of Strathclyde, Student Complaints (1995).

350. Clark & Quinault Interview, *supra* note 66.

Aberdeen, the students alone elect the Rector, the chair of the Court, and one of the three senior officials at the University. The Court includes not only the Rector, but the Rector's Assessor[351] and the President of the SRC.[352] Aberdeen's Senate includes nine student members.[353] The Regent at Aberdeen has special responsibilities toward students.[354] An active SRC, first constituted in 1854 and recognized by Parliament five years later, boasts a position constitutionally established within the framework of the University. The SRC promotes the interests of the students and affords a "recognized means of communication between students and the university authorities."[355] The SRC sends representatives to many university committees.[356] Often, in disputes with the University, students will seek representation from the SRC.[357] Two students sit on the disciplinary

---

351. *See* THE UNIVERSITIES (SCOTLAND) ACT 1889, § 5: "The Rector may, before he appoints his Assessor, confer with the Students' Representative Council." At St. Andrews, the Rector's Assessor, also a member of the Court, "is usually a student." UNIVERSITY OF ST. ANDREWS, PROSPECTUS 1996 ENTRY, at 6.

352. At Edinburgh, the Court includes, besides the Rector and the Rector's Assessor, "two fully matriculated students nominated by the Students' Representative Council." *History and Constitution*, *in* EDINBURGH CALENDAR, *supra* note 40, at A-23. At Heriot-Watt, the Court includes three from the Graduates' Association of the University, the Honorary President of the Students' Association, the President of the Students' Association, and one member of the Council of Students' Association. CHARTER OF HERIOT-WATT UNIVERSITY (SCHEDULE), STATUTE XII, § 1(ix)-(xi). For the membership of university Courts generally, see *supra* text accompanying notes 42-47.

353. At Edinburgh, thirteen student associate members populate the Senate. *History and Constitution*, *in* EDINBURGH CALENDAR, *supra* note 40, at A-24. Heriot-Watt's Senate includes the President of the Students' Association and two members of the Council of the Students' Association. CHARTER OF HERIOT-WATT UNIVERSITY (SCHEDULE), STATUTE XIII, § 1(ix). For the membership of university Senates generally, see *supra* notes 88-90.

354. Webb Interview, *supra* note 163.

355. ABERDEEN CALENDAR, *supra* note 47, at 32-33. *See* THE UNIVERSITIES (SCOTLAND) ACT 1889, §§ 5, 14(12). At St. Andrews, the Students' Association, the umbrella group for the SRC and the Students' Council, "acts like a Visitor" for the students. Clark & Quinault Interview, *supra* note 66.

Student unions first organized in Scotland as Student Representative Councils, earning statutory recognition in the Universities (Scotland) Act of 1889. *See supra* note 351. Universities founded later have student associations created by charter or by university statute. Students automatically become members of the student union through either an express or implied term of the contract of matriculation. In the early 1990s, the government expressed its intention to make student unions voluntary. FARRINGTON, *supra* note 17, at 185-87, 192. *See generally id.* at 185-88, 192.

356. ABERDEEN CALENDAR, *supra* note 47, at 33.

357. David Strachan, *Voices From Three Generations*, *in* ABERDEEN UNIVERSITY 1945-81: REGIONAL ROLES AND NATIONAL NEEDS, *supra* note 51, at 90. At times, the SRC President will represent students. Webb Interview, *supra* note 163.

At St. Andrews, the Welfare Advisor for the Students' Association deals with University officials regarding individual cases and does so responsibly and positively. Clark & Quinault Interview, *supra* note 66.

committees.[358] At hearings before a disciplinary committee, the charged student receives significant discovery and may be accompanied by any person of his choice. The student may address questions to the Convener of the committee or to any witnesses, and may also make a concluding statement.[359]

Other examples of university openness to students abound. At Heriot-Watt, every department has a staff-student committee for the discussion of proposed developments and other student concerns.[360] At Stirling, all committees dealing with student welfare or living conditions must include members of the Students' Association.[361] Students serve on the Planning and Resources Committee, which exercises the main responsibility for allocating resources and for advising the Court on financial matters, as well as on "most committees relating to teaching activity, or the management, of the University."[362] Stirling assigns to each student an Adviser of Studies, whose duties—specified in writing—include "assist[ing] in preparing a case for submission to University authorities."[363] The same institution provides that all disciplinary hearings must accord with principles of natural justice, the British equivalent of due process.[364] In serious disciplinary cases at Edinburgh, if the University proceeds through a practicing advocate or solicitor, it provides the student with reasonable funds for similar representation.[365] At Dundee, unless the accused objects, student "auditors" must be present at all disciplinary proceedings before an Authorized

---

358. University of Aberdeen, Resolution No. 196 of 1996 (Code of Practice on Student Discipline), § 8.1. Student membership on such committees is common. At Edinburgh, for example, six of the twelve members of the Standing Commission on Discipline, six of the twelve members of the Discipline Committee, and at least four members of any hearing panel, are students. *See* University of Edinburgh, Code of Student Discipline §§ 1(a), 3(a)(I) and (iv). For the membership of such committees at other universities, see *supra* note 249. At Heriot-Watt, students sit on the University Court, on the Senate, and on several committees. Heriot-Watt University, Student Charter: Sources of Information, at 12 (undated).

Such representation may sometimes be more important symbolically than substantively; at one University, at least, student committee members seem more willing to "convict" than academic staff members. Mellows Interview, *supra* note 6.

359. University of Aberdeen, Resolution No. 196 of 1996 (Code of Practice on Student Discipline), §§ 13.2, 13.2.4, 13.2.5.

360. Heriot-Watt University, Student Charter: Sources of Information, at 12 (undated).

361. CHARTER (SECOND SCHEDULE), STATUTE 12, § 1, *in* STIRLING CALENDAR, *supra* note 41, at 80.

362. STIRLING HANDBOOK, *supra* note 12, at 3.

363. *Id.* at 9.

364. Ordinance 2: Code of Student Discipline, *Natural Justice* § 1.3, *in* STIRLING CALENDAR, *supra* note 41, at 112. Officials at Strathclyde adhere to the principles of natural justice, taken to mean hearing the student and providing a neutral decision-maker. Mellows Interview, *supra* note 6.

365. *See* University of Edinburgh, Code of Student Discipline § 5(a)(ii).

Officer.[366] At Edinburgh, the SRC employs two or more permanent staff to help students and to advise on appeals. Sometimes these employees carry more credibility with students than do officials of the university. In certain cases, as a result, such employees might temper a student's anger, preclude an appeal, or otherwise help resolve matters at a low level.[367] Dundee students, both current and former, have a general right of access, as well as a process for correction, with regard to all personal information kept by the University.[368] The provisions applying to students in Educational Studies at Stirling reflect the kind of care and, in fact, leniency with which Scottish institutions address academic progress. The Board of the School of Human Sciences may permit a candidate who was unable to complete the first semester of the program to begin anew.[369] A candidate failing a unit of instruction must be granted the opportunity to submit "a further piece of assessed work or to undertake a repeat examination," a process available for up to four units of work; on these occasions, a student may not be given a grade lower than initially received.[370] A project report or "Honours dissertation" found unsatisfactory may be referred to the candidate for resubmission.[371] An honours candidate not fully successful may receive a general degree,[372] and a candidate who was required to withdraw from the University may have the case reconsidered.[373] Further, the Academic Council may waive any of the academic requirements set out in the governing ordinance.[374] At Glasgow, a student may have illness or "other personal circumstance" considered in the assessment of performance during an examination.[375] Also at Glasgow, students in the Faculty of Arts subject to suspension or exclusion are informed in writing of the time and place at which the Progress Committee will consider their cases. These students are

---

366. *See Ordinance 40: Student Discipline* § 8(3), *in* DUNDEE CALENDAR, *supra* note 41, at 201.

367. Rennie Interview, *supra* note 152.

368. *Ordinance 46: Student Access to Personal Information* §§ 1, 8, *in* DUNDEE CALENDAR, *supra* note 41, at 216-17.

369. *Ordinance 29: Degree of Bachelor of/Diploma in Educational Studies* § D3, *in* STIRLING CALENDAR, *supra* note 41, at 142.

370. *Id.* §§ E6, E7.

371. *Id.* § E9.1, *in* STIRLING CALENDAR, *supra* note 41, at 143.

372. *Id.* § E9.1.2; *see also Faculty of Social Sciences* § 21, *in* GLASGOW CALENDAR: FEES & INFORMATION, *supra* note 182, at 120-21; and STIRLING HANDBOOK, *supra* note 12, at 6.

373. *Ordinance 29: Degree of Bachelor of/Diploma in Educational Studies* § E11, *in* STIRLING CALENDAR, *supra* note 41, at 143.

374. *Id.* § F1.

375. GLASGOW CALENDAR: FEES & INFORMATION, *supra* note 182, at 19. *See also Code of Procedure for Appeals to a Faculty Appeals Committee* § 3(a), *in* GLASGOW CALENDAR: FEES & INFORMATION, *supra* note 182, at 22; and *Code for Degree Examinations* §§ 10, 26, 29, 42, *in* GLASGOW CALENDAR: FEES & INFORMATION, *supra* note 182, at 31, 33, 35.

entitled to appear in person before the Committee or to make written representations. Students ultimately suspended or excluded may appeal to the Faculty Appeals Committee. Even those students whose suspensions are upheld are entitled to readmission as long as, within the next two examination periods, they make good their shortcomings.[376]

Is the university responsive to student concerns? Aberdeen's Regent, like many other officials at Scottish universities, feels strongly that disputes should be resolved internally and at the lowest administrative level possible.[377] This philosophy seems clearly reflected in the frequency of success enjoyed by Aberdeen students appealing academic matters. Of the 174 academic appeals involving undergraduates at Aberdeen during the 1995-96 academic year, ninety—or approximately fifty-two percent were upheld;[378] of the fourteen postgraduate academic appeals at Aberdeen during that academic year, five—or approximately thirty-six percent were upheld.[379] Statistics for the three academic years 1992 through 1995 show that students succeeded in eighteen of thirty-four appeals—a stunning fifty-three percent—brought before the Senate Academic Appeals Committee.[380] At the University of Strathclyde, during the two academic years 1993 through 1995, 120 appeals were taken from academic decisions within the Engineering Faculty. Of these, only thirty-three were fully rejected; eighty-seven garnered some kind of positive response.[381] At Heriot-Watt, two appeals were taken to the Court during the 1995-96 academic year; in one, the degree was upgraded, in the other no decision has been made.[382] The extent to which academic decisions get a new look outside the department or school in Scottish universities would surely surprise most American academics.[383]

---

376. *Faculty of Arts* § 11(g) and (h), *in* GLASGOW CALENDAR: FEES & INFORMATION, *supra* note 182, at 60.

377. Powell Interview, *supra* note 47.

378. Webb Letter, *supra* note 314. These comprised a) appeals against a decision of the Examiners (in the nine cases upheld, the decisions resulted from the Examiners revising their original decisions in light of evidence presented on appeal—an Appeal Committee "does not have the power to overturn an academic decision of the Examiners"); b) appeals to a Students' Progress Committee for permission to continue despite failure to satisfy normal progress requirements; and c) appeals against the decision of a Head of Department or of a Students' Progress Committee disallowing progression to the "next normal year/level of study." *Id.*

379. *Id.* Each of these appeals challenged a decision of the Examiners. *Id.*

380. Memorandum from David M. Jones, Deputy Clerk to Senate and Clerk to Boards of Studies in Science and Medicine, Univ. of Aberdeen, to the author (July 29, 1996) (on file with author).

381. Mellows letter, *supra* note 325. Interestingly, however, the number of appeals from the first of these academic years to the second rose from 31 to 89, an increase of 187%. *Id.*

382. Parkinson Interview, *supra* note 6.

383. For example, in 26 years as a member of the faculty at the University of Notre Dame, the author can recall no instance in which an academic decision made by the law school regarding one of its students was reversed outside the school.

One of the most knowledgeable observers of the academic scene in the United Kingdom has noted that most academic and disciplinary disputes there "are resolved internally . . . ."[384] The high costs befalling universities that find themselves in court reinforce the incentives to reach such resolutions.[385]

Still, more could be done to shelter higher education from the prospective intrusion of the civil courts. There is, for example, no use of ombudsmen in the resolution of academic or disciplinary disputes.[386] Of course, the use of Visitors, as in England and Australia, projects at least a surface attractiveness. Relatively informal, private, cheap, and fast, such an approach can represent a "useful instrument of social policy in the context of university administration and academic discipline."[387] Accordingly, "suspicion of [its] archaic origins . . . should not inform current attitudes to the visitatorial jurisdiction."[388] Nonetheless, some officials at Scottish universities deem even it too adversarial, complex, and expensive.[389] Some officials feel that the extensive internal procedures at Scottish universities make unnecessary both the ombudsman and the Visitor.[390] Still, some of the newer universities in the United Kingdom, and at least one in Scotland, have used independent arbiters—a close parallel to the concept of a Visitor.[391] Discussions at St. Andrews have addressed the possibility of appointing an

---

384. Farrington, *supra* note 15, at 10. Appeals in American universities, at least in disciplinary cases, may also be well received. At the University of Michigan, the Appeals Board reviewed two cases in a 15 month period. Although in one case it upheld a sanction of suspension from the university, in the other it reduced a sanction of expulsion to one of suspension. University of Michigan, Summary of Judicial Activity: Statement of Student Rights and Responsibilities (Jan. 1, 1993 to Apr. 1, 1995). At Indiana University, during the 1994-95 academic year, 60 of the 2497 cases processed through the campus judicial system were ultimately reviewed by a hearing commission. In 38 of those cases, the hearing commission reversed the original decision or imposed a weaker sanction. (It upheld the original decision in 10 of the cases and imposed stronger sanctions in the remaining 12.) Six cases were ultimately reviewed by a Review Board. In all six cases, the original finding of responsibility was upheld, but in two the sanction was lessened. Indiana University, 1994-95 Comparative Report on Personal Misconduct by Academic Year. In light of the large number of cases processed, however, these figures reflect a relatively low reversal rate.

385. Farrington Interview, *supra* note 6. *See infra* text accompanying notes 457-69.

386. *See, e.g.*, Rennie Interview, *supra* note 152; and Mellows Interview, *supra* note 6. Neither the Parliamentary Commissioner nor its local equivalent deals with university disputes. Farrington Interview, *supra* note 6. *See* PARLIAMENTARY COMMISSIONER ACT 1967 (SCHEDULE 2).

387. G. L. Peiris, *Visitatorial Jurisdiction: The Changing Outlook on an Exclusive Regime*, 16 ANGLO-AM. L. REV. 376, 403 (1987).

388. *Id.* at 406.

389. Mellows Interview, *supra* note 6 ("You begin with someone who knows nothing about the University").

390. Reynolds Interview, *supra* note 155.

391. Farrington Interview, *supra* note 6.

independent person to handle appeals.[392] Dennis Farrington, an expert on the Scottish law of education, has urged some form of compulsory arbitration. The arbiter would be an independent person with a status like the English Visitor, an office unknown—at least in modern times—to Scottish institutions.[393] Farrington argues that the student-charter initiative and government proposals for providing students access to external review of certain complaints point toward such a development.[394] Under his proposal, all disputes would be settled using ordinary contractual principles. Such a procedure would grant students access to a neutral decision-maker, provide them with reasons for the decision, preserve the funds of both universities and legal-aid providers, and prevent cases from reaching the courts.[395]

Perhaps the Rector could become the ideal arbiter—close enough to the university to know it well, distant enough to provide neutrality and perspective, and prestigious enough among the students to lend rectorial decisions appropriate persuasiveness and weight. At St. Andrews, for example, students have called on the Rector for help with regard to their individual cases.[396]

3. *The Culture and Other Factors*

When asked why Scottish students so rarely call on courts to challenge university decisions, officials virtually unanimously invoke, among other things, "the culture."[397] British education traditionally has been elitist—though more egalitarian in Scotland than in England. Moreover, education was free; accordingly, students felt privileged to be at the university and took "whatever came."[398] When disputes have resulted in adverse determinations before internal bodies, students in Scotland have remained far readier than American students to accept the outcome. Moreover, Scottish students have tended to see the legal profession as designed only for service involving the rich or the criminal process—not academic or disciplinary matters.[399]

---

392. Clark & Quinault Interview, *supra* note 66.

393. FARRINGTON, *supra* note 17, at 51-52.

394. *Id.* at 52.

395. Farrington, *supra* note 15, at 21. *See also* FARRINGTON, *supra* note 17, at 44.

396. Clark & Quinault Interview, *supra* note 66.

397. Powell Interview, *supra* note 47; Rennie Interview, *supra* note 152; Mellows Interview, *supra* note 6; Farrington Interview, *supra* note 6.

398. Powell Interview, *supra* note 47.

399. Rennie Interview, *supra* note 152.

But culture is dynamic, not static, and some officials fear that university disputes might increasingly find themselves in civil courts.[400] Now, students know what education costs, grants fall short of need, students are being asked to contribute, and so they more willingly scrutinize the education they receive.[401] Over the last quarter-century, student protest changed from "collective and politically driven" to "individual and consumerist"; charters likely constituted a significant catalyst in this change.[402] Even though *The Further and Higher Education Charter for Scotland* avoided the "institution-customer" terminology of its English parallel,[403] the educational charter movement unquestionably contributed mightily to the notion of student *qua* consumer. As one university official put it, a charter yields the feeling that the student is a valued and paying customer.[404] "It is a short step from the Charters and the funding arrangements to the view that students are consumers . . . in a contractual . . . relationship with the institution."[405] The old notion of the university as a "social club" has yielded to a "new concentration" on the rights of the client to educational quality.[406] Like other consumers, educational consumers increasingly question the quality of the purchased product. Anecdotal evidence indicates that charters, by their nature, encourage complaints. To compound matters, universities themselves have become more "rule-bound" and adversarial.[407]

Ellis John Powell, University Regent at Aberdeen, observes that civil-law seems more and more to "take over" from internal courts—from courts-martial in the military, from consistory courts in the Church, and from academic and disciplinary "courts" at universities.[408] As expectations increase and as students increasingly perceive themselves as having rights—both within and without the university—more litigation seems inevitable.[409] Students' use, in dealing with university officials, of threats to sue may reflect a growing cultural adjustment to the idea of resort to the courts for relief. Telling too is the fact that all seven Scottish cases revealed by a computerized search covering the last forty-seven years arose during the

---

400. "The litigation culture is changing." Clark & Quinault Interview, *supra* note 66.

401. Powell Interview, *supra* note 47.

402. Michael Smith, *Charters in Higher Education*, 1 U. & C. EDUC. L. NETWORK REP. 3 (1996).

403. FARRINGTON, *supra* note 17, at 133.

404. Rennie Interview, *supra* note 152.

405. Farrington, *supra* note 15, at 2.

406. FARRINGTON, *supra* note 17, at 4-5.

407. Dennis Farrington & Frank Mattison, *Introduction* to UNIVERSITIES AND THE LAW, *supra* note 14, at xv.

408. Powell Interview, *supra* note 47.

409. Farrington Interview, *supra* note 6.

nineties.[410] This movement undoubtedly will find significant sustenance in the American cultural influence to which Scotland remains subject.

Of course, not all university officials view negatively the threat of student litigation. Dennis Farrington, Deputy Secretary and Clerk to the University Court at Stirling, argues that the threat should be seen as a "valuable shake-up," providing universities an opportunity to demonstrate, in an era of reduced resources, the quality of their educational process. Good internal procedures, he maintains, will significantly reduce, if not eliminate, the threat of litigation.[411]

4. *The Law*

Within the United Kingdom, Scots law remains a "distinct system" based heavily on Roman law and the influence of French and German scholars. The Treaty of Union in 1707 preserved this distinction, providing for the perpetual existence of Scots law and Scots courts. Nonetheless, English law supplanted Roman law as the most powerful influence on Scots legal development; the sway of Roman law waned and, at about the end of the seventeenth century, ended. The constant tendency toward harmonization has moved the laws of Scotland and England closer together.[412] Reminiscent of the Anglo-American equity courts, the *nobile officium* of the High Court and the Court of Session provides a remedy where neither statute nor precedent affords one.[413] Today, Parliament may limit a law's application to England or to Scotland. Too often Parliament passes, without sufficient thought, laws applicable to both. Great English influence over Scots law comes as well from the power of the House of Lords to hear appeals from Scottish civil courts, a power that has often been exercised to reverse.[414]

Since 1973, Scotland has also been under the influence of European Community law.[415] With regard to that law, all cases in the United Kingdom's courts are vulnerable to a "preliminary reference" to the European Court of Justice.[416] Separate from the European Community, the

---

410. *See supra* note 266.

411. Dennis Farrington, *Introduction* to 1 U. & C. EDUC. L. REP. 2 (1996).

412. *See* BRUCE MCKAIN ET AL., SCOTS LAW FOR JOURNALISTS 1 (6th ed. 1995); MARSHALL, *supra* note 15, at 2, 5-6. WHITE & WILLOCH, *supra* note 8, at 6-7, 22, and 28. The development of a Scots legal system different from, yet similar to, England's ended with the Wars of Independence beginning at the end of the thirteenth century and Edward I's subjugation of Scotland. MARSHALL, *supra* note 15, at 2.

413. *See* MCKAIN ET AL., *supra* note 412, at 155-56.

414. MARSHALL, *supra* note 15, at 7-8. By established custom, at least two Scottish law lords sit in the House of Lords. *Id.* at 42.

415. *Id.* at 7.

416. WHITE & WILLOCH, *supra* note 8, at 40.

"European Court of Human Rights . . . implements The European Convention for the Protection of Human Rights and Fundamental Freedoms," often called the European Convention on Human Rights.[417]

Legislation specifically controlling universities in Great Britain has been, at least until lately, comparatively rare. This relative and noteworthy lack of legislation may stem from the fact that "'the general powers and duties conferred by the principal Act (The Education Act 1944) were so far reaching.'"[418] In any event, the Education Reform Act of 1988 placed on a statutory basis the relationship between universities and the Crown.[419]

Where can a student go once internal challenges have failed? Currently, only to the courts.[420] Relationships between students, actual or potential, and their institutions in the United Kingdom present considerable complexity, especially in light of the many models of governance now prevailing.[421] Clearly, one has no right to university admission, and universities need give no reasons for the rejection of a candidate's application.[422] A student who has accepted an offer of admission from a university has a contract of admission with the institution.[423] Once matriculated, the student may assume two distinct but related relationships with the institution. The first derives from contract;[424] the second arises, at least when the student is a "corporator" in a chartered institution, from status, carrying rights independent of contract.[425] The contractual relationship between the student and the institution becomes underlined, if not created, by the educational charters. That contract provides for instruction, along with a variety of ancillary services. This relatively complex agreement grows from a panoply of sources—the prospectus, oral statements, custom and practice, student handbooks, departmental literature, and even the institution's individual charter. That charter might not only add

---

417. *Id.* at 45-46. For the enforceability of the ECHR "through the right of individual petition or at the instance of a signatory," see *id.* at 94-95.

418. Henderson & Mattison, *supra* note 14, at 9, 12 (quoting G. TAYLOR & J. B. SAUNDERS, THE LAW OF EDUCATION 3 (1976)).

419. *Id.* at 13.

420. FARRINGTON, *supra* note 17, at 53.

421. *Id.* at 1.

422. *See id.* at 4-5. *But see* O'Reilly v. University of Glasgow (1995) (unreported), *discussed in* FARRINGTON, *supra* note 17, at 5.

423. Henderson & Mattison, *supra* note 14, at 70; FARRINGTON, *supra* note 17, at 2. No reasons need be given for rejecting a candidate for admission. *Id.* at 4.

424. For more on the contract of matriculation, see FARRINGTON, *supra* note 17, at 347-55.

425. Henderson & Mattison, *supra* note 14, at 70. *See also* FARRINGTON, *supra* note 17, at 327. The same effect may obtain at non-chartered institutions. *See* Henderson & Mattison, *supra* note 14, at 77.

For a discussion of the rights of a foreign student against an institution in the United Kingdom, see Peter Kaye, *Colleges in Court,* 137 SOLIC. J. 816 (1993).

its own terms to the contract, but color or define those originating elsewhere.[426] Some of these potential sources of contractual terms, of course, and perhaps especially the institutional charters, might be seen more as "expressions of desire and intent than [as] statements of contractual obligation."[427] In any event, doctrine dating from the nineteenth century[428] counsels that courts not imply terms into contracts whenever it is reasonable to do so, but only when business efficacy makes it necessary to do so.[429] Nonetheless, in its contract with the student, the institution surely has at least impliedly agreed to employ reasonably competent professionals who will exercise reasonable care and skill.[430]

Even the enforcement of good order on campus rests on the student's agreement, under the contract of registration, to be bound by the institution's rules:[431] "[U]niversities do not have an inherent power to discipline their students . . . but only a contractual one."[432] Indeed, one might consider "the entire individual-institutional relationship from first offer and acceptance to final graduation as 'a rolling contract which matures and changes shape in the course of its life.'"[433] In any event, the contract between the student and the university reflects unequal parties and thus much resembles an adhesion contract,[434] a fact courts might notice in attempts to enforce that contract.

In simple terms, contractual matters go to the ordinary courts (and possibly, ultimately, on appeal to the European Court of Human Rights).[435] Judicial review, on the other hand, reflects "the exercise of the court's

---

426. Smith, *supra* note 402, at 2-3. Accordingly, Mr. Smith argues, the "ideal charter from the point of view of the lawyer advising a university is a bland descriptive document, which deals with aspirations not expectations, and tries to say nothing. This will often be unacceptable to the students, and indeed to the institution itself." *Id.* at 3.

427. FARRINGTON, *supra* note 17, at 8. For a model contractual provision, see *id.* at 10.

428. *See* The Moorcock, 13 PD 157 (1888), *aff'd*, 14 PD 64 (1889).

429. FARRINGTON, *supra* note 17, at 11.

430. *Id.* at 136.

431. Students commonly execute a form of undertaking to honor the rules of the institution. FARRINGTON, *supra* note 17, at 368. *See, e.g.*, the University Oath at the University of Glasgow: "I solemnly promise that I will fulfill the requirements made by the Senatus Academicus . . . and will conform to its discipline . . . ." GLASGOW CALENDAR: FEES & INFORMATION, *supra* note 182, at 3. *See also* STIRLING HANDBOOK , *supra* note 12, at 17: "When you sign the registration form you agree to be bound by the University's rules and regulations . . . ." Separate undertakings may occur with regard to libraries, residential facilities, computer facilities, laboratories, and the like. *See* FARRINGTON, *supra* note 17, at 369.

432. Ustaran, *supra* note 212, at 6.

433. Farrington, *supra* note 15, at 6 (quoting S. Arrowsmith, The University-Student Contract (1996)) (paper presented to the seminar "Key Issues in the Law of Higher Education," New College, Oxford, Mar. 27, 1996). For more on the institution-student contractual relationship, see FARRINGTON, *supra* note 17, at 330-47.

434. FARRINGTON, *supra* note 17, at 350.

435. *See id.* at 64, 68.

inherent power at common law to determine whether action is lawful or not . . . ."[436] Public-law matters thus qualify for judicial review,[437] triggered by an institution's statutory origins or the legislative underpinnings of the institutional power at issue.[438] Such a determination allows the student to rely on more than the rules and regulations of the institution applicable to "what could hardly be described as a wholly balanced contractual relationship[ ]."[439] Public institutions discharging public functions thus become subject to judicial review on "conventional grounds," generally comprising illegality, irrationality, or procedural impropriety.[440] Even so, since the same unfortunate (from the student's perspective) result might follow the court-ordered use of correct procedures, a judicial-review victory may prove to be an empty one.[441] Because in Scotland contract enforcement and judicial review present two different procedures, discerning which is at issue becomes crucial and, to this day, sometimes difficult. In *Naik v. University of Stirling,*[442] a tuition-fees case, the court found judicial review appropriate because of the tripartite relationship existing among: 1) the person on whom some authority to act has been conferred (here the University); 2) the person that conferred that authority (here The Queen, who granted the University its Royal Charter); and 3) the person for whose benefit the authority should be exercised (here the student). But this analysis did not prevail in *Re Alistair Joobeen's Application,*[443] another tuition-fees case (involving Naik's boyfriend and the same institution). In *Joobeen* the court found that the dispute concerning the tuition fees involved "matters of simple right and obligation, requiring the Court's ordinary, and not its supervisory jurisdiction."[444] In such a case, contractual rights cannot be trumped by "any general equitable or supervisory power" of the court.[445] In *Naik*, however, the court remained unpersuaded that the matter involved only payment of fees and not, in addition or instead, the student's misconduct.

---

436. Regina v. University of London *ex parte* Vijayatunga, 1 Q.B. 322, 343 (1988) (Simon Brown, L.J.).

437. Farrington Interview, *supra* note 6.

438. Alex J. Carroll, *The Abuse of Academic Disciplinary Power*, NEW L.J. 729 (May 27, 1994).

439. *Id.* at 730.

440. FARRINGTON, *supra* note 17, at 15.

441. *Id.* at 16.

442. 1994 S.L.T. 449, 1993 Sess. Cas. (Outer House, June 22, 1993).

443. 1995 S.L.T. (Notes) 120, 1994 Sess. Cas. (Outer House, July 28, 1994).

444. *Id. See generally* FARRINGTON, *supra* note 17, at 18-19, 56-57.

445. 1995 S.L.T. (Notes) 120, 1994 Sess. Cas. (Outer House, July 28, 1994).

As in the United States,[446] Scottish courts have shown great reluctance to overturn the academic judgments of universities;[447] addressing such appeals, Scottish courts have limited themselves to "ensuring that the academic decision has been reached following proper procedures."[448] In *Re Ahmed Saleh,*[449] a student sought to overturn a university judgment that he not be allowed to revise and re-submit a failed thesis. The Court of Session, declining to interfere with academic judgment, dismissed the petition for judicial review. A later re-framing of the claim, in *Ahmed Saleh v. University of Dundee,*[450] brought the same result. Since academic failure presents the area most likely to spawn legal action,[451] this unreceptive judicial posture obviously provides considerable solace to universities.

Other academic disappointments also found little welcome in the courts. In *Re Elaine Parks Carlton,*[452] a student denied an "Honours" degree attacked the process by which a subcommittee of the Academic Appeals Committee blocked her appeal from reaching the full Committee. Since the subcommittee had been given such discretion, its decision should stand, the court said, unless no reasonable subcommittee could have reached it—not the case here. In *Re Conor Reilly,*[453] a disappointed applicant to medical school argued that the University of Glasgow had, in violation of the principles of natural justice, a "work experience" requirement not listed in the University's prospectus. The court sided with the University, finding that no such requirement had been imposed. Thus, in all four of the cases disclosed by a computer search and involving direct challenges of academic decisions, the institution prevailed.

---

446. *See, e.g.*, Regents of Univ. of Mich. v. Ewing, 474 U.S. 214 (1985); Board of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978); Washington v. Baruch, 633 N.Y.S.2d 286 (N.Y. App. Div. 1995); Esmail v. S.U.N.Y. Health Science Ctr., 633 N.Y.S. 2d 117 (N.Y. App. Div. 1995); and Karen M. Porter, *Trend Favors Summary Adjudication of Lawsuits Challenging Academic Decisions*, IV HIGHER ED. L. BULL. 3 (1995): "To discourage efforts to engage the judiciary in the management of academic determinations, the federal and state courts have long applied an especially rigorous scrutiny to complaints of students." The showing of bad faith crucial to judicial overturning of an institution's academic decision has rarely been made. *Id.* (citing Susan M. v. New York Law Sch., 556 N.E.2d 1104, 1107 (N.Y. App. 1990).

447. FARRINGTON, *supra* note 17, at 361.

448. University of Aberdeen, Academic Appeals—Guidance Note, *supra* note 181, § 2. *See* FARRINGTON, *supra* note 17, at 12 n.75.

449. 1992 Sess. Cas. (Outer House, Nov. 6, 1992) discussed in FARRINGTON, *supra* note 17, at 19.

450. 1994 Sess. Cas. (Inner House—Extra Division, June 8, 1994).

451. FARRINGTON, *supra* note 17, at 359.

452. 1994 S.L.T. (Notes) 549, 1993 Sess. Cas. (Outer House, Sept. 24, 1993).

453. 1995 Sess. Cas. (Outer House, Aug. 22, 1995).

Though procedures and the conduct of officials in Scottish universities in fact reflect principles of natural justice,[454] it remains unclear to what extent Scottish corporations, chartered or unchartered, may ignore those principles in excluding members.[455] Though somewhat subjective, these principles reduce themselves to the right to notice of charges, the right to be heard in answer to those charges, and the right to a neutral hearing body.[456]

5. *Costs*

In Scotland, the financial costs—or at least the perceptions thereof—attending litigation further inhibit students from bringing suit. As one Scottish source puts it, "Most civil disputes are settled out of court, because litigation is slow, expensive and uncertain . . . ."[457] Interviews with university officials, however, bring no consensus on this point. One view holds that the expense indeed does contribute to the non-litigative culture.[458] Another observes that Legal Aid will sponsor any student with a colorable claim. The student's venture presents no risk: If the student wins, the university pays the costs, and if the student loses, the university will not likely recover its costs,[459] despite the general rule that assigns to the losing party the judicial expenses of the prevailing party.[460]

Legal aid will be less available under new rules,[461] thus reflecting a longstanding trend in Great Britain: In 1979, seventy-nine percent of Britons qualified for legal aid; only forty-seven percent did in 1990. Moreover, additional and significant cuts in the program's funding took place in 1993. Would-be "pursuers" (Scotland's plaintiffs) who do qualify for legal aid may nonetheless find it difficult to find a solicitor willing to work for the relatively frugal compensation provided by legal aid. Pursuers who do sue and prevail must reimburse the Legal Aid Fund for any expenses not covered

---

454. With regard to natural justice and disciplinary rules, see FARRINGTON, *supra* note 17, at 366.

455. *Id.* at 65 (citing Gaiman v. National Ass'n for Mental Health, 2 All E.R. 362, 380-81 (1970)). *But see* Re Ahmed Saleh v. University of Dundee, 1994 Sess. Cas. (Inner House—Extra Division, June 8, 1994).

456. Robert Seaton, *University Staff and Employment Law, in* UNIVERSITIES AND THE LAW, *supra* note 14, at 98-99.

457. WHITE & WILLOCH, *supra* note 8, at 61.

458. Reynolds Interview, *supra* note 155, and Mellows Interview, *supra* note 6.

459. Farrington Interview, *supra* note 6. These costs are not negligible. In a recent case—which it won—the University of Stirling did not recover costs, though having spent approximately 100,000 pounds sterling on the project. *Id.*

460. WHITE & WILLOCH, *supra* note 8, at 64, 252. For more on the assessment of costs, see *id.* at 252.

461. Rennie Interview, *supra* note 152.

by a judicial award of costs. As a result, even the winning party may finish with little or nothing of the recovery.[462]

Of course, the student might seek representation without recourse to legal aid. In some places, at least, a student can get an initial interview with a solicitor without cost.[463] From then on, however, the case might well require significant resources. One thing is clear and at least partly explains (in addition to reflecting) the difference between the culture of litigation in Scotland and that in America: Scottish lawyers may not accept cases on a contingent-fee basis.[464] It is unlawful on the part of either the advocate or the solicitor to make an agreement calling for payment of a proportion of the proceeds. But "speculative actions" are permitted when there is a reasonable prospect of success. Such arrangements allow lawyers to provide service with the understanding that they will be paid only if successful.[465]

Just as England and Australia have their solicitors and barristers, the Scottish legal profession also deploys two branches, called solicitors, who give advice and generally appear only in lower courts, and advocates, the parallel to barristers.[466] Advocates generally "receive instructions" only from a solicitor and not, therefore, directly from the client.[467] Accordingly, a pursuer can end up paying for a solicitor and two barristers, since a senior advocate (Queen's Counsel) might insist on the support of a junior advocate.[468] A pursuer who loses also faces the prospect of indemnifying the expenses of the "defender" (Scotland's defendant), who might in turn have employed a parallel group of three lawyers. In light of all of this, it is little

---

462. WHITE & WILLOCH, *supra* note 8, at 253-54, 256. For the specifics of income eligibility for legal aid in Scotland, see MARSHALL, *supra* note 15, at 56. Even those who qualify for legal aid must, depending on annual income and disposable capital, make a contribution to the Scottish Legal Aid Fund. *Id.* at 78. For more on Scottish legal aid generally, see *id.* at 71-82; and LEGAL AID (SCOTLAND) ACT 1986.

463. Clark & Quinault Interview, *supra* note 66.

464. Interview with Christopher H. W. Gane & Douglas Cusine, Professors of Law, Univ. of Aberdeen, in Aberdeen, Scot. (June 26, 1996). Interestingly, England, pursuant to government regulations introduced into Parliament by the Lord Chancellor, now allows "conditional fees" in personal-injury, insolvency and human-rights cases. The lawyer who loses receives no fee; the lawyer who wins recovers the "normal fee plus a special uplift, called a 'success' fee." Fenton Bresler, *British Thumbs-Up To "Conditional Fees,"* NAT'L L.J., July 1, 1996, at A17-A18. *See also* Frances Gibb, *Shake-up Aims to Curb 1.4bn £ Costs of Justice*, TIMES (London), July 3, 1996, at 6.

465. WHITE & WILLOCH, *supra* note 8, at 234.

466. MCKAIN ET AL., *supra* note 412, at 6-7. *See also* WHITE & WILLOCH, *supra* note 8, at 232-33. Advocates may not form partnerships but must practice independently. *Id.*

467. WHITE & WILLOCH, *supra* note 8, at 235; MARSHALL, *supra* note 15, at 56. Accordingly, the solicitor must be present when the advocate consults with the client. *Id.*

468. WHITE & WILLOCH, *supra* note 8, at 232.

wonder that for most people civil litigation provides a "rare and unwelcome experience."[469]

V. CONCLUSION

Scotland's universities, largely dependent on a decreasing governmental largesse, range from the ancient to the new. Their governing boards generally include significant representation of both off-campus and on-campus constituencies. At many campuses, two of the three primary offices—those of the Chancellor and of the Rector—tend to be largely honorific. Internal procedures, both academic and disciplinary, provide students with abundant protections in disputes with the university.

In dealing with their students' academic and disciplinary problems, Scottish universities have avoided litigation to an extent that would startle American lawyers. This happy situation results from diffused governance, restrained jurisdiction, meaningful internal remedies, a cultural disinclination toward litigation, a law relatively unreceptive to student complaints, and the prohibitive costs of legal recourse. Nonetheless, greater expectations of rights among students—spurred in part by the educational charters and burgeoning formal procedures, increasing use of threats to sue, and a modest though real growth in actual litigation send sure warning signs: Dramatic changes in the culture of litigation among Scottish students become increasingly possible, if not likely.

Litigation represents the most divisive, the most cumbersome, and the slowest medium for the resolution of intra-university quarrels. It is also the most expensive. Especially in a time of diminishing resources, therefore, universities must fervently seek additional devices, and reinforce existing ones, for avoiding lawsuits brought by students to challenge academic and disciplinary disputes. The principle of subsidiarity, through which universities strive to resolve matters at the lowest level possible, presents a solid defense to much litigation. Appeals that truly hear the student and right discovered wrongs provide an important safeguard. When litigation does arise, universities must continue to establish and underline the principle that academic judgments are best left to the experts, that is, the academics in the institution itself; absent irrationality or arbitrariness, courts should leave undisturbed academic disputes brought to them by students. Universities should give every consideration to the establishment of some form of "arbiter" who, borrowing from and improving upon the British or Australian Visitor, might provide, pursuant to agreement with the entering student, the final word on any ensuing academic or disciplinary disputes between the student and the university. In this quest to keep courts from exerting

469. *Id.* at 254.

jurisdiction within the academy, both the university and the student—as well as the concept of community—have much to gain.

NONCOMPLIANCE WITH TRIPS BY DEVELOPED AND DEVELOPING COUNTRIES: IS TRIPS WORKING?

*John E. Giust**

I. INTRODUCTION
II. MINIMUM LEVELS OF PROTECTION ESTABLISHED BY TRIPS
  A. *Patent Protection Under TRIPs*
  B. *Copyright Protection Under TRIPs*
  C. *Trademark Protection Under TRIPs*
  D. *Other Intellectual Property Rights Included Within TRIPs*
  E. *Self-Enforcement Mechanisms*
  F. *Implementation Timetable*
III. NONCOMPLIANCE BY DEVELOPED MEMBER COUNTRIES
  A. *The European Union and Its Member States*
    1. *The European Union's "Single Trademark"*
    2. *Ireland's Compulsory Licensing*
    3. *England's Compulsory Licensing*
  B. *The United States, Section 102(e) and 337*
  C. *Japan's Copyright Law*
IV. DEVELOPING COUNTRIES - INDIA'S MISSING "MAILBOX"
V. COMPARISONS AND OVERALL ASSESSMENT
VI. CONCLUSION

I. INTRODUCTION

The protection of intellectual property rights worldwide is critical to the international trading of goods and services as "at some level nearly all legitimately traded goods and services operate under patent, copyright or trademark protection."[1] Developed countries, as producers of goods and services, have an incentive to implement strong and effective intellectual property laws. However, developing countries have traditionally thought that strong intellectual property laws would impede their access to new technologies and as a consequence have historically placed the needs of right-owners over those of users.[2] This paper analyzes adherence by

---

* LL.M. Candidate, The George Washington University, J.D., *summa cum laude*, American University, 1995, B.S.E.E. University of New Hampshire, 1989. Mr. Giust is an Associate at the law firm of Dorsey & Whitney LLP. The views expressed herein are solely those of the author.

1. K. E. Maskus & D. Eby Konan, *Trade-Related Intellectual Property Rights: Issues and Exploratory Results, in* ANALYTICAL AND NEGOTIATING ISSUES IN THE GLOBAL TRADING SYSTEM 13 (Deardorff et al. eds., 1994).

2. *See* Primo Braga, *Trade Related Intellectual Property Issues: The Uruguay Round*

developed and developing countries to the patent, trademark, and copyright provisions of the recent TRIPs Agreement.[3]

The TRIPs Agreement has been called the most ambitious international intellectual property convention ever attempted.[4] TRIPs establishes the protection of intellectual property as an integral part of the multilateral trading system embodied in the World Trade Organization (WTO).[5] As one commentator illustrates, intellectual property is now a key component of this trading system: "the protection of intellectual property is one of the three pillars of the WTO, the other two being trade in goods (the area traditionally covered by the General Agreement on Tariffs and Trade (GATT)) and the new agreement on trade in services."[6]

TRIPs provides for the protection of many forms of intellectual property, including: Copyright, Trademarks, Industrial Designs, Patents, Integrated Circuit Layouts, and Trade Secrets.[7] All members of the WTO (Member States) must enact national laws to meet the minimum levels of protection set forth in TRIPs, although developing countries may delay full compliance.[8]

Despite its clear mandates, both developing and developed countries have been imperfect in enacting TRIPs-compliant legislation. Therefore, the question arises as to whether TRIPs is effectively protecting the rights it set out to protect. Are developed countries providing protection of intellectual property rights to the level required by TRIPs? Are developing countries on the road to being fully TRIPs-compliant at the appropriate time, and have they implemented required interim provisions?[9]

This article analyzes whether TRIPs has been breached to a degree whereby it is ineffective to achieve its goals and policies. Are the violations of TRIPs by both developing and developed WTO Member States significant or insignificant? Is there a trend to ignore the levels of protection established

---

Agreement and its Economic Implications, *in* 307 WORLD BANK DISCUSSION PAPERS: THE URUGUAY ROUND AND THE DEVELOPING ECONOMIES 385 (Martin et al. eds., 1995).

3. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1C, LEGAL INSTRUMENTS — RESULTS OF THE URUGUAY ROUND vol. 31; 33 I.L.M. 81 (1994) [hereinafter TRIPs or TRIPs Agreement].

4. J. H. Reichman, *Compliance with the TRIPS Agreement: Introduction to a Scholarly Debate*, 29 VAND. J. TRANSNAT'L L. 363, 366 (1996).

5. *See* WTO Agreement *reprinted in* The Results of the Uruguay Round of Multilateral Trade Negotiations - The Legal Texts, 6-19, 365-403.

6. A. Otten & H. Wager, *Compliance with TRIPS: The Emerging World View*, 29 VAND. J. TRANSNAT'L L. 391, 393 (1996) (footnote omitted).

7. TRIPs, *supra* note 3, arts. 1-39 (setting forth provisions regarding protection of specific intellectual property rights).

8. *Id.* arts. 65-67 (setting forth timetables for Members to comply with the provisions of TRIPs).

9. *Id.* art. 71 (setting forth certain interim provisions, discussed in Section II).

in TRIPs?

Ultimately, the conclusion is reached that the current noncompliance with TRIPs by developing and developed Member States, while not insignificant, will not impair the effectiveness of TRIPs. The dispute resolution mechanism of TRIPs has been effective in the past to induce noncomplying countries to comply, and could be effectively used in the future to induce compliance of Member States that do not currently comply. Overall, the degree to which nations of the WTO have altered their intellectual property laws in an attempt to comply with TRIPs is astonishing. TRIPs appears to be well on its way to successfully setting the world standard for intellectual property protection.

II. MINIMUM LEVELS OF PROTECTION ESTABLISHED BY TRIPS

As previously discussed, TRIPs establishes minimum levels for intellectual property protection in WTO Member States. Rather than begin anew, TRIPs incorporates certain provisions from pre-existing intellectual property treaties,[10] including the Paris Convention, [11] Berne Convention,[12] Rome Convention,[13] and Washington Treaty.[14] As with these other international treaties, TRIPs is organized around the principle of national treatment.[15] That is, "[e]ach Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property . . . ."[16]

Unlike most treaties utilizing concepts of national treatment, TRIPs is permeated with requirements for minimum levels of protection. Therefore, TRIPs directly regulates the degree of intellectual property protection that applies to all Member States.

---

10. *Id.* art. 1(3); art. 2(1) (Paris Convention); art. 3(1) (exceptions to national treatment); art. 9(1) (Berne Convention); art. 35 (Washington Treaty).

11. Stockholm Act of 14 July 1967 of the Paris Convention for the Protection of Industrial Property, 6 I.L.M. 806 [hereinafter Paris Convention].

12. Paris Act of 24 July 1971 of the Berne Convention for the Protection of Literary and Artistic Works, *available in* WL I.E.L. IV-B [hereinafter Berne]. The Berne Convention relates to copyright protection.

13. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961 (visited Nov. 26, 1997) <http://www.wipo.org/eng/iplex/wo_rom0_.htm>. The Rome Convention relates to performer, phonogram producer, and broadcasting organization rights.

14. Treaty on Intellectual Property in Respect of Integrated Circuits, adopted at Washington, D.C. on May 26, 1989, 28 I.L.M. 1477. The Washington Treaty relates to integrated circuit protection.

15. TRIPs, *supra* note 3, art. 3(1). This national treatment is subject to the exceptions already provided for in the Paris Convention, Berne Convention, Rome Convention, and Washington Treaty.

16. *Id.* (footnote omitted).

A. *Patent Protection Under TRIPs*

Articles 1 through 12 and 19 of the Paris Convention are adopted by TRIPs.[17] These articles repeat the concept of national treatment,[18] provide a right of priority for filing patent applications,[19] set forth requirements for trademark registration,[20] prohibit certain types of unfair competition,[21] establish national intellectual property offices,[22] and allow for separate, consistent agreements between members.[23]

TRIPs provides that patents shall be available for any invention, product or process, despite its field of technology.[24] However, a member may exclude from patentability diagnostic, therapeutic, and surgical methods,[25] as well as plants and animals other than micro-organisms.[26]

A product patent must confer to the owner the exclusive right of preventing third parties from making, using, offering for sale, selling, or importing the patented product.[27] A process patent must confer to the owner the right of preventing third parties from using the process and from using, offering for sale, selling, or importing the product obtained directly by the process.[28] The patent rights are subject to limited exceptions.[29]

Patents must be in force for at least twenty years after their filing date.[30] If a patent is revoked, an opportunity for judicial review must be provided.[31] In a process patent infringement proceeding, Member States

---

17. TRIPs, *supra* note 3, art. 2(1).
18. Paris Convention, *supra* note 11, art. 2(1).
19. *Id.* art. 4.
20. *Id.* arts. 6-7.
21. *See id.* art. 10*bis*.
22. *Id.* art. 12.
23. *Id.* art. 19.
24. TRIPs, *supra* note 3, art. 27(1).
25. *Id.* art. 27(3)(a).
26. *Id.* art. 27(3)(b). Plant varieties must be protected by patents or an effective sui generis system. *Id.*
27. *Id.* art. 28(1)(a).
28. *Id.* art. 28(1)(b).
29. *See id.* arts. 30, 31. Article 30 provides for "limited exceptions" where the exception does not "unreasonably conflict with a normal exploitation of the patent" and does not "unreasonably prejudice" the owner. *Id.* art. 30. Article 31 is a highly detailed exception for government-authorized use, normally requiring attempted authorization, limited scope and duration of use, nonexclusive use and domestic use, and payment of a compulsory license fee. *Id.* art. 31. Article 31 also allows for infringement of a first patent in order to exploit a second patent, but the second patent must "involve an important technical advance of considerable economic significance" in relation to the first patent, and the owner of the first patent must receive a cross-license for the second patent. *Id.*
30. *Id.* art. 33.
31. *Id.* art. 32.

must provide a presumption of infringement to the patentee in one or both[32] of the following situations: (a) where the product obtained by the process is new;[33] (b) where there is a substantial likelihood that the identical product was made by the patented process and the patentee cannot determine the actual process used.[34]

B. *Copyright Protection Under TRIPs*

The most significant copyright provisions of TRIPs are adopted from the Berne Convention, specifically Articles 1 through 21.[35] These articles are designed to protect literary and artistic works[36] and provide the rights of translation,[37] reproduction,[38] and communication to the public,[39] as well as allow for the seizure of infringing copies of a protected work.[40] However, TRIPs does not mandate compliance with the Berne Convention's moral rights provisions in Article *6bis*.[41]

To further the protection adopted by the Berne Convention, TRIPs provides that computer programs shall be protected as literary works under Berne.[42] Compilations of data are protectable if their arrangement or selection constitutes an intellectual creation, irrespective of any copyright subsisting in the data itself.[43]

For at least computer programs and cinematographic works, members must provide a rental right.[44] However, members are not obligated to provide rental rights for cinematographic works if rental of those works leads to widespread copying that materially impairs the right of reproduction.[45]

Although Berne provides that the term of protection is the life of the author plus fifty years,[46] TRIPs mandates minimum terms for works having terms calculated on the basis other than the life of a natural person. Specifically, in the case of works other than photographic works and works

---

32. *See id.* art. 34(1) and (2).
33. *Id.* art. 34(1)(a).
34. *Id.* art. 34(1)(b).
35. *Id.* art. 9(1).
36. *See* Berne, *supra* note 12, arts. 2 (defining "literary and artistic works"), 5 (prohibiting formalities as a requirement for enjoyment of the Berne rights), 7 (setting term of protection as life of the author plus 50 years).
37. *Id.* art. 8.
38. *Id.* art. 9.
39. *Id.* art. 11*bis*.
40. *Id.* art. 16.
41. TRIPs, *supra* note 3, art. 9(1).
42. *Id.* art. 10(1).
43. *Id.* art. 10(2).
44. *Id.* art. 11.
45. *Id.*
46. Berne, *supra* note 12, art. 7.

of applied art, the minimum term of protection is fifty years from publication, or fifty years from creation in the case of unpublished works.[47]

While members may limit the rights conferred by copyright, the limitations or exceptions must not conflict with a normal exploitation of the work and must not unreasonably prejudice legitimate interests of the right holder.[48] TRIPs also limits copyright protection under the idea/expression dichotomy illustrated by the United States Supreme Court decision in *Baker v. Seldon*,[49] limiting the application of copyright protection to expressions and prohibiting the protection of ideas, procedures, methods of operation, and mathematical concepts.[50]

Certain rights are conferred on performers, phonogram producers, and broadcasting organizations, subject to exceptions in the Rome Convention and to the retroactive provisions of the Berne Convention (as applied to performers and phonogram producers).[51] Performers may prevent unauthorized fixation[52] or reproduction of an unfixed performance, as well as unauthorized wireless broadcast or communication to the public of a live performance.[53] Phonogram producers have the right to authorize reproduction of phonograms,[54] as well as limited rental rights.[55] A minimum term of fifty years from the date of fixation is mandated for works of performers and phonogram producers.[56]

---

47. TRIPs, *supra* note 3, art. 12.

48. *Id.* art. 13.

49. 101 U.S. 99 (1879). In *Baker*, the plaintiff attempted to protect a book-keeping method published in a series of books under the copyright laws. The U.S. Supreme Court held that copyright did not extend to the book-keeping system, or the methods and diagrams necessarily incident thereto. This holding was later adopted in the Copyright Act of 1976, 17 U.S.C. § 102(b) (1976) (providing that copyright does not extend to the ideas, process, systems, and methods of operation).

50. TRIPs, *supra* note 3, art. 9(2).

51. *Id.* art. 14(6).

52. Unauthorized fixation presumably means recording the performance into a semi-permanent medium. A work is "fixed" according to U.S. law when "its embodiment in a copy . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." *See* Copyright Act of 1976 § 101.

53. TRIPs, *supra* note 3, art. 14(1).

54. *Id.* art. 14(2).

55. *See id.* art. 14(4):

> 4. The provisions of Article 11 in respect of computer programs shall apply mutatis mutandis to producers of phonograms and any other right holders in phonograms as determined in a Member's law. If on 15 April 1994 a Member has in force a system of equitable remuneration of right holders in respect of the rental of phonograms, it may maintain such system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of right holders.

56. *Id.* art. 14(5):

Broadcasting organizations must be provided with the right to prohibit unauthorized fixation, reproduction, rebroadcasting, and communication of television broadcasts.[57] The term of protection for these rights is set at a minimum of twenty years from the end of the first year of broadcast.[58]

C. *Trademark Protection Under TRIPs*

TRIPs provides both for the definition and registration of trademarks:

> Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, shall be eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use. Members may require, as a condition of registration, that signs be visually perceptible.[59]

A trademark may be denied registration on other grounds so long as they do not conflict with the Paris Convention.[60] One such ground of rejection may be failure to use the trademark, although the applicant must be given at least three years from filing to begin use.[61] A trademark registration may not be denied based on the nature of the goods or services to which the trademark is to be applied.[62]

---

5. The term of the protection available under this Agreement to performers and producers of phonograms shall last at least until the end of a period of fifty years computed from the end of the calendar year in which the fixation was made or the performance took place.

57. *Id.* art. 14(3):

3. Broadcasting organizations shall have the right to prohibit the following acts when undertaken without their authorization: the fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same. Where Members do not grant such rights to broadcasting organizations, they shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention (1971).

58. *Id.* art. 14(5).

59. *Id.* art. 15(1).

60. *Id.* art. 15(2).

61. *Id.* art. 15(3).

62. *Id.* art. 15(4).

Trademark publication is required either before or promptly after registration, but an opportunity to oppose another's published trademark is not required.[63]

While actual use is not required for filing a trademark application,[64] use may be required[65] prior to providing the owner with the following enforceable rights:

> [T]he exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed.[66]

If use is required to maintain a registration, the registration may not be cancelled unless nonuse has exceeded three years and there are no independent obstacles to use.[67] Use by another of a trademark can constitute "use" for maintaining the registration if the use is subject to the owner's control.[68]

On the other hand, a member may not encumber the use of a trademark by special requirements, such as use with another trademark, use in a special form, or use that is detrimental to the capability of the mark to distinguish a good or service.[69]

Article *6bis* of the Paris Convention allows for cancellation or opposition of trademarks that are likely to cause confusion with a well-known mark, if the marks are used on goods that are identical or similar.[70] TRIPs adopts Article *6bis* of the Paris Convention, but applies its protection to service marks[71] as well as trademarks, and extends its protection to non-

---

63. *Id.* art. 15(5).

64. *Id.*

65. *Id.* art. 16(1) ("The rights described above shall not . . . affect the possibility of Members making rights available on the basis of use").

66. *Id.*

67. *Id.* art. 19(1).

68. *Id.* art. 19(2).

69. *Id.* art. 20.

70. *See* Paris Convention, *supra* note 11, art. *6bis*: "The countries of the union undertake . . . to refuse or cancel the registration . . . of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark . . . to be well known . . . and used for identical or similar goods." Furthermore, Article *6bis* permits marks to be cancelled up to five years from their date of registration if they are an imitation of or likely to create confusion with a well-known mark that is in use or registered. *Id.*

71. TRIPs, *supra* note 3, art. 16(2) ("Article *6bis* of the Paris Convention (1967) shall

similar goods or services.[72]

Trademark registrations and renewals must be for a term of seven years or more, with no limit on the number of renewals.[73] Trademarks may be assigned with or without a transfer of the business associated with the trademark.[74] However, compulsory licensing of trademarks is prohibited.[75]

As with many other rights provided in TRIPs, the rights conferred by trademark may be limited; however, the limitations must take into account the legitimate interests of the trademark owner and those of third parties.[76]

D. *Other Intellectual Property Rights Included Within TRIPs*

There are numerous other intellectual property rights provided for within TRIPs. Such rights relate to geographical origins of goods,[77] industrial designs,[78] integrated circuit topographies,[79] and trade secrets,[80] as well as control of anti-competitive licensing practices.[81] Although not unimportant, these rights are beyond the limited scope of this article and are therefore not treated in-depth.

E. *Self-Enforcement Mechanisms*

Articles 64 and 68 of TRIPs adopt the WTO dispute resolution provisions.[82] This is a significant and important departure from other international intellectual property treaties, such as the Paris Convention and Berne Convention, that lacked any real enforcement mechanism. It is widely regarded that the dispute resolution procedures are an important and desirable feature of the TRIPs Agreement.[83] While a full analysis of the

---

apply . . . to services").

72. *Id.* art. 16(3). This article expressly applies Article 6*bis* of the Paris Convention to:

> goods or services which are not similar to those in respect of which a trademark is registered, provided that use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the registered trademark and provided that the interests of the owner of the registered trademark are likely to be damaged by such use.

73. *Id.* art. 18.
74. *Id.* art. 21.
75. *Id.*
76. *Id.* art. 17.
77. *See id.* arts. 22-24.
78. *See id.* arts. 25-26.
79. *See id.* arts. 35-38.
80. *See id.* art. 39.
81. *See id.* art. 40.
82. *See* WTO Agreement, Annex 2 and Annex 1A.
83. Michael K. Young, *Dispute Resolution in the Uruguay Round: Lawyers Triumph*

dispute resolution provisions themselves is beyond the scope of this article, the effectiveness of the dispute resolution provisions to induce compliance with TRIPs will be discussed.[84]

F. *Implementation Timetable*

TRIPs provides that members must comply with its provisions one year following the date of its entry into force.[85] Thus, in general, members should have been in compliance on January 1, 1996, one year from January 1, 1995 when TRIPs entered into force. However, there are exceptions for the dates with which developing countries must comply.

After the one year elapses, a developing Member State may delay implementation of TRIPs for four additional years (i.e., until January 1, 2000).[86] However, this exception does not affect the developing country's implementation of the general obligation concerning national treatment and the most-favored-nation provisions of TRIPs.[87]

If, on the date of general application (January 1, 2000), a developing country did not extend product patent protection to an area of technology required by TRIPs, that developing country may delay implementation of the product patent provisions of TRIPs for an additional five years (i.e., until January 1, 2005).[88] However, TRIPs provides a "mailbox" rule for pharmaceutical and agricultural chemical products. In the case of a member not making available patent product protection for pharmaceutical and agricultural chemical products, the member has the following obligations: (a) provide a means for applicants to file for patents to protect these products, (b) apply the criteria for patentability to those filed applications as if product protection existed on the date of filing of the application, (c) provide patent protection to those applications meeting the patentability criteria.[89] Step (a) must be implemented on the date the Uruguay Round enters into force (i.e., January 1, 1995);[90] steps (b) and (c) could presumably occur after the member's laws were brought into compliance (i.e., the date of "application" under Article 65), as long as deposited patent applications were given priority based upon their filing dates.[91]

Over Diplomats, 29 INT'L LAW. 389 (1995); Paul Edward Geller, *Intellectual Property in the Global Marketplace: Impact of TRIPS Dispute Settlement?*, 29 INT'L LAW. 99 (1995).

84. *See* discussion *infra* Parts III.B-C, IV.

85. TRIPs, *supra* note 3, art. 65(1).

86. *Id.* art. 65(3).

87. *Id.*

88. *See id.* art. 65(4).

89. *Id.* art. 70(8).

90. *Id.* art. 70(8)(a).

91. *Id.* art. 70(8)(b) states:

apply to these applications, as of the date of application of this Agreement, the

A "pipeline" rule with respect to product patents submitted to the "mailbox" is also established by TRIPs. If an entity has a patent and marketing approval in a member country, if a product patent is filed in another member's "mailbox," and if market approval in the other country is obtained, the entity obtains up to five years of exclusive marketing rights in the other country until either the marketed product is patented or a patent application on the marketed product is rejected by the other country.[92] Thus, a developing country may delay its implementation of TRIPs-compliant laws until January 1, 2000, and its implementation of TRIPs-compliant product patent laws until January 1, 2005.

WTO Member States that are in the process of transformation from a centrally-planned economy into a market, free-enterprise economy may also delay implementation of TRIPs. Those Member States that are undertaking structural reform of their intellectual property laws, and are facing special problems in preparation and implementation of intellectual property laws, may delay implementation of TRIPs for four additional years, subject to the general obligation to enforce the national treatment and the most-favored-nation provisions of TRIPs.[93]

A WTO Member State that is "least-developed" may delay implementation of TRIPs-compliant laws for up to ten years,[94] i.e., until January 1, 2005. However, even least-developed countries cannot delay implementation of the general obligation to enforce the national treatment and the most-favored-nation provisions of TRIPs. A least-developed country may request and obtain extensions of this ten-year period from the Council for TRIPs.[95]

It is clear that immediate compliance with TRIPs is not required for all members. Such leniency allows developing countries and least-developed countries an opportunity for slow change and growth prior to compliance. Countries undergoing a major economic change, as from communism to a free-market economy, are also provided with time to adapt to TRIPs. However, the transitions and progress towards compliance do undergo scrutiny, as the Council for TRIPs reviews the implementation of the TRIPs

---

criteria for patentability as laid down in this Agreement as if those criteria were being applied on the date of filing in that Member or, where priority is available and claimed, the priority date of the application . . . .

Consideration of patentability criteria on the date of filing presumably means that, as between two applicants having the same invention, the applicant who filed first would be granted the patent (in a first-to-file country), assuming all the other patentability criteria were met (such as novelty and inventive step/obviousness) as of the filing date.

92. *Id.* art. 70(9).

93. *Id.* art. 65(3).

94. *Id.* art. 66(1).

95. *Id.*

Agreement.[96]

III. NONCOMPLIANCE BY DEVELOPED MEMBER COUNTRIES

During the Uruguay Round, proposals by the developed countries focused on strong protection for intellectual property rights.[97] In view of this protectionist stance, it may be expected that developed countries would be most likely to comply with the TRIPs provisions. However, this is not necessarily the case.

A. *The European Union and Its Member States*

In *Re The Uruguay Round Treaties*,[98] the Court of Justice of the European Communities issued an opinion on the competence of the European Union to enter into the WTO Agreement, including TRIPs. The Court held that the Community and its Member States were jointly competent to include TRIPs.[99] Accordingly, on December 22, 1994, the Council of the European Union ratified the WTO Agreement, including TRIPs. Thus, while the Member States of the European Union are bound by their individual accession to the WTO Agreement, the European Union itself is also bound.

1. *The European Union's "Single Trademark"*

It is possible that a new regulation-based rule from the Council of the European Communities violates the trademark provisions of TRIPs. Specifically, in Regulation 2309/93,[100] the Council of the European Communities established a European Agency for the Evaluation of Medicinal Products (EMEA) and set forth procedures for the Commission of the European Union to centrally authorize marketing approval for certain human and veterinary medicinal products following a favorable scientific opinion by the EMEA. The centralized procedure is mandatory for medicinal products derived from biotechnology[101] and optional for medicinal products with novel

---

96. *See id.* art. 63(1) (providing that laws pertaining to intellectual property are to be published); *id.* art. 63(2) (providing that the Council for TRIPs shall be notified of the laws from ¶ 1); *id.* art. 71 (providing for review of TRIPs implementation by Council for TRIPs).

97. Braga, *supra* note 2, at 385-86.

98. [1995] 1 C.M.L.R. 205 (E.C.J. 1994).

99. *Id.* (holding: "It follows that the Community and its Member States are jointly competent to conclude TRIPs.").

100. Council Regulation 2309/93 of 22 July 1993 laying down Community procedures for the authorization and supervision of medicinal products for human and veterinary use and establishing a European Agency for the Evaluation of Medicinal Products, 1993 O.J. (L 214).

101. *See id.* Annex A.

characteristics or new active substances.[102]

The Commission of the European Union, in conjunction with the EMEA, is entrusted to "draw up detailed guidance on the form in which applications for authorization are presented."[103] A draft *Notice for Applicants,*[104] sets forth the current rules for obtaining marketing authorization for medicinal products for human use. The *Notice* states:

> The marketing authorisation includes, when available, the INN (International Non-Proprietary Name) and when branded a single invented name (brand name). In cases where companies wish to use a second brand name, then a second authorisation must be submitted. . . .
>
> It is important therefore, that applicants identify a brand name which would be valid throughout the Community when proposing to use the centralised procedure.
>
> For applications through the mutual recognition procedure, it is recommended that the same brand name for a given medicinal product should be used in all Member States. If a different brand name is to be used, it should be quoted in a covering letter from the applicant to the competent authority giving the justification for the different name.[105]

Accordingly, it is the current policy of the Commission and the EMEA to require the use of a single trademark throughout the Community as a condition for granting marketing authorization.[106] The single trademark requirement is vigorously opposed by the pharmaceutical industry.[107] Grounds for opposition are that the requirement is contrary to the directives concerning the EMEA, is contrary to European Union statutory law, is contrary to holdings of the Court of Justice of the European Communities, is contrary to the Community trademark regulations, is contrary to Council Directives, is highly impractical, and is violative of Article 20 of the TRIPs

---

102. *See id.* Annex B.

103. *Id.* art. 6(5) (medicinal product for human use); *id.* art. 28(5) (veterinary medicinal products).

104. D.G. III/5944/94, Dec. 1994 [hereinafter *Notice*].

105. *Id.* ch. 1, § 8.2.

106. While ch. 1, § 8.2 of the *Notice* allows for additional trademarks, it also requires that they be submitted in separate applications for authorization. This requires the payment of separate application fees and essentially defeats the purpose of centralized authorization.

107. Interview with Richard R. Saul, Jr., Deputy Vice President, International Division, Pharmaceutical Research and Manufacturers of America, in Washington, D.C. (Mar. 13, 1997).

agreement.[108]

The EMEA's initial reaction was that thus far, no applications have been rejected "for reasons of trademarks."[109] However, in response to additional pressure, the EMEA has released a *Working Paper*[110] that adopts the original *Notice* and responds to the arguments raised by the pharmaceutical industry. With respect to alleged violations of TRIPs, the *Working Paper* states the argument and response:

> *The requirement of a single trade mark is contrary to Article 20 of the TRIPS in that it imposes an unjustified restriction on a pharmaceutical company's ability to use the name of its choice.*
>
> This argument is manifestly unfounded. The principle of a single name does not affect the right of the holder of a community authorization to use the name of his choice provided that he chooses only one for the whole territory for which the authorization is valid; this principle has been embodied in Community law since 1965 and the situation is similar in practically all other countries, including the United States.[111]

However, the language of TRIPs, Article 20, states:

> The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings. . . .

Limiting applicants to a single trademark is obviously a "special requirement," as the applicant is prevented from distinguishing his goods from other goods on a country-by-country basis. Further, the translation of a single trademark into the varied languages of the European Union is a "special form" prohibited by Article 20 of TRIPs. Applicants seeking a

---

108. *Comments of the Pharmaceutical Research and Manufacturers of America Concerning Trademarks and the Centralized Procedure for Medicinal Products*, submitted to EMEA (1996); *see also* The Association of the British Pharmaceutical Industry, *The European Commission's Single Trade mark Policy Regarding Centralised marketing Authorisations for Medicinal Products*, submitted to EMEA (Position Paper, May, 1996).

109. Letter from Fernand Sauer, Executive Director, EMEA, to Dr. Trevor M. Jones, Director-General, The Association of the British Pharmaceutical Industry (June 20, 1996).

110. European Commission, *Single name for medicinal products authorized by the Community* (Working Paper, 1997).

111. *Id.* at 5-6.

favorable EMEA opinion cannot avoid problems inherent in translating their mark. Some such problems are caused by the nature of the mark itself. For example, "NOVA" for a car would not be an acceptable mark in Spain, where "NOVA" means "doesn't run" or "goes nowhere." Also, the application of a single trademark for pharmaceuticals is discriminatory to that industry and may constitute an impermissible "special requirement" on this basis.

It is clear that the "single trademark" proposal has many problems, only one of which is that it may violate TRIPs Article 20. While it may be difficult for a GATT panel to find a violation of a broad and general prohibitory provision such as that found in Article 20, it is clear that a challenge does have a basis under Article 20's express language. Additionally, the nature of the Commission's and EMEA's single trademark proposal allows for a challenge on other grounds. For example, if the proposal violates European Community law (as is alleged by the pharmaceutical industry), a case may be brought in the courts of Europe. In view of the proposal's significant problems, it is likely that it will be challenged on other grounds prior to resort to the TRIPs dispute resolution procedures. Thus, it is not currently thought that the "single trademark" proposal, although serious and significant, should cause an immediate concern over its implications on the future of TRIPs.

2. *Ireland's Compulsory Licensing*

Although Ireland's patent law enacted in 1992[112] repealed the prior 1964 Patent Act,[113] transitional provisions allowed certain provisions of the 1964 Act to survive.[114] In particular, certain applications for compulsory licenses (including applications under Section 42 of the 1964 Act for food, medical, or surgical products)[115] pending at the commencement of the 1992

---

112. Patents Act, No. 1 (1992) [hereinafter Irish Patent Act of 1992].

113. Patents Act, No. 12 (1964) [hereinafter Irish Patent Act of 1964].

114. Irish Patent Act of 1992, *supra* note 112, § 5 (repealing Irish Patent Act of 1964, *supra* note 113, subject to the provisions of the First Schedule).

115. Irish Patent Act of 1964, *supra* note 113, § 42. Section 42 states:

> (1) Without prejudice to the foregoing provisions of this Act, where a patent is in force in respect of —
>
> (a) a substance capable of being used as a food or medicine or in the production of food or medicine; or
>
> (b) a process for producing such a substance as aforesaid; or
>
> (c) any invention capable of being used as, or as part of a medical, surgical or other remedial device,
>
> the Controller shall, on application made to him by any person interested, order the grant to the applicant of a licence under the patent on such terms as he thinks fit, unless it appears to him that, having regard to the desirability of

Act were to be decided under the prior 1964 Act.[116]

In *Allen & Hanburys, Ltd. v. Controller of Patents*,[117] the Irish High Court considered the effect of TRIPs on the transitional use of Section 42 to issue compulsory licenses for food, medical, or surgical products. In November 1991 and February 1992, Clonmel filed applications to obtain a compulsory license under Section 42 of the 1964 Act for products whose patent rights were owned by Glaxo Group, Ltd. and Allen & Hanburys, Ltd.[118] The Controller granted the license in June-July 1995 and held that TRIPs had no application in the internal legal system of the State as it had not been enacted into domestic law.[119] This was despite Section 46(3) of the 1964 Patent Act,[120] which limited application of Section 42 where Section 42 would be contrary to any treaties or conventions.

Article 27(1) of TRIPs provides that: "Subject to [exceptions not relevant here], patents shall be available . . . and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced."

Article 70(6) of TRIPs sets forth an exception to Article 27(1):

> Members shall not be required to apply . . . the requirement in paragraph 1 of Article 27 that patent rights shall be enjoyable without discrimination as to the field of technology, to use without the authorization of the right holder where authorization for such use was granted by the government before the date this Agreement became known.

On appeal, the Irish High Court held that TRIPs did fall within Section 46(3) of the 1964 Act, in that TRIPs was a "treaty, convention, arrangement or engagement applying to the State." As such, the compulsory license provisions of Section 43 of the 1964 Act were subject to provisions of any treaty that were at variance, including TRIPs.

> encouraging inventors and the growth and development of industry and to such other matters as he considers relevant, there are good reasons for refusing the application.

Id.

116. Irish Patent Act of 1992, *supra* note 112, First Schedule, provision 13 (stating that applications under section 42 of the Irish Patent Act of 1964, which were pending as of the commencement of the Irish Patent Act of 1992, should be decided under the earlier act).

117. [1997] 1 I.R. (Ir. H. Ct.) (pagination unavailable).

118. *See id.*

119. *Id.* The license was ordered on June 2, 1995 and supported by a written grounds of decision on July 3, 1995.

120. Irish Patent Act of 1964, *supra* note 113, § 46(3) provides:

> No order shall be made in pursuance of any application under sections 39 to 43 of this Act which would be at variance with any treaty, convention, arrangement or engagement applying to the State and any convention country.

In analyzing whether the exception to Article 27(1) set forth in Article 70(6) would apply, the High Court did not define the "date the Agreement became known," but held that the license grant in July 1995 was after both possible dates, December 20, 1991 (the date the Dunkel Draft of TRIPs was published) and December 15, 1993 (the date the final version of TRIPs was agreed upon). The grant of the license was reversed as inconsistent with TRIPs Article 27(1).

Additional compulsory licensing provisions in the Irish 1992 Patent Act may violate TRIPs Article 27. The Irish patent law still allows for compulsory licensing in numerous circumstances where the invention is not "worked" in Ireland. While *Allen & Hanburys* was decided on the grounds that Section 43 of the 1964 Act provided impermissible discrimination as to the field of technology (food and medical products and processes), there is no indication that an Irish court would hold that it is acceptable to discriminate on the grounds of whether products are imported or locally produced. Since both prohibitions are stated in TRIPs Article 27(1), it is possible that the Irish compulsory licensing provisions may not withstand court challenge.

Accordingly, while the courts of Ireland have cured one violation of TRIPs, others may exist along with a consequent need for reform. Because the Irish courts have demonstrated a willingness to reform law inconsistent with TRIPs, one effect of the violations in Ireland may be to strengthen TRIPs rather than weaken it. Other countries in Europe may follow the Irish example and strike their own inconsistent laws.

3. *England's Compulsory Licensing*

Similarly, the patent law of the United Kingdom provides that a compulsory license may be obtained if the invention is not worked in the U.K.[121] This law is similar to Section 42 that was struck down by the Irish High Court. However, in *Parke Davis & Co. v. Comptroller of Patents, Designs and Trademarks*,[122] the British House of Lords, prior to the *Allen & Hanburys* decision, sustained a compulsory license under a subsection (45(3)) almost identical to that found inconsistent with TRIPs in *Allen & Hanburys*. The Irish High Court, in *Allen & Hanburys*, cited the House of Lords decision in *Parke Davis* with the following commentary:

> The plaintiffs submitted . . . that the terms of international agreements with convention countries should be complied with by the Controller when granting licences under the 1964 Act (see

121. Patents Act of 1977, ch. 37 (Eng.).
122. [1954] AC 321 (H.L.).

> *Parke Davis & Co. v. Comptroller of Patents, Designs and Trademarks* [1954] AC 321) where the House of Lords held that an almost identical subsection (section 45(3) of the English Patents Act 1949, from which section 46(3) derives its origin) had no application because the grant of a compulsory licence for food or medicine was not forbidden by the relevant convention. *It seems that if the relevant convention had forbidden the grant, then it could not have been made.*[123]

The position of the Government of the U.K. is that Section 53(5) of the Patent Act makes the compulsory license provisions in compliance with TRIPs.[124] Section 53(5) provides that no compulsory license shall be granted if to do so "would be at variance with any treaty or international convention to which the United Kingdom is a party."[125] However, "for reasons of transparency," amending legislation was drafted and is currently being considered. The amending legislation would subject compulsory licenses to new Sections 47B through 47G if the proprietor of the patent is a national of, or is domiciled or has a real and effective industrial or commercial establishment in, a country that is a WTO member.[126]

Now that a relevant convention (TRIPs) forbids the grant, it appears that a solid legal argument against the present compulsory license provisions in the U.K. laws exists, at least in the view of the Irish High Court. Accordingly, the U.K. should and intends to amend its law to ensure TRIPs compliance. The argument that Section 53(5) provides TRIPs compliance is self-defeating. This argument is essentially an argument that the law is invalid, since that is when Section 53(5) has force. Despite the "reasons of transparency," the amending legislation is necessary.

The U.K. provides an excellent example of a country that is amending its law for clear TRIPs consistency despite the fact that it considers an interpretation of the law to be compliant with TRIPs. In the U.K. and other countries, TRIPs has overcome mere lip-service; it has instigated a real change in the law of a Member State. Accordingly, the changes in the U.K. reflect upon the success of TRIPs, rather than a failure.

B. *The United States, Section 102(e) and 337*

To bring its laws into compliance with TRIPs, the United States

---

123. Allen & Hanburys, Ltd. v. Controller of Patents, [1997] 1 I.R. (Ir. H. Ct.) (emphasis added).

124. Press Release, "Changes to the Patents and Trade Marks Acts: TRIPS," The Patent Office (contact: Phil Thorpe, 1997).

125. Patents Act of 1977, ch. 37, § 53(5) (Eng.).

126. Amendments to the Patents Act of 1977, § 47A (proposed).

Congress passed the Uruguay Round Agreements Act (URAA).[127] The URAA amended, along with other laws, the United States copyright law,[128] trademark law,[129] and patent law.[130]

As previously mentioned, TRIPs adopts numerous provisions of the Berne Convention.[131] While the United States copyright law is in general compliance with Berne, it is not clear whether the U.S. fully complies with Berne's "moral rights" provisions in Article *6bis*.[132] It is noted, however, that while TRIPs requires compliance with Berne Articles 1 through 21, it expressly excepts compliance with the moral rights provisions of Berne Article *6bis*.[133] Thus, while the U.S. may be out of compliance with Berne (a topic beyond the scope of this article), its recently amended copyright laws are generally inconsistent with TRIPs.

Even though the U.S. patent laws were amended by the URAA, the amendments left 35 U.S.C. § 102(e)[134] in place as interpreted in the two *In re Hilmer*[135] decisions. In these decisions, the court held that a U.S. patent was available for prior art purposes, i.e. "filed" as of its U.S. filing date, but a U.S. patent based on a foreign Paris Convention application was not available for prior art purposes, i.e. was not "filed" as of its earlier international (Paris Convention) filing date.[136]

This interpretation of 35 U.S.C. § 102(e) has been criticized as

---

127. 19 U.S.C. § 3501, *et. seq* (1994) [hereinafter URAA].

128. *See id.* Title V, Subtitle A, §§ 511-514.

129. *See id.* Title V, Subtitle B, §§ 521-523.

130. *See id.* Title V, Subtitle C, §§ 531-534.

131. *See* discussion *supra* Part II.B.

132. Berne, *supra* note 12, art. *6bis* provides:

> the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

However, the United States Copyright Act only recognizes some of these rights and limits their application to works of "visual art," defined as paintings, drawings, prints, sculptures, and still photographic images which are less than 200 in number. *See* Copyright Act of 1976 §§ 101 (definition of "work of visual art") and 106A (setting forth moral rights of attribution and integrity).

133. TRIPs, *supra* note 3, art. 9(1) (providing: "Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of [the Berne] Convention or of the rights derived therefrom").

134. 35 U.S.C. § 102 (1975) states:

> A person shall be entitled to a patent unless —
>
> > (e) the invention was described in a patent granted on an application for patent by another *filed in the United States* before the invention thereof by the applicant for patent . . . . [emphasis added.]

135. In re Hilmer, 359 F.2d 859 (C.C.P.A. 1966); In re Hilmer, 424 F.2d 1108 (C.C.P.A. 1970).

136. *See* cases cited *supra* note 135.

incorrect[137] and as violating national treatment[138] in that equal treatment, for prior art purposes, is not given to U.S. patents based on foreign-filed patents. Despite the scholarly controversy, the United States has thus far successfully maintained that 35 U.S.C. § 102(e) is consistent with its obligations of national treatment under the Paris Convention and GATT. Barring some further event or the raising of the current level of scrutiny, it is likely that § 102(e) will continue to walk the border of compliance and noncompliance with the TRIPs national treatment requirements.

One sensitive area of law meriting close scrutiny under TRIPs is Section 337 of the Tariff Act of 1930[139] (Section 337). Prior to the URAA, Section 337 authorized the U.S. International Trade Commission (I.T.C.) to exclude goods from entry into the United States if the goods are found to infringe on U.S. intellectual property rights or otherwise violate the statute.[140] In practice, U.S. companies ("complainants" under Section 337) filed a complaint at the United States I.T.C. against a foreign company (a "respondent") accused of infringing the U.S. company's intellectual property rights. The I.T.C. then instituted an investigation, if warranted. The investigations were effectively the equivalent of full-blown federal court litigation. I.T.C. Section 337 actions were characterized by strict and short time-limits. Counterclaims were not permitted, and the I.T.C. had power to issue general exclusion orders that would exclude the importation of products manufactured by nonparties to the I.T.C. investigation. Complainants had a choice as to whether to bring a federal district court action or an I.T.C. investigation ("dual-path" litigation) or both ("parallel" litigation). While Customs automatically enforced a final determination by the I.T.C., a separate action had to be taken to enforce injunctions issued by the federal courts.

In 1987, the European Economic Community requested GATT dispute resolution with the United States concerning the GATT-illegality of Section 337 proceedings.[141] After unsuccessful consultations, a GATT panel was

---

137. *See, e.g.*, Gordon R. Lindeen, *In re Hilmer and the Paris Convention: An Interpretation of the Right of Foreign Priority for Patents of Invention*, 18 CAL. W. INT'L L.J. 335 (1988); George R. Gansser, *Violations of the Paris Convention for the Protection of Industrial Property*, 11 INT'L REV. INDUS. PROP. & COPYRIGHT L. 1, 22-23 (1980). *But see* Harold Wegner & Jochen Pagenberg, *Paris Convention Priority: A Unique American Viewpoint Denying "The Same Effect" to the Foreign Filing*, 5 INT'L REV. INDUS. PROP. & COPYRIGHT L. 361 (1974).

138. *See* Donald S. Chisum, *Foreign Activity: Its Effect on Patentability Under United States Law*, 11 INT'L REV. INDUS. PROP. & COPYRIGHT L. 26 (1980); Lindeen, *supra* note 137; Wegner & Pagenberg, *supra* note 137.

139. 19 U.S.C. § 1337 (1930).

140. *See id.*

141. *See* GATT Panel Report on United States - Section 337 of The Tariff Act of 1990, L/6439 - 36S/345, 1989 GATTPD LEXIS 2 (Nov. 7, 1989) (unpublished) [hereinafter GATT

formed that ultimately issued a decision holding that the United States did not afford national treatment to foreigners under Section 337.[142] To support its holding, the panel cited the following: (a) complainants had a choice of forum to challenge imported products, but no corresponding choice was available to challenge products of U.S. origin; (b) the tight and fixed time-limits under Section 337 for imported products were incomparable to time-limits for challenging U.S. origin products; (c) the inability to raise counterclaims in a Section 337 proceeding; (d) general exclusion orders available under Section 337 proceedings were unavailable against products of U.S. origin; (e) automatic enforcement of exclusion orders by Customs was available under Section 337 actions, but unavailable for federal court actions; (f) the possibility of dual-path litigation for importers, but not for producers of U.S. origin goods.[143]

The United States I.T.C. and federal courts essentially ignored the GATT Panel Report[144] and waited for the adoption of the URAA to attempt to place Section 337 into compliance with GATT and TRIPs.[145] The URAA generally amended Section 337 to eliminate the formerly strict time-limits, to permit counterclaims, to limit exclusion orders, and to end parallel litigation. However, the amendments appear to be superficial at best. In point of fact, the previous time-limits are being used in new Section 337 investigations despite the URAA amendments to the contrary.[146] While

---

Panel Report].

142. *Id.* at *133-34.

143. *Id.*

144. *See In the Matter of Certain Aramid Fiber Honeycomb*, 1990 ITC LEXIS 56, at *17 (U.S.I.T.C. 1990):

> The administrative law judge recognizes that the General Agreement on Tariffs and Trade (GATT) has the status of valid law in the United States because it was accepted by the President of the United States pursuant to the Reciprocal Trade Agreements Act. However the GATT can be superseded by subsequent federal law passed in the United States because, having never been ratified by Congress, it does not enjoy the status of a treaty which takes precedence over federal laws.

See also Suramerica de Aleaciones Laminadas v. United States, 966 F.2d 660, 668 (Fed. Cir. 1992) (holding "[t]he GATT does not trump domestic legislation").

145. *See* URAA Title III, Subtitle C, § 321 (amending Section 337).

146. *See In the Matter of Certain Monolithic Microwave Integrated Circuit Downconverters*, 337-TA-384, 1996 ITC LEXIS 144 (U.S.I.T.C. Mar. 28, 1996) (Order No. 3: Setting Target Date of January 31, 1997). In this case the Administrative Law Judge stated:

> Congress has made clear its intent that the Commission continue its practice of expeditiously completing section 337 investigations and the Commission has indicated that most investigations will be concluded within the traditional time-frame of 12 months or less.

The ALJ also quoted the Senate Joint Committee Report in the legislative history to the URAA:

counterclaims are permitted, they are removed to U.S. district court.[147] And while exclusion orders are limited, they are limited consonant with past I.T.C. practice.[148] Even though parallel litigation in the federal courts and the I.T.C. is no longer permitted, the federal court action is merely stayed pending resolution of the I.T.C. investigation, thus maintaining the existence of dual-path litigation.[149] Furthermore, nothing has been done to the prior provisions concerning choice of forum or automatic enforcement of I.T.C. exclusion orders by Customs.

The United States adopted wholesale revisions to its laws in the URAA in an attempt to comply with TRIPs. The fact that this compliance is imperfect should not detract from the success at the more general level, that of stimulating an international adherence to TRIPs. As with the U.K., the U.S. is an example of a country moving towards compliance. Because the violations examined herein do not appear to be overly significant barriers to trade, the U.S. is an example of TRIPs success in adopting a scheme of compliant legislation. However, the U.S. is by no means in perfect compliance.

C. *Japan's Copyright Law*

TRIPs requires that "the provisions of Article 18 of the Berne Convention (1971) shall also apply, mutatis mutandis, to the rights of performers and producers of phonograms in phonograms."[150] Article 18 of the Berne convention, entitled "Retroactive Effect of the Convention," states in paragraph 1: "This Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection."[151]

While Japan's copyright law was amended in 1971 to protect sound recordings, it does so only prospectively.[152] Therefore, Japan does not

---

> Although the fixed deadlines for the completion of section 337 investigations have been eliminated, the Committee expects that, given its experience in administering the law under the deadlines in current law, the ITC will nonetheless normally complete its investigations in approximately the same amount of time as is currently the practice.

Id.

147. URAA § 321(a)(2)(B).

148. *Compare* URAA § 321(a)(5) *with Certain Airless Paint Spray Pumps and Components Thereof*, 337-TA-90 (U.S.I.T.C. Pub. No. 1199, November 1981).

149. URAA § 321(b) (adding a new provision to Title 28 of the U.S. Code, 28 U.S.C. § 1659).

150. TRIPs, *supra* note 3, art. 14(6).

151. Berne, *supra* note 12, art. 18.

152. *See* Copyright Law of Japan (1971), *translated in* Copyright Laws and Treaties of the World.

provide the retroactive protection stated in Berne Article 18, and adopted by TRIPs Article 14(6).

Accordingly, the United States initiated formal dispute settlement proceedings against Japan, and in fact, successfully resolved the dispute:

> On February 14, 1996, the United States initiated WTO dispute settlement proceedings against Japan and several rounds of formal and informal consultations took place over the course of 1996. Based on the Government of Japan's promulgation on December 26, 1996, of amendments providing U.S. sound recordings retroactive protection, the United States and Japan notified the WTO that a mutually satisfactory solution had been reached, thus terminating the dispute settlement proceeding.[153]

While the proposed legislation has yet to be implemented, it is clear that Japan has made an affirmative obligation to comply with TRIPs. Japan's actions are an excellent example of the success obtainable by the GATT dispute resolution procedure adopted by TRIPs.

IV. DEVELOPING COUNTRIES - INDIA'S MISSING "MAILBOX"

During the Uruguay Round negotiations, developing countries disfavored a strong application of intellectual property rights in scope and enforcement.[154] In fact, at this time, developing countries need not comply with virtually any of the substantive requirements of TRIPs. As previously discussed, Article 65(2) of TRIPs allocates developing countries four additional years to bring their laws into TRIPs compliance (i.e., January 1, 2000). With respect to extending product patent protection to an area of technology not protectable in a developing country on the date of application of TRIPs for that member (January 1, 2000), TRIPs Article 65(4) states that product patent protection for that area of technology may be delayed five additional years (i.e., until January 1, 2005). However, as previously discussed, Article 70(8)(a) states that a means for filing (i.e., a "mailbox") these patent applications must be provided on the date that TRIPs enters into force (i.e., January 1, 1995).

India is a developing country that has yet to implement the "mailbox" rule of Article 70(8)(a). In response to pressure by the United States Trade Representative, India promised to amend its laws:

---

153. Press Release, "USTR-Designate Barshefsky Announces Resolution of WTO Dispute With Japan on Sound Recordings," Office of the United States Trade Representative (Jan. 24, 1997).

154. Braga, *supra* note 2, at 385-86.

> The Indian Government has announced its intention to fully conform to the IPR related requirements of the Uruguay Round as a first step. The Rao Government promulgated in late 1994 a temporary ordinance and introduced in early 1995 patent legislation consistent with India's TRIPs obligations relating to the "mail box" provisions. The patents bill failed to make passage in the upper house of Parliament in 1995, leaving India in violation of this TRIPs provision since mid-1995 when the patent ordinance expired.[155]

While India has affirmed its intent to pass legislation implementing its TRIPs obligations,[156] it has yet to do so. Accordingly, the U.S., on July 2, 1996, formally requested consultations with the Government of India under the provision of the WTO Dispute Settlement Understanding.[157]

Consultations between India and the U.S. were unsuccessful, and a panel was formed by the WTO Dispute Settlement Body to hear the dispute. On September 5, 1997, the panel's report was issued.[158]

Even though the temporary ordinance had expired, India urged that it had a "mailbox" system in place which complied with TRIPs Article 70(8). India argued that patent applications for pharmaceutical and agricultural products were being filed and examination deferred (for "mailbox" purposes) under the existing patent act, despite the fact that the provisions of the existing act dictated that these applications could not be patented, and despite the fact that the existing act made no provision for setting aside applications drawn to pharmaceutical or agricultural product patent applications.[159] Furthermore, India had not published the fact that "mailbox" applications were being accepted as required by Article 63(1),[160] nor had India notified the Council for TRIPs as required by Article 63(2).[161] Although India had not implemented a system for complying with the "pipeline" provisions of

---

155. 1996 National Trade Estimate, India, Office of the United States Trade Representative (1996).

156. "Special 301" on Intellectual Property Rights and Title VII Decisions, Office of the United States Trade Representative (1996).

157. *See* Report to Congress on Section 301 Developments, Office of the United States Trade Representative (1996).

158. WTO Panel Report on India - Patent Protection for Pharmaceutical and Agricultural Chemical Products, Sept. 5, 1997, *available in* 1997 WL 556224 [hereinafter Panel Report].

159. *Id.* at *7.

160. TRIPs, *supra* note 3, art. 63(1) (stating that a Member shall publish laws, regulations, final judicial decisions and administrative rulings pertaining to the subject matter of TRIPs).

161. TRIPs, *supra* note 3, art. 63(2) (setting forth the requirement to notify the Council for TRIPs of laws and regulations pertaining to the subject matter of TRIPs).

TRIPs Article 70(9), India argued, in part, that no violation of TRIPs existed because no applications for "pipeline" protection had yet been filed.[162]

The panel found that India violated the "mailbox" provisions of TRIPs Article 70(8):

> [O]ur view is that Article 70.8(a) requires the Members in question to establish a means that not only appropriately allows for the entitlement to file mailbox applications and the allocation of filing and priority dates to them, but also provides a sound legal basis to preserve novelty and priority as of those dates, so as to eliminate any reasonable doubts regarding whether mailbox applications and eventual patents based on them could be rejected or invalidated because, at the filing or priority date, the matter for which protection was sought was unpatentable in the country in question. . . .[163]

> In consideration of the above, we find that the lack of legal security in the operation of the mailbox system in India is such that the system cannot adequately achieve the object and purpose of Article 70.8 and protect legitimate expectations contained therein for inventors of pharmaceutical and agricultural chemical products.[164]

With respect to the publication and notification provisions of TRIPs Article 63, the panel ruled against India on both issues:

> India claims that the existence of the mailbox system was recognized in a written answer from the Government to a question in Parliament. However, such a way of conveying information cannot be regarded as a sufficient means of publicity under Article 63.1 of the TRIPS Agreement. India has not complied with this obligation. . . .[165]

With respect to its notification obligations under Article 63(2), it is evident that India did not notify the Council for TRIPs of the legal basis of the current system for the handling of "mailbox" applications after the expiry of the Patents (Amendment) Ordinance 1994.

---

162. Panel Report, *supra* note 158, at *25-26.
163. *Id.* at *52.
164. *Id.* at *55.
165. *Id.* at *58 (note omitted).

To address the alleged violation of the "pipeline" provisions of TRIPs Article 70(9), the panel formulated the following question:

> (a) Is India in breach of the TRIPs Agreement if, at the appropriate time, its executive authorities do not have the legal authority to grant exclusive marketing rights, even if the grant of such rights has not yet been refused to an eligible product?[166]

The panel answered in the affirmative[167] and stated: "under Article 70.9 there must be a mechanism ready for the grant of exclusive marketing rights at any time subsequent to the date of entry into force of the WTO Agreement."[168]

The panel recommended that the WTO Dispute Settlement Body request India to bring its transitional regime for patent protection of pharmaceutical and agricultural chemical products into conformity with its obligations under the TRIPs Agreement.[169]

The "mailbox" rule is not important in and of itself, but is important because it provides the basis for priority of invention, in view of prior art and in view of subsequently filed applications when the laws of the developing country are brought into compliance with TRIPs. It is also the basis for the "pipeline" provisions of Article 70(9), which provide for five years of marketing exclusivity if a patent is filed in the mailbox (the patent is in the "pipeline"), if marketing approval is obtained and another patent is issued abroad. Because India currently lacks pharmaceutical patent protection, the mailbox rule is of paramount importance to drug and chemical companies doing business in India.

The mailbox rule is not difficult to implement. It simply requires that an address be provided to which patent applications can be mailed or deposited. According to the GATT Panel, India must also implement the more burdensome "pipeline" provisions as well.

In view of the general hostility to intellectual property laws by developing countries, it is not a surprise to learn that they are slow in

---

166. *Id.* at *59.

167. *Id.* stating:

> In our view, the answer to question (a) is yes for the following reasons. Most of the provisions in the WTO Agreement aim to prevent governments from taking measures that might be harmful to trade and, therefore, concern the existence of legislation requiring governments to act in a way that is inconsistent with the obligations under the WTO Agreement. Thus, if a Member has legislation mandating the executive to act in such a way, it is in breach of its obligations even if that particular legislation has not yet been applied.

168. *Id.* at *61.

169. *Id.* at *64.

enacting TRIPs compliant legislation. However, it is too early to conclude that TRIPs has failed until the implementation deadlines arrive in 2005. For now it can be said that a full implementation of TRIPs is gingerly being considered by the developing Member States, as should be expected. India's experience before the GATT Panel should induce compliance by other developing countries.

V. COMPARISONS AND OVERALL ASSESSMENT

While TRIPs has not been uniformly adopted, it is clear that developed WTO Member States are attempting to assess its provisions and adopt compliant legislation. This is exemplified by the United Kingdom's currently proposed amendment to its patent law compulsory licensing scheme. Other Member States, such as Ireland, are striking down TRIPs inconsistent laws. The most stubborn offenders, such as the United States and Japan, have changed, or are in the process of changing, the offending laws after being subject to the GATT/TRIPs dispute resolution process.

While developing Member States, such as India, have demonstrated a lack of enthusiasm for TRIPs, it is likely that they will eventually become compliant by virtue of international pressure and the GATT/TRIPs dispute resolution process. The developing members have been uncertain that high levels of protection are in their best interest, as exemplified by India's historical treatment of pharmaceuticals.

Before the TRIPs Agreement, developing Member States, such as India, "had deliberately taken the pharmaceutical industry out of its patent system and built a tariff wall to protect it."[170] In India, "the result was that 'Indian manufacturers of bulk drugs and formulations not only dominate the Indian market but are among the most fiercely competitive in the world,' especially with regard to the production of generic drugs."[171] At the same time, Indian investment in pharmaceutical research and development was extremely low, and local firms contributed nothing to the development of new drugs.[172]

Some scholars expect that TRIPs will cause countries like India to develop a vigorous and thriving research-and-development-based drug sector focusing on diseases of local importance, which will rival those of developed countries.[173] Others point to the lackluster performance of the

---

170. Reichman, *supra* note 4, at 379.

171. *Id.* (citation omitted).

172. *Id.*

173. *Id.* at 379-80 (citing Martin J. Adelman & Sonia Baldia, *Prospects and Limits of the Patent Provision in the TRIPS Agreement: The Case of India*, 29 VAND. J. TRANSNAT'L L. 507, 530 (1996). *See also* Carlos A. Primo-Braga & Carsten Fink, The Economic Justification for the Grant of Intellectual Property Rights: Patterns of Convergence and

pharmaceutical industry in Italy, which was well positioned prior to the introduction of pharmaceutical product patent protection, as an example of how TRIPs will hurt the pharmaceutical industry in developing countries.[174]

It is uncertain whether TRIPs will actually help or hinder the economies of developing Member States. TRIPs sets forth comprehensive modifications to the administration and law of Member States, including the developing Member States. In recognition of the problems faced by developing Member States, TRIPs states that developed Member States shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favor of developing and least-developed Member States.[175]

For similar reasons, the Council for TRIPs entered into, with the World Intellectual Property Organization (WIPO), an agreement on cooperation between WIPO and WTO. The objectives of the TRIPs Agreement are essentially the same as those of WIPO: Adequate and effective protection of intellectual property.[176] As explicitly set out in the Preamble to the TRIPs Agreement, WTO aims to establish a mutually supportive relationship with WIPO.[177] It is also to be noted that TRIPs is not inflexible: A mechanism exists to allow least-developed countries to obtain further extensions to fully implement TRIPs as their needs dictate.[178]

For now it is enough to say that developing Member States are obligated at least to comply with the "mailbox" provisions of TRIPs. However, developing Member States should receive assistance from WIPO and from developed Member States in view of the international awareness that protection of intellectual property does not come cheap.

VI. CONCLUSION

Thus far, TRIPs has achieved its goal: The modification of existing laws of Member States to its minimum levels of protection. There is optimism that Member States that deviate from the proper TRIPs minima will eventually comply, as the TRIPs dispute resolution mechanisms, as well as other national and international mechanisms, have proven successful at coercing compliance. While developing countries could be hurt the most by

---

Conflict, Address Before the Symposium on Public Policy and Global Technological Integration (Oct. 1995), *in* 72 CHI-KENT L. REV. 439 (1996).

174. *See* A. Samuel Oddi, *TRIPS - Natural Rights and a "Polite Form of Imperialism,"* 29 VAND. J. TRANSNAT'L L. 415 (1996); F. M. Scherer & Sandy Weisburst, *Economic Effects of Strengthening Pharmaceutical Patent Protection in Italy*, 26 IIC 1009 (1995).

175. TRIPs, *supra* note 3, art. 67.

176. Reichman, *supra* note 4, at 410.

177. *See id.*

178. TRIPs, *supra* note 3, art. 66(1).

TRIPs, it is hoped that developed countries will provide assistance to achieve, in the end, what everyone wants: A workable system of global trading.

THE RUSSIAN COURTS AND THE RUSSIAN CONSTITUTION

*Peter B. Maggs**

I. INTRODUCTION

It is a true honor to have been asked to give the Third John N. Hazard Lecture. I had the great pleasure of working with John Hazard during the last quarter-century of his long and illustrious career. In particular, I collaborated with him on the production of several of the later editions of his casebook on the Soviet legal system. In preparation for this lecture I looked in my law school's library and found a copy of a precursor of this casebook, John Hazard's mimeographed materials on Soviet law, dated December 1947. I looked in it for court decisions involving the Constitution. I only found one.

Some of you who studied with John Hazard may recall the second case in these materials, a case that also appeared in his casebook,[1] the case of K, apparently an outstanding Red Army sergeant, who made "politically incorrect"—I quote the phrase from John Hazard's translation—statements, including an offensive evaluation of the Constitution of the USSR. The sergeant was acquitted of anti-Soviet agitation and propaganda, and the USSR Supreme Court upheld the acquittal, finding that the sergeant's statements were not aimed against Soviet authority, but were directed toward the strengthening of military discipline. The placement of this decision at the very start—on page 3 of his materials—reflects John Hazard's practice of looking at the positive as well as the negative elements in the Soviet legal system. There are many ways courts can protect individual rights; judicial review of statutes for constitutionality is only one of them. Strict construction of criminal statutes, as in the case of K, is another. In this talk, I would like to trace the development of some of these positive aspects of the Soviet judicial system into the way courts apply the Constitution today.

A conscious choice made by John Hazard during his teaching was to pay a great deal of attention to Russian court cases. His academic colleagues in Europe and Russia often criticized him for this, pointing out that the Soviet Union had nothing like the Anglo-American system of precedent. However, John always argued that only by seeing a large number of concrete applications of a legal system could one understand its spirit. I fully agree with him, and so I have organized this lecture around court decisions interpreting and applying the Russian Constitution. I would like to start with a little history

---

* Corman Professor of Law, University of Illinois at Urbana-Champaign College of Law. The following is an edited version of remarks Professor Maggs delivered in the Spring of 1997 to the Association of the Bar in the City of New York.

1. JOHN N. HAZARD & ISAAC SHAPIRO, THE SOVIET LEGAL SYSTEM 73 (1962).

and then discuss the explosion in constitutional adjudication of the past few years.

II. THE RUSSIAN SUPREME COURT IN THE 1920S

In 1928, a Soviet legal scholar named Vsevolod Kornilevich Diablo published a book entitled *Judicial Protection of the Constitutions in Bourgeois States and the USSR*.[2] The book has a good account of judicial review for constitutionality in the United States and other Western countries, as well as an analysis of the role of the Soviet Supreme Court in constitutional adjudication. In the 1920s, the Soviet Supreme Court engaged in two types of constitutional decision-making. First, it could recommend to the Soviet executive—the Presidium of the Central Executive Committee—that the Presidium annul unconstitutional orders and decrees of central government agencies and ministries. Second, on request of the Presidium, it could provide advice on the constitutionality of legislation of the highest bodies of the Union Republics. During the period up to 1928, the Supreme Court rendered eighty-six opinions about the legality of acts of government agencies and eleven about republic legislation.[3] Diablo urged expansion of judicial review, but this was not to be. When Stalin came to power in the late 1920s, judicial review by the Supreme Court stopped—Stalin had more arbitrary ways of determining who was violating his policies and more direct ways of dealing with the violators. The Supreme Court shifted to a new role, with most of its caseload being the review of criminal convictions. In this role, it did provide some protection of rights for those lucky ones, like Sergeant K, who had the good fortune to go through the regular judicial system rather than through the Special Boards of the secret police.

III. SCHOLARS SUPPORT JUDICIAL REVIEW

With the thaw that followed Stalin's death, Russian scholars started recalling the experience with judicial review in the 1920s and writing very positive things about it.[4] The fact that judicial review was a policy in effect while Lenin was alive made the area relatively safe for discussion.

---

2. VSEVOLOD KORNILEVICH DIABLO, SUDEBNAIA OKHRANA KONSTITUTSII V BURZHUAZNYKH GOSUDARTSVAKH I V SOIUZE SSR (1928).

3. Peter H. Solomon, Jr., *The U.S.S.R. Supreme Court: History, Role, and Future Prospects*, 38 AM. J. COMP. L. 127, 128 (1990).

4. S.G. Bannikov, *Verkhovnyi sud SSSR I sovershenstvovanie sovetskogo zakonodatel'stva*, *in* VERKHOVNYI SUD SSSR 47 (L.N. Smirnov et al. eds., 1974); T.N. DOBROVOLSKAIA, VERKHOVNYI SUD SSSR 18-32 (1964).

IV. THE COURTS START TO CITE THE CONSTITUTION

By the late 1960s, and perhaps earlier—I have not checked all the published cases—the USSR and Russian Supreme Courts began to cite the Constitution in their published rulings. I have seen no case in which they cited the Constitution to hold particular legislation unconstitutional. Most of the citations were to very general principles; for instance, a 1963 ruling of the USSR Supreme Court exhorted judges to obey Article 112 of the 1936 Constitution, which provided for judicial independence. By the late 1970s, some of the citations to the Constitution had become a little more daring. In general rulings in particular areas of the law, the USSR Supreme Court would cite, in parallel, sections of the Constitution and statutes implementing those sections. For instance, in a ruling of June 16, 1978, it cited Article 158 of the Constitution and Article 13 of the Fundamental Principles of Criminal Court Procedure, both of which guaranteed the right to counsel.[5] The same ruling also cited in parallel Article 159 of the Constitution and Article 11 of the Fundamental Principles of Criminal Court Procedure, both of which guaranteed the right to the services of an interpreter. By 1988, the USSR Supreme Court had moved a step further. In a December 23, 1988 decision, the Court issued a "guiding explanation" instructing lower courts how to handle complaints of illegal actions by officials; it suggested that refusal by state health institutions to provide medical assistance could be attacked as a denial of the right to health care provided by Article 42 of the USSR Constitution.[6]

V. THE COMMITTEE ON CONSTITUTIONAL SUPERVISION

Gorbachev's reforms in the late 1980s reintroduced many of the features of the Soviet system of the 1920s, for instance the two-tiered Parliament of a Council of People's Deputies and Supreme Soviet. The reforms created the Committee on Constitutional Supervision, with powers in many ways similar to those of the Supreme Court in the 1920s. Like its predecessor, the Committee had a dual function, ensuring the protection of constitutional rights, and keeping the republics in line with the central authorities' policy in legal matters. As various commentators, including myself have pointed out, the Committee did much better in protecting individual rights than in restraining the increasingly independent republics. The Committee's best opinions on individual rights, for instance its opinion invalidating the residence permit system, were an auspicious starting point for the judicial protection of human rights in Russia. I will not dwell further

5. Biull. Verkh. Suda SSSR, 1978, No. 4, p. 8.
6. Biull. Verkh. Suda SSSR, 1989, No. 1, p. 4.

on the work of the Committee. Neither it nor, for that matter, the Soviet Union still exists. And there are many excellent published articles on the Committee's work. I will move directly to the Russian courts of today.

VI. THE COURT SYSTEMS OF THE RUSSIAN FEDERATION

A. *Introduction*

For the last several years there have been three separate court systems in the Russian Federation: the Constitutional Court, the courts of general jurisdiction, and the commercial courts. The Constitutional Court has jurisdiction only over constitutional cases. The courts of general jurisdiction have jurisdiction over all cases except those where neither party was a private citizen. The commercial courts have jurisdiction over suits involving enterprises or entrepreneurs suing one another or suing government agencies. This third system of courts has evolved from highly informal, quasi-arbitration tribunals created in the 1930s, to full-fledged adversarial commercial courts today. To reflect this change, I will call them "commercial courts," though their Russian name, "arbitrazh courts," still reflects their origin. These are the same courts that many still refer to as "arbitration courts," but their current role has nothing to do with arbitration.

B. *The Constitutional Court*

1. *Introduction*

There have been two phases in the history of the Russian Constitutional Court. Its first phase lasted from 1991 until the fall of 1993. During the spring and summer of 1993, the Court and the Parliament came into increasing political conflict with President Yeltsin. This conflict reflected, on the one hand, Yeltsin's impatience with the Soviet-era Constitution that put most power in the hands of a Parliament selected under the old regime in a less than fully democratic process, and, on the other hand, the Court's total lack of judicial self-restraint. Yeltsin won the conflict in the fall of 1993 when he suspended the Court and incorporated a court-packing plan into the Constitution that went into effect after he declared that the plan had been ratified in a referendum in the fall of 1993. Parliament adopted a new statute for the Court in 1994. However, due to President Yeltsin's difficulties in having some of his appointees confirmed, the reconstituted Court did not reach a quorum until early in 1995. This left a gap in constitutional review from October 1993 until early 1995. The revived Constitutional Court has exercised much more self-restraint and has created a highly creditable record of decision making. Now I would like to discuss how the Constitutional Court has applied the Constitution, and how particular

decisions affect individual rights, which I understand are a key focus of this lecture series.

2. *The First Constitutional Court*

The 1992-1993 Constitutional Court had one important power that is lacking in the 1994 statute of the current Court. This was the power to hold judicial practice in applying legislation to be unconstitutional. One of its earliest decisions, on February 4, 1992, held that both a labor code provision allowing arbitrary discharge and a 1984 USSR Supreme Court ruling interpreting this provision were violations of the constitutional right to employment.[7] This was the first application of the Court's power to hold judicial practice unconstitutional. A January 27, 1993 decision held that the judicial practice of the Supreme Court of the Russian Federation in applying the Labor Code was unconstitutional.[8] At this point, it appeared that the Constitutional Court was on its way to establishing its supremacy over the other court systems in constitutional matters.

The Court rendered a number of important decisions protecting citizens against arbitrary government action. In one of these decisions, the Court held that a government agency could not get out of its promise to sell cars to railroad workers at fixed prices, even though inflation had made the prices ridiculously low.[9] This decision is a keystone of the Russian market economy, for it completely repudiates the Soviet practice of changing the rules of the economic game upon the whim of the ruling officials.[10] A decision on Communist Party property, which held that Yeltsin's decree seizing Party property was unconstitutional as applied to property paid for out of local Party funds, was another important step in protecting property rights. These and a number of other decisions showed a willingness to apply the Constitution even when the result would cost the government substantial sums of money.

Several of the early decisions emphasized the right of access to court, a right guaranteed by Article 63 of the Constitution then in effect.[11] In a decision of February 5, 1993, the Court found the arbitrary, unappealable

---

7. Vestn. Konst. Suda RF, 1993, No. 1 [monthly], case re: Article 33 of the Code of Laws on Labor.

8. Vestn. Konst. Suda RF, 1993, Nos. 2-3 [monthly], case re: limiting payment in case of illegal discharge.

9. Vestn. Konst. Suda RF, 1993, Nos. 2-3 [monthly], case re: Decree of the Government of the Russian Federation of Jan. 24, 1992.

10. Bernard Rudden, *Civil Law, Civil Society, and the Russian Constitution*, 110 L.Q. REV. 56 (1994).

11. Equivalent to Article 46 of the current Constitution.

eviction of squatters to be unconstitutional.[12] And in a decision of April 16, 1993, it found the practice of denying fired prosecutors the right to appeal to court failed to meet constitutional requirements.[13] All these decisions were tempered by the Court's cautious approach to the question of righting the many constitutional violations committed by the Soviet regime. An October 1993 case held that Article 63 applied prospectively only to give government officials the right to contest their firing in court.[14]

3. *The Constitutional Court Under the 1994 Statute*

Under the 1994 statute, the relation of the Constitutional Court to the other court systems has been quite different. The Court no longer has the right to review judicial practice. Commercial courts and courts of general jurisdiction at all levels have the right to refer constitutional questions to the Constitutional Court. However, there are only half-a-dozen reported cases in which this power was used. One of these cases involved a referral by the Civil Division of the Russian Supreme Court; all the other referrals were by lower courts. Given the lack of the power to review judicial practice and the underutilization of the referral power, one provision of the 1994 statute took potentially great importance. This provision, which repeated a similar provision of the 1991 statute, gave quasi-precedential effect to Constitutional Court decisions invalidating a statute or other legal act. Under this provision, all courts were ordered to treat as void not only the invalidated act, but also other acts that had like provisions to those found unconstitutional in the invalidated act.

The reconstituted Constitutional Court was quick to bemoan its inability to deal with judicial practice. In a June 15, 1995 decision, the Court reaffirmed its 1993 decision on the unconstitutionality of judicial practice that limited pay for lost wages, and regretted that it had neither some means of dealing with judicial practice that disobeyed the 1993 decision nor of forcing Parliament to solve the problem. Enforcement difficulties were also reflected in two cases on the residence registration system, which had replaced the residence permit system held invalid in 1992 by the Committee on Constitutional Supervision. As it turned out, the new residence registration system was treated by the administrative authorities in practice very much like the unconstitutional residence permit system. In the case of Sitalova, which I have written on elsewhere, the Constitutional Court invalidated most of the negative effects of the residence permit system.

12. Vestn. Konst. Suda RF, 1993, Nos. 4-5 [monthly], case re: Edict of Aug. 23, 1991.

13. Ross. Gazeta, 22 July, 1993.

14. Vestn. Konst. Suda RF, 1994, No. 6 [monthly], case re: legislation in effect before June 21, 1990.

However, undaunted, the Moscow city authorities returned with a new approach, that of charging gigantic fees for residence registration. In April 1996, the Court held these prohibitive fees to be unconstitutional. However, this is unlikely to be the last of the residence permit litigation.

There were many other cases in which the Court struck down legislation, including: laws barring all strikes in civil aviation;[15] providing criminal penalties for "fleeing abroad";[16] barring lawyers without a security clearance from cases involving national security;[17] denying credit for pretrial detention while the defense was studying the record of the preliminary investigation;[18] and allowing a judge to institute a criminal case.[19]

There also were a number of cases that denied claims of constitutional rights. For instance, the Court upheld legislation limiting criminal defense work to lawyers who were members of semi-official lawyers' organizations.[20] The dissent in this case is jurisprudentially interesting. It makes a convincing case on the basis of rejected drafts and debate during the Constitution-making process that the majority has completely misinterpreted the Constitution.

VII. THE CONSTITUTIONAL COURT AND THE OTHER COURT SYSTEMS

In addition to problems with enforcement, some members of the Constitutional Court fought a losing battle during this period with the supreme court's increasing assertion of authority to apply the Constitution directly. A case decided by the Constitutional Court in May of 1995 was somewhat contradictory.[21] This case involved the question of whether a person under an order of pre-trial detention had a right to a court evaluation of the validity of the detention order.[22] The Court found that the courts of general jurisdiction had acted erroneously in following the Criminal Procedure Code, which would deny the right to such an appeal, since the denial of the right to appeal violated the general right to a judicial remedy guaranteed by Article 46 of the Constitution. In dictum, it suggested that the courts of general jurisdiction should have referred the issue to the Constitutional Court and went on to note that these courts did not have the power to declare a law unconstitutional.

---

15. Sobr. Zakonod. RF, 1995, No. 21 [weekly], Case No. 5-P.
16. Sobr. Zakonod. RF, 1996, No. 1 [weekly], Case No. 17-P.
17. Vestn. Konst. Suda RF, 1996, No. 2 [monthly], case re: Law on State Secrecy.
18. Ross. Gazeta, 2 July, 1996.
19. Ross. Gazeta, 6 Dec., 1996.
20. Ross. Gazeta, 18 Feb., 1997.
21. Sobr. Zakonod. RF, 1995, No. 19 [weekly], Case No. 4-P.
22. *Id.*

It is clear that this dictum is in no way binding. The only binding action the Constitutional Court can take is to declare a particular legal act unconstitutional. Furthermore, it is unclear what this dictum meant. Did it mean that the courts of general jurisdiction, including the supreme court, do not have the power, which only the Constitutional Court has, to declare a law unconstitutional with an effect equal to repeal of the law? Or did it go further and mean that the courts of general jurisdiction were bound in every case either to apply the law before it or to refer the case to the Constitutional Court—that they could not merely refuse to apply an unconstitutional law? In either case, the courts of general jurisdiction have ignored this dictum entirely. Paradoxically, this case greatly extended the powers of the courts of general jurisdiction and the commercial courts. By adopting the principle that Article 46 of the Constitution guaranteed a legal remedy for every wrong, it indicated to the courts that given the rule that Constitutional Court decisions were to be applied to analogous situations, they were free to always find laws denying remedies unconstitutional.

A number of cases involving equal protection principles also opened the door for application of the same broad principles by the other court systems. These included cases holding unconstitutional: legislation giving less rights to a child than to adult victims of Communist repression;[23] discrimination in discharge against pension-age police;[24] and denial of pensions to convicted criminals.[25]

Several cases stated broad principles of protection of entitlements and property rights, principles that likewise could serve as the basis for broad application in cases in the other court systems. These included cases holding unconstitutional: automatic loss of rights to low rent state housing in case of long-term imprisonment;[26] and restrictions on testamentary disposition by collective farm members.[27]

Two other cases are of very specific relevance to the interrelation between the Constitutional Court and the other court systems. The first case involved a complaint that the libel provision of the Civil Code violated the right of free speech.[28] The Constitutional Court refused to decide the question in the abstract, but instead indicated that the courts of general jurisdiction would have to distinguish unprotected defamatory fact statements from protected negative political evaluations.[29] This case appears to

---

23. Case No. 6-P of May 23, 1995 (official electronic text from NTTs "Sistema"), *available in* KODEKS, Zakonodatel'stvo Rossii (polnyi nabor dokumentov) database.

24. Ross. Gazeta, 15 June, 1995.

25. Ross. Gazeta, 25 Oct., 1995.

26. Sobr. Zakonod. RF, 1995, No. 27 [weekly], Case No. 8-P.

27. Ross. Gazeta, 25 Jan., 1996.

28. Ross. Gazeta, 22 Nov., 1995.

29. *Id.*

recognize the legitimacy of the courts of general jurisdiction applying the Constitution directly. In a case involving a retroactive tax, the Constitutional Court interpreted its jurisdiction to include complaints not only of natural persons but also of legal persons.[30] While the Constitution does not explicitly protect the property rights of legal persons, the Court held that a violation of the property rights of a legal person was an indirect violation of the property rights of the citizens who owned the legal person—the shareholders or stockholders—and so violated these citizens' constitutionally protected property rights.[31] This case brought the Court into potentially overlapping jurisdiction with the commercial courts where suits by legal persons against government agencies normally are decided.

VIII. THE SUPREME COURT STARTS TO APPLY THE CONSTITUTION

A. *The Beginnings*

I have already mentioned the limited references made to the Constitution by the USSR Supreme Court in the Soviet period. In the post-Soviet period, the Russian supreme courts gradually became more bold in using the Constitution. In a decision of December 8, 1992, the Russian Supreme Court directly applied Article 53 of the Constitution (which provides that everyone has the right to equal compensation for equal work) to uphold a lower court decision in favor of a worker denied a pay raise that was given to his fellow workers.[32]

The Resolution of the Russian Supreme Soviet of December 12, 1991, "On Ratification of the Agreement on the Creation of the Commonwealth of Independent States," provided that USSR legislation would continue to be in effect in Russia to the extent that it did not violate the Russian Constitution, Russian legislation, or the agreement. The Russian Supreme Court interpreted this Resolution as requiring it to test each USSR law against the Russian Constitution before applying it. In a January 14, 1993 decision, for instance, the Judicial Division for Civil Cases of the Russian Supreme Court applied a 1991 USSR law after stating that it did not contradict the Russian Constitution.[33]

On April 28, 1993, the Judicial Division for Criminal Cases of the Russian Supreme Court made a daring direct application of the Constitution.[34] A woman named Il'chenko was convicted under Article 190 of the Criminal Code for failure to report the commission of a murder by her

30. Sobr. Zakonod. RF, 1996, No. 45, Case No. 17-P.
31. *Id.*
32. Biull. Verkh. Suda RF, 1993, No. 4, p. 2.
33. Biull. Verkh. Suda RF, 1993, No. 5, p. 4.
34. Biull. Verkh. Suda RF, 1993, No. 8, p. 6.

husband, brother, and cousin. I would like to quote excerpts from a few paragraphs of the opinion in this case:

> According to Article 67 of the Constitution of the Russian Federation, "No one is obligated to testify against himself, against his spouse, or against close relatives, the circle of which shall be defined by law." The law may also establish other cases of freedom from the obligation to give testimony.
>
> As appears from the record of the case, the murder of Lushep with extraordinary cruelty was committed by Vdovyka, Plakhotnikov, and Mosienko in connection with the hostile relations that had arisen between Il'chenko and the victim. Thus, in reporting on the commission of the crime, Il'chenko would be compelled to a certain extent to testify against herself.
>
> Vdovyka is Il'chenko's husband, and Plakhotnikov and Mosienko are her brother and cousin respectively.
>
> A norm of criminal law may not contradict the rules provided in the Basic Law—the Constitution of the Russian Federation . . . .
>
> Although responsibility for failure to report crimes is retained in the current Criminal Code, nevertheless, the provisions of Article 67 of the Constitution of the Russian Federation eliminate the punishability of the actions done by Il'chenko.[35]

This is a key decision because it frees the defendant on constitutional grounds despite the fact that her conduct contained all the elements of a crime defined in the Criminal Code. Thus, in effect, it states that as applied in this case, the relevant Criminal Code article is unconstitutional. From this point on, the supreme court has acted as if it, and all the courts of general jurisdiction under it, has the power of judicial review.

The Criminal Division of the Supreme Court applied the Constitution directly again in a case it decided on September 1, 1993.[36] Two convicted defendants appealed alleging that they had inadvisedly waived the right to counsel at their trial. The court granted a new trial with appointed counsel, holding that "[f]ailure of the court to ensure the actual participation of lawyers in the trial of the case violated the constitutional right of the accused

---

35. *Id.*

36. Biull. Verkh. Suda RF, 1994, No. 6, p. 7.

to counsel."[37] A decision of March 2, 1994, in rejecting a complaint by a prosecutor that the court had improperly excluded testimony by the accused's wife, cited Article 50 of the Constitution.[38] An August 2, 1994 decision held that it was unconstitutional for someone to be tried by a person who had not been properly appointed as a judge.[39]

Of course, the supreme court did not accept every claim of constitutional right. In a decision of March 29, 1993, the Judicial Division for Civil Cases rejected a claim that legal limitations on the right to strike violated Article 33 of the Constitution.[40] In a decision of August 1, 1994, the court took a like position, applying Article 37 of the 1993 Constitution.[41]

In these early cases, the supreme court made particularly broad use of the right to a judicial remedy found in Article 63 of the old Constitution and in Article 46 of the 1993 Constitution. In a case decided on March 2, 1994, the court held that a citizen claiming to be the real inventor of an invention could sue in court, despite the fact that the statute only allowed administrative remedies.[42] It applied Article 63 of the former Constitution.[43] A further important extension of its jurisdiction was made by the supreme court in a decision of November 9, 1994 in a case involving a suit by the American Smirnoff Vodka trademark owner against the upstart Russian Smirnov Vodka company. The lower courts and the Judicial Division for Civil Cases found no jurisdiction because the relevant statute called only for administrative appeals in trademark cases.[44] However, the Presidium of the Supreme Court held that Article 63 of the former Constitution (the equivalent of Article 46 in the present Constitution) overrode the relevant statute and provided a right to go to court.[45] It also rejected the argument that constitutional rights applied only to natural persons, or even more narrowly, only to citizens.[46] It cited Part 2 of Article 10 of the former Constitution (analogous to Part 2 of Article 8 of the current Constitution) as providing equal protection for all forms of property. It indicated that this meant that property rights, in particular intellectual property rights, would be protected equally for legal and natural persons.[47]

Two years later, the Constitutional Court upheld legislation allowing the Tax Inspectorate to seize funds from the bank accounts of legal persons

---

37. *Id.*
38. Biull. Verkh. Suda RF, 1994, No. 5, p. 8.
39. Biull. Verkh. Suda RF, 1995, No. 3, p. 15.
40. Biull. Verkh. Suda RF, 1993, No. 8, p. 3.
41. Biull. Verkh. Suda RF, 1994, No. 10, p. 2.
42. Biull. Verkh. Suda RF, 1995, No. 2, p. 3.
43. *Id.*
44. Biull. Verkh. Suda RF, 1995, No. 1, p. 11.
45. *Id.*
46. *Id.*
47. *Id.*

without a court order, even though such a seizure required a court order if made from the assets of private citizens.[48] The Constitutional Court specifically rejected arguments based upon equality of various forms of property ownership. This and the case just discussed raise a question that is as of yet unanswered: what will happen when two court systems reach different conclusions on the same constitutional question? In particular, there appears to be a real possibility for a problem if the supreme court finds a law unconstitutional, while the Constitutional Court finds the same law to be constitutional, since the statute on the Constitutional Court only gives binding force to findings of unconstitutionality.

B. *Recent Supreme Court Decisions*

Supreme court decisions in 1995 and 1996 on constitutional issues are analyzed in an excellent forthcoming article on recent supreme court practice in constitutional matters by Professor Peter Krug of the University of Oklahoma, which I highly recommend to you.[49] His emphasis is somewhat different from mine. He sees the supreme court as having suddenly moved into constitutional adjudication in 1995, while I see the movement as having been gradual over decades, with the most significant change in 1993.

The most important action taken in 1995 was the adoption of Resolution Number 8 of the Full Bench of the Supreme Court of the Russian Federation of October 31, 1995.[50] This resolution instructed judges to apply the Constitution directly whenever they came to the conclusion that legislation contradicted the Constitution.[51] It suggested that if they were in doubt, they could apply to the Constitutional Court for a ruling.[52] This ruling went on to indicate how the Constitution should be applied in a number of specific areas of the law: right to strike, right to change one's place of residence, exclusion of illegally obtained evidence, right to counsel, and right against self-incrimination.[53] This Resolution essentially summed up the constitutional law principles developed by the supreme court in deciding cases in 1993 and 1994. The Russian Supreme Court publishes a variety of general exhortations in its bulletin. Despite their informal nature, these exhortations undoubtedly are influential given the natural reluctance of judges to avoid reversal. In a survey of judicial practice published in 1995, the First Deputy Chairman of the Supreme Court indicated that lower courts

---

48. Ross. Gazeta, 26 Dec., 1996.

49. Peter Krug, *Departure from the Centralized Model: The Russian Supreme Court and Constitutional Control of Legislation*, __VA. J. INT'L L.__ (199_).

50. Ross. Gazeta, 28 Dec., 1995.

51. *Id.*

52. *Id.*

53. *Id.*

should follow the International Covenant on Civil and Political Rights—which is incorporated into Russian law by the Russian Constitution—rather than the more restrictive rules of the Criminal Procedure Code, in determining the circumstances giving the right to appeal detention to a court.[54]

To give a flavor of the specific holdings, I will summarize briefly a few of the more important cases in the courts of general jurisdiction. A 1995 decision of the Judicial Division for Civil Cases held that a stockholder has the right under Article 46 of the Constitution to contest in court a decision of the general meeting of stockholders.[55] A case decided March 1, 1995 applied Article 57 to a claim of improper discharge by an official in Yaroslavl Oblast.[56] A military appeals court held that it was error for a trial court to order its own expert examination—that this violated Article 123 of the Russian Constitution, which provided for adversarial trial procedure. This radical ruling was reversed by the Military Division of the Supreme Court of the USSR.[57] A November 9, 1995 decision applied Article 35 of the Constitution to require compensation for taking of the home.[58] This was done even though the home was not actually taken, rather its use was severely restricted.[59] A 1995 decision of the Judicial Division for Civil Cases held that under Article 61 of the Constitution an accused could not be extradited to another country without a basis in law or international treaty.[60]

In a decision of July 5, 1995 involving the firing by President Yeltsin of the head of administration of Lipetsk Oblast, the supreme court found that the plaintiff had the right to apply to court under the general guarantee of Article 63 of the prior Constitution and Article 46 of the current Constitution, and rejected the argument that the proper recourse was to the Constitutional Court; pointing out that since the plaintiff was a citizen and the act complained of was not a normative act, there would be no access to the Constitutional Court.[61] A 1994 decision of the Judicial Division for Criminal Cases reversed a lower court decision denying a jury trial, where one defendant wanted a jury and the other did not, on the basis of Article 20

---

54. Biull. Verkh. Suda RF, 1995, No. 2, p. 12. This publication preceded the Constitutional Court decision on a similar issue in the case of Avetian. *See* Ross. Gazeta, 12 May, 1995.

55. Judicial Division for Civil Cases, Survey of Judicial Practice, Biull. Verkh. Suda RF, 1995, No. 10, pp. 9-10.

56. Biull. Verkh. Suda RF, 1995, No. 9, p. 1.

57. Case 4n-04/95 (in *Voennaia Kollegiia Verkhovnogo Suda Rossiiskoi Federatsii, Obzor kassatsionnoi nadzornoi praktiki za 1995)*, Jan. 1, 1996, *available in* KODEKS, Zakonodatel'stvo Rossii (polnyi nabor dokumentov) database.

58. Biull. Verkh. Suda RF, 1996, No. 4, p. 4.

59. *Id.*

60. Biull. Verkh. Suda RF, 1995, No. 6, p. 5.

61. Biull. Verkh. Suda RF, 1996, No. 2, p. 1.

of the Constitution.[62] A 1995 decision of the Judicial Division for Criminal Cases applied Article 20 of the Constitution on the right of an accused facing a death penalty to a jury trial, and Article 15 of the Constitution, on the direct application of the Constitution to hold that a defendant had a right to a jury trial regardless of the wishes of his codefendants.[63] A similar decision was made on October 25, 1994.[64] Decisions on right to jury trial and exclusion of evidence were summarized in a December 20, 1994 ruling of the Plenum of the Supreme Court.[65]

A ruling of the Plenum of the Supreme Court of October 25, 1996 added to an earlier ruling a reference to Article 35 of the Constitution restricting property from being taken except by decision of a court. A February 7, 1996 decision held that the right to be tried by the court specified in procedural legislation was a constitutional right under Article 47 of the Constitution.[66] A decision of February 29, 1996 applied Articles 72 and 76 of the Constitution on the relation of federal and local legislation and found that a local law establishing a high fine for the distribution of "erotic productions" violated federal law.[67] A decision of January 3, 1996 held that an individual's refusal to register a citizen in an apartment in Moscow that she owned because she had refused to pay a huge registration fee levied on new residents violated Articles 27 and 55 of the Constitution.[68] This decision echoed decisions of the Constitutional Court on residence permits but did not cite them.[69]

A decision of June 26, 1995 applied Article 46 of the Constitution to provide a fired senior assistant procurator the right to contest his discharge in court even though the relevant legislation provided only for non-judicial contestation.[70] Article 46 was also applied in a decision of November 17, 1995 on the right to challenge a decision of an election commission.[71] A decision of October 23, 1995 applied Article 46 to a libel suit by a police official against a procurator.[72] A 1995 decision applied Article 46 to a complaint about electoral rights.[73] A decision of August 11, 1995 applied Article 46 to hold that a citizen had the right to sue the St. Petersburg city authorities for failure to provide cut-rate transportation guaranteed to

---

62. Biull. Verkh. Suda RF, 1995, No. 1, p. 14.
63. Biull. Verkh. Suda RF, 1995, No. 7, p. 14.
64. Biull. Verkh. Suda RF, 1995, No. 2, p. 8.
65. Biull. Verkh. Suda RF, 1995, No. 3, p. 2.
66. Biull. Verkh. Suda RF, 1996, No. 12, p. 2.
67. Biull. Verkh. Suda RF, 1996, No. 5, p. 1.
68. Biull. Verkh. Suda RF, 1996, No. 3, p. 4.
69. *Id. See generally supra* Part VI.3.
70. Biull. Verkh. Suda RF, 1996, No. 3, p. 6.
71. Biull. Verkh. Suda RF, 1996, No. 3, p. 5.
72. Biull. Verkh. Suda RF, 1996, No. 3, p. 7.
73. Biull. Verkh. Suda RF, 1996, No. 4, p. 1.

veterans by federal statute.[74] A decision of March 25, 1996 held that Article 46 allowed suit for failure to hire even in cases where the Labor Code did not.[75] In a decision of February 5, 1996, the Judicial Division for Civil Cases applied Article 123 of the Constitution on the adversary nature of proceedings to put the burden of proof on the customs service in a case contesting a sanction leveled against a joint venture.[76]

IX. THE COMMERCIAL COURTS AND THE CONSTITUTIONS

A. *Early References to the Constitution*

Like the courts of general jurisdiction, the commercial courts referred to the Constitution from time to time even in the Soviet period. A 1990 Survey of Practice refers to a case in which a Lipetsk Region court upheld certain actions of the Lipetsk Region Executive Committee as being within its constitutional powers.[77] The survey, in a letter signed by Deputy Chief Judge V.V. Vitriansky, criticized this decision, indicating that the court should have applied a USSR statute that invalidated the Executive Committee's action.[78] This criticism perhaps reflected the spirit of the times when a USSR statute normally trumped a constitutional provision.

B. *General Instructions to the Lower Commercial Courts*

A 1993 letter and a 1994 instruction letter from the High Commercial Court provide guidance to the lower commercial courts on the application of the Constitution.[79] The first letter was rather cautious. It stated that suits seeking the recognition of acts of the Council of Ministers of the Russian Federation, or of the Council of Ministers of republics in the system of the Russian Federation, as unconstitutional are not subject to the jurisdiction of the commercial court since decision of this question is in the competence of the Constitutional Court of the Russian Federation.[80]

This letter, signed by Veniamin Yakovlev, the chief judge of the Constitutional Court, represented an attitude in sharp contrast to the practice

---

74. Biull. Verkh. Suda RF, 1996, No. 5, p. 2.

75. Biull. Verkh. Suda RF, 1996, No. 6, p. 2.

76. Biull. Verkh. Suda RF, 1996, No. 5, p. 4.

77. Letter of Dec. 24, 1990, No. S-13/OPI-455, *available in* KODEKS, Zakonodatel'stvo Rossii (polnyi nabor dokumentov) database.

78. *Id.*

79. Instruction Letter of Aug. 25, 1994, No. S3-7/OZ-614, *available in* KODEKS, Zakonodatel'stvo Rossii (polnyi nabor dokumentov) database; Letter of Mar. 20, 1993, No. S-13/OP-98, *available in* KODEKS, Zakonodatel'stvo Rossii (polnyi nabor dokumentov) database.

80. *Id.*

the Russian courts of general jurisdiction were adopting in 1993. However, the 1994 instruction letter signed by Deputy Chief Judge V.V. Vitriansky largely paraphrased the 1994 statute on the Constitutional Court. In particular, it quoted the provision of Part 2 of Article 87 of the statute, which indicated that invalidation of particular provisions of a normative act also invalidated other normative acts based on the invalidated provisions and like provisions in other normative acts. As I have already suggested, this article opens broad possibilities for the exercise of constitutional jurisdiction by the commercial courts.

C. *Specific Reference*

In a few instances, Russian statutes make specific references to the Constitution. Article 11 of the 1991 Land Code provided that alienation of land parcels should be in accordance with Article 12 of the Russian Constitution. The commercial court of St. Petersburg applied Article 12 of the Constitution to hold a land sale invalid. This decision was cited with approval in a letter of the High Commercial Court dated July 31, 1992.[81]

Article 41 of the Commercial Court Procedure Code gives the procurator of a subject of the Russian Federation the right to bring cases before a commercial court. The Udmurt Republic Commercial Court denied this right to the Procurator of the Yamalo-Nenets Autonomous District, reading it as allowing the procurator of a subject of the Russian Federation only to bring a suit in the commercial court of the same subject of the Russian Federation. In interpreting the statute, the Presidium of the High Commercial Court applied the definition of subject of the Russian Federation found in Article 65 of the Russian Constitution.[82]

D. *Statute Implementing the Constitution*

Russian statutes often paraphrase or directly implement constitutional provisions. In such cases, commercial courts may cite the statutory and constitutional provision in parallel, a practice similar to the practice of the Communist-era Supreme Court.[83] An example is a 1996 case decided by the North-Western District Commercial Court, involving a question of the jurisdictional line between the commercial courts and the courts of general

---

81. "O razreshenii sporov, sviazannykh s primeneniem zakonodatel'stva o sobstvennosti," (*i.e.* On the Decision of Disputes Connected With the Application of Legislation on Ownership) Letter No. C-13/OP-171, *available in* KODEKS, Zakonodatel'stvo Rossii (polnyi nabor dokumentov) database.

82. Case No. 8661/95 (38-425-96) (ruling of June 25, 1996), *available in* KODEKS, Zakonodatel'stvo Rossii (polnyi nabor dokumentov) database.

83. *See generally supra* Part IV.

jurisdiction.[84] It cited both the statutory and constitutional jurisdiction provisions as the basis for its decision.[85]

E. *Narrow Application of Precedent*

The commercial courts routinely apply the narrow, specific holdings of the Constitutional Court on constitutional issues. The full bench of the High Commercial Court remanded a case involving ownership of a building that was constructed for the Communist Party with state funds so it could be decided in accordance with the decision of the Constitutional Court that held President Yeltsin's decree on seizure of Party property partly constitutional and partly unconstitutional.[86] A 1995 decision of the High Commercial Court involved a presidential decree that had been partially invalidated by the Constitutional Court. The commercial court held that since the Constitutional Court ruling was not expressly retroactive, transactions made in reliance on the decree before the Constitutional Court ruling were unaffected by the ruling.[87]

F. *Broad Application of Precedent*

A 1995 instruction letter from Chief Judge Veniamin Yakovlev of the High Commercial Court called for a much broader application of precedent.[88] The letter cited the Constitutional Court case of Avetian,[89] discussed above—the case that provided access to court for a person under an order of detention. The letter quoted the broad holding of Avetian: "the right to judicial protection may not be limited in any circumstances."[90] It instructed the commercial courts to be guided by this holding in their decisions.[91] This letter is of considerable significance. As the number of Constitutional Court decisions grows, the number of broad holdings that must be followed will increase. It is possible that, by applying this expanding group of broad holdings, the commercial courts will move in their

84. Case No. 273/95 (ruling of Mar. 19, 1996), *available in* KODEKS, Zakonodatel'stvo Rossii (polnyi nabor dokumentov) database.

85. *Id.*

86. Case No. K1/31 (ruling of July 1, 1993), *available in* KODEKS, Zakonodatel'stvo Rossii (polnyi nabor dokumentov) database.

87. Case No. 6299/95 (ruling of Dec. 26, 1995), *available in* KODEKS, Zakonodatel'stvo Rossii (polnyi nabor dokumentov) database.

88. Instruction Letter of June 14, 1995, No. S1-7/OP-328, *available in* KODEKS, Zakonodatel'stvo Rossii (polnyi nabor dokumentov) database.

89. Ross. Gazeta, 12 May, 1995.

90. Instruction Letter of June 14, 1995, No. S1-7/OP-328, *available in* KODEKS, Zakonodatel'stvo Rossii (polnyi nabor dokumentov) database.

91. *Id.*

application of constitutional law to a position similar to that of the courts of general jurisdiction.

G. *Direct Application of Constitutional Provisions*

In a case involving a municipal enterprise formed with charter provisions in violation of federal law, the North-Western District Federal Arbitration Court invoked Article 15 of the Constitution to hold that the provisions of federal law prevailed over the charter provisions.[92]

By 1996, the High Arbitration Court had begun to apply the Constitution directly. One case involved a suit by the Deputy Procurator of the Republic of Tatarstan against the Tatarstan Division of the Russian Federation Pension Fund, which had exacted a penalty of one-half billion rubles against a military electronics factory located in Tatarstan. The lower commercial courts ruled for the procurator and the factory on the ground that the factory was exempt from penalties due to a joint document signed by the Chairman of the Government of the Russian Federation, the Minister of Finance of Russia, and the Minister of Defense of Russia, and also a resolution and a decree of the Cabinet of Ministers of Tatarstan. The Presidium of the High Commercial Court held that the Tatarstan legislation was in violation of Article 71 of the Russian Constitution, which placed federal taxes in the jurisdiction of the Russian Federation.[93] It rejected the document signed by the high Russian officials as not being a normative act, noting that it had not been officially registered.[94]

In a letter of December 5, 1996, the Presidium of the High Arbitration Court instructed lower courts to apply international treaties directly in accordance with Article 15 of the Constitution, and to interpret rules on paying court costs so as to effectively provide foreign plaintiffs with access to court in accordance with Article 46 of the Constitution.[95] Also in 1996, the St. Petersburg commercial court invalidated a Decree of the Head of Administration of the Podporzhsky District instituting a new tax as an attempt to exercise tax powers allocated by the Constitution to the federal legislative authorities.[96] And the North-Western District Commercial Court,

---

92. Case No. 241/96 (ruling of Mar. 14, 1996), *available in* KODEKS, Zakonodatel'stvo Rossii (polnyi nabor dokumentov) database.

93. Case No. 148/96 (ruling of Sept. 17, 1996) *available in* KODEKS, Zakonodatel'stvo Rossii (polnyi nabor dokumentov) database.

94. *Id.*

95. Letter of Dec. 25, 1996, No. 10, *available in* KODEKS, Zakonodatel'stvo Rossii (polnyi nabor dokumentov) database.

96. Letter of the State Tax Inspectorate of the Russian Federation for Leningrad Region, July 1, 1996, No. 15-09/2391, *available in* KODEKS, Zakonodatel'stvo Rossii (polnyi nabor dokumentov) database.

citing Articles 71, 72, and 76 of the Russian Constitution, upheld a lower court decision finding invalid rules adopted by the State Property Committee and the Russian Federal Property Fund—rules that had been agreed upon with the Ministry of Finance, the State Tax Service, and the Central Bank.[97]

Overall, the number of constitutional cases in the commercial courts is much less than in the courts of general jurisdiction. There are three reasons for the difference: the overall caseload is much less than that of the regular courts; there are no criminal procedure issues; and the approach of the High Commercial Court has been rather conservative.

X. CONCLUSION: CONSTITUTIONAL CONSCIOUSNESS IS SPREADING

Overall, I found my survey of how Russian courts are treating the Constitution to be very encouraging. There is some unfinished business in the coordination of the three independent judicial systems. However, the Constitution appears to have become a fundamental part of legal thinking of the judges of all three court systems. This is all the more remarkable considering that top levels of the court systems are dominated by lawyers educated during the Communist period. I think one cannot underestimate the importance of comparative lawyers, and particularly of John Hazard, who actively promoted exchanges, conferences, and interaction between Soviet and foreign lawyers, who kept open the channels through which these lawyers were exposed to modern ideals of human rights and constitutionalism.

97. Case No. 108/96 (ruling of Feb. 8, 1996), *available in* KODEKS, Zakonodatel'stvo Rossii (polnyi nabor dokumentov) database.

SQUATTERS' RIGHTS AND ADVERSE POSSESSION: A SEARCH FOR EQUITABLE APPLICATION OF PROPERTY LAWS

> Human history has been an endless struggle for control of the earth's surface; and conquest, or the acquisition of property by force, has been one of its more ruthless expedients. With the surge of population from the rural lands to the cities, a new type of conquest has been manifesting itself in the cites of the developing world. Its form is squatting, and it is evidencing itself in the forcible preemption of land by the landless and homeless people in search of a haven.[1]

I. INTRODUCTION

According to the United States Census Bureau, the total world population on January 1, 1998, will be 5,886,645,394 people.[2] Using average annual growth rate percentages, the Census Bureau estimates that the world population will be approximately 9,368,223,050 by the year 2050.[3] With this geometric rise in world population, invariably there will be an increase in scarcity and competition for vital resources, including food, fossil fuels, raw materials, shelter, and land. With increasing disparities in wealth and resources between the world's rich and poor, many of the world's citizens will continue to be forced into homelessness. Already, the United Nations (U.N.) estimates that "one hundred million [persons] have no home at all" while "more than one billion persons throughout the world do not reside in adequate housing."[4] An accurate number of currently homeless

---

1. C. ABRAMS, MAN'S STRUGGLE FOR SHELTER IN AN URBANIZING WORLD 12 (1964), *reprinted in* CURTIS J. BERGER, LAND OWNERSHIP AND USE 513 (3d ed. 1983).

2. U.S. BUREAU OF CENSUS (visited Nov. 17, 1997) <http://www.census.gov/cgi-bin/ipc/popclockw>.

3. *Id.* The United Nations' *World Population Prospects 1990* confirms this forecast; it predicts the world population to approach 8.5 billion persons by the year 2025. STANLEY JOHNSON, WORLD POPULATION—TURNING THE TIDE 235 (1994).

4. Justice R. Sachar, *Working Paper on Promoting the Realization of the Right to Adequate Housing*, at 4-11, U.N. Doc. E/CN.4/sub.2/1992/15 (visited Oct. 8, 1997) <http:/www.undp.org/un/habitat/presskit/dpi1778e.htm> [hereinafter *Realization*]. The Global Report on Human Settlements released in March 1996 estimates that "500 million urban dwellers are homeless or live in inadequate housing." *Id.* The World Health Organization estimates that the number of homeless children ranges from 10 million to 100 million, with the possibility that 20 million live in industrialized nations, 40 million in Latin American nations, 30 million in Asia, and 10 million in Africa. Robin Wright, *Gimme Shelter: The Plight of the Homeless in Lands of Plenty in Advanced Nations, the 'New Poverty' Sends More and More People into the Street*, L.A. TIMES, Oct. 4, 1994, *available in* 1994 WL 2351607.

persons in the United States is difficult to establish; however, numbers range from 350,000 to 3,000,000 persons.[5] In raising the world's consciousness of the condition of the homeless or poorly housed, the U.N. has established the right to housing as an international human right.[6] As of 1994, 129 nations had signed or ratified the International Covenant on Economic, Social, and Cultural Rights, under which states must "retain ultimate responsibility for shortfalls in housing or deteriorating housing conditions."[7] Despite broad declarations by the U.N. and attempted remedies by individual nations, deplorable economic conditions and housing shortages continue to plague the homeless and the under-housed in both developed and least-developed countries (LDCs).

Frequently, the homeless find themselves needing both food and shelter. Thus, squatting on unoccupied lands, buildings, forests, or even garbage dumps becomes an attractive remedy that squatters frequently practice.[8] *Black's Law Dictionary* defines a squatter as:

> [o]ne who settles on another's land, without legal title or authority. A person entering upon lands, not claiming in good faith the right to do so by virtue of any title of his own or by virtue of some agreement with another whom he believes to hold the title. Under former laws, one who settled on public land in

---

5. The National Coalition for the Homeless found that it is not easy to accurately count the number of homeless persons in the United States because: "1) people who lack permanent addresses are not easily counted; 2) definitions of homelessness vary from study to study; and 3) different methodologies for counting homeless people yield significantly different results." The National Coalition for the Homeless (visited Oct. 8, 1997) <http://nch.ari.net/numbers.html>. Furthermore, one source claims that "[t]he number who are homeless for at least one night during the year is probably over three million." Charles Froloff, *54 Ways You Can Help the Homeless* (visited Oct. 8, 1997) <http://www.earthsystems.org/ways>.

6. The necessity for adequate housing is described in various international documents that include: "the Universal Declaration of Human Rights (article 25), the International Covenant on Economic, Social and Cultural Rights (article 11), the International Convention on the Elimination of all Forms of Racial Discrimination (article 5), the Convention on the Elimination of All Forms of Discrimination against Women (article 14) . . . [and] the Convention on the Rights of the Child (article 27)." United Nations Department of Public Information, *Is There a Right to Housing?* (visited Oct. 8, 1997) <http://www.undp.org/un/habitat/presskit/dpi1778e.htm>.

7. MATTHEW C. R. CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT 333 (1995). The U.N. Committee on Economic, Social and Cultural Rights did not oblige Member States to end homelessness immediately, but simply to take steps to decrease its prevalence. *Realization*, *supra* note 4.

8. For a general discussion of rights of the homeless in the United States, see David Rosendorf, Note, *Homelessness and the Uses of Theory: An Analysis of Economic and Personality Theories of Property in the Context of Voting Rights and Squatting Rights*, 45 U. MIAMI L. REV. 701 (1990) [hereinafter Rosendorf].

order to acquire title to the land.[9]

Traditionally, both governments and citizens have viewed squatters as criminals who take advantage of neglectful municipalities and land owners. The U.N.'s Commission on Human Rights, the Sub-Commission on Prevention of Discrimination and Protection of Minorities issued a report illuminating "Twelve Misconceptions and Misinterpretations of the Right to Housing" and attempting to dispel the notion that "squatters are criminals."[10] The Report found that generally an "impression is created that pavement dwellers are anti-social elements, and that a majority of them are criminally inclined, unemployed and not interested in working."[11] However, many squatters contribute to local economies; for example, the Asia Coalition on Housing Rights found squatters who worked an average of "9.9 hours per day," compared to higher income groups who only worked "7.3 hours per day."[12] Plainly, society should not always view squatters as benevolent revolutionaries fighting for equity and justice; however, there are times when squatters and squatters' movements must be recognized for their noble and courageous efforts in developing efficient uses of property and alleviating one of society's ills.

In several nations, including the United States, Germany, and Great Britain, a squatter may gain legal possession of land through adverse

---

9. BLACK'S LAW DICTIONARY 1403 (6th ed. 1990). There are many different types of squatters:

> The *owner squatter* owns his shack, though not the land; . . . . The *squatter tenant* is in the poorest class, does not own or build a shack, but pays rent to another squatter . . . . The *squatter holdover* is a former tenant who has ceased paying rent and whom the landlord fears to evict. The *squatter landlord* is usually a squatter of long standing who has rooms or huts to rent, often at exorbitant profit. The *speculator squatter* is usually a professional to whom squatting is a sound business venture . . . . The *store squatter* or occupational squatter establishes his small lockup store on land he does not own, and he may do a thriving business without paying rent or taxes . . . . The *semi-squatter* has surreptitiously built his hut on private land and subsequently come to terms with the owner . . . . The *floating squatter* lives in an old hulk or junk which is floated or sailed into the city's harbor . . . . The *squatter 'cooperator'* is part of the group that shares the common foothold and protects it against intruders, public and private.

ABRAMS, *supra* note 1, at 515.

10. *Realization*, supra note 4. *See also The Realization of Economic, Social and Cultural Rights: The Right to Adequate Housing* (2d Progress Report by Mr. Rajindar Sachar, Special Rapporteur), U.N. Commission on Human Rights (Sub-Commission on Prevention of Discrimination and Protection of Minorities), 46th Sess., Provisional Agenda Item 8, U.N. Doc. E/CN.4.Sub.2/1994/20 (visited Oct. 8, 1997) <http://www.undp.org/un/habitat/rights/s2-94-20.html> [hereinafter *The Right to Adequate Housing*].

11. *The Right to Adequate Housing*, *supra* note 10.

12. United Nations Department of Public Information, *supra* note 6.

possession. Adverse possession is "[a] method of acquisition of title to real property by possession for a statutory period under certain conditions."[13] Adverse possession generally has five elements that a claimant must establish: the possession must be (1) open, (2) continuous for the statutory period, (3) for the entirety of the area, (4) adverse to the true owner's interests, and (5) notorious.[14] In some jurisdictions, if a squatter or an adverse possessor can establish these elements within the statutory period, then she may take legal and rightful title to the property. The policy supporting adverse possession is that the rule forces landowners to maintain and monitor their land. Moreover, this policy discourages owners from "sleeping" on their property rights for an indefinite period. While squatting problems and adverse possession may often involve private land owners, governments are often large land holders whose interests should be examined.[15] Adverse possession promotes efficient and economic use of land, thereby serving important economic and social ends. However, there are problems associated with adverse possession, including, but not limited to, monitoring problems, safety concerns, and environmental degradation.[16]

Unlike squatters in many Western countries, squatters and the homeless in LDCs often face unclear property rights and inefficient property allocation systems. While both squatters in LDCs and squatters in more-developed nations face severe housing shortages, the squatters in LDCs, with fewer

---

13. BLACK'S LAW DICTIONARY, *supra* note 9, at 53. The theory of property use by prescription is also useful in certain property disputes. Prescription in real property law is "[t]he name given to a mode of acquiring title to incorporeal hereditaments by immemorial or long-continued enjoyment." *Id.* at 1183. The difference between prescription and adverse possession is that "[p]rescription is the term usually applied to incorporeal hereditaments, while 'adverse possession' is applied to lands." *Id.* Incorporeal hereditaments are "[a]nything, the subject of property, which is inheritable and not tangible or visible." *Id.* at 726.

14. *See generally* Annotation, *Adverse Possession of Landlord as Affected by Tenant's Recognition of Title of Third Person*, 38 A.L.R.2d 826 (1995). Adverse possession "promote[s] the universality requirement [of property]." Howard Gensler, *Property As An Optimal Economic Foundation*, 35 WASHBURN L.J. 50, 55 (1995). Generally, "universality means that all valuable, scarce resources must be owned by someone." *Id.* at 51.

15. Property rights have always been different when held by the government. Section 37 of the Code Hammurabi states, with respect to the real property of a member of the government: "[i]f a man purchase the field or garden or house of an officer, constable or tax-gatherer, his deed-tablet shall be broken (canceled) and he shall forfeit his money and he shall return the field, garden or house to its owner." THE CODE OF HAMMURABI, KING OF BABYLON 23 (Robert Francis Harper trans., Univ. of Chicago Press 1904). In England, the legal maxim "nullum tempus occurit regis (no times runs against the king) barred the running of the statute of limitations against the state." JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 112 (1981). In the United States, several states do allow adverse possession to run against the state. *See generally* THOMPSON ON REAL PROPERTY § 87 (David A. Thomas ed., 1994) [hereinafter THOMPSON].

16. *See infra* Parts IV.E.2 and IV.F.1.

resources and less-developed legal systems at their disposal, face an even steeper climb than their Western counterparts. This note will survey squatting, squatters' rights, and adverse possession from an international perspective. Section II examines early property law and the development of adverse possession. More specifically, the section examines Roman law, English common law, European civil-law, early American property law, and the impact of colonialism on LDCs. Section III examines the theoretical developments that have helped define adverse possession and the property rights of squatters. Section IV begins by examining squatting within the common law traditions of the United States and Great Britain. Section IV then explores squatting and adverse possession on the European continent within the context of the civil-law tradition. The section ends with a discussion of squatting and adverse possession within the United States and within several LDCs. Finally, the note concludes by demonstrating how squatters are affected by the current framework of property policies and laws. In considering possible alternatives to the current laws, the author concludes that such alternatives would serve legitimate property interests and benefit societies at large by promoting general goals of equity and efficiency.

II. HISTORY OF SQUATTING, SQUATTERS' RIGHTS, AND ADVERSE POSSESSION

A. *Early History*

Squatting has a long history, and it is probably as old as history itself.[17] Adverse possession and the misuse of land through waste was discussed as long ago as 2250 B.C. in the Code of Hammurabi.[18] At one time, the laws offered little in the way of property guarantees, but today some property systems contain increased certainty of possession, transfer, and even title recording.[19] In investigating modern property rights, the past is certainly

17. DUKEMINIER & KRIER, *supra* note 15, at 100.

18. Section 44 regarding the waste of land states: "If a man rent an unreclaimed field for three years to develop it, and neglect it and do not develop the field, in the fourth year he shall break up the field with hoes, he shall hoe and harrow it and he shall return it to the owner of the field and shall measure out ten GUR of grain per ten GAN." THE CODE OF HAMMURABI, *supra* note 15, at 27. Section 60 rewards long economic development: "If a man give a field to a gardener to plant as an orchard and the gardener plant the orchard and care for the orchard four years, in the fifth year the owner of the orchard and the gardener shall share equally: the owner of the orchard shall mark off his portion and take it." *Id.* at 33. Maximizing the gardener's plot of land, section 61 states: "If the gardener do not plant the whole field, but leave a space waste, they shall assign the waste space to his portion." *Id.*

19. Some scholars debate the value of land titling. *See generally* Steven E. Hendrix, *Myths of Property Rights*, 12 ARIZ. J. INT'L & COMP. L. 183 (1995). Hendrix finds that, depending on complex conditions, land titling may either improve or slow economic development in LDCs. *Id.*

relevant.

Squatting has been influenced by the Roman property law tradition, especially as it evolved in the civil-law countries in continental Europe.[20] Emilie De Laveleye in *Primitive Property* describes the long history of property rights from the Greco-Roman tradition. "From the earliest times in their history, the Greeks and Romans recognized private property as applied to the soil . . . ."[21] Modern scholars have identified the Roman property system as "[a] well-articulated organization of private property."[22] This sophisticated and dynamic property system is a microcosm of the Roman Empire itself. Under the Roman Law Codes, "an owner was said to have virtually unlimited rights to preside over property without state interference."[23] In the agrarian economy of ancient Rome, the goal of most property owners was not to "increase their holdings."[24] In fact, Roman policy and tradition allowed a man only "as much public land as he could cultivate himself."[25] These policies favored the interests of the whole Empire over the interests of any individual land owner. Consequently, this property system did not allow a large landholder to waste potentially economically-viable land.[26]

As for the utilitarian Roman system of property, "[i]n the earliest times the arable land was cultivated in common, probably by the several clans; each of these tilled its own land, and thereafter distributed the produce among the several households belonging to it."[27] This property system, which was designed to create wealth for the Roman state as a whole, even applied to the holders of vast land under a system known as *precarium*.[28] Under *precarium*, a wealthy man with a surplus of land could allow another person to cultivate land and that person would maintain property rights "against third parties but not against the owner himself."[29] *Precarium* was yet another Roman policy aimed at curbing or ending the waste of land and

---

20. For a general discussion of property rights in the civil-law tradition, see *infra* Part IV.B-D. For further discussion of Roman law and its connection with "a vector of the morals of the 'materialistic world order,'" see generally James Whitman, *The Moral Menace of Roman Law and the Making of Commerce: Some Dutch Evidence*, 105 YALE L.J. 1841, 1842 (1996).

21. EMILIE DE LAVELEYE, PRIMITIVE PROPERTY 6 (G. R. L. Marriott trans., 1878).

22. ANDREW LINTOTT, JUDICIAL REFORM AND LAND REFORM IN THE ROMAN REPUBLIC 34 (1992).

23. JOHN CHRISTMAN, THE MYTH OF PROPERTY 17 (1994). These absolute rights are similar to the rights that would later re-assert themselves in Europe and eventually in the United States. *Id.*

24. *Id.*

25. LINTOTT, *supra* note 22, at 36.

26. See *infra* Part III for a discussion of utilitarianism and land use theory.

27. DE LAVELEYE, *supra* note 21, at 138.

28. LINTOTT, *supra* note 22, at 35.

29. *Id.*

resources. This system of property attempted to maximize the utility of land.[30] After the fall of Rome, real property rights in Europe drastically changed. However, the legacy of Rome would greatly influence the development of "modern Continental law" in the Napoleonic codes of France and in Germany's Civil Code.[31]

The tribes of northern Europe had a system of property that was "built on family estates, one where ownership was fragmented and circumscribed, [and] replaced the notion of the unencumbered individual owner."[32] In a system of estates, no one but the sovereign had absolute property rights. This system of property was based upon seisin, wherein "one who was 'seized' held all of the legal rights that the law recognized as capable of being concentrated in an individual."[33] After great political and social upheaval, northern Europeans would reestablish strong individual property rights in the common law tradition.

B. *Great Britain and the Common Law Tradition*

The common law tradition in England went through a substantial transformation from a system that promoted heredity and limited access to land to a system that emphasized the protection of individual property rights and free alienation. In feudal times, the monarchy maintained property rights through primogeniture, ultimogeniture, and other hereditary systems that kept land from being freely alienated. "Land was the essential pivot of feudal society . . . and thus had special importance."[34] The French established this system of tenure in England after the Norman conquest of that country in 1066,[35] and it was "a system of government through the agency of landholders."[36] The early remedy for loss of possession was to "oust the 'disseisor' by force . . . [and] if one did not do so promptly one

---

30. See *infra* Part III for a discussion of utility and economic rights.

31. JACOB H. BEEKHUIS, *Civil Law*, *in* VI INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, ch. 2 (Structural Variations in Property Law), at 4 (1981). For a detailed survey of European legal history, see MANLIO BELLOMO, THE COMMON LEGAL PAST OF EUROPE 1000-1800 (1995).

32. CHRISTMAN, *supra* note 23, at 10.

33. THOMPSON, *supra* note 15, at 70. *See also* OLAN LOWERY, ADVERSE POSSESSION, ch. 87 (1994).

34. PHILIP JAMES, INTRODUCTION TO ENGLISH LAW 420 (12th ed. 1989). For an interesting comparison to Scotland, see THE CIVIL LAW TRADITION IN SCOTLAND (Robin Evans-Jones ed., 1995). In particular, chapter eight by David Johnston compares Scottish and Roman law.

35. William Ackerman, *Outlaws of the Past: A Western Perspective on Prescription and Adverse Possession*, 31 LAND & WATER L. REV. 79, 81 (1996).

36. JAMES, *supra* note 34, at 422. As payment for their lands, these landholders supported the King in his foreign military quests or in defending against the hostile Scotsmen from the North. *Id.*

lost the right."[37] The system of feudalism eventually "decay[ed] within two hundred years of its introduction by the Normans."[38] In the fourteenth century, "the rural middle class began to develop," and "an economy based upon wages and not upon rendering services" caused the death of feudalism and the birth of strong individual property rights in real property.[39]

The metamorphosis from state- to individual-control of property in England is reflected in John Locke's writings on the theory of property. Locke saw a specific and limited role for the state in regulating property for the individual:

> the necessity of preserving men in the possession of what honest industry has already acquired, and also of preserving their liberty and strength, whereby they may acquire what they farther want, obliges men to enter into society with one another, that by mutual assistance and joint force they may secure unto each other their properties . . . .[40]

Locke also asserted that the state should simply provide for "the peace, riches, and the public commodities of the whole people."[41] Blackstone's *Commentaries*, written in the eighteenth century, further illustrate the changes in property law that occurred after the feudal periods. Blackstone described the ownership of property as "the sole and despotic domination which one man claims and exercises over the external things of the world in total exclusion of the right of any other individual."[42] Once the state relinquished absolute control of property, property rights and individual rights were to be forever linked.

Along with strong individual property rights, both adverse possession and the free alienation of property emerged as legal principles in England. Adverse possession was first identified in England as a legal doctrine in 1275 in the Statute of Westminster I, chapter 39, which fixed 1189 as the earliest date from which a plaintiff in a property action could establish seisin of his ancestry. Seisin was critical to the establishment of a property claim in Great Britain,[43] and the establishment of this fixed date for seisin greatly

---

37. THOMPSON, *supra* note 15, at 71.

38. JAMES, *supra* note 34, at 423.

39. DUKEMINIER & KRIER, *supra* note 15, at 359.

40. PASCHAL LARKIN, PROPERTY IN THE EIGHTEENTH CENTURY 64 (1969) (quoting JOHN LOCKE, LETTERS CONCERNING TOLERATION 177).

41. *Id.* at 65.

42. CHRISTMAN, *supra* note 23, at 18.

43. CHARLES HARR & LONNIE LIEBMAN, PROPERTY AND LAW 81 (2d ed. 1985). One author identifies the date as 1184 instead of 1189, explaining that the date "may have varied at the king's pleasure." THOMPSON, *supra* note 15, at 72 n.20. *Black's Law Dictionary*

disadvantaged those who were trying to establish adverse possession claims since it became more difficult to establish clear claims as the years passed. This unfair policy changed in 1623 with the Statute of Limitations,[44] which created a twenty-year limitation.[45]

The statute of 1623 was the adverse possession statute that many American colonial jurisdictions used as a prototype for their own laws.[46] The express goals of this statute were the "avoiding of Suits" and the "quieting of Man's Estates."[47] This statute reflected an early desire in England to prevent the waste of land resources and to force owners to monitor their lands properly. Further, by avoiding legal actions and quieting title, this statute provided a framework for decreasing the often high transaction costs associated with land disputes, and allowed for greater economic development based on the new certainty of title. The Statute of Limitations "was amended by 3 & 4 Wm. IV, c.27 (1833), which included a provision giving title to the possessor after the running of the period."[48] This statute and other provisions changed the statute of limitations for an adverse possession claim to twelve years. Statutes of limitations were critical for the proper development of property rights as they "[were] considered [to be] necessary and expedient for the general welfare."[49] The Statute of Limitations and adverse possession policies gave English citizens clear and defined mechanisms to expedite their property claims.

Great Britain may not have enjoyed its vast economic prosperity in the nineteenth century had the policy makers developed a property system that led to uncertainty and inefficiency. Further, these strong property rights have carried forward to modern times, giving squatters and land owners alike useful tools to further their varied interests. Great Britain has established a strong tradition of property and adverse possession rights for the United States and other common law countries to follow. This tradition promotes the values of uniformity, efficiency, and at least attempted impartiality within the property system.

---

defines seisin as "[p]ossession of real property under claim of freehold estate. The completion of the feudal investiture, by which the tenant was admitted into the feud, and performed the rights of homage and fealty." BLACK'S LAW DICTIONARY, *supra* note 9, at 1358.

44. 21 Jac. 1, c. 16, §§ 1, 2. For a history of adverse possession in the United States, see *infra* Part II.D. For the current state of adverse possession law in the United States, see *infra* Part IV.E.

45. BERGER, *supra* note 1, at 499.

46. DUKEMINIER & KRIER, *supra* note 15, at 100.

47. BERGER, *supra* note 1, at 499.

48. HARR & LIEBMAN, *supra* note 43, at 81.

49. THOMPSON, *supra* note 15, at 81.

C. *Continental Europe and the Civil-Law Tradition*

Roman law also had a strong impact on the creation of the civil-law tradition in continental Europe. Unlike the common law tradition, the civil-law tradition emphasized sources of law such as "statutes, regulations, and customs."[50] Within this tradition,

> codified civil law was the heart of private law, and the dominant concepts of the codes were individual private property . . . . This individualistic emphasis was an expression . . . of the rationalism and secular law of the age. The emphasis on rights of property and contract in the codes guaranteed individual rights against intrusion by the state.[51]

Although different in form, the civil-law traditions essentially had the same purpose of many of the common law traditions, which was to secure and protect citizens' property interests. Despite the similarities, however, there were some important differences between civil- and common law property concepts. In civil-law countries, the principle of unity that "makes the owner unable to split his right arbitrarily into powers of various kinds . . . . [is] one of the essential differences between the Civil Law systems and the Anglo-American law."[52]

D. *United States: Following Great Britain's Lead*

Tracing the origins of adverse possession in the United States is a difficult task because of "legislative and judicial confusion in the field of adverse possession of land . . . . The reason for the difficulty, but not its answer, lies in the mists of history."[53] Not surprisingly, early American property law followed English law closely, as "[m]ost American Jurisdictions first adopted the English model of a twenty-year limitation."[54] These American adverse possession statutes had

> negative and procedural importance, namely, the barring of an action, or of conduct, designed to recover land, when the bringer of the action has delayed too long. Their chief importance, however, in the law of property, [rested] on their proprietary and affirmative consequences, in constituting one means for the

50. JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 25 (1969).
51. *Id.* at 100.
52. BEEKHUIS, *supra* note 31, at 10.
53. THOMPSON, *supra* note 15, at 69.
54. BERGER, *supra* note 1, at 500. For a discussion of modern United States adverse

acquisition of ownership.[55]

The first adverse possession statute, in the form of a statute of limitations, appeared in North Carolina in 1715.[56] One early and critical decision involving adverse possession was the case of *Johnson v. M'Intosh*.[57] In *M'Intosh*, the plaintiff claimed title to a parcel of land that was titled to him from the Piankeshaw Indians; the defendant's title came from a grant from the United States government. Recognizing the principle of discovery and conquest, Chief Justice Marshall found that:

> [t]he United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or conquest . . . . An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognise [sic] the absolute title of the crown, subject only to the Indian right of occupancy . . . . This is incompatible with an absolute and complete title in the Indians.[58]

Despite what the above excerpt may suggest, Justice Marshall perhaps may have been uncomfortable with the decision he ultimately reached. The case presented the Court with a predicament: had the Court decided in favor of the Indians, thousands of property titles across the United States would have been clouded, causing severe chaos and a hindrance to commerce. Thus, this case of Indian title and adverse possession wrought an injustice based on policies that supported landholders and clarity of title. However, the history of American property development and westward expansion illustrates the tension between Indians, squatters, ranchers, homesteaders, farmers, railroad interests, miners, and many others who all sought land and resources. Today, as land has become more scarce in the United States, the law of adverse possession has moved toward shorter statutes of limitations. Despite some poor legal decisions and policies, the shortening of these statutes of limitations has helped adverse possessors and increased the duties

---

55. 7 R. POWELL, REAL PROPERTY ¶ 1012 (P. Rohan ed., 1977), *reprinted in* DUKEMINIER & KRIER, *supra* note 15, at 83.

56. Ackerman, *supra* note 35, at 83 (citing Patton's Lessee v. Easton, 14 U.S. 474 (1816)).

57. 21 U.S. (8 Wheat.) 543 (1823).

58. *Id.* at 587-88.

of land owners to monitor their land.

E. *Colonialism and the Impact on Property Rights*

The nineteenth century saw the rise of European power and hegemony due to the industrial revolution and the resulting increase in technology and wealth in Europe. Due to increased technology, European nations found distant areas of the world to be more accessible and desirable as these states sought to increase their wealth and power. Consequently, Europeans established colonies on every continent and every unclaimed area in a quest for wealth and resources. Colonization of the underdeveloped world had a direct impact upon many nations. "Pressure on and confiscation of land was a fundamental feature of colonialism, especially in East and Central Africa."[59] Even after they departed, the colonial powers left their former territories with "a general atmosphere of suspicion of individual land rights"[60] due to their emphasis on land acquisition. This lasting influence, although not present in every former colony, manifested itself in flawed property systems that lacked certainty and uniformity of property rights. Furthermore, the instability of property systems resulted in slower economic

---

59. Martin Chanock, *Paradigms, Policies and Property: A Review of the Customary Law of Land Tenure*, *in* LAW IN COLONIAL AFRICA 61 (Kristin Mann & Richard Roberts eds., 1991). An interesting historical event in the movement away from colonialism was the "Mau Mau Emergency" in Kenya. *See generally* DAVID W. THROUP, ECONOMIC & SOCIAL ORIGINS OF MAU MAU 1945-53 (1990). In 1949, a local farmer described the influx of squatters into Kenya at the time:

> squatter labour is pouring into the forest reserve, where the conditions are probably so attractive as to make this a squatters' paradise, and a haven of refuge. Land; land; land; nice fresh virgin land, is their cry; little or no work from their *bibis* [wives]; sheep filling their bellies with good green luscious grass; firewood quite handy; *pombe* [beer] brewing galore- who will visit us in the forest at night . . . Utopia has been discovered . . . ."

Id. at 91 (quoting KNA Lab 9/320, The Resident Labourers' Ordinance: Aberdare District Council 1944-51, Major L.B.L. Hughes to DC Naivasha, Mar. 16, 1949). The Mau Mau movement was

> an alliance between three groups . . . : the urban unemployed and destitute, the dispossessed squatters from the White Highlands and the tenants and members of the junior clans in the Kikuyu reserves. The revolt was a dominating factor in convincing the conservative [English] imperial government that the cost of repression in the African colonies was not worth the troops and resources."

Id. at back cover. Similar colonial revolts plagued other European powers whose resources were sapped by World War II: France in Vietnam, Belgium in Congo, and Great Britain in Kenya. *See generally*, FRANK FUREDI, THE MAU MAU WAR IN PERSPECTIVE (1989). Furedi notes that the English attempted to present the squatters' movement "as a criminal organization. The colonial government went to great lengths to portray Mau Mau as an irrational force of evil, dominated by bestial impulses and influenced by world communism." *Id.* at 3-4. The Mau Mau movement "expressed the irreconcilable nature of social tensions. Its destruction was the pre-condition for the evolution of a more acceptable reforming nationalist movement and the consummation of the process of decolonization." *Id.* at 7.

development and a general loss of individual rights that often had tragic results.

III. PROPERTY FROM A THEORETICAL PERSPECTIVE

A theoretical understanding of property is helpful in making proper determinations regarding property laws and policies. Utilitarianism is applicable and influential to property law and to the law of adverse possession. Jeremy Bentham, whom some academics have called the "father of modern utilitarianism,"[61] pointed to a connection between "full property rights, security, and happiness."[62] Bentham emphasized this link when he stated "[p]roperty and law are born together and die together."[63] Because of the importance of property law, there is the "need for a consistent and sufficiently public institution of property rights . . . . Structures could vary greatly from liberal ownership as long as the structure is public and consistent."[64] Bentham did not advocate a system of forced equality, but simply a system of guaranteed property rights similar to what the Romans had provided for their citizens.

In order to achieve the goal of efficiency, a property system must strive to lower transaction costs. Transaction costs are those expenses or costs that impact parties negotiating a dispute. Transaction costs from litigation, evictions, and property damage can place a heavy burden on individuals and society as a whole. In economic terms, these burdens are often reflected in "externalities," i.e., costs borne by persons who are not parties to the immediate transaction. Externalities are "market imperfections . . . like pollution."[65]

Harold Demsetz in *Toward a Theory of Property Rights* stated that "[p]roperty rights are an instrument of society and derive their significance from the fact that they help a man form those expectations which he can reasonably hold in his dealings with others. These expectations find expression in laws, customs, and mores of a society."[66] The significance of property rights is illustrated by the fact that countries that afford few individual rights generally have property systems that cloud claims and

---

61. CHRISTMAN, *supra* note 23, at 101.

62. *Id.*

63. Chanock, *supra* note 59, at 62.

64. CHRISTMAN, *supra* note 23, at 102. Similarly, one author contends that "[i]n order for an economy to reach its full potential, that is, to achieve an optimal level of production, there are three basic features which its system of property rights must have: universality, exclusivity, and transferability." Gensler, *supra* note 14, at 51.

65. Gensler, *supra* note 14, at 51.

66. H. Demsetz, *Toward a Theory of Property Rights*, *in* THE ECONOMICS OF PROPERTY RIGHTS 31 (Eirik G. Furubotn & Svetozar Pejovich eds., 1974). *See generally* Terry L. Anderson & P. J. Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J.L. & ECON. 163 (1975) (additional economic information on property rights).

potential claims to property.[67] With respect to this general goal of efficiency, property rights should provide "incentives to achieve a greater internalization of externalities."[68] Such internalization allows society to deal effectively with problems by lowering overall transaction costs. In accordance with the philosophical underpinning of utilitarianism, adverse possession must be equitably applied to promote efficiency and fairness. Regarding the current situation concerning property rights, squatters, and land use, the Economic Commission for Europe reported the following:

> [h]igh levels of squatter housing indicate that the formal land market does not provide affordable residential land for housing, forcing households to occupy land illegally. High levels of this indicator also suggest that eviction may not be a realistic option, but rather calls for policies and programmes which lead to strengthening tenure security in squatter settlements, thus facilitating higher levels of housing investment.[69]

Following the philosophical foundations of utilitarianism, governments should strive for more efficient use of land as both populations and scarcity of housing increase. To achieve the goal of more efficient and ultimately more beneficial use of land, squatting, homesteading, and more liberal application of adverse possession laws—even if such actions are contrary to the interests of governments, municipalities, or private land holders—should be encouraged.

IV. MODERN SQUATTING AND ADVERSE POSSESSION

A. *Great Britain and the Common Law Tradition*

Despite squatting's long history, squatting became a significant problem in Great Britain in the late 1960s and 1970s.[70] Because of high

---

67. *See infra* Part IV.F (property rights in LDCs).

68. Demsetz, *supra* note 66, at 32.

69. *The Right to Adequate Housing*, *supra* note 10, ¶ 35. Despite this announcement, there are a number of objections to squatting:

> 1) it violates property rights; 2) it subjects the participants to the risk of arrest; 3) it involves significant labor and expense to rehabilitate the housing, which invariably is in poor physical condition; 4) squatters gain shelter for themselves at the expense of the hundreds of thousands on waiting lists for public housing; and 5) squatting is likely to antagonize neighborhood residents who object to the presence of squatters.

Eric Hirsch & Peter Wood, *Squatting in New York City: Justification and Strategy*, 16 N.Y.U. REV. L. & SOC. CHANGE 605, 605 (1987).

70. DUKEMINIER & KRIER, *supra* note 15, at 100. After World War II, there was a massive squatting movement in London after the government promised "homes fit for heroes," but housing was lacking. Greg Neale, *50 Years on[] a Squat Fit for Heroes*, SUNDAY

property taxes and urban renewal projects, there were many vacant buildings in Great Britain at that time.[71] In 1968, a wave of squatting hit Great Britain as a result of these conditions.[72] The squatters in Britain were not simply homeless persons looking for shelter. Instead, the squatting movement in Great Britain took on a strong political flavor as squatters urged changes in existing property policies. This lower class "revolution" received great public sympathy, which is common in many squatting movements.[73] Nonetheless, in the 1970s, this sympathy waned when some squatters shifted from urban squatting to residential squatting.[74] In this new wave of squatting, a home owner might leave on an extended vacation only to come back and find his home occupied by squatters. Under the Criminal Law Act 1977, "the person who comes back from holiday may use or threaten to use violence to oust squatters found in his home; but the squatters will commit the offence [sic] [of threatening violence without lawful authority] if they retaliate."[75]

As evidence of the strength of the current squatting movement in Great Britain, agencies currently exist that show potential residential squatters a list of vacant houses or buildings.[76] The agencies have photos for the prospective squatters to examine, and they give the squatters instructions to "not cause damage when entering properties and . . . [to] not change the locks" because if so, "the landlord can do nothing except apply for an

---

TELEGRAPH (London), Apr. 28, 1996, *available in* 1996 WL 3945816.

71. Neale, *supra* note 70. In 1992, there were 764,000 empty properties in Great Britain. Rachel Kelly, *Squatters Put Down Roots in Campaign to Reclaim Derelict Flats*, TIMES (London), Aug. 7, 1992, *available in* 1992 WL 10896061. In 1995, "[a]ccording to the Department of the Environment, there [were] an estimated 864,000 empty homes in Britain. The Advisory Service for Squatters estimate[d] that 17,000 of [those homes] contain[ed] squatters." Ian Hunter, *Streetwise Moves to Outsmart Squatters*, GUARDIAN (London), Mar. 26, 1995, *available in* 1995 WL 7590927.

72. DUKEMINIER & KRIER, *supra* note 15, at 100.

73. *Id.* at 101. As evidence of this sympathy for squatting in England, the villagers of Pulham St. Mary at one time supported four squatters who occupied a 27-room mansion and called them "delightful young people." Jo Knowsley, *Squatters Defy Court Order to Vacate Mansion*, SUNDAY TELEGRAPH (London), Mar. 24, 1996, *available in* 1996 WL 3937509. However, this relationship deteriorated over a two year period as the squatters continued to host "a series of rave parties [that] . . . kept [the villagers] awake until dawn." *Id.*

74. DUKEMINIER & KRIER, *supra* note 15, at 100, 101. This squatting is not unlike what is currently happening in California. *See infra* Part IV.E.2.

75. JAMES, *supra* note 34, at 474.

76. These agencies are non-profit organizations, unlike a similar squatting agency in California that charges its customers monthly rent. *See infra* Part IV.E.2. This agency is called the Advisory Service for Squatters (ASS) and its goals are to provide legal and practical advice to squatters, those interested in squatting, and local squatting groups. It also produces the "Squatters' Handbook"—a guide to many of the problems that may arise in connection with squatting. Resource Information Service, *Homelessness in the U.K.* (visited Oct. 10, 1997) <http://www.ris.org.uk>.

eviction order."[77]

In Great Britain, these "commercial squatters" often reflect poorly upon squatters as a whole. In Katherine Bowen's letter to the editor, *The Worst Kind of Squatter*, she describes the ordeal of having commercial squatters moving into viable "letting retail premises."[78] Commercial squatting has been described as "a highly organised business, with groups now set up to provide information on vacant properties, arrange false leases and keys and even introduce commercial squatters to suppliers of stock, which is often of dubious origin."[79] However, with respect to the commercial and residential squatter, it is sound public policy for governments to differentiate between the squatter who inhabits because of necessity and the squatter who simply is out for profit: public policy should allow residential squatters greater latitude for basic humanitarian reasons.

In 1995, there were an estimated 60,000 squatters in Great Britain.[80] Many of these squatters were among the estimated 700,000 homeless people in Great Britain.[81] Today, these squatters may only be removed after a civil hearing in the British courts at considerable expense to the homeowner. Each year about 10,000 property owners seek expulsion of squatters through the civil courts.[82] Unfortunately, this wave of squatting has also prompted British government officials to enact criminal legislation specifically aimed at the squatters. One anti-squatting provision is found in the Criminal Justice and Public Order Act of 1994. The offense of "aggravated trespass" was specifically aimed at squatters.[83] Under the new laws, a property owner who

---

77. Michael Fleet & Trevor Fishlock, *I'm Your New Estate Agent*, DAILY TELEGRAPH (London), Feb. 27, 1996, *available in* 1996 WL 3931101.

78. Katherine Bowen, Letter to the Editor, *The Worst Kind of Squatter*, DAILY TELEGRAPH (London), June 13, 1993, *available in* 1993 WL 10948348.

79. Lynne Wallis, *Taking Stock as Empty Shops Fall to Commercial Squatters*, DAILY TELEGRAPH (London), June 28, 1993, *available in* 1993 WL 10951926.

80. Steven Ward, *Squatters Face Six Months' Jail*, INDEPENDENT (London), Aug. 24, 1995, *available in* 1995 WL 9804810.

81. Wright, *supra* note 4. There are specific procedural steps that an unintentionally homeless person must go through to receive housing. R. v. London Borough of Ealing *Ex parte* Denny, CO/390/93 (Q.B. 1993). First the person must "appl[y] to the local authority for permanent accommodation." *Id.* Next, "[e]ach successful applicant for housing is offered by his local authority a property which is vacant, available for occupation and suitable in terms of size, location, facilities, etc." *Id.* If the person rejects this housing offer, the authority may offer another property. *Id.* Often a person will accept a squatted property and "arrangements and likely time scale for ejecting the squatters and securing vacant possession is discussed with the homeless person . . . ." *Id.* Then the homeless person is given tenancy in the property, is protected, and given "assistance of the police under § 7 of the Criminal Law Act 1977." *Id.* This system certainly has some merit. If abandoned viable property is kept in registries, this could be an effective and low cost remedy to some of the world's homelessness.

82. Ward, *supra* note 80.

83. *Off Beat: The Police; Great Britain's Criminal Justice Act Gives More Power to Police Officers in Cases of Trespassing and Squatting, But Police Are Reluctant to Make Arrests Because They Are Not Compensated for the Work*, ECONOMIST (UK), Nov. 26, 1994,

has a potential squatter problem will "receive a hearing three days after applying to a county court."[84] If the squatters fail to appear, then the squatters "have 24 hours to leave and face up to six months' jail and fines of up to pounds 5,000 if they stay."[85]

In protest of this new law, 250 British squatters advocates conducted a "mock trial" in the garden of Michael Howard, the British Home Secretary, and the police took no action.[86] The lack of action by the police, due to limited resources, was in part caused by the various new responsibilities the Criminal Act places on police. Critics of this legislation claim that these laws "have the effect of criminalising a large number of people, including homeless persons squatting in empty properties; travelers living in caravans on land other than authorized official sites . . . and people participating in a wide range of demonstrations or public protests."[87] Nevertheless, in 1995, the rules were amended in order to allow a "fast track eviction of squatters."[88] Under the 1995 procedure, "landlords and homeowners can now go to court to obtain an 'Interim Possession Order' (IPO) against alleged squatters."[89] Essentially, an IPO gives a squatter twenty-four hours to vacate the premises or face criminal penalties. The trespass laws represent the policy tightrope the British government has walked between two distinctly-motivated interests: the interests of residential squatters with legitimate housing and habitat concerns, and the interests of the commercial or profit motivated squatters who move into temporarily-vacated businesses or the homes of people on vacation. While squatting in Great Britain may present legitimate problems, criminalizing squatting does not get to the root of the problem of homelessness.

Like many squatters around the world, British squatters have become an important part of the communities in which they live, often performing socially important and valuable functions. Squatters in Brighton, East Sussex, have taken over a row of "dilapidated Victorian cottages . . . and have turned them into a brightly-painted terrace."[90] These squatters include

---

available in 1994 WL 12754630 [hereinafter *Off Beat*].

84. Ward, *supra* note 80.

85. *Id.*

86. *Off Beat*, *supra* note 83.

87. Penal Affairs Consortium, *Squatters, Travelers, Ravers, Protesters and the Criminal Law* (visited Oct. 2, 1996) <http://www.penlex.org.uk/pacsquat.html>.

88. *Letting Facts: Squatters and the County Court (Amendment No. 2) Rules 1995*, (visited Oct. 2, 1996) <http://www.letlink.co.uk/lfacts14.html>.

89. *Id.*

90. Michael Fleet, *'Let the Trumpton Squatters Stay,'* DAILY TELEGRAPH (London), July 8, 1996, *available in* 1996 WL 3963350. Despite the apparent success of these squatters, others have faced severe problems, such as difficulties in obtaining electricity. In *Woodcock v. South W. Elec. Bd.*, the court held that the defendants were not obligated to provide the plaintiffs with electricity. 2 All E.R. 545 (Q.B. 1975). In that case, student squatters sued under an 1899 law that requires that electricity be given to "the owner or occupier of any premises." *Id.* In *R. v. McCreadie*, another case involving electricity, the court upheld the conviction of two squatters, one of whom told the police that he was "renting the shop from

"students, a carpenter, a former embalmer and some women with children."[91] These squatters have so endeared themselves to the community that their neighbors have "sent a 1,500-name petition to their local council asking that they be allowed to stay."[92] Strangely enough, despite the apparent harmony, there are plans to demolish the cottages and build an office on that site. Thus, while squatting in England is often legal and justified, squatters using adverse possession have had mixed results.

In Great Britain, the statutory period for adverse possession is twelve years under section 15 of the Limitation Act 1980.[93] Interestingly, in *Mount Carmel Inv. Ltd. v. Peter Thurlow Ltd.*, the court held that tacking of claims could exist among squatters: "[i]f a squatter dispossessed another squatter and the first squatter abandoned his claim to possession, the second squatter could obtain title to the land by 12 years' adverse possession by both squatters."[94] Thus, some squatters have had success using the English adverse possession rules. As another example, in 1996, a pair of squatters "earnt Pounds 103,000 from the sale of the Victorian house where they had lived rent-free for 19 years."[95]

It is nearly impossible to evaluate the overall success of the squatters' movement in Great Britain. At minimum, the squatters in Great Britain have raised public awareness of the housing crisis and one potential remedy—squatting. With some unusual but visible exceptions, liberal squatting in Great Britain seems to have somewhat alleviated the problems associated with homelessness and the housing crisis. Despite the acts criminalizing squatting, Great Britain has a climate generally warmer to the plight of squatters.

B. *Continental Europe and the Civil-Law Tradition: Germany*

Like many wealthy western countries, Germany has had its share of squatting problems. Germany also has an established property system that includes rights of adverse possession. The prevalence of squatting in Germany may be attributed to the fact that in 1994 the number of homeless

---

the owner, that he did not know that the electricity was being used illegally and that payment was nothing to do with him." 96 Crim. App. 143 (1992).

91. Fleet, *supra* note 90.

92. *Id.*

93. JAMES, *supra* note 34, at 480.

94. Mount Carmel Inv. Ltd. v. Peter Thurlow Ltd., 3 All E.R. 129 (C.A. 1988). This tacking without privity is not allowed in most jurisdictions in the United States, where clear privity between transferors of adverse possession claims is required. "Tacking occurs whenever the successive occupiers are said to be in 'privity of estate.' Privity of estate is a term that recurs often . . . . [P]rivity would be satisfied if the relationship between the first and second occupier were: grantor-grantee, landlord-tenant; testator-devisee; decedent-heir; mortgagor-mortgagee." BERGER, *supra* note 1, at 506.

95. Ian Murray, *Couple Cash in on Sale of a Squat*, TIMES (London), July 9, 1996, *available in* 1996 WL 6505728.

individuals was estimated to be in excess of one million.[96] Some of Germany's homeless problems are due to the reunification of East and West Germany, evidenced by the billions of Deutsche Marks that the West has poured into the East.

The German government has a core of centralized power that is checked by the powers of the individual states. The German Civil Code and basic law provide much of the framework and structure for German governance. The most important laws involving property and adverse possession are found within the German Civil Code, The Third Book: Law of Property. The first section of the Law of Property, entitled "Possession," considers property possession and adverse possession. The second section of the Law of Property contains a provision delineated as Section 900, which states: "[a] person, who is registered in the Land Register as the owner of a piece of land without having obtained ownership, acquires the ownership, if the registration has subsisted for thirty years and he has during this period held the piece of land in his proprietary possession."[97] This thirty-year period in Germany represents a governmental policy that does not promote adverse possession claims. Typically, the shorter the statutory period, the greater the governmental interest in preventing owners from "sleeping" on their property rights, through lack of maintenance, lack of visitation, or a general disregard for their duties. Despite this lengthy statutory requirement for adverse possession (especially when compared to other countries), in one particular squatting situation German authorities found it necessary to compromise and depart from the written civil-law.

In Hamburg, Germany, a group of squatters who were occupying a block of buildings won a fourteen-year battle against the government. This prolonged battle began in October 1981 "when a group of about 100 punks and social revolutionaries occupied a block of empty houses overlooking the harbour and owned by the city."[98] This site was very important to Hamburg city officials because it "is near some of Germany's most exclusive hotels and brothels . . . [and] city officials feared the squatters would harm tourism."[99] As in Great Britain, the squatters received public support, as illustrated by a demonstration in 1986 when "10,000 supporters of the

---

96. Wright, *supra* note 4.

97. § 900 BGB III, *available in* THE GERMAN CIVIL CODE 168 (Simon L. Goren trans., 1994). This statute is not absolute and the limitation of claims on lands has caused some problems in Germany, as "Germany's reunification treaty allowed for the return of property seized by the Nazis up until 1945, and the Communist from 1948 onwards, but not for the restitution of land expropriated by the Soviet occupation of 1945-1948. Six years on, the former owners are still fighting furiously for recognition." George Monbiot, *A Man's Home is Someone Else's Castle*, GUARDIAN (London), July 18, 1996, *available in* 1996 WL 4034575.

98. Stephen Kinzer, *'Anarchist' Squatters Win the Right to a Mortgage[;] Hamburg Has Given Up Trying to Evict a Gang of Residents Who Were Seen as a Potential Threat to Tourism*, GUARDIAN (London), Jan. 6, 1996, *available in* 1996 WL 4003442.

99. *Id.*

squatters marched through central Hamburg."[100] However, a year later the German police remained unsuccessful in their attempts to evict the squatters from the group of buildings. Finally, in 1996, the city officials radically changed their policy, and the city government accepted the squatters and decided to take "the decisive step toward permanently ending this difficult conflict."[101]

This reconciliation is quite different from the approach taken by many governments, including jurisdictions within the United States, as local authorities appear quite willing to oppose residential squatters' claims in American cities.[102] In this agreement between the German city and the squatters, the squatters will purchase the buildings for "less than a third of [their] market value."[103] The squatters will shoulder the costs of repairing and renovating the buildings, and they will pay the city one-half of overdue rent and utility bills.[104] This type of compromise should serve as a model to other municipalities around the world as a way of ending potentially violent and expensive conflicts. This type of compromise produces a win-win result. Hamburg may not have received full market value for its property, but the city was able to avoid costly litigation and/or eviction costs and the associated expenses of housing the evicted squatters. Further, by transferring the property rights to the squatters, the government created a cost-effective remedy to a housing shortage.

C. *Continental Europe and the Civil-Law Tradition: Denmark*

Danish legal philosophy has been described as a system "of positivism as well as of realism in the common and commonplace sense."[105] Under this system of "commonplace sense," Denmark has had a long history of promoting efficient use of property. Since 1683, under King Christian V's Danish Code, "*twenty years of possession* is required for prescription."[106] Under this code, "[i]t is up to the user—regardless whether his use is lawful or contrary to other rights—to prove that his prescriptive possession of the property took place during the necessary period of time."[107] If the use of property is for a general purpose "ownership [of the property] is regularly

---

100. *Id.*

101. *Id.*

102. *See infra* Part IV.E.1 (conflict between the government and squatters in New York City).

103. Kinzer, *supra* note 98.

104. *Id.*

105. Preben Stuer Lauridsen, *Introductory Review of the Links between Law and Jurisprudence in Scandinavia, in* DANISH LAW, A GENERAL SURVEY 9, 10 (Hans Gammeltoft-Hansen et al. eds., 1982).

106. Jesper Berning, *Property Law, in* DANISH LAW, A GENERAL SURVEY, *supra* note 105, at 186 (emphasis in original). *See also supra* note 13 (general definitions of prescription).

107. *Id.*

obtained."[108] However, if the use is "directed for a specific purpose" then "an easement is obtained."[109] Although Denmark does not have a long history of squatting problems, this theory of "commonplace sense" and "positivism" has been reflected in the creation of a major squatters' settlement in Copenhagen.

The Free City of Christiana celebrated its twenty-fifth year in 1996. In October 1971, as a response to housing shortages, an abandoned army barracks in the Danish capital of Copenhagen was occupied by 800 squatters.[110] Squatters call Christiana the "free city" because there they are "free of rents, free of taxes, and free of laws imposed by the society."[111] Part of the freedom also included the open sale of drugs and collectivized property.[112] Because of a governmental policy of "tolerance of diverse philosophies and lifestyles," the squatters were able to remain and the "Ministry of Defense even left on the water and electricity."[113]

Although the Christiania experience may seem extreme, it suggests an interesting housing solution for the United States, Europe, and the Soviet states. Due to the end of the Cold War, both East and West have many vacant military complexes. Some of these facilities could be turned over to squatters, homeless persons, and homesteaders for rapid change into low income housing. Transfers of military property could quickly change a remnant of the past into a salient solution to the homeless problem.

D. *Continental Europe and the Civil-Law Tradition: Netherlands*

The Netherlands has a long history of squatting and a strong tradition of adverse possession. Supporters of the squatting movement "numbered tens of thousands at its heights in the Sixties."[114] The Dutch squatters' movement "lost much of its strength during the 1980s when many of its members were offered alternative housing over the years."[115] Despite its weakened state, squatting is still a powerful force in the Netherlands. In fact, squatting has been called "lasting evidence of the continuing anarchic youth movement [in the Netherlands]."[116]

---

108. *Id.*

109. *Id.*

110. *Squatting It Out*, ECONOMIST (UK), Apr. 1, 1978, at 44, *available in* LEXIS, World Lib., ALLNWS File.

111. *All Things Considered: Free City of Christiania Changing After 25 Years* (National Public Radio broadcast, Sept. 26, 1996), *available in* 1996 WL 12726671.

112. *Id.*

113. *Id.*

114. *Dutch City Fights to Evict 30 British Squatters*, EVENING STANDARD (UK), Jan. 24, 1995, at 16.

115. *Dutch Police Arrest 139 in Clean-up of Squatted Building*, REUTER LIB. REP. (Amsterdam), May 27, 1990.

116. Catherine Trevison, *Decadence, or Tolerance?*, TENNESSEAN (Nashville, Tenn.), June 23, 1996, *available in* 1996 WL 10355456.

The Dutch legal system is considered to "belong to the Romano-Germanic family."[117] The rules for acquisitive prescription of property, i.e., adverse possession, are set out in article 3:99 of the Dutch Civil Code:

> 1. possession; whether there is possession is decided along the lines of generally prevailing views (art. 3:108); 2. possession must have been acquired in good faith. Once a possessor is in good faith, subsequent knowledge will not affect his good faith (3:118 par 2). 3. possession must have been uninterrupted. Loss of possession therefore means that a current prescription-period is terminated. . . . (art. 3:103). 4. lapse of time: a. a period of three years for non-registered movables . . .; b. a period of ten years for all other goods. . . . [immovable goods, real property](art. 3:119).[118]

Despite the seemingly strict rules on prescription, Dutch squatters, particularly in Amsterdam, have had some successes. According to Dutch historian Han Van Der Horst: "[i]n spite of clear legislation to the contrary, tolerance had become second nature for the political leaders in the Netherlands."[119] Edward Soja, professor of urban and regional planning at the University of California, described the squatter movement in Amsterdam as:

> more than just an occupation of abandoned offices, factories, warehouses and some residences. It was a fight for the rights of the city itself, especially for the young and for the poor. Nowhere has this struggle been more successful than in Amsterdam. Nowhere has it been less successful than in Los Angeles.[120]

Squatters in the Netherlands have been successful in part due to compromises by the Dutch government. After the Dutch coronation in 1980, squatters and police often battled. Like the experiences in Great Britain and Germany, these battles "brought a great wave of public sympathy, not for the state's over-reaction but for the young and lawless."[121] After the great

---

117. W.M. Kleijn, *Property Law*, *in* INTRODUCTION TO DUTCH LAW FOR FOREIGN LAWYERS 63 (J. M. J. Chorus et al. eds., 2d rev. ed. 1993).

118. *Id.* at 83. Also interesting in the Dutch property system is that "[s]ince 1951 the Dutch Code recognizes community property in apartment buildings . . ." *Id.* at 72. This system allows separate co-ownership of the building. *Id.*

119. Trevison, *supra* note 116.

120. Freedom Press, *A Visit to Amsterdam* (visited Oct. 2, 1996) <http://www.lglobal.com/TAO/Freedom/ams.html>.

121. *Id.*

squatter battles of 1980, the Dutch government passed "new legislation to tidy up the rules on empty property" that "requir[ed] local authorities to keep a list of empty houses and other buildings which could be converted into homes."[122] The new criminal code also protected property from occupation and "squatters [could] be fined up to $215."[123]

Despite the tightening of laws in the Netherlands, squatters have still enjoyed success. Dutch culture and society emphasize tolerance and compromise, two qualities needed to address homelessness effectively. Nonetheless, as in Germany and other countries, there will always be some problems in the Netherlands related to squatting due to the tension between property rights and adverse possession. But governmental cooperation and public support of squatters in the Netherlands have seemingly reduced the specter of violence in the battle for shelter and land.

E. *United States*

English law influences much of the law of adverse possession in the United States. Despite this background, United States adverse possession law has taken on its own unique flavor. This is evidenced by the various statutes of limitations for adverse possession claims that range from five years in California, Idaho, and Montana, to forty years in Iowa.[124]

1. *New York*

In the United States, no city has experienced more urban squatting activity than New York City. Within the United States, New York is a relatively old city with diverse regions and many abandoned buildings and factories. New York State's adverse possession law provides that those who openly and hostilely possess land for ten years can request title to that land.[125] An important case in New York State's adverse possession law is *Van Valkenburgh v. Lutz*.[126] In that case, William Lutz "cultivated" a triangular lot, erected a fence on the lot's borders, built a small shack on the lot, and generally acted as the owner of the lot for over thirty years, only to have his adverse possession claim fail because "[t]he proof concededly fail[ed] to show that . . . the garden utilized the whole of the premises claimed."[127] In *Levy v. Kurpil*, [128] which involved a dispute between

122. *Holland; Swat the squatters*, ECONOMIST (UK), Mar. 28, 1981, at 34.

123. *Id.* This criminal code is very similar to the anti-squatting acts passed in Great Britain. *See generally supra* text and accompanying notes 82-85.

124. *See generally* CAL. CIV. PROC. CODE. §§ 317-321 (1996); IDAHO CODE ANN. § 5-203 (1881); MONT. CODE ANN. § 70-19-401 (1975); IOWA CODE ANN. § 614.31 (West 1969).

125. N.Y. [Real Property Actions and Proceeding Law]§§ 501-551 (McKinney 1997) (ten year statute of limitations).

126. 106 N.E.2d 28 (N.Y. 1952).

127. *Id.* at 29.

128. 168 A.D.2d 881 (N.Y. App. Div. 1990).

neighbors over the ownership of a triangular shaped area of land bordering the two properties, the court stated that "[a]dverse possession is established by showing possession which is hostile and under claim of right, actual, open and notorious, as well as exclusive and continuous for a prescribed 10 year period."[129] Despite the seemingly clear rules on adverse possession in New York, squatters have had difficulty using them effectively.

In New York City, the "13th Street squatters" received significant attention because of protests, riots, and subsequent police action. On 13th Street, the squatters claimed title by asserting themselves as the "homesteaders" of abandoned buildings owned by New York City.[130] Many squatters invested money and "sweat equity" in the properties, "controlled them, secured them, and behaved in all ways as owners of the property."[131] In 1995, the radio program "All Things Considered" interviewed one of the 13th Street squatters who estimated that he spent about $6,000 renovating his apartment.[132] The city evicted the squatters to make way for a four million dollar low-income housing project.[133] The squatters protected their squat by

---

129. *Id.* at 883.

130. Homesteading is an excellent solution to the problem of homelessness, as it offers a win-win solution with municipalities saving money while at the same time reducing the amount of homeless. For an interesting illustration of squatting and the underground homeless in New York City, see MARGARET MORTON, THE TUNNEL: THE UNDERGROUND HOMELESS OF NEW YORK CITY (1995). This book describes some of the many homeless who have established a residence on abandoned railroad tracks. According to one squatter:

> I don't ascribe any mystical thing to [living underground]. It's just free. Not about a monetary free thing—but I feel free here. I'm not constricted by people crowding me like over there where everybody's in a matchbox. You could hear through the wall. Where's your privacy? Over here there's privacy and spaciousness. I feel comfortable, and this is my home.

Id. at 72.

131. *Adverse Possession* (visited Nov. 30, 1997) <http://www.escape.com/~spyder/squat/adverse.html>.

132. *All Things Considered: East Village Squatters Win First Round Against City Segment* (National Public Radio broadcast, Nov. 9, 1995), *available in* 1995 WL 9892520. In regards to the contribution of the squatters, the petitioner's complaint in *East 13th St. Homesteaders' Coalition v. New York City Dep't of Hous. Preservation and Dev.* states that the "Petitioners here have dedicated themselves to the long-term rehabilitation of abandoned housing stock, and have labored for more than ten years to make comfortable, safe homes for homeless and low-income families from the neighborhood." *Squatter Legal Petition* (East 13th St. Homesteaders' Coalition v. New York City Dept. of Hous. Preservation & Dev.), para. 23 (visited Oct. 10, 1997) <http://www.escape.com/~spyder/squat/legal1.html> [hereinafter Bukowski Petition].

133. Sarah Ferguson, *You Can't Go Home Again: Inside the City's Siege of the 13th Street Squats*, VILLAGE VOICE (New York), June 13, 1995, *available in* 1995 WL 10286507 [hereinafter Ferguson, *You Can't Go Home Again*]. Many of the 13th Street squatters were charged with criminal trespass, which is a violation of 140.10 of the New York State Penal Code. This provision states: "A person is guilty of criminal trespass in the third degree when he knowingly enters or remains unlawfully in a building or upon real property: (a) which is fenced or otherwise enclosed in a manner designed to exclude intruders. . . . Criminal trespass in the third degree is a class B misdemeanor." N.Y. [Criminal Trespass in the Third Degree]

creating a "flimsy tangle of bicycle frames and barbed wire welded to the metal stairways."[134] New York City Mayor Rudolf Giuliani justified the eviction based on safety concerns. The squatters claimed adverse possession in excess of the statutory ten-year period because the 13th Street buildings had been vacant since 1984. The failure of the squatters to establish adverse possession claims in court partially rested on their inability to establish tacking for their claims. It was nearly impossible for the squatters to prove that they had continually lived in the building for the required ten-year period. Thus, the squatters lacked the type of documentation required to win their adverse possession suit.

The struggles of the 13th Street squatters reflect only a limited number of the difficulties squatters encounter in seeking legal remedies. For instance, some jurisdictions do not recognize adverse possession claims asserted against governments or have special rules or limitations periods for those types of suits.[135] Moreover, in many cases, squatters lack standing to bring proper actions. In *Valentin v. Department of Housing Preservation & Development*, the trial court found that a squatter who instituted a housing action (for lack of a proper stove and refrigerator) against the City of New York lacked standing because it would be "incongruous and completely unfair to those pre-approved applicants who distinctly have a legal priority over those individuals who assume occupancy of an apartment without regard to their legal status."[136] Despite these adverse decisions, the New York squatters remained hopeful that they might succeed.

The February 8, 1996 decision in *Walls v. Giuliani*[137] was considered by many to be a victory for the squatters in New York City because the court considered the actual merits of the squatters' case. The case represented a critical decision for squatters because "[t]he ruling left the door open for similar legal challenges to be brought by squatters all over the city."[138] In that case, the court held that the squatters had stated a valid civil rights claim

---

§ 140.10 (McKinney 1997). The squatters were charged for trespassing in 1983 despite a three year statute of limitation and no formal notices of removal or trespass except for two eviction efforts. Bukowski Petition, *supra* note 132, paras. 42-50.

134. Ferguson, *You Can't Go Home Again*, supra note 133.

135. For example, in North Carolina the statute of limitations for normal adverse possession is twenty years. N.C. GEN. STAT. §§ 1-40 (1996). However, adverse possession against North Carolina has a thirty-year statute of limitations or a twenty-one year statute of limitation against the state with color of title. *Id.* §§ 1-35. Likewise, South Dakota's statute of limitations is normally twenty years (S.D. CODIFIED LAWS §§ 15-3-1, 2, 3, 7, 10 (Michie 1997)); however, the statute of limitations against the state doubles to forty years. *Id.* § 15-3-14. Finally, Wisconsin normally has a twenty-year statute of limitations (WIS. STAT. ANN. § 893.25 (West 1995-1996)), and the statute of limitations against state property is also twenty years. *Id.*

136. 609 N.Y.S.2d 554, 555 (N.Y. Civ. Ct. 1994).

137. 916 F. Supp. 214 (E.D.N.Y. 1996).

138. Sarah Ferguson, *Under Siege: Can the East Village Survive Another Purge?*, VILLAGE VOICE (New York), Aug. 27, 1996, *available in* 1996 WL 11169869.

under 42 U.S.C. § 1983 and denied the City's motion to dismiss.[139] Mayor Rudolf Giuliani called the district court's ruling "ideology run amok."[140] The 13th Street squatters' short-lived success came to an end on August 8, 1996, when the New York Supreme Court, Appellate Division, reversed the district court's decision in *Walls v. Giuliani*.[141] Subsequently, to evict the squatters, the New York Police employed a 50,000 pound tank-like armored personnel carrier along with fifty policemen.[142] Strangely, despite the city's spirited battles with the residential squatters, New York City allowed and even encouraged small businesses to squat in an abandoned court house.[143] In light of Giuliani's claim of "ideology run amok," this action of allowing commercial squatting can be seen as nothing short of an unconscionable double standard.

The battle over urban territory also raises critical questions about municipalities and the way they manage their property. The City of New York, under its Department of Housing Preservation and Development (HPD), currently admits to holding more than 2,000 buildings vacant—including some 17,000 individual dwelling units that have been vacant for decades—while bureaucrats argue over how to spend available funds.[144] Besides the mismanagement of properties, the HPD has also been accused of fraud. The petitioner's complaint in *East 13th Street Homesteaders' Coalition* stated that the HPD "knowingly mis-characterized, in bad faith, [property] as 'vacant' on the Respondent's application for an Urban Development Action Area Project area designation, pursuant to New York State law, in order to facilitate state and federal funding programs."[145] With several vacant land holdings and a critical need for housing, does the city have a duty to monitor its properties? Should the city have a better index of its vacant properties? The City of New York will be faced with the potentially expensive problem of having to frequently monitor its vacant properties, especially if squatters with better documentation are able to bring adverse possession claims to sympathetic courts and juries.

Groups like the Association of Community Organizations for Reform Now (ACORN), which introduce legal squatting through homesteading programs, represent a workable compromise between the interests of the city and the housing concerns of its citizens.[146] Beginning in 1985, ACORN was able to "tak[e] possession of twenty-five vacant, City-owned buildings" in

---

139. Walls, 916 F. Supp. at 224.

140. *All Things Considered: East Village Squatters Win First Round Against City Segment*, *supra* note 132.

141. East 13th St. Homesteaders' Coalition v. New York City Dep't of Hous. Preservation and Dev., 230 A.D.2d 622 (N.Y. App. Div. 1996).

142. Ferguson, *You Can't Go Home Again*, *supra* note 133.

143. *White-Collar Squatters: Deeds Done Dirt Cheap*, VILLAGE VOICE (New York), Aug. 1, 1995, *available in* 1995 WL 10285089.

144. *Adverse Possession*, *supra* note 131.

145. Bukowski Petition, *supra* note 132, para. 5.

146. *See generally* Hirsch & Wood, *supra* note 69, at 605.

Brooklyn and force "HPD into meaningful negotiations."[147] In New York City, "ACORN has demonstrated how effective community organizing can pressure the City to release its low-income housing stock to poor City residents."[148] ACORN and "other squatting efforts are both increasingly common and justified"[149] as they provide utilitarian and workable solutions to some housing problems. American urban municipalities such as New York City, like their European counterparts, must work towards compromise in order to effectively address the crisis of homelessness. It only makes sense that governments and squatters or homesteaders should work together in community partnerships, rather than the adversarial relationships of the past that yielded riots, police actions, prolonged litigation, high transaction costs and little in terms of concrete results.

2. *California*

California is a large and wealthy state with a large and expanding population because of internal growth, domestic migration, and both legal and illegal immigration. The most prevalent squatting problems in California are typically not found within urban environments.[150] California law requires the typical elements for adverse possession: (1) possession must be held either under a claim of right or color of title; (2) possession must be actual, open, and notorious occupation of the property in such a manner as to constitute reasonable notice of that occupation to the record owner; (3) the occupation must be both exclusive and hostile to the title of the true owner; (4) possession must be continuous and uninterrupted for at least five years; and (5) the occupier must pay all taxes assessed against the property during such five-year period.[151] Despite the clear requirements of California's

147. *Id.* at 613-14.

148. *Id.* at 617.

149. *Id.* at 606.

150. This is not to say that there are not serious urban squatting problems in California. With many military base closures in California there may be a new squatting wave. In San Francisco, "twelve squatters took over two Presidio apartments for a Christmas day sit-in to call attention to the need for housing for the homeless." *Presidio Squatters Charged*, SACRAMENTO BEE, Dec. 27. 1996, *available in* 1996 WL 14034524. These squatters were members of an organization known as "Homes not Jails" and this was the "third time in three years the group [had] occupied a vacant building to bring attention to what they believe is a lack of affordable housing for homeless people in San Francisco." Venise Wagner, *Protesting Squatters Yanked From Presidio[:] Homeless Advocates Took Over Apartments Slated for Demolition*, S.F. EXAMINER, Dec. 26, 1996, *available in* 1996 WL 3723242. This protest came after "housing advocates declared a housing emergency in San Francisco. In November, for example, the Tenderloin Housing Clinic turned away 300 people, compared with the usual 10 to 20, because its 1,100 residential hotel rooms were occupied." *Id.* It is possible that communities like Christiana in Denmark could develop from military complexes. *See supra* Part IV.C.

151. *See generally* CAL. [The Time of Commencing Actions for the Recovery of Real Property] CODE § 325 (West 1997).

adverse possession law, most of the squatting problems in California stem from abuses of an 1856 property law.

Middle-class neighborhoods in California have been invaded by squatters guided by squatters' agencies. These squatters' agencies[152] have legal standing based upon the "1856 [law designed] to break up Spanish claims to land after California changed hands."[153] This law allows squatters to enter a dwelling "as long as a window or door is open or has been left unlocked[;] they can't break in."[154] Often squatting "agents" will look for foreclosed property and then inform their customers of the ripe pickings. The squatters agree to pay monthly rent to the agents. These housing agents give their customers "four to six months in a house . . . [and] a three-page disclosure on what [they] do."[155] In many ways, this type of squatting is similar to the squatting promoted by residential squatting agents in the United Kingdom.

One California company, Windsor Pacific, "scours public records for properties in foreclosure or finds homes that are vacant, looks for ways to enter the home, and makes its [adverse] claim. If no one objects to the claim, it rents the home to its customers and may even make an offer to purchase."[156] As of April 1996, this company had thirty-six houses under an alleged claim of adverse possession. Jay E. Orr, the Riverside County Supervising Deputy District Attorney, stated: "[t]hese companies have been allowed to flourish because banks are so far behind on foreclosures."[157] The proprietors of Windsor Pacific ask their "house sitters" to sign a disclosure form that indicates "Windsor Pacific has attempted to file a notice of adverse possession, cleaned the house and re-keyed all locks, and notified the lender it has placed a tenant on the premises."[158] This disclosure states that the tenants are to move out within thirty-days notice, if and when the bank takes title. Many of these squatters are families that became interested in a property because of an advertisement for low rental rates.

Typically, these companies will ask for three months rent up front; therefore, they make money from the house sitters/squatters regardless of the results of their adverse possession claims. These squatters' agencies maintain that they are making legitimate adverse possession claims, but such claims are dubious at best. These companies do not pay property taxes, which would be required for a proper adverse possession claim under

---

152. Note that these agencies are for-profit organizations, unlike the squatters' agencies found in the United Kingdom. *See supra* note 76.

153. Jessica Crosby, *Urban Squatters May Be Headed for O.C. Neighborhoods*, ORANGE COUNTY REG., May 14, 1995, *available in* 1995 WL 5849615.

154. *Id.*

155. *Id.*

156. Rick Burnham, *Old Law Fuels New Problems[:] Squatters Take Over Abandoned Homes*, PRESS-ENTERPRISE (Riverside, Cal.), Apr. 5, 1996, *available in* 1996 WL 3274010.

157. *Id.*

158. *Id.*

California law. Despite the inadequacy of such adverse possession claims, it is still true that this suburban squatting is maximizing the use of land that would otherwise remain vacant for months or years at a time. One squatters' agent, who was facing thirty-six felony counts involving houses, reasoned that he was performing a public service because "[squatting] tells the banks they have to pay attention to their properties and do something with abandoned houses . . . . It gets banks off the dime."[159] Some law enforcement officials have taken unusual steps in dealing with squatters' agencies like Windsor Pacific. Sheriffs' deputies are now telling renters/house sitters/squatters not to pay rent. Sheriffs' deputies believe that someone has broken into "at least 13 foreclosed homes, cleaned them up, changed the locks and rented them under the name of Windsor Pacific."[160] If this alleged breaking and entering is true, these actions would violate California law even under the 1856 adverse possession statute.

Under a utilitarian property theory, a strong argument exists for allowing temporary use of property. However, this theory is accompanied by the distinct potential for abuse. The rights or duties of the renters or their agencies with respect to the occupied property remains unclear. Temporary squatters with little stake in the property could become careless or destructive and inflict heavy damage on valuable property. This potential for abuse of property which has been allegedly adversely possessed places a heavy burden on property holders to guard and monitor their property interests.

Monitoring can place an extremely heavy burden on property holders such as out-of-state banks that have foreclosed on property. Serious problems arise not only when banks find that foreclosed property has been claimed by squatters, but also when legitimate buyers are attempting to purchase property. One California couple bid on a $385,000 home only to find that a squatter had moved in the day before.[161] In that case, the purchasers obtained a restraining order that prevented the squatters from remaining in the house, but such a civil action still may take more than one month to settle.[162] While the situation in California does illustrate severe abuses of squatting and adverse possession, the actions of a few should not overshadow the efforts of the legitimately homeless who squat in order to survive.

It is difficult to glean much encouragement from the United States' policies involving squatters and the homeless. Despite a strong and growing

---

159. Don Babwin, *Good Deal—Bad Dream[:] Arcane Legal Argument Tied to House Rental Scheme*, Press-Enterprise (Riverside, Cal.), May 30, 1995, *available in* 1995 WL 8897314.

160. Bhavna Mistry, *Palmdale 'Landlord' Suspected of Fraud*, L.A. DAILY NEWS, June 29, 1996, *available in* 1996 WL 6564557.

161. Andrew Horan et al., *Foreclosure Pitfall*, ORANGE COUNTY REG., Jan. 31, 1995, *available in* 1995 WL 5828724.

162. *Id.*

economy, there is neither a clear solution nor a national priority to reduce the specter of homelessness in the United States. With severe cutbacks in welfare and government programs, there is little hope for the homeless in our Darwinian society, except for that provided by the already overburdened private organizations. In light of the experiences of European countries, United States municipalities should change their adversarial attitudes toward legitimate residential squatters, while continuing to enforce strict property laws against commercial squatters motivated by profit. A partnership with squatters who would become homesteaders would serve utilitarian property interests and would at the same time alleviate homelessness. With a problem as diverse and widespread as homelessness, governments with little resources should at least attempt to foster potentially viable homesteading partnerships in conjunction with other low-income housing enterprises.

F. *Least Developed Countries: Property Laws and Squatting*

The lack of established property rights in underdeveloped countries often hampers both economic and environmental progress. The lack of property rights in LDCs may be manifested through a lack of title, unclear title, or a lack of recording, but is generally exhibited through insecure title for landowners. Jeremy Bentham, in his *Theory of Legislation: Principles of The Civil Code*, defined property and its importance by stating that "[p]roperty is nothing but a basis of expectation; the expectation of deriving certain advantages from a thing, which we are said to possess, in consequence of the relation in which we stand towards it."[163] The lack of title security that citizens of LDCs face compounds the economic problems of LDCs. For many LDCs, "[l]and titling has been promoted as the key to broad-based sustainable growth."[164] The current lack of certainty often hampers economic investment because land owners or squatters will have less incentive to invest work into insecure land.[165] While LDCs are weak in terms of economic power, their populations far outnumber those of more developed nations. The weak economies result in lower net spending on

---

163. BENTHAM, THEORY OF LEGISLATION: PRINCIPLES OF THE CIVIL CODE 111-13 (Hildreth ed., 1931), *reprinted in* BERGER, *supra* note 1, at 3.

164. Hendrix, *supra* note 19, at 183. Hendrix in his article argues that studies show land titling is not a panacea to economic and social problems in LDCs as many proponents claim. *Id.*

165. *Id.* at 194. The author states: "[p]ersons without title may invest less 'sweat equity'—time and effort—into their land." *Id.* For a case study on urban squatters in LDCs, see generally CHARLES L. CHOGUILL, NEW COMMUNITIES FOR URBAN SQUATTERS (1987). Choguill examines the plan to resettle 173,000 "shelter-less" individuals in Bangladesh who were forced to resettle into three camps, and "the chasm that can exist between planning and implementation [causing] such disastrous results." *Id.* at 2. Choguill cites several factors that led to the failure of the plan, including: organizational issues, lack of resources, cultural understanding, inappropriate technology, and inadequate public participation. *Id.* at 8-12.

housing, thus increasing the severity of housing problems.[166]

1. *Brazil*

Brazil is a country with vast natural resources and a growing population. In fact, "[b]y 2015, Brazil's economy—which already surpasses that of Russia—will be the sixth largest in the world."[167] Brazil's land is diverse and is nearly the size of the continental United States. However, as in many developing countries, there is a great disparity in wealth and property ownership among Brazilian citizens. The United States Department of State (U.S. State Department) reported that "[l]arge disparities in income distribution continue to exist, with the poorest fifth of the population earning only 2 percent of national income, while the richest tenth receive 51 percent."[168] This disparity in wealth has created a housing shortage that was estimated to be at ten million units in 1992.[169] In Brazil, forty-six percent of the land is owned by wealthy landowners, who account for one percent of the Brazilian population.[170] According to the Brazilian Institute for Geography and Statistics, just three percent of the land is owned by the

---

166. For an urban squatter case study from the 1970s in Zambia, see DAVID PASTEUR, THE MANAGEMENT OF SQUATTER UPGRADING 196 (1979). This experiment in LDC squatter development established broad and universal goals:

> [t]o improve the quality of life of people in the project areas . . . [t]o enable the low income population to achieve an improved standard of housing at a cost which can be afforded . . . . [b]y providing security of tenure and land for plots . . . . [b]y provision of utilities, especially water supply, sewage disposal, refuse disposal, security lighting and road access . . . . [b]y making maximum use of self-help labour in house building . . . .[b]y providing building materials loans.

Id. Although this study used a comprehensive and scientific methodology to address squatters' problems, its methods may be too complex for many LDCs. These almost utopian 1970s ideals for LDC squatter development are not unique. *See also* MICHAEL Y. SEELIG, THE ARCHITECTURE OF SELF-HELP COMMUNITIES (Sue Cymes et al. eds., 1978). This book contains 33 separate architectural entries for a worldwide contest that required the participants to design a squatter housing project for a city in the Philippines. The proposed housing had to be designed for low-income families in an area with a high density of people, with buildings that were low in height, that served as self-sufficient units, that maintained a pedestrian orientation, and that established an ecological fit. *Id.* at 27. Despite the fact that many of these designs were probably relatively easy and inexpensive to build, little progress was made in constructing novel low-income housing.

167. Fabio L. S. Petrarolha, *Brazil: The Meek Want the Earth Now*, BULLETIN OF THE ATOMIC SCIENTISTS, Nov. 21, 1996, *available in* 1996 WL 8994403.

168. United States Department of State, *Brazil Human Rights Practices, 1995*, DEPARTMENT OF STATE DISPATCH (Mar. 1996), *available in* LEXIS, International Law Lib., DSTATE File.

169. Beth Cohen, *Housing, the State and Urban Squatter Settlements: Reviewing Policy and Prospects* (visited Nov. 2, 1996) <http://lanic.utexas.edu/project/ppb/papers93-94/cohen.html>.

170. *Nearly 700 Landless Peasants Take Over Brazilian Farm*, AGENCE FRANCE-PRESSE, Sept. 30, 1996, *available in* 1996 WL 12147992.

Brazilian rural poor, who make up fifty-three percent of the country's population.[171] Many of the landless are upset because large tracts of land are going unused in Brazil.[172] Not surprisingly, this disparity in land ownership has led to squatting and subsequent violent reactions by landowners. In reporting on this violence, the U.S. State Department noted that "[t]he most serious human rights abuses continue[] to be extrajudicial killings and torture. Justice is slow and often unreliable, especially in rural areas where powerful landowners use violence to settle land disputes."[173]

In Brazil, conflicts related to squatting occur most often "[w]here land title is not clear and/or government programs provide incentives for invasion."[174] A study commissioned by the National Science Foundation and World Bank study found that violent clashes are often caused by sluggish governmental policies and rising land values.[175] The U.S. State Department, noting the power of the landowners and the ineffectiveness of the government, reported: "[i]n rural areas . . . landowners [have] often intimidated judges, lawyers, and police with violence and threats of violence."[176] The report points out that violence has intensified "because of the slow progress of the Federal Government toward reaching its goal of granting land tenure certifications to hundreds of thousands of landless families."[177]

It is a common characteristic of many LDCs to have uncertainty in title. Not only does this uncertainly harm economic development, but, as in Brazil, it often leads to violence and death. Brazilian governmental policies have increased violence by placing incentives and subsidies for land development in certain areas. Most of these incentive plans have been based upon development of the Amazon Basin. Moreover, police and governmental officials have been implicated in much of the violence against the squatters. On August 9, 1995, nine squatters were killed when police opened fire on a squatters' camp.[178] Seven of the nine squatters killed

171. *Id.*

172. Mary Anastasia O'Grady, *The Americas: Muddled Policies Spark Brazilian Land Wars*, WALL ST. J., Oct. 20, 1995, *available in* 1995 WL-WSJ 9904714.

173. United States Department of State, *supra* note 168. Additionally, in 1997, three squatters were killed when police attacked an abandoned housing project while trying to enforce an eviction order. *Squatter Crisis Eases in Brazil[:] Police, Homeless Back Off in Dispute that Left Three Dead*, SUN-SENTINEL (Ft. Lauderdale, Fla.), May 22, 1997, *available in* 1997 WL 3106330. The police captain claimed that the squatters "attacked with sticks and stones and gunfire," but one squatter claimed that the "squatters had no fire arms, 'only sticks and stones.'" *Id.* Consistent with other Brazilian police action, the squatter claimed that "he saw police shoot his friend in the back." *Id.*

174. O'Grady, *supra* note 172.

175. *Id.*

176. United States Department of State, *supra* note 168.

177. *Id.*

178. *Brazil Says Squatters Were Executed in Camp*, RECORD (Northern N.J.), Aug. 25, 1995, *available in* 1995 WL 3477227.

"were shot point-blank in the face, neck, chest, and back."[179] According to the Pastoral Land Commission, the battles over land have "left 74 people dead."[180] A human rights group also "attribute[s] 10 percent of that state's homicides to the police. . . . [and] speculates that the actual number may be higher since no suspects have been found in one-third of these cases."[181] Supporting the peasants are groups like the Landless Workers Movement that organized "controversial land occupations to help dispossessed farm workers and those longing to escape from the slums to establish small agricultural encampments on Brazil's vast tracts of privately owned but idle land."[182] This squatting group has become powerful as "[h]undreds of thousands of workers have become involved."[183] The fact that "[n]early a half-million Brazilians have been resettled in this manner" demonstrates the group's success.[184] However, acquiring housing in this manner involves great risk; the Unified Worker Central reports that "more than 1,700 [workers] have been killed in the last decade" by "[t]hugs hired by private landowners, the police, or the two together."[185]

In addition to violence, there are also critical collateral problems with respect to property in Brazil. In the Brazilian rainforests, squatters and squatters' camps have been linked to destruction of the forest. For instance, occupants without property rights are unwilling to invest in "'erosion control, fertilizers, and irrigation.'"[186] One squatter stated that "[w]e don't have any machinery or fertilizers, so the only way to prepare the soil is by burning [it]."[187] These squatters, who are clearly in a difficult situation, need the support of international organizations capable of helping them secure viable farm land and educating them on environmentally friendly farming techniques. Nevertheless, the environmental degradation caused by insufficient property rights is not unique to Brazil, but plagues other LDCs as well.[188]

Brazil, a dynamic and growing country, needs guidance in decreasing the terrible incidents of violence against squatters. For Brazil, it will not be enough to simply mandate or support land titling procedures or to enact

---

179. *Id.*

180. *Nearly 700 Landless Peasants Take Over Brazilian Farm, supra* note 170.

181. United States Department of State, *supra* note 168.

182. Petrarolha, *supra* note 167.

183. *Id.*

184. *Id.*

185. *Id.*

186. Hendrix, *supra* note 19, at 195 (quoting PETER C. BLOCH, LAND TENURE ISSUES IN RIVER BASIN DEVELOPMENT IN SUB-SAHARAN AFRICA 26 (1986)).

187. Jan Rocha, *Burning Ambition[:] Brazil's Rainforest is Being Destroyed Not Only by Ranching and Logging But by the Farming Methods of Landless Poor Fighting to Eke Out a Living in Squatter Camps*, GUARDIAN (London), Nov. 20, 1996, *available in* 1996 WL 13388272.

188. Squatters and poor property rights have also caused environmental degradation in Malaysia. *See infra* Part IV.F.2.

Western property schemes. In light of the international "right to housing"[189] and other human rights agreements, other nations must provide support as well as pressure to prevent further squatter tragedies.

2. *Malaysia*

As a former British colony, Malaysia has a common law legal history. Like many LDCs, Malaysia is besieged by squatting problems. In a recent Malaysian census, "552,196 squatters had been identified . . . . [and] most squatters settlements were built on government land."[190] Squatters are very prevalent in the Malaysian cities of Selangor, Kuala Lumpur, and Johor.[191] In these cities, costs of living are so high that even legitimately employed workers are forced into squatting for survival.[192] Furthermore, illegal immigration represents a significant problem in Malaysia: "Perlis . . . [is] a major entry and transit point for illegal workers, especially those from the Indian sub-continent. Most head straight for the capital, Kuala Lumpur."[193] To address the illegal immigrant problem the Malaysian parliament passed the "Immigration Act (Amendment) 1996 . . . [under which] employers who hire illegal workers can be fined . . . [and] those responsible for bringing them in [to the country] can be fined . . ., jailed and caned."[194] The government has resorted to these harsher laws because, as Malaysian Deputy Finance Minister Datuk Dr. Affifuddin Omar has reported, "studies show that the inflow of foreign workers and their families not only cause[s] the population density to rise in major towns but also affect[s] house [sic] prices and rentals as well as cause[s] health problems."[195]

Despite some of the serious labor and housing problems, squatters in Malaysia do hold some power. In Malaysia, "[t]he tolerance level for squatters has . . . been traditionally high."[196] Atypical of most LDCs and perhaps attributable to the squatters' power, Malaysia has taken affirmative steps to cure some of the problems associated with squatters and their

189. The international right to housing is supported by numerous United Nations covenants, conferences, resolutions, declarations, and recommendations. *See supra* note 6.

190. Dewan Negara, *552,196 Squatters Identified Under Ministry Census Note*, NEW STRAITS TIMES, May 27, 1997, *available in* 1997 WL 2962833. Interestingly, of the half-million squatters, "90,417 were foreigners." *Id.* Malaysian officials estimate that, "450,000 legal foreign workers [and] more than one million illegal labourers, mainly from Burma, Bangladesh, India, Indonesia, Pakistan, the Philippines and Thailand" currently reside in Malaysia. Joseph Chin, *Malaysia Prepares New Year Crack Down On Illegal Workers*, AGENCE FRANCE-PRESSE, Dec. 30, 1996, *available in* LEXIS, World Lib., ALLNWS File.

191. *Squatting on a Problem*, NEW STRAITS TIMES, Apr. 3, 1996, *available in* 1996 WL 9812791.

192. *Id.*

193. Chin, *supra* note 190.

194. Hamisah Hamid, *Malaysia: No More Exercise to Legalize Illegal Foreign Workers*, BUSINESS TIMES (Malaysia), Jan. 7, 1997, *available in* LEXIS, World Lib., ALLNWS File.

195. *Id.*

196. *Squatting on a Problem*, *supra* note 191.

communities. Squatting safety is one area in which Malaysian government officials have made significant progress. In Kuala Lumpur, it is estimated that 226,000 squatters reside in 255 squatter settlements.[197] To some degree, the government has accepted their existence and decided to limit the safety risks that the squatters may encounter. For example, "[t]he government is prepared to provide fire-fighting equipment and training" to 150,000 squatters if they are willing to set up "volunteer fire response units."[198] Malaysian government officials have also made plans to limit the impact of waste and garbage on squatters' areas.[199] One government official stated that "rubbish dumping in squatter areas has become a big issue. . . . [Polluters,] including factory owners, [have been] dumping toxic waste near squatter areas."[200] Malaysian officials have also sought to improve the lifestyles of squatters by providing them with a sense of community. The government has moved towards "build[ing] community halls in traditional and squatter villages . . . as they serve as a focal point for community activities."[201] These centers would be used "for social activities like meetings, gatherings, as public libraries, reading rooms and kindergartens."[202] As evidence of the success of squatters in Malaysia, one government official noted "the positive development in squatter villagers [sic] to date especially the readiness of squatters to support development in their area and development proposals squatter committees have sent him."[203]

The Malaysian government has accepted the reality that squatters and squatters' movements are an integral part of their country. Instead of fighting the squatters, Malaysian officials are taking real and logical steps to assist the squatters: this type of partnership is a model that other LDCs should emulate and follow.

3. *Philippines*

The Philippines is a LDC that is rapidly growing in population. As in many LDCs, there is a great disparity between the rich and the poor. The Philippine government has started a program called "Philippines 2000" that aims "to convert its agrarian-based, paternalistic economy into an industrial,

---

197. Teoh Teik Hoong, *Government Offers to Help Squatters in Fire-Fighting*, NEW STRAITS TIMES, Aug. 31, 1995, *available in* LEXIS, World Lib., ALLNWS File.

198. *Id.* These fire brigades might have helped squatters recently when "100 people were made homeless after their container homes were destroyed by fire." Noor Adzman Baharuddin, NEW STRAITS TIMES, *100 Loose Container Homes in Fire*, Jan. 3, 1997, *available* in 1997 WL 2943254.

199. Khairunnisa Hussin, *Plan to Take Over Trash Collection in Squatter Areas*, NEW STRAITS TIMES, Jan. 27, 1995, *available in* LEXIS, World Lib., ALLNWS File.

200. *Id.*

201. *Priority for Building of Community Halls*, NEW STRAITS TIMES, Jan. 5, 1996, *available* in 1996 WL 8260695.

202. *Id.*

203. *Id.*

market-driven one."[204] Despite these lofty goals, poverty and homelessness are prevalent throughout urban and rural areas in the Philippines. High rates of homelessness have led to numerous incidents of squatting and subsequent government action to remove squatters. According to the U.S. State Department, the Philippine government has illegally "forced eviction of squatters" since 1992.[205] The State Department's report indicates that "[h]uman rights NGO's [nongovernmental organizations] have criticized government efforts to resettle tenant farmers and urban squatters to make way for infrastructure, commercial, and housing developments."[206] These industrial developments often collide with squatters' housing and shanty towns. The State Department's report found that governmental policies in the Philippines were ineffective because of the "extensive poverty, the limited availability of affordable housing for the urban poor, and squatter syndicates that exploit human misery and legal safeguards for pecuniary or political ends."[207]

Manila, the capital of the Philippines, contains a very large concentration of squatters. The National Housing Authority estimates that "[a]bout 3.5 million people live in squatter colonies in and around Manila, representing 39 percent of the capital's population."[208] Squatters armed with "rocks, darts, broken bottles and gasoline bombs" have fought police in an attempt to "prevent government wrecking crews from demolishing more than 500 shanties and semi-concrete houses they had built on private property. Many of them have been living in the area for more than a decade."[209] One particular area of Manila has been a hot spot for squatter activity. "Smokey Mountain" is a huge dump sight that houses thousands of squatters and has been described as "a small mound [that] soon spread out of control, sprawling over a nine-acre area and containing 2.2 billion tonnes [sic] of rotting rubbish."[210] Although squatters and scavengers benefitted from the mound by "collecting bottles, nails and copper wire for recycling . . . [and by obtaining] their rent-free shanty houses," there were serious dangers as demonstrated by the "[u]ntold numbers of scavengers [who] died after falling into the flames . . . [and] [o]thers [who] were run over by bulldozers or dust carts, or [who] succumbed to lung diseases and other illnesses that were rife on the dump."[211] However, the government has treated these squatters

204. United States Department of State, *The Philippines Human Rights Practices, 1995*, DEPARTMENT OF STATE DISPATCH (Mar. 1996), *available in* LEXIS, International Law Lib., DSTATE File.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Squatters Battle to Save Dwellings in Philippines*, SAN DIEGO UNION-TRIBUNE, Jan. 16, 1997, *available in* 1997 WL 3111525.

209. *Id.*

210. Claire Wallerstein, *New Houses Rise from City Dump; Smokey Mountain Has Been Built Over*, GUARDIAN (London), Sept. 1, 1997, *available in* 1997 WL 2398877.

211. *Id.*

poorly as evidenced by its preparation for last year's APEC [Asian Pacific Economic Cooperation] forum: "[h]undreds of squatter shacks [were] bulldozed along the capital's major roads leading from the international airport to the big hotels and convention sites."[212] "Imelda Marcos, widow of former president Ferdinand Marcos, used to call [the bulldozing] beautification . . . ."[213] This "beautification" of Manila left "at least 10,000 of the city's estimated 3 million people homeless . . . . About 1,000 families were removed from a stretch of land reclaimed from Manila Bay, and 200 more families were left homeless when the bulldozers plowed though the Paco slum."[214] This strategy of "[r]elocating squatters to distant relocation camps [didn't] work; the people return[ed] since there [was] no work there."[215]

The international community should not support the mistreatment of squatters by allowing countries like the Philippines to host prestigious summits such as APEC. Additionally, the world community can provide practical and effective assistance to help LDCs with housing problems by facilitating the establishment of partnerships between squatters and governments. However, this assistance must be contingent upon a government's willingness to adhere to internationally recognized values and human rights.

V. CONCLUSION

In examining why squatters are treated so differently in different parts of the world, it is clear that the rights of squatters are directly linked to the amount of support given by their communities. In Europe, squatters and squatters' movements are generally well supported by the public; thus, squatters in Europe have had more success. As for squatters' movements in

212. Keith B. Richburg, *10,000 Left Homeless in Manila Beautification: Heavy-Handed Move Reminiscent of Marcos Abuses*, OTTAWA CITIZEN, Nov. 18, 1996, *available in* 1996 WL 3624689. Other Asian countries have attempted to remove squatters from their settlements. For example, in India, the government created a "scheme to rehabilitate the 55,000-odd squatters living in ['objectionable areas']." *India: Squatters to Be Rehabilitated Outside City*, HINDU, Dec. 5, 1996, *available in* 1996 WL 14122800. Under this plan squatters will be removed from their dwellings "along rivers, canals, roads and rail tracks in the metropolitan area . . . [to] tenements to be built outside the city." *Id.* A reported "56,000 families live on objectionable locations" and their resettlement, coupled with adequate replacement housing, might act to improve the health, safety, and welfare of both squatters and non-squatters. *Id.* *See generally* DEVENDRA B. GUPTA, URBAN HOUSING IN INDIA (1985). Gupta claims that "because of the enormity of the problem of slums and squatting and the paucity of resources, the focus of the government program has presently shifted to the worst slums." *Id.* at 102. It remains to be seen whether the new-found economic success of India will impact its many citizens who face housing and basic sustenance problems.

213. *Id.*

214. *Id.*

215. *Housing for Asia's Poor*, MARKET ASIA PACIFIC, Apr. 1, 1996, *available in* LEXIS, World Lib., ALLNWS File.

the United States, it might simply be that their time has not come. European nations in the twentieth century have been more socially progressive and more advanced in environmental areas. The United States may be following in their path. The fate of squatters in LDCs, on the other hand, depends on the willingness of governments to accept and foster partnerships with squatters and squatters' communities. Without such relationships, the tension between property rights and those attempting to survive often results in tragedy.

Utilitarianism and efficiency are proper models for the establishment and maintenance of property laws. Despite the desire for wealth and profit, the efficient use of property benefits all of society. Property that stands idle or unused simply acts as an anchor on the ultimate progress of society. Governments should put to use unused public lands by creating new housing and settlements. Thus, a mere accounting of governmental resources, adverse possession laws, and attitudes towards squatters, the homeless, and homesteaders may itself lead to the alleviation of homelessness.

Governments should also reform adverse possession laws to place heavier burdens on private land owners to monitor and preserve their land. Long statutes of limitations are simply anachronistic. Statutes of limitations in adverse possession laws should be uniformly shortened to coincide with the increased scarcity of property and housing. Likewise, governments worldwide should strive for greater certainty and clarity with respect to real property rights. Indeed, governments should consider such reforms to be their duty and should take action to reduce violence caused by unclear property rights.

As a matter of policy, governments and municipalities should be held accountable for vacant property. If this burden is too great, they should allow squatters and homesteaders to fill their resource gaps. Instead of antagonizing squatters, governments should strive to support squatters' efforts and should provide safe solutions by forming community partnerships. Moreover, governments must establish minimum support for the health, safety, and welfare of squatter residences and settlements. Homesteading should be encouraged. This type of squatting provides homeless people with a sense of purpose and lowers the costs for governments in providing housing.

This note has illuminated existing property laws, policies, and solutions that serve both legitimate property interests and the interests of society at large, while serving the general goals of equity and efficiency. Nonetheless, the potential for realizing these goals globally would be even greater if more governments engaged in the aforementioned activities and supported

squatting efforts instead of criminalizing these actions. All squatters should not be viewed as opportunistic criminals. Instead, squatters should be respected as citizens who choose not to wait for governmental solutions, but choose self-help and attempt to remedy to their problems independently.

Brian Gardiner[*]

* J.D. candidate 1998, Indiana University School of Law—Indianapolis; B.A., 1994, Indiana University—Bloomington. The author would like to thank Professor James Nehf for his early insight. The author especially thanks his parents, family, and Sandra Sheets for their support and understanding.

THE UNITED STATES AND THE WORLD NEED AN INTERNATIONAL CRIMINAL COURT AS AN ALLY IN THE WAR AGAINST TERRORISM

> There is nothing more difficult to carry out, nor more doubtful of success, nor more dangerous to handle than to initiate a new order of things. For the reformer has enemies in all those that profit by the old order, and only lukewarm defenders in all those who would profit by the new order . . . .[1]
>
> Niccolo Machiavelli
> *The Prince*

I. INTRODUCTION

The world continues to be plagued by international terrorism.[2] The epidemic is exacerbated by the ability of terrorists to avoid prosecution by seeking refuge in nations that distrust the judicial system of the victimized state.[3] Meanwhile, the world stands on the verge of creating a permanent international criminal court.[4] Though it began as an amorphous concept, the quest to establish a permanent international criminal court has recently evolved into a well-developed framework. In fact, the world is likely to see the establishment of the first international criminal court to prosecute the perpetrators of global offenses in 1997 or 1998.[5]

A major issue yet to be resolved surrounding the creation of the court is over which offenses the proposed tribunal should be given jurisdiction.[6] The United States has urged that the jurisdiction of the tribunal be drawn narrowly to encompass only three crimes: (1) genocide, (2) crimes against humanity, and (3) serious violations of the laws applicable in an armed conflict or war crimes.[7] However, other nations have argued that the

---

1. *1994 ILC Draft Statute for an International Criminal Court*, U.N. GAOR, 50th Sess., at iii, U.N. Doc. A/Res 50/46 (1995) (quoting NICCOLO MACHIAVELLI, THE PRINCE 15 (1513)).

2. *See generally* U.S. DEPARTMENT OF STATE, 1996 APRIL: PATTERNS OF GLOBAL TERRORISM, 1995, at 2 (1996) (visited Oct. 5, 1996) <gopher://dosfan.lib.uic.edu> [hereinafter U.S. DEPARTMENT OF STATE].

3. Arlen Specter, *A World Court for Terrorists*, N.Y. TIMES, July 9, 1989, 4:27.

4. Bonnie Santosus, *An International Criminal Court: "Where Global Harmony Begins,"* 5 TOURO INT'L L. REV. 25, 29-30 (Fall 1994).

5. United Nations Department of Public Information, *Daily Highlights*, Sept. 3, 1996, at 2 (visited Sept. 22, 1996) <http://www.un.org/plweb-cgi>.

6. Thalif Deen, *United Nations: North-South Split Over U.N. Criminal Court*, INTER PRESS SERVICE, Apr. 5, 1995, *available in* 1995 WL 2260180.

7. *Id.*

proposed court should be given subject matter jurisdiction over international terrorism—generally, such nations are less powerful states that cannot effectively combat terrorists through independent efforts.[8]

Part II of this note discusses the rise in international terrorism and suggests that the United States is one of the countries most dedicated to bringing terrorists to justice. Part III then overviews the events making the establishment of a permanent international criminal court a reality and sets forth the structure of the proposed tribunal. Finally, in Part IV, the note details the debate as to whether the court, if established, should be given subject matter jurisdiction over international terrorism. That section further examines the United States' position regarding the proposed court in light of the influence it maintains over the international community.

II. THE CONTINUED THREAT OF INTERNATIONAL TERRORISM AND AMERICA'S DEDICATION TOWARD BATTLING IT

It is unquestionable that international terrorism poses a grave threat to peace and security in the world. Former United States Secretary of State Warren Christopher stated: "President Clinton has rightly identified terrorism as one of the most important security challenges [America faces] in the wake of the Cold War."[9] The threat posed by terrorist attacks is heightened because terrorists are now armed with weapons of mass destruction. A demonstration of this disturbing reality occurred when members of the Japanese Aum Shrinrikyo cult perpetrated a nerve gas attack on the Tokyo subway system.[10]

Not only are international terrorists better armed today, but the frequency of their attacks has increased. In comparing the instances of international terrorism in 1994 and 1995, the United States Department of State disclosed that the number of attacks rose from 322 to 440.[11] Additionally, international terrorist attacks against American citizens or interests increased from sixty-six in 1994 to ninety-nine in 1995.[12]

The United States government has not only identified global terrorism as a serious problem, but has also dedicated itself to battling the

---

8. *Id.*

9. Warren Christopher, Fighting Terrorism: Challenges for Peacemakers, Address to the Washington Institute for Near East Policy Annual Soref Symposium (May 21, 1996), at 1 (visited Oct. 12, 1996) <http://www.usia.gov/topics/terror/521speech.htm>.

10. *Id.*

11. U.S. DEPARTMENT OF STATE, *supra* note 2, at 5. *Cf.* U.S. DEPARTMENT OF STATE, 1995 APRIL: PATTERNS OF GLOBAL TERRORISM, 1994 (visited Oct. 5, 1996) <http://www.hri.org/docs/USSD-Terror/94/year.html> (a summary of significant acts of international terrorism in 1994 and a comparison of terroristic acts occurring in 1993 and 1994).

12. U.S. DEPARTMENT OF STATE, *supra* note 2, at 5.

phenomenon. Counter-terrorism has been identified as a top priority for the executive administration.[13] Accordingly, President Bill Clinton has taken a number of steps intended to meet the threat of terrorism, including pressing for congressional legislation to increase America's capacity to fight international terrorists.[14]

The counter-terrorism efforts initiated by President Clinton illustrate the veracity of his statement that "[t]oday, America is more determined than ever to stand against terrorism, to fight it, to bring terrorists to answer for their crimes."[15] It is, however, ironic that this declaration was made in Arlington National Cemetery at the foot of the memorial commemorating those killed in the bombing of Pan Am Flight 103, while the perpetrators of that crime continued to evade prosecution.[16] The Pan Am Flight 103 bombing is a clear demonstration that unilateral actions by the United States have not been effective in combatting terrorists, and that such criminals will only be consistently brought to justice through global cooperation.

Scholars have long asserted that global terrorism must be combatted through concerted international action.[17] In fact, many commentators believe that terrorism can best be combatted through the use of a permanent international criminal court.[18]

The United States government has also seemingly recognized that international terrorism can only be combatted effectively through global cooperation. For instance, in Sharm el-Sheikh, Egypt, President Clinton co-chaired the Summit of Peacemakers, which he convened in an effort to face the growing threat of international terrorism.[19] The Summit of Peacemakers brought together the leaders of a multitude of nations.[20] The participating

---

13. THE WHITE HOUSE OFFICE OF THE PRESS SECRETARY, FACT SHEET: COUNTER-TERRORISM, at 1 (1996) (visited Oct. 12, 1996) <http://www.usia.gov/topics/terror/factsheet/htm>.

14. *Id.*

15. U.S. DEPARTMENT OF STATE, *supra* note 2, at 4.

16. Libya has refused extradition of the suspects accused of bombing Pan Am Flight 103 because it does not believe that its citizens will receive a fair trial in either the United States or the United Kingdom and has agreed to try them itself. The United States and the United Kingdom feel that any trial conducted by Libya will be a mere show designed to acquit the accused. BRYAN F. MACPHERSON, AN INTERNATIONAL CRIMINAL COURT: APPLYING WORLD LAW TO INDIVIDUALS 16 (1992). *See also infra* text accompanying notes 183-92.

17. *See* Ved P. Nanda, *We Can Defeat International Terrorism*, DENV. POST, Feb. 5, 1995, at D4.

18. Joel Cavicchia, *The Prospects for an International Criminal Court in the 1990's*, 10 DICK. J. INT'L L. 223, 233 (Winter 1992).

19. THE WHITE HOUSE OFFICE OF THE PRESS SECRETARY, *supra* note 13.

20. The Summit was a gathering of leaders from around the globe, including representatives of all but five Arab nations. Siona Jenkins, *Summit Leaders Unite on Need to Save Damaged Peace Process*, IRISH TIMES, Mar. 14, 1996 (visited Oct. 12, 1996) <http://www.irish-times/paper/0314/for3.html>.

leaders ultimately decided to promote a coordinated effort to stop acts of terrorism on international levels and thus ensure that the instigators of such acts will be brought to justice.[21]

Some members of the United States government feel that not only is international cooperation needed to stop terrorism, but that such cooperation should come in the form of an international criminal court. For instance, for over a decade, Pennsylvania Senator Arlen Specter has advocated the creation of an international tribunal to try terrorists. Senator Specter has summarized the problems causing the growth in terrorism by explaining that terrorists are currently able to blackmail powerful countries to avoid extradition, escape prosecution, and even secure their freedom.[22] Senator Specter has concluded that "[t]he fight against terrorism could be tremendously aided by [the creation of] an international court to try these international criminals."[23]

III. THE CREATION OF AN INTERNATIONAL CRIMINAL COURT IS MOVING TOWARD REALITY

Senator Specter's suggestion that an international court be created to try global criminals is an idea that has existed for years.[24] The first of the most recent attempts to create a permanent international criminal court was introduced by the League of Nations' Convention Against Terrorism of 1937 ("Terrorism Convention").[25] The Terrorism Convention proposed that an international tribunal be created to try the offenses that it proscribed. However, since the Terrorism Convention was first introduced, it has been ratified only by India.[26]

Notwithstanding the ill fate of the Terrorism Convention, the prospects for the creation of a permanent international criminal court have never been more promising than they are today.[27] In April 1996, 120 countries met in Geneva and reached a consensus in favor of the establishment of a permanent international criminal court.[28] Following this gathering, a committee of the

---

21. ISRAELI MINISTRY OF FOREIGN AFFAIRS, SUMMIT OF PEACEMAKERS: SHARM EL-SHEIKH, Mar. 13, 1996, FINAL STATEMENT, at 1 (visited Oct. 12, 1996) <http://www.israel-mfa.gov.il/peace/sharmsum.html>.

22. Specter, *supra* note 3, at 4:27.

23. *Id.*

24. Santosus, *supra* note 4, at 29-30. The debate over the creation of an international criminal court can be traced to 1474 when an international tribunal was used to try Peter Von Hagebush for "crimes against God and man." *Id.*

25. Rupa Bhattacharyya, *Establishing a Rule-of-Law International Criminal Justice System*, 31 TEX. INT'L L.J. 57, 58-59 (Winter 1996).

26. *Id.* at 59.

27. Santosus, *supra* note 4, at 31.

28. *Establishing an International Criminal Court*, USIA ELECTRONIC JOURNALS, May

United Nations, the Preparatory Committee on the Establishment of an International Criminal Court ("Preparatory Committee"), began an effort to finalize the draft statute that would create the international criminal court. The committee set a goal to complete the text by April 1998 and submit it to the General Assembly of the United Nations for adoption later that year.[29] The Chairman of the Preparatory Committee, Adrian Bos, commented that the fact that no country had opposed the creation of the proposed tribunal "[was] an indicator of the important progress achieved in a short period of time."[30]

The United States government has endorsed the creation of a permanent international criminal court.[31] However, the United States' support for the establishment of such a tribunal is only a recent development. For many years, the United States opposed the creation of the proposed court. As recently as 1992, the Judicial Conference of the United States noted that the progress of the United Nations in developing the proposed court was so insignificant that it hesitated to even comment on its feasibility at that time, stating only that the draft statute in existence left serious issues to be addressed.[32] In reality, the opinion of the Judicial Conference may have been based not on the lack of progress made by the United Nations, but on the general attitude of the United States at the time, which one commentator characterized as "cautious and indifferent."[33]

Today, however, the United States has become more open to the concept of creating a permanent international criminal court. The former United States delegate to the United Nations, James Borek, reported that President Clinton supports the creation of such a tribunal.[34] Nevertheless, some are skeptical of the United States' new position, believing that the nation has become involved in the process simply to ensure the creation of

---

1996 (visited Oct. 12, 1996) <http://www.usis.usemb.se/journals/itps/0596/ijpe/pj4unrpt.htm>.

29. United Nations Department of Public Information, *supra* note 5.

30. Thalif Deen, *United Nations: U.N. Moves Closer to a Global Criminal Court,* INTER PRESS SERVICE, Aug. 22, 1996, *available in* 1996 WL 11624975 [hereinafter *U.N. Moves Closer*].

31. President Clinton has commented that "nations all around the world who value freedom and tolerance [should] establish a permanent international court to prosecute . . . serious violations of humanitarian law." David Stoelting, *The Proposed International Criminal Court*, N.Y.L.J., Aug. 8, 1996, at 1.

32. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, REPORT OF THE JUDICIAL CONFERENCE OF THE U.S. ON THE FEASIBILITY OF AND THE RELATIONSHIP TO THE FED. JUDICIARY OF AN INT'L CRIM. COURT, S. REP. NO. 103-71 (1993) [hereinafter JUDICIAL CONFERENCE REPORT], *reprinted in* SENATE COMM. ON FOREIGN RELATIONS, 103D CONG., 1ST SESS., INTERNATIONAL CRIMINAL COURT 182 (1993) [hereinafter SENATE REPORT].

33. Timothy C. Evered, *An International Criminal Court: Recent Proposals and American Concerns*, 6 PACE INT'L L. REV. 121, 129 (Winter 1994).

34. *Establishing an International Criminal Court*, *supra* note 28.

the weakest court possible: one observer suggested that the biggest obstacle to the establishment of the court to date has been the United States and asserted that the United States has now gotten involved only "because it had no choice. 'It's happening.'"[35] The United States can either try to shape the tribunal or end up with something that will be unacceptable to that nation's interest.[36]

Another possible reason for America's recent endorsement of the court may be the progress made by the Preparatory Committee in creating a more concrete draft statute detailing the structure of the proposed court and the process by which alleged criminals will be prosecuted.[37] The existence of the draft may have enabled the United States to make a more informed decision as to whether such a tribunal should be created. Perhaps the United States has recognized that the drafters have created an impartial court that generally comports with the requirements of due process.[38] For example, the sixty-article draft statute establishes a permanent institution consisting of judges and prosecutors separately elected by the states that are parties to the convention creating the court.[39] By providing for the separate election of judges and prosecutors, the statute seeks to ensure that the prosecutorial arm of the court will be independent from the adjudicatory arm.[40] A separation of the two bodies is essential to ensure that judges will not be influenced by the prosecution.

Proceedings in the court will be initiated by the filing of a complaint by either the United Nations Security Council[41] or a state that has accepted the court's jurisdiction over the alleged crime.[42] Upon determining that a prima facie case exists, the prosecutor will then perform an investigation and file an indictment.[43] The indictment will be reviewed by the Presidency—a

---

35. Tina Rosenberg, *Tipping the Scales of Justice*, 12 WORLD POL'Y J. 55-64 (Fall 1995) <http://worldpolicy.org/americas/wpj-f95.html> (quoting an unnamed United States administration official).

36. *Id.*

37. Stoelting, *supra* note 31, at 1.

38. *Id.* at 2.

39. *Report of the International Law Commission on the Work of Its Forty-Sixth Session*, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994) (Draft Statute for an International Criminal Court) [hereinafter ICC Draft].

40. *Id.* (art. 12).

41. *Id.* (art. 23).

42. *Id.* (art. 25). The court is intended to complement domestic courts. Nations can choose the international offenses for which they accept the jurisdiction of the court. Rosenberg, *supra* note 35. This is intended to allow states who have jurisdiction over the accused an opportunity to prosecute them in their own judicial systems. Additionally, if a suspect has fled the state where the violations occurred, the jurisdiction of the court must be accepted by both the state with custody over the suspect and the state on whose territory the violation occurred. ICC Draft, *supra* note 39 (art. 21).

43. ICC Draft, *supra* note 39 (art. 27(1)).

third branch of the court elected from among the members of the court—which will act as a grand jury in deciding whether there is indeed a prima facie case.[44] The Presidency may also review a decision of the prosecutor not to investigate or not to indict and can ask the prosecutor to reconsider.[45]

Following the review of the indictment, the person of the accused will be brought within the jurisdiction of the court. The draft statute does not require that the state of the accused accept the jurisdiction of the court before the suspect may be brought before the tribunal.[46] This may seem counter-intuitive since the home state of the accused may be most interested in whether the conduct of its citizen will be punished; however, the intent of the Preparatory Committee was to eliminate the difficulties associated with acquiring the consent of an overprotective home state.[47] The accused's home state will still retain the opportunity to try its citizens within its own judicial system without the fear of being preempted by the international court, because the draft statute prohibits double jeopardy.[48] Thus, the jurisdiction of the international court will come into effect only when the judicial powers of the home state are unused or ineffective.[49]

Once the court has obtained personal jurisdiction over the accused, the suspect will be tried. The draft statute creating the court adheres to basic notions of due process to ensure a fair trial of the accused.[50] To protect suspects from being wrongly brought before the court, the draft statute allows the jurisdiction of the court to be challenged by interested states at the commencement of the proceeding[51] and by the accused throughout the proceeding.[52] In addition, the accused is entitled to a presumption of innocence.[53] The draft statute also provides for the protection of the basic rights of the accused including the right to be present at trial[54] and freedom from double jeopardy.[55] Judgments are to be delivered in open court,[56] and separate sentencing hearings are to be held to determine appropriate

---

44. *Id.* (art. 27(2)(a)).

45. *Id.* (art. 26(5)). However, "the ultimate decision is left to the prosecutor [because] it would be inconsistent with the independence of the prosecutor for the Presidency to direct prosecution." Bhattacharyya, *supra* note 25, at 77.

46. Bhattacharyya, *supra* note 25, at 85.

47. *Id.*

48. ICC Draft, *supra* note 39 (art. 42).

49. Bhattacharyya, *supra* note 25, at 86.

50. *Id.*

51. ICC Draft, *supra* note 39 (art. 34(a)).

52. *Id.* (art. 34).

53. *Id.* (art. 40).

54. *Id.* (art. 37(1)).

55. *Id.* (art. 42).

56. *Id.* (art. 45(5)).

penalties.[57] Following a trial, the statute allows appeals by both the prosecutor and the convicted individual based on procedural errors, errors of fact, errors of law, or disproportionality between the crime and the sentence.[58] Appeals are to be heard by a seven-judge Appellate Chamber.[59]

Thus, the protections extended by the proposed international criminal court are similar to those given to a defendant in the United States. In addition, it is apparent that the proposed tribunal is not intended to supplant the efforts made by national courts to prosecute criminals, but merely to supplement those initiatives.[60] These two factors are likely to be major reasons underlying the United States' recent support for the creation of an international criminal court.

Although the Preparatory Committee has made much progress, the extent of the proposed court's subject matter jurisdiction remains an important yet unresolved issue surrounding its creation.[61] The United States and many other nations argue that the court should be given subject matter jurisdiction over only genocide, crimes against humanity, and war crimes.[62] The United States is opposed to granting the tribunal subject matter jurisdiction over international terrorism.[63] The United States takes this position despite its recent efforts to establish international cooperation in the fight against terrorism, including convening the Summit of Peacemakers at Sharm el-Sheikh, Egypt.

Many less powerful nations favor granting the proposed international court subject matter jurisdiction over international terrorism. In general, these nations take this position because they do not have the ability to prosecute terrorists themselves. Included among these nations are: Egypt, Argentina, New Zealand, Uganda,[64] Algeria, India,[65] Cameroon,[66] Antigua,

---

57. *Id.* (art. 46).

58. *Id.* (art. 48(1)).

59. *Id.* (art. 9).

60. Colin Warbrick, *The United Nations System: A Place for Criminal Courts?*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 237, 243-44 (Fall 1995).

61. Deen, *supra* note 6.

62. Virginia Morris & M.-Chrisiane Bourloyannis-Vrailas, *The Work of the Sixth Committee at the Fiftieth Session of the U.N. General Assembly*, 90 AM. J. INT'L L. 491, 496 (1996).

63. Katherine C. Hall, *The Proposed International Criminal Court*, INT'L HUM. RTS. L. UPDATE, Spring 1995, at 4 (visited Sept. 22, 1996) <http://www.aspeninst.org/dir/polpro/JSP/IHRLspring1995.html>.

64. NGO COALITION FOR AN INTERNATIONAL CRIMINAL COURT, MATRIX OF COUNTRY POSITIONS ON THE ICC FOR NOV. 1995, U.N. SIXTH COMMITTEE MEETING (1996) (on file with author).

65. UNITED NATIONS, PRESS RELEASE L/2761, *Preparatory Committee on Establishment of International Criminal Court Begins First Session*, Mar. 25, 1996 (visited Sept. 22, 1996) <http://www.un.org>.

66. UNITED NATIONS, PRESS RELEASE L/2767, *Laws of Particular States Should Not Be*

Barbuda,[67] the Phillippines,[68] Guatemala, Mali,[69] Ghana,[70] and the Russian Federation.[71] Some of these delegations had, in fact, incorrectly presumed that the Summit of Peacemakers led by the United States had endorsed granting the proposed tribunal jurisdiction over crimes of international terrorism.[72]

IV. THE AMERICAN GOVERNMENT'S OPPOSITION TOWARD GRANTING THE PROPOSED INTERNATIONAL CRIMINAL COURT JURISDICTION OVER TERRORISM

Not only does the United States' opposition to granting the international criminal court jurisdiction over global terrorism not reflect the opinion of the international community as a whole, but it also does not reflect the opinion of the nation as a whole. The American public has given some highly spirited endorsements for the creation of an international criminal court to prosecute terrorists.[73] Additionally, American academics and legal professionals generally have favored granting subject matter jurisdiction over international terrorism to the proposed court.[74] This group includes such notable figures as Telford Taylor, the Chief United States Prosecutor during the Nuremberg trials, who commented that establishing a permanent international tribunal to prosecute crimes like terrorism is "a thing which should be done."[75]

Non-governmental organizations within the United States also favor granting an international tribunal jurisdiction over terrorist crimes. The most

---

Applied by International Court, Say Speakers in Preparatory Committee, Mar. 28, 1996 (visited Sept. 22, 1996) <http://www.un.org>.

67. Deen, *supra* note 6.

68. *44 Nations to Urge Creation of International Criminal Court*, ASSOCIATED PRESS, Mar. 6, 1996, *available in* 1996 WL 4415133.

69. UNITED NATIONS, PRESS RELEASE GA/L2878, *Proposed International Court Should Have Inherent Criminal Jurisdiction, Legal Committee Told*, Nov. 1, 1995, at 4 (visited Sept. 25, 1996) <http://www.un.org>.

70. Deen, *supra* note 6.

71. UNITED NATIONS, PRESS RELEASE L/2766, *Terrorism Should Be a 'Core Crime' of Proposed ICC India Tells Preparatory Committee*, Mar. 27, 1996 (visited Sept. 22, 1996) <http://www.un.org>.

72. *Id.*

73. *See generally* Robert E. Griffin, *Editorial: Court Would Deter Terror*, HARRISBURG PATRIOT, Aug. 2, 1996, at A10. In the wake of the Pan Am Flight 800 tragedy, the author quoted Abraham Lincoln as saying "tragedy should inspire increased devotion to ideals." *Id.* Furthermore, the author concluded that "[t]he creation of an International Criminal Court is such an ideal." *Id.*

74. *See generally* Santosus, *supra* note 4, at 28.

75. Linda Maguire, *An Interview With Telford Taylor*, 18 FALL FLETCHER F. WORLD AFF. 1, 3 (1994).

notable example is the Non-Governmental Organization Coalition for an International Court ("Coalition"), which has brought together a broad variety of non-governmental organizations for the purpose of advocating "an effective and just International Criminal Court."[76] Some of the organizations involved in the Coalition include: Amnesty International, DePaul Institute for Human Rights, International Human Rights Law Group, and the United Nations Association-USA.[77] Bill Pace, the organizer of the Coalition, stated that terrorist incidents like the bombing of Pan Am Flight 103 "are excellent examples of the kinds of crimes requiring an international criminal court."[78]

Regardless of the opinions expressed by these groups, the United States government generally does not favor granting an international criminal court jurisdiction over global terrorism.[79] For better or worse, the opinion of the United States government is the only one that truly matters, because ultimately its desires, along with those of other involved nations, will shape the structure of the proposed court. The United States government has, at various times, expressed support for granting an international criminal court jurisdiction over terroristic crimes. For instance, the Omnibus Security and Terrorism Act of 1986 declared that the President should contemplate "the possibility of eventually establishing an international tribunal for prosecuting terrorists."[80]

In addition, Senator Arlen Specter has consistently called for the creation of an international criminal court to address global terrorism.[81] Likewise, House Banking Chairman Allen Leach asked the Clinton administration to assume a leadership role in the global fight against

---

76. NGO COALITION FOR AN INTERNATIONAL CRIMINAL COURT, INFORMATION SHEET, (1996) (visited Sept. 22, 1996) <gopher://gopher.igc.apc.org;7030/0./icc/ciccflyr.txt>.

77. *Id.*

78. *U.N. Moves Closer*, *supra* note 30.

79. John M. Goshko, *U.N. Moving Toward Creation of Criminal Court; But Advocates Fear Severe Limits, Backed by U.S., Will be Imposed on Its Independence*, WASH. POST, Apr. 21, 1996, at A27. *See also Report of the International Law Commission on the Work of Its Forty-Sixth Session*, U.N. GAOR, 49th Sess., Agenda Item 137, at 13, U.N. Doc. A/C.6/49/SR.17 (1994) (statement of Conrad K. Harper, Legal Advisor, U.S. Department of State). The United States does not clearly see the need for an international criminal court in cases other than genocide, crimes against humanity and war crimes. *Id.*

80. Cavicchia, *supra* note 18, at 230-31 (quoting Omnibus Diplomatic Security and Terrorism Act of 1986, Pub. L. No. 99-399, 1986 U.S.C.C.A.N. (100 Stat.) 853).

81. *See* 141 CONG. REC. S16652-01 (daily ed. Nov. 3, 1995) (statement of Sen. Specter). "For more than a decade . . . I have urged the formation of an international criminal court to deal with crimes such as hostage taking, terrorism and drug dealing where we find that there are people in custody who [the custodial nation] will not extradite to the United States . . . ." *Id. See also* 140 CONG. REC. S11384-01 (daily ed. Aug. 12, 1994) (statement of Sen. Specter). "Terrorism remains an enormous problem internationally. . . . One area on which we have not had . . . progress is in the establishment of an international criminal court which I have spoken about many times during my 14 years in this body . . . ." *Id.*

terrorism by working towards the establishment of an international criminal court.[82] However, the urgings of Specter and Leach have not received the support of either the Republican or Democrat congressional factions.

Thus, the prevailing opinion of the United States government today is that the proposed international criminal court should not have jurisdiction over international terrorism. While the United States is only one country within the United Nations system, its position is worthy of careful analysis because America has a recognized ability to influence other nations. Illustrating this proposition is former Secretary of State Warren Christopher's statement that the responsibility of the United States in the Middle East is "[t]o use our influence to stop the suffering of innocent civilians" who continue to be victimized by terrorist attacks.[83] It follows that if an international criminal court would alleviate the suffering caused by global terrorism, then it might also be the responsibility of the United States to use its influence to see that the proposed tribunal is granted jurisdiction over that crime.

The reasons behind the United States' opposition to granting the proposed court jurisdiction over terrorism are varied. Some objections are not based on the specific qualities of the crime of terrorism, but on concerns about the court in general. Such concerns have created a desire on the part of the American government to limit the court's jurisdiction to as few crimes as possible and thus exclude terrorism.[84] Among these concerns are: (1) the sovereignty of the United States will be invaded by the creation of a strong international court with the ability to try global terrorism;[85] (2) the tribunal could become a highly politicized body where suspects will be tried by biased judges hailing from enemy nations;[86] and (3) the international criminal court will not afford defendants the same due process protections given to suspects tried in courts of the United States.[87]

The United States also has several objections to granting the proposed court jurisdiction over international terrorism that are specifically related to the nature of that crime. Among these concerns are: (1) there is no international law under which terrorists may be prosecuted (i.e., the doctrine of *nullum crimen sine lege*);[88] (2) granting the proposed tribunal jurisdiction over terrorism will overburden the court and increase disagreement

---

82. *Leach Seeks International Court to Battle Terrorism*, CONG. DAILY A.M., Apr. 27, 1995, *available in* 1995 WL 10434303.

83. Christopher, *supra* note 9.

84. *See supra* text accompanying notes 34-36.

85. *See infra* text accompanying notes 91-106.

86. *See infra* text accompanying notes 107-25.

87. *See infra* text accompanying notes 126-39.

88. *See infra* text accompanying notes 140-49.

surrounding its establishment causing further delays in implementation;[89] and (3) creating a world court with jurisdiction over terrorism would disrupt the workings of the already existing system of treaties that has allowed the United States to effectively deal with international terrorists.[90]

A. *American Concerns about the Proposed International Criminal Court Itself*

The United States' first objections to the court are general concerns that have prompted a call for a weak court with jurisdiction over only genocide, war crimes, and crimes against humanity. One such concern is that national sovereignty will be invaded by a permanent court with jurisdiction over crimes like global terrorism.[91] The refusal of states to surrender sovereignty is perhaps the oldest problem associated with the establishment of an international criminal court.

In 1899, Nicholas II of Russia convened twenty-six sovereign nations at the First Hague Peace Conference to discuss disarmament.[92] The goal of the conference was "to create an international court with compulsory jurisdiction which would transcend national borders."[93] The Conference succeeded only in establishing the Permanent Court of Arbitration that never functioned on a permanent basis and tried only approximately twenty cases in eighty years.[94] The failure of the Permanent Court of Arbitration resulted from the unwillingness of sovereign nations to be bound by an impartial international body.[95] The United States, in fact, expressly reserved the power to resolve any purely American issues.[96]

In the following years, many developments resulted in an increased willingness on the part of nations to sacrifice a fraction of their independence to ensure that international criminals would be prosecuted. This increase in global determination to prosecute international criminals was first displayed at the Nuremberg and Tokyo trials.[97] Later, the European Court of Human Rights and the Inter-American Court of Human Rights were established in 1950 and 1975, respectively, for the purpose of holding governments accountable for their own nationals' violations of the European Convention

---

89. *See infra* text accompanying notes 150-62.

90. *See infra* text accompanying notes 163-221.

91. Daniel B. Pickard, *Security Council Resolution 808: A Step Toward a Permanent International Court for the Prosecution of International Crimes and Human Rights Violations*, 25 GOLDEN GATE U. L. REV. 435, 443-44 (1995).

92. *Id.* at 443.

93. *Id.*

94. *Id.* at 443-44.

95. *Id.* at 444.

96. *Id.*

97. *Id.* at 454.

on Human Rights.[98] Although the Convention did not endow the courts with mandatory jurisdiction, several nations voluntarily submitted to the jurisdiction of these international tribunals, thereby surrendering a significant portion of their sovereignty to ensure the protection and enforcement of human rights by an international court of law.[99]

Today, nations have become even more dedicated to establishing a permanent tribunal to prosecute international criminals. The United States is one of the countries committed to this notion.[100] Nevertheless, because counter-terrorism is such a high priority for the United States government,[101] it might fear that relinquishing authority as a sovereign to prosecute terrorists to a newly formed tribunal would not be in the best interests of its citizenry.

However, the draft statute establishing the proposed court attempts to address such sovereignty issues in its preamble by stating that the "court is intended to be complementary to national criminal justice systems in such cases where trial procedures may not be available or may be ineffective."[102] The statute goes on to deal specifically with sovereignty concerns by allowing states to choose the jurisdiction they wish to confer on the tribunal. Article 22 of the statute allows nations to accept the jurisdiction of the court for crimes of their choice,[103] and gives them the right later to deny the courts' jurisdiction over the same crimes by giving a notice six months in advance.[104] In addition, the court will allow states to refer cases to it on an ad hoc basis without permanently submitting to its jurisdiction.[105]

Article 22 thus allows a nation to "relinquish jurisdiction [to the court] over certain offenders and still remain sovereign."[106] For instance, if the court were given the authority to try terrorism cases, the United States could grant it jurisdiction over the individuals accused of bombing Pan Am Flight 103. This would provide the families of the victims with the knowledge that the perpetrators of the crime had been brought to justice without interfering with the sovereign ability of the United States government to prosecute any subsequently accused terrorists.

American officials also oppose giving the proposed international criminal court jurisdiction over causes of action other than genocide, war crimes, and crimes against humanity for fear that the tribunal might become a politicized body where the accused will be tried by biased judges hailing

---

98. *Id.* at 456.
99. *Id.*
100. *See supra* text accompanying note 34.
101. *See supra* text accompanying note 13.
102. ICC Draft, *supra* note 39 (Annex).
103. *Id.* (art. 22(1)(b)).
104. *Id.* (art. 22(3)).
105. *Id.* (art. 22(2)).
106. Santosus, *supra* note 4, at 40.

from enemy nations.[107] These fears ignore the fact that the current extradition system does not prevent defendants from being tried before biased foreign nationals. In the United States, "extradition hearings are more like probable cause hearings than determinations of guilt or innocence and need not even be carried out before an Article III judge."[108] Once it has been demonstrated that the accused is the individual sought and that there is reason to believe that he committed an offense within the scope of an extradition treaty, the suspect will be extradited.[109] This rule applies even when the defendant is a United States citizen who alleges that he will be tortured or killed should he be extradited.[110]

The United States courts also will not consider the adequacy of the judicial procedure that the defendant will receive upon extradition; it is bound to assume the trial will be fair due to the existence of an extradition treaty.[111] These procedures, employed under the current system, often cause accused terrorists to face biased or prejudicial proceedings. For example, although the United Kingdom is reputed as having one of the fairest legal systems in the world, it was recently revealed that its courts wrongly convicted eighteen suspected IRA terrorists.[112] In one case, several individuals collectively known as the Guilford Four were released from prison after it was determined that their confessions had been coerced through severe beatings.[113] It was also found that the investigating officers committed perjury and withheld exculpatory evidence in order to obtain their convictions. In addition, the government of the United Kingdom had enacted legislation to relax procedural safeguards in the trials of such suspected terrorists in Northern Ireland.[114]

Throughout this time, the United States continued to extradite suspected IRA terrorists to the United Kingdom.[115] In fact, in 1985 the

---

107. SENATE REPORT, *supra* note 32, at 19 (statement of Sen. Helms). "[J]udges would come from 'States Members of the United Nations as well as non-member States maintaining permanent observer missions at United Nations headquarters.' . . . [T]he General Assembly [of the United Nations] contains all the world's major dictatorships including Syria, Libya, Cuba and North Korea just to name a few." *Id.*

108. Paul D. Marquardt, *Law Without Borders: The Constitutionality of an International Criminal Court*, 33 COLUM. J. TRANSNAT'L L. 73, 108 (1995).

109. *Id.*

110. *Id.* at 108-9.

111. *Id.* at 109.

112. MACPHERSON, *supra* note 16, at 13.

113. *Id.* at 13-14.

114. *Id.* at 14.

115. *See* In re Smyth, 820 F. Supp. 498, 502 (N.D. Cal. 1993). Smyth was charged by the United Kingdom with murdering a prison guard in an escape attempt. Smyth was not allowed to challenge the general fairness of the court system in which he would be tried. In addition, the accused could not present evidence that he would be subject to restraints on his liberty even if he were released from prison, nor could he attempt to demonstrate risk of

American government entered into a revised extradition treaty with the United Kingdom prohibiting those accused of violent crimes from availing themselves of the political offense exception (an extradition treaty exception whereby a nation may opt not to extradite those accused of political offenses).[116] The revision was accepted due to the respect the United States government had for the judicial system of the United Kingdom and the resulting assumption that these suspects would receive a fair trial.[117]

The draft statute establishing the proposed international criminal court contains safeguards to ensure that those trying the accused will not be the biased citizens of enemy nations. First, the statute allows each state to nominate for election as judges two parties who must be of separate nationalities.[118] Next, the states together will elect eighteen judges, none of whom may be of the same nationality.[119] Upon election, judges must perform their functions independently. This means that they may not be members of the legislative or the executive branches of any state.[120] The accused would be tried in the presence of five of these judges, none of whom could be from the nation of either the suspect or the complaining party.[121] In addition, the defendant would have to be convicted or acquitted by a majority of these judges.[122]

Thus, in comparing the draft statute and the United States' past experience, it is clear that the draft statute creates a more impartial tribunal than those of countries to which the United States currently extradites suspects. The Judicial Conference of the United States admitted this even when the American government was skeptical that an international court was feasible at all.[123] The Judicial Conference stated that one "possible benefit [of the proposed tribunal] is that defendants might receive a fairer trial in an

---

assassination. However, since he had already been convicted in that court system and imprisoned, he could introduce irregularities in his previous trial. *Id.* at 502-3. The conviction of the defendant for attempted murder precluded him from asserting the "political offense" defense pursuant to the revised extradition treaty between the United States and the United Kingdom. *Id.* at 500. *Cf.* In re Doherty, 599 F. Supp. 270, 276 (S.D.N.Y. 1984). The extradition request for Doherty was made before the "political offense" defense was precluded. The court held that the murder of a British army captain by a member of the Irish Republican Army was a political offense. *Id.*

116. MACPHERSON, *supra* note 16, at 14 (citing Michael P. Scharf, *The Jury is Still Out on the Need for an International Criminal Court*, 1991 DUKE J. COMP. & INT'L L. 135, 153 (1991)). *See also supra* note 115.

117. MACPHERSON, *supra* note 16, at 14 n.21.

118. ICC Draft, *supra* note 39 (art. 6(2)).

119. *Id.* (art. 6(4)).

120. *Id.* (art. 10(2)).

121. *Id.* (art. 9(7)).

122. *Id.* (art. 45(2)).

123. *See supra* text accompanying notes 32-33.

international tribunal than in a politically-charged forum state."[124] The Judicial Conference then specifically cited the courts established by the United Kingdom to try suspected terrorists as one example where "[a]n international court might provide a more neutral forum . . . ."[125]

Several members of the American government also want to limit the jurisdiction of the proposed tribunal because they are concerned that it will not give suspects the same due process guarantees that they would receive in the United States.[126] However, the international tribunal would be more analogous to a foreign jurisdiction than to an instrumentality of the United States. The international criminal court would operate under its own authority and apply its own laws; thus, the judicial power of the United States would in no way be invoked.[127] Since the proposed tribunal should not be considered a court of the United States, its protections should be compared to those of a foreign forum to which America currently extradites suspects.

When the tribunal is viewed as a foreign court to which the United States will merely extradite defendants, the protection of individual rights it affords is more than sufficient under a due process analysis. Under the American system of extradition, once it is determined that the accused is the person sought and that there is reason to believe he committed the crime, he will be extradited even if it is alleged that the trial will be unfair or that the accused will be tortured or killed.[128] Against this background, the proposed international criminal court clearly provides an acceptable level of protection of basic human rights.

The draft statute establishing the structure of the proposed international criminal court contains a number of safeguards aimed at protecting individual rights. For instance, Article 42 protects the accused from double jeopardy.[129] Additionally, the penalties provided for under Article 47 would not violate the prohibition, found in the Eighth Amendment to the United States Constitution, against cruel and unusual punishment.[130] Furthermore,

---

124. JUDICIAL CONFERENCE REPORT, *supra* note 32, at 43.

125. *Id.*

126. *Id.* at 45.

127. Marquardt, *supra* note 108, at 105.

128. *Id.* at 108-9; *see also supra* text accompanying notes 107-10. *See also* Escobedo v. United States, 623 F.2d 1098, 1107 (5th Cir. 1980). American citizens attempted to kidnap the Cuban Consul in Merida, Mexico. During the attempt, an associate of the Consul was shot and killed. One American suspect, Escobedo, alleged that he would be tortured or killed upon extradition to Mexico. The Fifth Circuit Court of Appeals affirmed his extradition regardless, noting that such issues are for the executive branch to consider when entering into extradition treaties. *Id.*

129. ICC Draft, *supra* note 39 (art. 42).

130. *Id.* (art. 47). The maximum penalty provided for under Article 47 is life imprisonment. No person convicted of any crime may be sentenced to death. Furthermore,

Article 41 provides the accused with the right to a speedy trial,[131] freedom from self-incrimination,[132] the right to counsel,[133] and the right to compel the attendance of witnesses.[134] As in United States courts, the accused will also be "presumed innocent until proven guilty in accordance with the law."[135]

It is true that the accused will not receive a jury trial, but will be judged by a panel of five judges who will acquit or convict by majority vote.[136] However, the peculiar status of the tribunal as an international court must be kept in mind. Judge John J. Parker observed that "[the judges would be] better qualified than a jury could possibly be to pass upon the issues which would be presented to a court trying the complicated sort of cases which would be presented to an international criminal court."[137] Additionally, one commentator recalled that the general reasoning behind the creation of the United States Constitution was to ensure the supremacy of laws.[138] An international tribunal could help bring to justice international terrorists who are currently able to seek refuge in nations that distrust the judicial system of the victimized country; such current practices violate the concept of supremacy of laws.[139]

B. *American Concerns about the Specific Nature of the Crime of Terrorism*

The United States objects to granting the proposed court jurisdiction over international terrorism not simply on the basis of its desire to create a weak tribunal, but also on the basis of the specific nature of the crime. One such protest is that no international law exists under which terrorists may be prosecuted.[140] This objection is commonly known as the doctrine of *nullum crimen sine lege*, which means there is no crime without law. Finding law under which to prosecute terrorists presents an especially difficult problem

---

in determining the length of the sentence the court will consider the law of: the state of the accused, the state where the crime was committed, and the state that had custody over the accused. *Id.*

131. *Id.* (art. 41(c)).

132. *Id.* (art. 41(g)).

133. *Id.* (art. 41(d)).

134. *Id.* (art. 41(e)).

135. *Id.* (art. 40).

136. *Id.* (art. 45).

137. Ilia B. Levitine, *Constitutional Aspects of an International Criminal Court*, 9 N.Y. INT'L L. REV. 27, 38 (1996) (quoting John J. Parker, *An International Criminal Court: The Case for Its Adoption*, 38 A.B.A. 641, 643 (1952)).

138. *Id.* at 47.

139. *Id. Cf.* JUDICIAL CONFERENCE REPORT, *supra* note 32, at 47. "[T]rial by jury is fundamental to our system. U.S. Const. art. III, §2. However, none of the draft statutes . . . provides for a jury trial even in the most serious offenses." *Id.*

140. Pickard, *supra* note 91, at 442-43.

because one man's terrorist is often considered to be another man's freedom fighter.[141]

While it is true that there is no comprehensive international criminal code, criminal law does exist that proscribes acts of global terrorism. The United Nations Conventions provide concrete bodies of substantive international law under which the proposed court could prosecute terrorists. For instance, the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons provides laws prohibiting terrorist attacks on diplomats.[142] The Convention on Offenses and Certain Other Acts Committed on Board Aircraft is a substantive body of law under which aircraft highjackers and bombers could be prosecuted.[143] In addition, terrorists charged with taking hostages could be prosecuted under the International Convention Against Taking of Hostages.[144]

Although past efforts of the United Nations to adopt an international criminal code have failed, a draft of such a code exists today.[145] In recent years, "[s]cholars and members of the United Nations have made substantial progress in drafting an international criminal code."[146] The crimes that are to be proscribed by the code include terrorism and aircraft highjacking.[147]

---

141. Specter, *supra* note 3. Senator Specter states that: "[a] narrow definition of terrorism, limited to offenses such as hijacking and hostage-taking, could avoid the political quagmire of distinguishing between a terrorist and a freedom fighter." *Id.*

142. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons (New York Convention), Dec. 14, 1973, 1035 U.N.T.S. 167.

143. Convention on Offenses and Certain Other Acts Committed on Board Aircraft (Tokyo Highjacking Convention), Sept. 14, 1996, 704 U.N.T.S. 219. This Convention could have been used by an international tribunal to try Mohammad Hamadei, who in 1985 highjacked TWA Flight 847 and killed an American in the process. Hamadei was apprehended by German authorities, and the United States sought extradition. During this debate, terrorists kidnapped two German businessmen in an effort to block his extradition. In the end, Hamadei was tried in Germany and received a life sentence. Had there been an international criminal tribunal to try Hamadei, perhaps the kidnapping of the two German civilians would have been prevented. MACPHERSON, *supra* note 16, at 18.

144. International Convention Against Taking of Hostages, Dec. 18, 1979, G.A. Res. 146, U.N. GAOR, 34th Sess. (1979). The terrorists who kidnapped the two German businessmen in an effort to manipulate the German government could be prosecuted under this convention. *See supra* note 143. The Convention on the Prevention of Crimes Against Internationally Protected Persons (New York Convention), Convention on Offenses and Certain Other Acts Committed on Board Aircraft (Tokyo Highjacking Convention), and the International Convention Against Taking of Hostages are collectively referred to throughout the text as the Terrorism Conventions.

145. Pickard, *supra* note 91, at 443. In 1954, a draft code of offenses entitled the Code of Offenses Against the Peace and Security of Mankind was submitted to the United Nations. Since then that code has been reintroduced numerous times but has never been adopted. *Id.*

146. *Id.* at 452.

147. *Id.* (citing M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW: A DRAFT INTERNATIONAL CRIMINAL CODE 52-106 (1980)).

Although the draft code has not been ratified to date, the United Nations has made great strides in developing it.

The fact that the prospects for the completion of an international criminal code have improved does not mean that the international criminal court should wait for its ratification before assuming jurisdiction over terrorism. The existing conventions proscribing various methods employed by terrorists to threaten global security create a sufficiently concrete body of substantive international law to allow violators to be immediately prosecuted by the proposed tribunal.

The aforementioned Terrorism Conventions do not cover all of the acts of terrorism that are proscribed in the United States. However, the proposed tribunal is intended to only supplement national criminal justice systems in cases where trials in those states are unavailable or ineffective.[148] Therefore, the United States could continue to prosecute terroristic conduct prohibited by its own laws in American courts. In fact, the United States could even prosecute offenses falling under the conventions in its own courts if it decides not to accept the jurisdiction of the tribunal with respect to those crimes or that particular offense.[149] The United States, however, should support granting the proposed court jurisdiction over the crimes proscribed by the Terrorism Conventions even if it does not intend to avail itself of that jurisdiction; such support would aid less powerful nations that are unable to effectively prosecute terrorists themselves.

The United States also seeks to exclude global terrorism from the jurisdiction of the proposed court because of concerns that allowing the tribunal to try crimes other than genocide, war crimes, and crimes against humanity will overburden it and possibly stall its creation.[150] However, giving the proposed tribunal jurisdiction over the offenses falling under the Terrorism Conventions will not overburden the court. In 1995, there were 440 acts of international terrorism.[151] Of the 440 acts of international terrorism, 272 were low-level arson attacks on property occurring in Germany and Turkey orchestrated by the Kurdistan Workers' Party (PKK).[152] These arson assaults are not proscribed by any of the Terrorism Conventions and thus could not be brought before the proposed court. Of the remaining 168 acts of international terrorism occurring in 1995, only about thirty major incidents involved acts prohibited by the Terrorism Conventions.[153] Assuming that all of these incidents would be brought before

148. ICC Draft, *supra* note 39 (Annex).

149. *See supra* text accompanying notes 102-06.

150. *Terrorism Should Be a 'Core Crime' of the Proposed ICC India Tells Preparatory Committee*, *supra* note 71. *See also* Stoelting, *supra* note 31.

151. U.S. DEPARTMENT OF STATE, *supra* note 2, at 5.

152. *Id.* at 6.

153. *Id.*

the tribunal, it is unlikely that thirty cases would overburden a court of eighteen judges sitting in five-judge panels.

Concededly, the court would also be responsible for the adjudication of cases involving crimes against humanity, genocide; and war crimes. However, the possibility that all of the cases involving major acts of international terrorism would be brought before the court is slim. The proposed tribunal is intended only to supplement national efforts to prosecute terrorists, not replace them.[154] Many nations, like the United States, will elect to prosecute terrorists in their own courts whenever they have the opportunity to do so.[155] Thus, of the thirty cases that the tribunal could try, in reality it will only receive cases where the complaining nation is unable to prosecute the defendant itself. These cases would be those in which the nation with custody over the defendant refuses extradition to the complaining state, or where the victimized nation is afraid to prosecute the suspect. These are the exact types of situations that exemplify the need for the creation of an international criminal court.

Some speculate that the proposed court is actually unlikely to receive many cases involving genocide, war crimes, or crimes against humanity.[156] Such crimes are typically committed or endorsed by those who control the actions of a nation. Only through defeat or disgrace will criminals of this caliber be handed over willingly by the governments they control.[157] Thus, in a majority of these situations, in order to prosecute the offender, the court would have to intervene against the wishes of the national government. This realization led one commentator to conclude that these types of cases "are the least likely to reach trial before an international court."[158]

Thus, the real danger may exist not in the creation of an overburdened tribunal, but in the creation of an illegitimate court that never actually tries cases.[159] "A weak and inactive court may undermine respect for international law and any deterrent effect that the prospect of criminal responsibility might have."[160] Giving the proposed tribunal jurisdiction over international terrorism would allow it to preside over several cases each year concerning problems that could actually be resolved. Therefore, jurisdiction over crimes such as terrorism is exactly what the court needs to help it build

---

154. ICC Draft, *supra* note 39 (Annex).

155. Under the draft statute establishing the proposed court, a nation could prosecute particular offenses even though they have consented to granting the court jurisdiction over that crime. *Id.* (art. 22). Countries such as the United States will likely desire to try some particular offenses in their own judicial systems for a number of reasons, including the fact that the proposed tribunal may not sentence convicted defendants to death. *Id.* (art. 47).

156. Marquardt, *supra* note 108, at 96.

157. *Id.*

158. *Id.*

159. *Id.* at 139.

160. *Id.*

a positive reputation and save it from being useless.

World leaders should also avoid granting the court jurisdiction over only those offenses that have not been contested (i.e., genocide, war crimes, and crimes against humanity) simply to avoid further debate surrounding its creation. Several states have expressed concerns that adding crimes like terrorism will cause further delays in the creation of the tribunal.[161] However, as stated by David Sheffer, legal adviser to United States Ambassador Richard Dicker, the objective of the countries involved should be "to get it right and now [rather than] to rush to create a court which in the end will be weak, ineffective and not joined by many countries in the world."[162]

Perhaps the most vigorously asserted objection to granting the proposed tribunal jurisdiction over international terrorism is that such jurisdiction would disrupt the workings of already-existing treaties that have proven to be an effective means of dealing with terrorists.[163] However, this is an isolationist contention that ignores the fact that many smaller nations cannot deal with terrorists themselves.[164] Additionally, the multi-national treaties that the United States worries will be disrupted have weaknesses and do not ensure that even America, as powerful as it is, will be able to prosecute terrorists.[165] In many cases the United States has been forced to extend, through Supreme Court decisions, its jurisdiction to apprehend a terrorist who otherwise could not have been prosecuted under the applicable treaty.[166] These situations have caused many allies to become infuriated with the American government, because the United States has often resorted to

---

161. *Laws of Particular States Should Not Be Applied by International Court, Say Speakers in Preparatory Committee*, *supra* note 66. Japan believes that any discussion regarding the jurisdiction of the proposed court over terrorism will delay the court's establishment. *Id.* *See also Proposed International Court Should Have Inherent Criminal Jurisdiction, Legal Committee Told*, *supra* note 69. Jamison Borek of the United States feels that there is not enough support to include terrorism within the jurisdiction of the court. *Id.*

162. David Sheffer, *Opposing Sides Discuss U.S. Participation in Tribunal* (National Public Radio, Aug. 27, 1995), *available in* Westlaw, 1995 WL 2916142.

163. *See* SENATE REPORT, *supra* note 32, at 23 (statement of Edwin D. Williamson). "I fear that the alternative of a permanent court could undermine the efficacy of the prosecute or extradite approach and impair efforts to foster domestic administration of justice reforms in other countries." *Id.* *See also* Evered, *supra* note 33, at 133. The United States has expressed concern that "the proposed court might disrupt or detract from the existing mechanisms of international cooperation." *Id.* *See also* John B. Anderson, *An International Criminal Court—An Emerging Idea*, 15 NOVA L. REV. 433 (1991). Anderson notes that "the argument can be made that such a court is unnecessary because the United States has already demonstrated the capacity and will to deal by statute with such matters as terrorism and hostage taking." *Id.* at 439.

164. *See infra* text accompanying notes 168-81.

165. *See infra* text accompanying notes 182-97.

166. *See infra* text accompanying notes 198-208.

economic sanctions to punish terrorists when treaties are ineffective.[167] Such sanctions are not always effective and frequently cause uninvolved states to resent the United States government.

The contention of the United States that the proposed court should not be given jurisdiction over terrorism because it can effectively deal with terrorists itself is an isolationist argument. This contention ignores the fact that smaller countries have not been as successful as America in the war against terrorism. Many small states lack the resources to bring terrorists to justice[168] because the criminals themselves are often better armed than the nations' security forces.[169] Lionel Hurst, the United Nations delegate from Antigua and Barbuda, noted that weaker nations are forced into an awkward situation when prosecuting terrorists, because they must "handle [the] criminals carefully, because [the criminals] are citizens of large countries."[170] The United States generally takes pride in protecting smaller countries and then-United Nations Ambassador Madeleine K. Albright at one time even criticized some members of Congress for espousing isolationist views.[171]

Colombia is an example of a smaller country that has been unable to bring terrorists and other criminals to justice. Colombia cannot try or extradite terrorists and drug-traffickers due to risks of adverse political consequences or violent repercussions at home.[172] Narco-terrorists have murdered hundreds of law enforcement officers, judges, and political leaders, generating an atmosphere wherein bringing drug-traffickers and terrorists to justice is life-threatening.[173] In 1995, Colombia recorded seventy-six international terrorist incidents, the highest number in Latin America.[174] Among the many killed by Colombian terrorists in 1995 were two American missionaries who had been held hostage by the Revolutionary Armed Forces of Colombia since 1994.[175] The same group later attacked a police counter-narcotics base, killing six and injuring twenty-nine police officers.[176]

Colombia is not only unable to prosecute terrorists itself, but also it cannot extradite these criminals to the United States due to bitterness and resentment on the part of the Colombian population toward the American

---

167. *See infra* text accompanying notes 209-21.

168. *U.S. Should Back Concept of an International Criminal Court*, DENV. POST, Apr. 20, 1996, at B7.

169. Deen, *supra* note 6.

170. *Id.*

171. Madeleine K. Albright, *International Law Approaches the Twenty-First Century: A U.S. Perspective on Enforcement*, 18 FORDHAM INT'L L.J. 1595, 1599 (1995).

172. SENATE REPORT, *supra* note 32, at 10.

173. *Id.*

174. U.S. DEPARTMENT OF STATE, *supra* note 2, at 18.

175. *Id.* at 5.

176. *Id.* at 17.

government.[177] Unless an alternative such as an international criminal court is made available to the government of Colombia, drug-traffickers, paramilitary squads, and common criminals will continue to commit scores of terrorist acts with complete impunity.

Countries whose security forces are too weak to apprehend international terrorists are often forced to resort to criminal acts themselves. In October 1995, Palestine Islamic Jihad (P.I.J.) leader Fathi Shaqaqi was assassinated.[178] The P.I.J. is a group committed to the destruction of Israel through holy war and is responsible for numerous suicide attacks against Israeli targets in the West Bank, the Gaza Strip, and Israel.[179] The group assumed that Israel ordered the assassination of its leader as retribution, and symbolized post-assassination support for their cause with a poster that depicted a burning Israeli school bus.[180] One commentator noted that although assassination is an illegal self-help remedy under international law, in the absence of a global authority to enforce the rules against terrorism, nations seeking justice are forced to rely on it and other self-help methods.[181]

Aside from ignoring the needs of smaller countries, the United States may overstate its contention that it can successfully combat terrorists within the existing system of extradition treaties.[182] A situation vividly demonstrating the need for an international criminal court is the failure of the United States to apprehend and try the terrorists responsible for bombing Pan Am Flight 103 over Lockerbie, Scotland, on December 21, 1988.[183] In November 1991, two Libyan intelligence agents were indicted for destroying the aircraft.[184] However, Libya refused to extradite the suspects to either the United States or the United Kingdom because of doubts that its citizens would receive a fair trial in those forums.[185] Libya instead offered to try the suspects itself, but British and American officials were concerned that the

---

177. MACPHERSON, *supra* note 16, at 15. "Colombia was for a time extraditing accused drug-traffickers to the United States for trial. This was in violation of its Constitution, but was permissible under a declaration of a state of emergency. Such extraditions were not politically popular and are no longer permitted." *Id.* at 15 n.24.

178. U.S. DEPARTMENT OF STATE, *supra* note 2, at 26.

179. *Id.* at 52-53.

180. Louis Rene Beres, *An Enemy of Mankind*, JERUSALEM POST, Nov. 3, 1995, at 5.

181. *Id.*

182. *See, e.g.*, Nanda, *supra* note 17, at D4. The author, who serves as the Director of the International Legal Studies Program at the Denver University College of Law, notes that the United States has adopted comprehensive legislation on the subject of terrorism and entered into numerous bilateral agreements with other nations. He suggests further that "[w]hat has been done is still not enough, and no effort should be spared to meet this tremendous challenge." *Id.*

183. MACPHERSON, *supra* note 16, at 16 (quoting WASH. POST, Nov. 16, 1991, at A23).

184. U.S. DEPARTMENT OF STATE, *supra* note 2, at 29.

185. MACPHERSON, *supra* note 16, at 16.

trial would be a mere show designed to acquit the defendants.[186] Russian Foreign Minister Andrei Kozyrev suggested that Libya offer the defendants to the United Nations for trial.[187] Soon afterward, the Libyan government agreed to send the case to "neutral international committees of inquiry or to the International Court of Justice."[188] However, since an international criminal court has not yet come into existence, the suspects indicted for the bombing remain free. One scholar has expressed surprise that the United States maintains that states should remain solely responsible for prosecuting terrorists in light of its experience with the Libyan terrorists.[189]

Edwin D. Williamson, a former legal advisor to the U.S. Secretary of State, argued that pushing for the establishment of an international criminal tribunal to try the Flight 103 bombers "would have played into the hands of the Libyans."[190] However, a verdict against the suspects from an international court would hurt Libya far more than would a guilty verdict from an American court because many of Libya's allies believe that the United States has prejudged the defendants.[191] Furthermore, if the Libyan offer to turn the accused individuals over to an international tribunal were a mere sham, Libya's hypocrisy would be demonstrated to the entire world.[192] Instead, as it stands, the international community can only impose sanctions on the Libyan government when that country either complies with the extradition requests of the United States and the United Kingdom, or when an international criminal court is created.

A second situation demonstrating America's inability to effectively prosecute terrorists under the existing system is its attempt to apprehend and try Mohammad Hamadei. In 1985, Hamadei highjacked TWA Flight 847, killing a United States Navy diver in the process. Hamadei was apprehended in Germany, and the United States requested that he be extradited to America.[193] In an attempt to prevent Hamadei's extradition to the United States and obtain his release, terrorists kidnapped two German businessmen in January 1987.[194]

The terrorists succeeded in blocking Hamadei's extradition to the United States; however, he was tried in Germany where he was convicted and sentenced to life imprisonment.[195] Following Hamadei's conviction,

---

186. *Id.*

187. Santosus, *supra* note 4, at 28.

188. MACPHERSON, *supra* note 16, at 16.

189. Howard S. Levie, *Evaluating Present Options For an International Criminal Court*, 149 MIL. L. REV. 129, 130 (1995).

190. SENATE REPORT, *supra* note 32, at 25.

191. Marquardt, *supra* note 108, at 140-41.

192. *Id.*

193. MACPHERSON, *supra* note 16, at 18.

194. *Id.*

195. *Id.*

United States Senator Arlen Specter commended Germany for convicting him but expressed regret that the terrorists had coerced that country into prosecuting Hamadei in lieu of extraditing him to the United States.[196] Specter concluded that the presence of a permanent international criminal court would have prevented the entire situation, including the abduction of two innocent civilians.[197]

The situations involving both Hamadei and the Libyan terrorists demonstrate that the United States would benefit from the creation of an international criminal court with supplemental jurisdiction over international terrorism. This proposition is also demonstrated by situations where the American government has been successful in prosecuting terrorists only by forcibly abducting the suspect. Situations where the United States must resort to self-help should be avoided because they endanger lives and create international tension.[198]

Perhaps the most notorious example of the American use of forcible abductions is illustrated in *United States v. Alvarez-Machain.*[199] Humberto Alvarez-Machain, a Mexican national, was indicted for participating in the kidnapping and eventual murder of a United States Drug Enforcement Agent.[200] Despite an extradition treaty between Mexico and the United States, the suspect was kidnapped from his office in Mexico by American agents, flown to Texas, and arrested.[201] Following the defendant's apprehension, the Mexican government repeatedly protested the abduction, stating that it violated the extradition treaty.[202]

The United States Supreme Court ruled that the general rules of international law provided no basis for interpreting an extradition treaty as prohibiting international abduction even when the home state of the kidnapped defendant protests the abduction.[203] Justices Stevens, Blackmun, and O'Connor dissented, worrying that the majority's decision could have adverse effects on the American citizenry. The dissenting Justices summarized their concerns by quoting Thomas Paine, who once stated: "[h]e that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach himself."[204]

---

196. *See generally* 135 CONG. REC. S54, 63-64 (1989).

197. *Id.* at 64.

198. MACPHERSON, *supra* note 16, at 16-17.

199. 504 U.S. 655 (1992).

200. The United States specifically alleged that the defendant, a medical doctor, kept the agent alive and conscious during prolonged periods of torture. *Id.* at 657.

201. *Id.*

202. *Id.* at 659.

203. *Id.* at 669.

204. *Id.* at 688 (Stevens, J., Blackmun, J., and O'Connor, J., dissenting) (quoting 2 THE COMPLETE WRITINGS OF THOMAS PAINE 588 (P. Foner, ed., 1945)).

The possibility that the United States has set a precedent that will reach its own citizens is all the more disturbing because America and many other countries have expanded their jurisdiction to foreign nationals who commit offenses that merely injure their citizens.[205] This expansion of jurisdiction effectively means that an American citizen could be abducted by a foreign government—possibly one hostile to the United States—for committing offenses in the United States that allegedly violate the other country's law. However, even if the United States never has the precedent of *Alvarez-Machain* used against its own citizenry, the decision still may have harmed the standing of the United States in the world community. Conrad K. Harper, a former legal adviser to the U.S. Department of State, commented that "[o]nly as a respecter of [the] law among its international neighbors can the United States maintain its rightful authority as a leader among nations."[206] Forcible abductions certainly do not respect the law of America's neighbors.

Because an international criminal court would provide an impartial means[207] of investigating an alleged offense through its Prosecution and Presidency, it would provide a third party to which nations could turn for a determination as to whether a prima facie case rightly exists against a suspect. Thus, the establishment of an international criminal court would be an important step in reducing the number of situations necessitating the resort to extraterritorial abductions.[208]

The United States' claim that it can effectively deal with terrorism is based partly on its ability to impose economic sanctions on countries harboring terrorists. By prosecuting terrorists whose home states would not otherwise extradite them to the victimized nation, the establishment of the proposed international criminal court would reduce the use of economic sanctions. George Lamptey, the United Nations ambassador from Ghana, has commented that if an international tribunal existed, "Libya would not be suffering today because it refused to send its citizens for trial in a court in whose jurisdiction it lacked confidence."[209] All nations, including the United

---

205. *See generally* Anderson, *supra* note 163, at 439-40.

206. SENATE REPORT, *supra* note 32, at 15.

207. *See supra* text accompanying notes 39-43. *See also* Bhattacharyya, *supra* note 25, at 76-78. The author notes that the draft statute proposing the creation of the International Criminal Court "strives to eliminate improper influences, bias and prejudice on two levels: (1) structurally, through provisions intended to ensure the independence and impartiality of the members of the Court, and (2) procedurally, through provisions intended to ensure that the process of adjudication is insulated from improper influences." *Id.* at 76. *Cf.* Marquardt, *supra* note 108, at 146. The author notes that, under the current draft, the Presidency could use its influence to press a prosecution and appoint judges to try the case. The author concludes that these functions should be further separated to limit the ability of this small group to have so much influence over the prosecution. *Id.*

208. Bhattacharyya, *supra* note 25, at 72.

209. Deen, *supra* note 6.

States, should attempt to reduce the use of economic sanctions for two reasons. First, the effectiveness of these sanctions in accomplishing their intended objective has always been debatable. Second, the imposition of sanctions often causes uninvolved countries to resent the sanctioning nation.

Currently, the United States and its allies are imposing economic sanctions against seven countries for supporting, tolerating, and engaging in international terrorism. The sanctioned countries are Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria.[210] Many scholars contend that sanctions such as these are *never* effective. At the very least, most commentators seem to agree that such sanctions are less effective in some situations than in others.[211] For instance, the sanctions imposed on Cuba have been called a failure.[212] This contention is supported by noting Cuba's continuing role as a safehaven for terrorists.[213] For example, a number of Basque Fatherland and Liberty (E.T.A.) terrorists and fugitives from the United States who sought sanctuary in Cuba several years ago continued to live on the island in 1995.[214]

The most notable example of a nation under sanctions for harboring terrorists is Libya. Libya is being sanctioned for failing to extradite the two suspects accused of bombing Pan Am Flight 103, to pay compensation to the victims, and to cooperate with international authorities in the investigation.[215] The sanctions against Libya have been only marginally successful because the extent of U.S. trading with Libya was already minimal before the imposition of trade prohibitions.[216] Because the sanctions have not damaged the Libyan economy, Libya still has only agreed to yield the suspects over to an international forum. However, since no such court exists, the only recourse available to the United States is to increase the sanctions—which they intend to do—in hopes that they will one day succeed.[217]

---

210. Jerry Stilkind, *State Department Releases Report on International Terrorism*, USIA ELECTRONIC JOURNALS, Apr. 30, 1996 (visited Oct. 12, 1996) <http://www.usia.gov/topics/terror/stlkart.html>.

211. *See generally* Marynell DeVaughn, *Effects and Effectiveness of Economic Sanctions*, 84 AM. SOC'Y INT'L L. PROC. 203, 206 (1990) (statement of Barry E. Carter, Professor of Law, Georgetown University Law Center).

212. *Id.* at 211 (statement of Covey T. Oliver, Professor Emeritus of International Law, University of Pennsylvania Law School).

213. U.S. DEPARTMENT OF STATE, *supra* note 2, at 27.

214. *Id.*

215. *Id.* at 29.

216. DeVaughn, *supra* note 211, at 207 (statement of Barry E. Carter, Professor of Law, Georgetown University Law Center).

217. Albright, *supra* note 171, at 1601-1602.

> Libya has proposed a variety of schemes for trial, all of which have in common their lack of compliance with the resolutions of the Security Council that require a trial either in the United Kingdom or the United States. The United States has pushed hard to maintain sanctions to keep the pressure on [the] Qaddaffi

The United States government has recognized that the existence of a permanent international criminal court could aid in reducing the need to resort to economic sanctions.[218] The tribunal would provide a forum where nations could confidently send suspects, whom they are knowingly harboring, to receive an impartial trial. The American government also recognizes that, in reality, nations will remain unwilling to turn over their own nationals to an international tribunal when it is not in the nation's best interest to do so.[219] However, no nation enjoys being permanently labeled as an international criminal. If the court could develop a reputation for fair-minded adjudications, nations would feel a greater pressure to subscribe to and abide by its jurisdiction to avoid such a reputation. This would result in limiting the number of instances where sanctions become necessary.[220]

By providing an alternative to sanctions, the proposed international criminal court will benefit the United States and the world not only because sanctions are often ineffective, but also because they create global tension. For instance, the sanctions that have been imposed on Libya have carried negative repercussions for United States in their relations with other Islamic states.[221]

V. CONCLUSION

The problems accompanying the use of sanctions is only one reason that the United States should support the creation of an international criminal court with jurisdiction over terrorism. Other methods employed by the American government to bring terrorists to justice, such as extraterritorial abductions, also often inspire animosity towards the United States. In addition, the United States should respect the needs of less powerful countries whose only means to try terrorists may be an international criminal court.

Many of the concerns expressed by the United States surrounding granting the proposed court jurisdiction over terrorism have been alleviated by the recent draft statute that would establish the tribunal. For instance, restrictions on the election process ensure that those who would judge the accused will not be biased persons who hail from enemy nations. The draft statute also provides extensive due process protections that go beyond those

---

regime, and we would prefer stronger ones, including an arms embargo, if the Libyan leadership remains intransigent.

Id.

218. *See generally* SENATE REPORT, *supra* note 32, at 12-13.

219. *Id.* at 13.

220. *Id.*

221. DeVaughn, *supra* note 211, at 207 (statement of Barry E. Carter, Professor of Law, Georgetown University Law Center).

of which defendants are currently assured under the current extradition process. The statute also protects the sovereignty of the United States and all nations involved by allowing victimized nations to choose which particular offenses the court may try.

In addition, the court would have more than adequate resources for trying cases of terrorism and could bring each case to a definite conclusion. The proposed court also would have a concrete body of law under which to prosecute terrorists: the existing international conventions proscribing terroristic conduct. Thus, granting the proposed court jurisdiction over terrorism would benefit not only the United States and the world, but also the tribunal itself by giving it the opportunity to build a positive reputation in the international community.

*Steven W. Krohne**

* J.D. Candidate 1998, Indiana University School of Law—Indianapolis; B.S., 1993, Indiana University—Bloomington.

DISCRETION AND VALOR AT THE RUSSIAN CONSTITUTIONAL COURT: ADJUDICATING THE RUSSIAN CONSTITUTIONS IN THE CIVIL-LAW TRADITION[1]

The better part of valor is discretion, in the which better part I have sav'd my life.[2]

I. INTRODUCTION

A few years ago, when the former republics of the Soviet Union were reconstituting themselves as democratic sovereigns, American constitutional scholars debated the worth of the East European draft constitutions that were circulating at the time. The arguments necessarily proceeded from pure theory rather than from empirical evidence, because no empirical evidence existed. The constitutions, after all, were in draft. Now that the emerging democracies have adopted and begun to test their constitutions, though, it pays to revisit the earlier debate to see whether the direst predictions for the East European constitutions are coming true. In the empirical tests of both the new and the old Russian Constitutions by the Russian Constitutional Court, they are not.

Several scholars criticized the East Europeans for not getting it right—that is, for not closely modeling their charters on the U.S. Constitution. Cass Sunstein, for example, faulted the emerging republics for constitutionalizing "positive rights"—rights that placed affirmative obligations on the government to ensure specific benefits for its citizens.[3] Sunstein argued that "[t]he endless catalogue of . . . 'positive rights' [in the draft constitutions], many of them absurd, threatens to undermine" the ability of those constitutions to establish liberty rights and "the preconditions for some kind of market economy."[4] Similarly, Sunstein's colleague at the

---

1. Throughout this note, "[t]he names 'Russian Federation' and 'Russia' shall be equivalent." KONSTITUTSIIA (ROSSIISKOY FEDERATSII) [CONSTITUTION OF THE RUSSIAN FEDERATION] (1993) art. 1, § 2, *translated in* 16 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flantz eds., Federal News Service (Washington, D.C.) trans., 1994) [hereinafter KONST. RF].

2. In context, this comment is a somewhat slanted observation on the relationship between courage and judgment offered by Sir John Falstaff in WILLIAM SHAKESPEARE, THE FIRST PART OF KING HENRY THE FOURTH act 5, sc. 4, ll. 119-20 (G. Blakemore Evans ed., Riverside 1974).

3. Cass Sunstein, *Against Positive Rights*, 2 E. EUR. CONST. REV. 35 (Winter 1993) [hereinafter Sunstein, *Against Positive Rights*].

4. *Id.* at 36, 35. For a judicial rejection of the concept of positive rights, see, e.g., Webster v. Reproductive Health Services, 492 U.S. 490, 507 (1989) ("'our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which government itself may not deprive the individual'") (quoting Deshaney v. Winnebago County Dept. of Soc. Serv., 489 U.S. 189, 196 (1989)).

University of Chicago, Lawrence Lessig, amplified the subtheme of "the endless catalogue of positive rights" and faulted the republics for constitutionalizing concepts whose semantic narrowness, Lessig feared, would doom the East European constitutions to an absence of productive evolution:

> Founders in postcommunist democracies take their constitutional texts very seriously. . . . [but] [a]ll this obsession over text is quite understandable. Coming from a communist past, and trained in a civil law [*sic*] tradition before that, [for these founders] respect for textual limits is an important lesson to relearn. But we might ask nonetheless whether this fetish for code-like constitutions is either useful or realistic. . . .
>
> My point . . . is about the nature of a constitution as evolutionary. What is general is not a particular path of presidential growth, but that presidencies have a path of growth, and that at their birth constitutions should understand and accommodate this.[5]

Both Sunstein and Lessig believed that code-like precision in constitutions, especially if combined with a "chaotic catalogue of abstractions from the social welfare state,"[6] was "a large mistake, possibly a disaster."[7] In the founding charter of a democracy, they urged, such precision freezes "issues [that] should be subject to democratic debate, not constitutional foreclosure."[8] In this basic position, Sunstein and Lessig probably agree with most American lawyers who have thought about how best to draft a constitution: a constitution should state a few basic negative rights with enough precision to keep the government off your back, but those statements

---

5. Lawrence Lessig, *The Path of the Presidency*, 3 E. EUR. CONST. REV. 104, 104, 106 (Fall 1993/Winter 1994). Lessig might have been alluding to a work such as 1 FRANCOIS GÉNY, METHODE D'INTERPRETATION ET SOURCES EN DROIT PRIVE POSITIF 70 (2d ed. 1919) (calling "'th[at] fetishism of the written and codified statutory law' the 'most distinctive and . . . most salient trait' of nineteenth-century academic and judicial practice"), *quoted and translated in* Mitchel de S.-O.-l'E. Lasser, *Judicial (Self-)Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325, 1345 (1995), though without attribution it is difficult to tell. On constitutional evolution with reference to Eastern Europe, see also Cass Sunstein, *Changing Constitutional Powers of the American President*, 3 E. EUR. CONST. REV. 99 (Fall 1993/Winter 1994) [hereinafter Sunstein, *Changing Constitutional Powers*].

6. Sunstein, *Against Positive Rights*, *supra* note 3, at 35.

7. *Id.*

8. *Id.* at 37. *See also* Lessig, *supra* note 5 and accompanying quoted text.

of rights should be abstract enough to allow surface modifications on an *ad hoc* basis for centuries.[9]

The Russian Constitution, the drafting of which Yeltsin oversaw,[10] deserves criticism on many grounds. It is plagued by contradictions that undermine the separation of powers in the new Russian government,[11] and the aggrandized position of the president in the Constitution is all but frankly anti-democratic.[12] Further, the contradiction between Russia's express desire to move to a market economy and the Constitution's establishment of "positive rights" does seem self-defeating. Such an outright contradiction makes sense only if its purpose is primarily rhetorical rather than strictly legal, only if it is primarily a way to persuade the Russian people that, after centuries of brutal evidence to the contrary, their government is committed to "work[ing] against [the] nation's most threatening tendenc[y]"[13]—the

---

9. This proudly open-ended American understanding of constitution-drafting was fundamental, for example, for former U.S. Supreme Court Justice Felix Frankfurter: "Not the least characteristic of great statesmanship which the Framers manifested was the extent to which they did not attempt to bind the future." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 596 (1952) (Frankfurter, J., concurring).

10. Edward W. Walker, *Politics of Blame and Presidential Powers in Russia's New Constitution,* 3 E. EUR. CONST. REV. 116 (Fall 1993/Winter 1994) [hereinafter Walker, *Politics of Blame*].

11. *Compare, e.g.,* KONST. RF art. 10 ("State power in the Russian Federation shall be exercised on the basis of the separation of the legislative, executive and judiciary branches. The bodies of legislative, executive and judiciary powers shall be independent"); KONST. RF art. 80, § 2 ("The President shall . . . take measures to protect the sovereignty of the Russian Federation, its independence and state integrity, *and ensure concerted functioning and interaction of all bodies of state power")* (emphasis added); and KONST. RF art. 110, § 1 ("Executive power in the Russian Federation shall be exercised by the Government of the Russian Federation").

12. *See* KONST. RF art. 90 (establishing the Russian president's decree powers) and KONST. RF art. 93 (outlining the difficult presidential impeachment process). *See also* Stephen Holmes, *Superpresidentialism and Its Problems,* 3 E. EUR. CONST. REV. 123 (Fall 1993/Winter 1994); Walker, *Politics of Blame, supra* note 10, at 116; and Amy J. Weisman, *Separation of Powers in Post-Communist Government: A Constitutional Case Study of the Russian Federation,* 10 AM. U. J. INT'L L. & POL'Y 1365 (1995). On Yeltsin's further accumulation of powers after the drafting and adoption of the new Constitution, see *Yeltsin Voted Special Powers for Reform,* 43 CURRENT DIGEST OF THE POST-SOVIET PRESS 7 (no. 44, 1991); *Yeltsin's Concentration of Power Lauded—But Not Its Planned Use,* 43 CURRENT DIGEST OF THE POST-SOVIET PRESS 13 (no. 45, 1991); and *Yeltsin Defends Exercise of Presidential Powers,* 45 CURRENT DIGEST OF THE POST-SOVIET PRESS 9 (no. 46, 1993).

13. Sunstein, *Against Positive Rights, supra* note 3, at 36 (assuming that institutionalized socialism is one of Russia's "most threatening tendencies"). As the text accompanying this footnote suggests, this writer sees Russia's recent institutionalized socialism as merely a symptom of what is traditionally the far more pervasive problem of the total disrespect for the rule of law in Russia's leaders—a "threatening tendency" that antedated the Communist regime by several centuries. *See* ROBERT SHARLET, *Crisis and Constitutional Reform in Tsarist Russia and the Soviet Union, in* SOVIET CONSTITUTIONAL CRISIS: FROM DE-STALINIZATION TO DISINTEGRATION 3-13 (1992).

Russian government's disregard for the rule of law at the expense of the Russian people.[14] On these bases, criticism of the Russian Constitution is sound.

Criticism of the Russian Constitution for its code-like qualities, however, cannot withstand scrutiny. The criticism fails both in theory and in practice. It fails in theory for at least two reasons. First, it fails because it proceeds from misplaced assumptions. The "code-like" argument is actually a surprisingly provincial insistence on analyzing East European constitutions, not against the civil-law premises from which they evolved, but against common-law premises that are totally foreign to the East European legal psyche. Analyzed against common-law premises, the code-like Russian Constitution is an abject failure—precisely because it is code-like. Where the terse, elliptical U.S. Constitution is a text of suggestion—a text that deliberately gives the trusted common-law judiciary room to interpret—the Russian Constitution frequently tries to be a text of statement—a text that deliberately deprives the distrusted civil-law judiciary of room to interpret.[15] The success of other constitutions that have aimed for relative specificity, however, suggests that we need not extrapolate a general rule for all the world from the American constitutional experience.[16]

The second flaw in criticizing the Russian Constitution for its code-like precision is that the argument rests on another assumption that is at best dubious. To argue that relatively positivistic constitutions "foreclose"[17] subsequent debate, one must assume that language is *capable* of being positive, that the affirmative rights stated in the Russian Constitution will remain conceptually stable enough to block democratic debate in the distant future. Surely the past century of linguistic philosophy has demonstrated the error in that assumption; the inescapable gap between language and even its tangible referents should by now enjoy the status of an established fact.[18]

---

14. *See* SHARLET, *supra* note 13.

15. *See, e.g.*, KONST. RF art. 22, § 2 (establishing a 48-hour maximum for warrantless detentions), and accompanying discussion, *infra* note 93.

16. *See* Herman Schwartz, *In Defense of Aiming High*, 1 E. EUR. CONST. REV. 25, 25 (Fall 1992) (citing the presence of a catalogue of positive rights in the constitutions of France, Japan, and Switzerland) [hereinafter Schwartz, *Aiming High*].

17. Sunstein, *Against Positive Rights*, *supra* note 3, at 37.

18. *See generally* KENNETH BURKE, *The Human Actor: Definition of Man*, *in* ON SYMBOLS AND SOCIETY 56-74, 65 (Joseph R. Gusfield ed., 1989) ("There is an implied sense of negativity in the ability to use words at all. For to use them properly, we must know that they are *not* the things they stand for"); MAURICE MERLEAU-PONTY, *Indirect Language and the Voices of Silence*, *in* SIGNS 39-83, 39, 42, 43 (Richard C. McCleary trans., 1964) ("taken singly, signs do not signify anything, and . . . each one of them does not so much express a meaning as mark a divergence of meaning between itself and other signs. . . . [L]anguage . . . is the lateral relation of one sign to another . . . so that meaning appears only at the intersection of and as it were in the interval between words. . . . [Thus,] the idea of *complete* expression is nonsensical . . . [because] all language is indirect or allusive"); FRIEDRICH

This is especially true in law (as one half of the self-contradictory argument that the East Europeans, or at any rate the Russians, need to accommodate constitutional evolution clearly recognizes).[19] Whatever validity recent linguistic philosophy has in everyday contexts, it is necessarily all the more valid when the referents for language are as inherently intangible and abstract as those upon which legal inquiry depends. Because words that refer to even the most concrete concepts can denote only vastly interpretable "semantic fields,"[20] and because even code-like constitutions must exist only in words, even code-like constitutions must and will evolve by being subjected to the conflicting perspectives of legal interpretation.[21]

Moreover, with respect to the Russian Constitution the "code-like" criticism also fails in practice, largely because the Russian Constitution is being interpreted by a Court whose assumptions about law are essentially the same as those of the Constitution's framers. The Russian Constitution's code-like qualities seem not to have hampered the Russian Constitutional Court; unquestionably, the Russian Constitution already has evolved since its adoption by referendum on 12 December 1993. The upper house in the Russian bicameral Federal Assembly, the Federation Council,[22] now knows

---

NIETZSCHE, BEYOND GOOD AND EVIL 216 (Walter Kaufmann trans. and ed., 1966) ("Words are acoustical signs for concepts; concepts, however, are more or less definite image signs for often recurring and associated sensations, for groups of sensations. To understand one another, it is not enough that one use the same words; one also has to use the same words for the same species of inner experiences . . ."); FRIEDRICH NIETZSCHE, *On Truth and Lying in an Extra-Moral Sense, in* FRIEDRICH NIETZSCHE ON RHETORIC AND LANGUAGE 246-57 (Sander L. Gilman et al. trans. and eds., 1989) (arguing that all language is essentially metaphor and therefore essentially inaccurate as a representational medium); and FRIEDRICH NIETZSCHE, THE WILL TO POWER 358 (Walter Kaufmann & R.J. Hollingdale trans., Walter Kaufmann ed., 1967) ("all our words refer to fictions . . . and . . . the bond between man and man depends on the transmission and elaboration of these fictions").

19. "With very few exceptions, the constitutional provisions relating to the president have not been changed at all since they were ratified in 1787, but in 1993 those provisions do not mean what they meant in 1787." Sunstein, *Changing Constitutional Powers, supra* note 5, at 99. It is difficult for this writer to see why the late twentieth-century Russian language will resist natural linguistic evolution any more successfully than the U.S. Constitution's late-Enlightenment American English has resisted such evolution since 1787.

20. This phrase is from Professor John T. Kirby, graduate course in classical rhetoric, Purdue University, West Lafayette, Ind., Spring 1994.

21. To appreciate the interpretable (and *therefore* evolutionary) nature of even code-like constitutions, consider the semantic field of a specific bird—say, a chicken. On the face of it, *chicken* seems to be a significantly narrower concept than the concepts in the more code-like provisions of the new Russian Constitution. *See, e.g.*, KONST. RF art. 37, § 4 (constitutionalizing the right to strike during labor disputes). Yet not even the relatively narrow semantic field of *chicken* can escape linguistic evolution during a legal dispute. *See* Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116 (S.D.N.Y. 1960) (answering the perennial question, *What is chicken?*). To say the least, arguing that a code-like constitution cannot evolve is overstating the case.

22. *See generally* KONST. RF arts. 94-109 (defining the duties of the Federal Assembly).

that it has fourteen days to begin the approval process of all bills sent to it by the lower house, the State Duma.[23] The State Duma now knows that because "the bearer of sovereignty and the sole source of power in the Russian Federation is its multinational people,"[24] and because "[t]he acts of parliament must embody the interests of the majority in society and not only of just a parliamentary majority," "the legitimacy of adopted laws can be guaranteed only by an interpretation of the concept of 'the total number of deputies' as their constitutional number—450 deputies of the State Duma . . . ."[25] And the Russian citizenry now knows that the code-like constitutional right to housing means, among the untold other things it will come to mean as the right evolves, that a statute governing "the right of a renter to settle other citizens in the residential premises being occupied by" the renter cannot have a "blanket character" that permits arbitrary application.[26] When it was adopted, the code-like Russian Constitution neither denoted nor necessarily connoted any of the preceding interpretations. In practice, the new Constitution has merely provided a group of premises against which all governmental acts in the Russian Federation can be measured. The framers of the Russian Constitution endowed it with a specificity at its inception that the U.S. Constitution has acquired only after more than 200 years of accumulating "the gloss which life has written upon [it]."[27] The particularity of the Russian Constitution has not foreclosed democratic debate.[28] It has merely defined relatively mature places for constitutional disputes to begin.

---

23. In the Case Concerning the Interpretation of Part 4 of Article 105 and Article 106 of the Constitution of the Russian Federation, Decree No. 1-P of the Constitutional Court of the Russian Federation, 23 March 1995; Ross. Gazeta, 29 Mar., 1995, p. 11, *translated in* 31 STATUTES & DECISIONS: THE LAWS OF THE USSR AND ITS SUCCESSOR STATES 57-62 (July-Aug. 1995).

24. *Cf.* KONST. RF art. 3, § 1 ("The multinational people of the Russian Federation shall be the vehicle of sovereignty and the only source of power in the Russian Federation").

25. In the Case Concerning the Interpretation of Articles 103 (Part 3), 105 (Parts 2 and 5), 107 (Part 3), 108 (Part 2), 117 (Part 3), and 135 (Part 2) of the Constitution of the Russian Federation, Decree No. 2-P of the Constitutional Court of the Russian Federation, 12 April 1995; Ross. Gazeta, 20 Apr., 1995, p. 3, *translated in* 31 STATUTES & DECISIONS 63-76, 64, 65 (July-Aug. 1995).

26. In the Case Concerning Verification of the Constitutionality of Parts One and Two of Article 54 of the Housing Code of the RSFSR [Russian Soviet Federated Socialist Republic] in Connection with the Appeal of L.N. Sitalova, Decree of the Constitutional Court of the Russian Federation, 25 April 1995; Ross. Gazeta, 5 May, 1995, p. 3, *translated in* 31 STATUTES & DECISIONS 79-85, 82 (July-Aug. 1995) [hereinafter *Housing Code Case*].

27. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

28. If the Russian Constitution causes the "disaster" that Sunstein predicted, the Russian people may put their Constitution's more code-like provisions (whatever each of those provisions may signify from one year to the next) to democratic debate via the Russian Constitution's amendment provisions. *See* KONST. RF arts. 134-137.

The Russian Constitutional Court is a civil-law court interpreting a civil-law instrument according to a civil-law approach to adjudication. It behooves American commentators to appreciate each of those elements. Our analysis of the East European constitutions—and the advice we offer on the basis of our analyses—will be more productive if we read those instruments for what they are, rather than for their failure to conform with what our common-law American experience says a constitution should be. The Russian Constitutional Court undoubtedly would agree in the abstract that "[t]he pole-star for constitutional adjudications is John Marshall's greatest judicial utterance, that 'it is a constitution we are expounding.'"[29] In practice, however, the Court's definitions of *constitution* and the manner in which one expounds a constitution would diverge sharply from ours. Accordingly, this note will demonstrate that Russian law in general follows the civil-law tradition, and that the Russian Constitutional Court in particular resolves even its relatively abstract constitutional disputes through an essentially civilian methodology.

More generally, this note hopefully will encourage further study of the Russian Constitutional Court; American common lawyers have at least as much to learn from lawyers trained in the civil-law tradition as civil lawyers

---

29. *Youngstown Sheet & Tube Co.*, 343 U.S. at 596 (Frankfurter, J., concurring) (quoting McCulloch v. Maryland, 17 U.S. 316, 407 (1819)). For an example of one Russian justice's recognition of the foundational nature of the Russian Constitution, see a dissent that is worthy of great principled dissents such as Justice John Marshall Harlan's in Plessy v. Ferguson, 163 U.S. 537, 552-64 (1896), *overruled by* Brown v. Board of Educ., 347 U.S. 483, 494-95 (1954), or that of Justice Stephen Fields in the Slaughter-House Cases, 83 U.S. 36, 83-111 (1872), in In the Case Concerning Verification of the Constitutionality of Edict No. 2137 of the President of the Russian Federation "On Measures for the Restoration of Constitutional Legality and Law and Order on the Territory of the Chechen Republic" of 30 November 1994; Edict No. 2166 of the President of the Russian Federation "On Measures for the Cessation of the Activity of Illegal Armed Formations on the Territory of the Chechen Republic and in the Zone of the Ossetian-Ingush Conflict" of 9 December 1994; Decree No. 1360 of the Government of the Russian Federation "On Provision for the State Security and Territorial Integrity of the Russian Federation, Legality, the Rights and Freedoms of Citizens, and the Disarmament of Illegal Armed Formations on the Chechen Republic and the Regions of the North Caucasus Contiguous to It" of 9 December 1994; and Edict No. 1833 of the President of the Russian Federation "On the Fundamental Provisions of the Military Doctrine of the Russian Federation" of 2 November 1993, Decree No. 10-P of the Constitutional Court of the Russian Federation, 31 July 1995; Ross. Gazeta, 11 Aug., 1995, pp. 3-7, *translated in* 31 STATUTES & DECISIONS 48-94, 66 (Sept.-Oct. 1995) (Luchin, J., separate opinion) ("If one were to agree [with the majority] that the Edicts of the President and the decrees of the Government are in accord with the Constitution, then involuntarily the question arises: What kind of Constitution is it on the basis of which decisions can be adopted that open the way to war with its own people?") [hereinafter *Chechen Crisis Case*].

See generally Mark F. Brzezinski, *Toward "Constitutionalism" in Russia: The Russian Constitutional Court*, 42 INT'L & COMP. L.Q. 673 (1993); and Molly Warner Lien, *Red Star Trek: Seeking a Role for Constitutional Law in Soviet Disunion*, 30 STAN. J. INT'L L. 41 (1994).

have to learn from us. At the very least, the Court's opinions can serve as a basis for reevaluating the comparatively broad discretion enjoyed by American judges. As one American commentator has noted, "Whatever the historical reality, it is clear that discretion has largely triumphed in the modern legal sensibility. Discretion is everywhere; 'formalist,' 'formalism,' and the like are epithets, even in the word processors of the most conservative judges."[30] Because it is a civil-law court, the Russian Constitutional Court's discretionary jurisdiction is (at least in theory) narrow and strictly defined; the nineteen judges on the Court (usually) strive to implement the law as they find it and to leave the business of outright legislation to the legislature. Moreover, the compact, syllogistic, civilian style of the Court's published opinions proves that the power of judicial review and disciplined analysis can coexist. The contrast between the Russian Court's opinions and the steady diet of discursive, judge-made law in American law schools could make for a productive pedagogy.

Finally, in the interest of clarity it is important to establish what this note is not. First, it is not a study of substantive Russian constitutional law. This note's primary subject is an attitude toward law that expresses itself in a particular approach to legal reasoning. Thus, the substantive law in the cases analyzed in Part IV of this note is irrelevant. Although this study must of course refer to the substance of Russian constitutional law, the substantive law of the analyzed disputes is important only to distinguish one case from another. Whether the Russian Constitutional Court is adjudicating the constitutionality of a presidential attempt to fuse two security ministries into one superministry of security, the constitutionality of a renegade republic's unilateral attempt to vote out the superior sovereign, or the constitutionality of presidential edicts and a governmental decree that order the use of military force to silence civil conflict, in all of these cases the Court resolves disputes through a consistent approach to legal reasoning. Regardless of the substantive constitutional law at issue, this note addresses the manner in which the Court identifies and applies the law.

Further, this note is not an excursion into twentieth-century influences on the contemporary Russian legal system. This study blithely assumes that almost seventy-five years of Soviet socialist rule had no effect on the development of the essentially civilian nature of contemporary Russian

30. Douglas Laycock, *The Triumph of Equity*, 56 LAW & CONTEMP. PROBS. 53, 71 (1993). Contrast Laycock's observation with the following exchange between a Russian reporter and the second Chairman of the Russian Constitutional Court: Q—"Are not the members of the Constitutional Court afraid of being reproached for their purely formal approach to things?" A—"No, we stand firmly on a position of principle: everyone must adhere to the Constitution and to nothing else." Interview by Valentin Maslennikov with Vladimir A. Tumanov, former Chairman of the Russian Constitutional Court, Ross. Gazeta, 19 Apr., 1995, pp. 1-2, *translated in* 31 STATUTES & DECISIONS 76-79, 79 (July-Aug. 1995) [hereinafter *Tumanov Interview*].

constitutional adjudication. Some commentators, publishing in the year of Gorbachev's ascendancy, have argued persuasively that the methodological innovations of socialist law qualified it as a third legal tradition alongside the civil- and common-law traditions:

> Even though the methodology of socialist law is deeply rooted in the civil law [*sic*] tradition, the socialist legal tradition has in turn evolved two methodological devices that are totally unknown to the civil law [*sic*] system. One of these is . . . a form of elasticity in its law of judicial procedure that permits it to be expanded or contracted like an accordion to suit the needs of the state. Because of this built-in element of malleability, socialist law of judicial procedure . . . contemplates the parallel existence of legal regularity and legal irregularity in the way it handles different cases. The very notion of legal irregularity or legalized lawlessness is a unique contribution of socialist law, especially Soviet law, to the general theory of law. . . . [I]n socialist law . . . the law expressly sanctions the unequal treatment of certain privileged or disfavored litigants.[31]

Of course, it is precisely that "parallel existence of legal regularity and legal irregularity," based on the socialist premise that the community's rights always trump the individual's, that the new Russian Constitution emphatically abolished. Under the Russian Federation's new Constitution, as a matter of constitutional law Russian citizens no longer exist to serve the state. Now, "[m]an, his rights and freedoms shall be the supreme value. It shall be a duty of the state to recognize, respect and protect the rights and liberties of man and citizen."[32]

Thus, after the Soviet Union's collapse in 1991, the unique contributions of socialist law are becoming more important academically than as a description of present realities in Russian law:

> [W]ith the decline of Soviet socialism has come a decline in the significance of socialist law. In most of the socialist nations,

---

31. MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS AND CASES ON THE CIVIL LAW, COMMON LAW AND SOCIALIST LAW TRADITIONS, WITH SPECIAL REFERENCE TO FRENCH, WEST GERMAN, ENGLISH AND SOVIET LAW 679 (1985).

32. KONST. RF art. 2. *Contrast* KONSTITUTSIIA (SOYUZ SOVYETSKIH SOZIALISTICHESKIH RESPUBLIC) [CONSTITUTION OF THE USSR] (1978, as amended through 1990) preamble ("The ultimate purpose of the Soviet State is the building of a classless communist society in which social communist self-administration is being developed"), *translated in* BASIC DOCUMENTS ON THE SOVIET LEGAL SYSTEM 4 (W.E. Butler trans. and ed., 1991).

> socialist law was little more than a superstructure of socialist concepts imposed on a civil law [*sic*] foundation. With the end of the Soviet empire the superstructure is being rapidly dismantled . . . .[33]

Although several decades of Communist rule undoubtedly have left residual effects on contemporary Russian law, the scope of those effects narrows considerably when viewed against the panorama of Russian history. As Harold J. Berman has observed, contemporary legal systems are only surface expressions of deeper, broader forces of cultural evolution:

> Law cannot be neatly classified in terms of social-economic forces. A legal system is built up slowly over the centuries, and it is in many respects remarkably impervious to social upheavals. This is as true of Soviet law, which is built on the foundations of the Russian past, as it is of American law, with its roots in English and Western European history.[34]

It follows that Berman's oft-cited observation is as true of post-Soviet law as it was of Soviet law: the cultural forces that permitted Communist domination in Russia did not begin in 1917, nor did they end in 1991.[35]

---

33. JOHN HENRY MERRYMAN ET AL., THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA vii (1994) [hereinafter MERRYMAN ET AL.].

34. HAROLD J. BERMAN, JUSTICE IN THE USSR 5 (2d ed. 1963).

35. *See* SHARLET, *supra* note 13; and ALEXANDER YAKOVLEV, STRIVING FOR LAW IN A LAWLESS LAND: MEMOIRS OF A RUSSIAN REFORMER 11 (1996) ("Historically, [in Russia] the law was not considered to be a real ingredient of normal life but something imposed from above, more often than not a burden, if not actually a yoke").

Not surprisingly, the legal system of post-Soviet Russia does bear at least one disturbing substantive similarity to the legal system in Soviet Russia. For Western commentators, the Soviet Civil Code contained one particularly controversial clause which provided that "[t]he law protects civil (*i.e., private*) [*sic*] rights except in the case when they are exercised in contradiction to their social economic [*sic*] destination," *quoted in* Valerian E. Greaves, *The Social-Economic Purpose of Private Rights: Section 1 of the Soviet Civil Code: A Comparative Study of Soviet and Non-communist* [*sic*] *Law*, 12 N.Y.U. L.Q. REV. 165, 165 (1934). *See also* 13 N.Y.U. L.Q. REV. 441 (1935) (concluding installment of preceding citation).

The new RF Civil Code adopted in October 1994 contains the following provision: "Civil rights may be limited on the basis of Federal law and only to the extent to which this is necessary for the protection of the principles of the constitutional system, morality, health, rights and lawful interest of other persons, guarantee of the country's defense and the security of the state." GRAZHDANSKII KODEKS RF (Civil Code) art. 1, § 2 (1994), *translated in* 1994 WL 765547 [hereinafter GK RF]. Rather than rush to denigrate the new legal system by equating it with the old, however, to explain the similarity between these two provisions we would do well to follow Berman and search for an older, deeper cause. *See supra* text accompanying note 34.

Regardless of the residual impact that almost seventy-five years of Soviet ideology might still have on Russian law, this note will ignore that impact to concentrate on the methods of legal reasoning used by the civil lawyers who have comprised the Russian Constitutional Court.

Toward that end, this study will proceed in three gradually narrowing stages. Part II establishes the general foundation of the civil-law tradition, distinguishing it from the common-law tradition where appropriate to identify more sharply the features that typically characterize legal inquiry in civil-law countries. Building on that basis, Part III then focuses on several qualities of the Russian legal system that illustrate its civil-law heritage. Finally, Part IV narrows the two preceding inquiries to an examination of the analytic methodology employed by the Russian Constitutional Court in three disputes: the Internal Security Case,[36] the Tatarstan Referendum Case,[37] and the Chechen Crisis Case.[38]

II. FIRST PRINCIPLES OF THE CIVIL-LAW TRADITION

Most of the characteristics commonly associated with the civil-law tradition—comprehensive codes, an official preference for positive law in the judicial process,[39] the accompanying absence of a formal doctrine of *stare decisis*,[40] statutorily allocated and statutorily defined discretionary

---

36. In the Case of the Verification of the Constitutionality of Edict No. 289 of the President of the RSFSR of 19 December 1991 "On the Establishment of the Ministry of Security and Internal Affairs of the RSFSR," Decree of the Constitutional Court of the RSFSR, 14 January 1992; GAZETTE OF THE CONGRESS OF PEOPLE'S DEPUTIES OF THE RSFSR AND THE SUPREME SOVIET OF THE RSFSR, 1992, No. 6, Item 247, *translated in* 30 STATUTES & DECISIONS 9-19 (May-June 1994) [hereinafter *Internal Security Case*].

37. In the Case of the Verification of the Constitutionality of the Declaration of State Sovereignty of the Republic of Tatarstan of 30 August 1990, the Law of the Republic of Tatarstan of 18 April 1991 "On Amendments and Additions to the Constitution (Fundamental Law) of the Republic of Tatarstan," the Law of the Republic of Tatarstan of 29 November 1991 "On the Referendum of the Republic of Tatarstan," and the Decree of the Supreme Soviet of the Republic of Tatarstan of 21 February 1992 "On the Conduct of a Referendum of the Republic of Tatarstan on the Question of the State Status of the Republic of Tatarstan," Decree of the Constitutional Court of the RSFSR, 13 March 1992; GAZETTE OF THE CONGRESS OF PEOPLE'S DEPUTIES OF THE RSFSR AND THE SUPREME SOVIET OF THE RSFSR, 1992, No. 13, Item 671, *translated in* 30 STATUTES & DECISIONS 32-48, 48 (May-June 1994) [hereinafter *Tatarstan Referendum Case*].

38. *See supra* note 29.

39. "[I]n civil law [*sic*] systems the starting point for legal reasoning is formed by the provisions of the written law." J.G. SAUVEPLANNE, CODIFIED AND JUDGE MADE [*sic*] LAW: THE ROLE OF COURTS AND LEGISLATORS IN CIVIL AND COMMON LAW SYSTEMS 1 (1982). Contrast this preference for positive law with the preference in a common-law jurisdiction such as the United States, where legal reasoning sometimes also begins with statutes—but, when it does, it usually does so only as a prelude to on-point case law.

40. "Civil law [*sic*] theory does not recognize the existence of a formal doctrine of *stare*

jurisdiction of courts,[41] the use of concentrated rather than diffuse judicial review,[42] even "code-like constitutions"[43]—ultimately exist to promote one overriding value: certainty in the law.[44] Roughly three times older than the common-law tradition, the civil-law tradition is now about 2,500 years old,

---

decisis. Thus, judicial pronouncements are not binding on lower courts in subsequent cases, nor are they binding on the same or coordinate courts." GLENDON ET AL., *supra* note 31, at 208. *See also* MAARTEN HENKET, STATUTES IN COMMON LAW AND CIVIL LAW: THEIR INTERPRETATION AND STATUS 6 (1991) ("formally [in civil-law countries] precedent is not binding—it only has persuasive force").

41. *See, e.g.*, GK RF art. 6, § 2: "Where it is impossible to use analogy of [legislation regulating similar relations], the rights and obligations of the parties shall be determined proceeding from the general principles and meaning of civil legislation . . . and the requirements of good faith, common sense and fairness." Even in the United States, a mixed common-law/civil-law jurisdiction such as Louisiana, following its civil-law premises, must undertake the formidable task of legislating judicial discretion: "When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages." LA. CIV. CODE ANN. art. 4 (West 1988). *See generally* Hessel E. Yntema, *Equity in the Civil Law and the Common Law*, 15 AM. J. COMP. L. 60 (1967).

Discretion and equity are not synonyms; in its procedural sense, equity is a subset of discretionary adjudication. Vernon V. Palmer has articulated a concise definition of procedural equity whose two elements are (1) discretionary adjudication (2) that is based on the judge's notions of standards of fairness. Vernon V. Palmer, *The Many Guises of Equity in a Mixed Jurisdiction: A Functional View of Equity in Louisiana*, 69 TUL. L. REV. 7, 11 (1994) (equity is now "the exercise of discretion in the pursuit of greater fairness"). Thus, it is possible to sever discretion from this definition and base discretionary adjudication on other standards besides substantive equity (*i.e.*, fairness).

An example of discretionary adjudication that is more relevant to a study of the Russian Constitutional Court is the discretion that occurs when a court resolves a conflict between two or more statutes that speak *in pari materia* but cannot be reconciled. There, instead of fairness, the standard that measures the court's discretion is legislative intent. *See, e.g.*, Freeman v. State, 658 N.E.2d 68 (Ind. 1995) (using rules of construction to divine legislative intent and resolve a conflict between two statutes that would have imposed a double enhancement of the defendant's penalties had both statutes been applied); and Ferdinand Fairfax Stone, *The So-Called Unprovided-For Case*, 53 TUL. L. REV. 93, 96 n.14 (1978) (quoting former LA. CIV. CODE ANN. art. 17 (since repealed), which provided that "[l]aws *in pari materia*, or upon the same subject matter, must be construed with a reference to each other; what is clear in one statute may be called in aid to explain what is doubtful in another").

42. *See* Sarah Wright Sheive, *Central and Eastern European Constitutional Courts and the Antimajoritarian Objection to Judicial Review*, 26 LAW & POL'Y INT'L BUS. 1201, 1205-06 (1995). Judicial review is "concentrated," as in the Russian Federation and in most East European and European countries, when only one court, isolated from the ordinary judicial system, is vested with the power to review the constitutionality of legislative and executive actions. Judicial review is "diffuse," as in the United States, when the review power is vested in courts at all levels of the judicial system. *See also* Herman Schwartz, *The New East European Constitutional Courts*, 13 MICH. J. INT'L L. 741, 743-47 (1992) [hereinafter Schwartz, *New Courts*].

43. Lessig, *supra* note 5, at 104.

44. JOHN H. MERRYMAN, THE CIVIL LAW TRADITION 50 (1st ed. 1969) [hereinafter MERRYMAN].

having begun in 450 B.C., "the supposed date of publication of the XII Tables in Rome."[45] The tradition thus began with an attempt to establish certainty in the law through a positive statement of "the law." A little more than 1,000 years later, another defining moment in the tradition occurred when Justinian published another comprehensive positive statement of "the law," his monumental *Corpus juris civilis,* in A.D. 533.[46] Moreover, throughout the tradition's development, the value placed on certainty in the law had caused the specific legal systems in the tradition to constrict the necessarily interpretive judicial function[47] because "the law" cannot be certain if it must change to accommodate the whims and prejudices of individual judges. But it was only upon a much later defining moment in the tradition, the French Revolution, that the judiciary began to meet the level of disrespect that persists in civil-law countries today.[48] With the French Revolution, egalitarianism required an increased trust in representative legislative bodies at the further expense of trust in the judiciary. "Distrust of the judiciary[,] which was identified with the *ancien regime,* contributed to the view that as little room as possible should be left to the courts in interpreting and, as it was feared, thereby distorting the sense of the law."[49] The French judiciary's established (and apparently well-deserved) reputation for corruption only exacerbated the French impulse to keep the judiciary in check.[50]

---

45. MERRYMAN ET AL., *supra* note 33, at 4-5.

46. *Id.* at 5. The reprinted excerpt (in MERRYMAN ET AL., *supra* note 33, at 4-5) from the first edition of Merryman's CIVIL LAW TRADITION provides a humbling perspective on the place of the common-law tradition in the scheme of things: "It is sobering to recall that when the *Corpus juris civilis* of Justinian was published . . . the civil law [*sic*] tradition . . . was already older than the common law is today." *Id.* The date traditionally assigned as the beginning of the common-law tradition is 1066 A.D., when William the Conqueror invaded England. *Id.* at 4-5.

47. MERRYMAN, *supra* note 44, at 36.

48. "Bulgarians are not as respectful of judges as we are in [the United States]. Many consider judges to be almost on the order of government clerks and some were appalled at the thought that judges could nullify laws passed by the National Assembly, the representative of all the people." BERNARD SIEGAN, DRAFTING A CONSTITUTION FOR A NATION OR REPUBLIC EMERGING INTO FREEDOM 2 (2d ed. 1994). Bulgaria is a civil-law country. Sheive, *supra* note 42, at 1207.

49. SAUVEPLANNE, *supra* note 39, at 7.

50. MERRYMAN, *supra* note 44, at 16-17. It is interesting to compare the ethical reputation of the eighteenth-century French judiciary, whose legal acumen was commonly for sale to the landed aristocracy, *id.*, to the reputation of the ordinary judges who sat under Communist rule:

> During the Communist period, the public viewed the Central and Eastern European judiciary as incompetent and corrupt, equating judges and the judicial system with the state and the Communist Party. [footnote omitted] The term 'telephone justice' was popularly coined to describe a common practice in which state officials would contact judges and tell them how to rule in particular cases.

Combined with the traditional civil-law value of certainty in the law, the French Revolution's rationalist, egalitarian ideology enabled Napoleon in 1804 to create and publish the French Civil Code. Because it was the product of human reason and covered all general areas of civil relations, the Code's drafters presumed to consider it complete; one of the rationalist premises of the Enlightenment was that, through reason, humans may know a subject completely.[51] Moreover, as an expression of the will of the people, the Code was also presumed to be complete in the sense of being a complete statement of "the law" (of private, rather than public or criminal, relations) that needed no supplementation from the judiciary. The Code expressly granted carefully defined discretionary authority to the courts—which meant that "the discretionary power [would always] . . . be exercised within the scope of the written law."[52] Further, the purported completeness with which the Code expressed the public will implied a strict separation of the legislative and judicial powers: because the legislature had legislated entirely, no room remained for the judiciary to legislate, either through discretion or through reliance on previous judicial decisions.[53] *Stare decisis* cannot exist in any formal, binding sense in civil-law countries because the doctrine conflicts with the premises upon which such countries conduct the business of law.[54]

[footnote omitted]
Sheive, *supra* note 42, at 1207-08.

51. Angelo Piero Sereni, *The Code and the Case Law, in* THE CODE NAPOLEON AND THE COMMON-LAW WORLD 55-79, 57 (Bernard Schwartz ed., 1956). What we now see as the intellectual naiveté of this presumption, though, clearly was recognized by one of the principal drafters of the French Civil Code, Portalis: "The function of the law is to determine . . . the general precepts of the law . . . rather than to go into the details of questions that may arise with regard to each particular matter. It is for the judge and the lawyer . . . to attend to its implementation. . . . The codes of nations shape up with the passage of time; properly speaking, they are not drawn up by the legislature." *Id.* at 62.

52. *Id. Cf.* GK RF art. 6, § 2, and LA. CIV. CODE ANN. art. 4 (West 1988), *supra* note 41. *Contrast, e.g.,* IND. CODE ANN. § 1-1-4-1(1) (West 1996) (in a jurisdiction in which the judge's discretionary powers are inherent rather than statutory, this "rules of construction" statute's most stringent requirement is that "[w]ords and phrases shall be taken in their plain, or ordinary and usual, sense").

53. Sereni, *supra* note 51, at 65. And this strict separation of powers was not only implied. *See* Bernard Rudden, *Courts and Codes in England, France and Soviet Russia,* 48 TUL. L. REV. 1010, 1012 (1974) (quoting Article 5 of the French Civil Code: "'Judges are forbidden to decide the cases submitted to them by laying down general rules.' (*Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises.*)") [hereinafter Rudden, *Courts and Codes*].

54. Even in common-law countries, though, where the doctrine is formally binding—*i.e.*, where the judiciary formally creates law to cover for incomplete legislative enactments—the doctrine of *stare decisis* is not absolute. Especially in the United States, *stare decisis* is only "a 'principle of policy' . . . and not 'an inexorable command.'" United States v. IBM, 116 S.Ct. 1793, 1801 (1996). Between 1971 and 1992, for example, the U.S. Supreme Court "overruled in whole or in part 34 of its previous constitutional decisions."

It is for these reasons that codes in civil-law countries are best understood as "the expression[s] of an ideology."[55] Codes in *common-law* countries "do[] not propose completely to supersede the pre-existing traditional law governing the topics covered by [them], nor do[] [they] propose to lay down general principles of [their] own."[56] That is precisely, however, what codes in civil-law countries do propose to do. Whereas common-law codes seek primarily to "clarify[] doubtful points, settl[e] the law with regard to particular questions relating thereto, and implement[] pre-existing rules and principles,"[57] codes in civil-law countries purport to enact a "legislative novation"[58] in which "the validity and binding force of [even the codes'] various [preexisting] provisions [are] exclusively dependent on the fact that they ha[ve] been merged with the new enactment."[59] Such legislative completeness renders the ordinary judge in civil-law countries as "a civil servant . . . a kind of expert clerk [whose] . . . function is merely to find the right legislative provision, couple it with the fact situation, and bless the solution that is more or less automatically produced from the union."[60] Under the prevailing assumptions about the separation of legislative and judicial powers, in civil-law countries judicial work traditionally is seen as requiring no great intellectual gifts:

> The prevailing image of the judge tends to become self-justifying. The career is attractive to those who lack ambition, who seek security, and who are unlikely to be successful as practicing lawyers or in the competition for an academic post. . . . The legal profession has a clearly defined class structure; judges are the lower class.[61]

Further, "[in civil-law countries,] judges are 'career judges' who enter the judiciary early in their professional careers and are promoted on the basis of

---

Planned Parenthood of Southeast Pa. v. Casey, 505 U.S. 833, 959 (1992) (Rehnquist, C.J., dissenting).

55. MERRYMAN, *supra* note 44, at 27-28.

56. Sereni, *supra* note 51, at 58.

57. *Id.* at 59. *Cf.* U.C.C. § 1-102(2) (1996) ("Underlying purposes and policies of this Act are (a) to simplify, clarify and modernize the law governing commercial transactions").

58. Sereni, *supra* note 51, at 57 (quoting and translating FRANCOIS GÉNY, *La Technique Législative dans la Codification Civile Moderne, in* 2 LE CODE CIVIL, 1804-1904, LIVRE DU CENTENAIRRE 987 (1904)).

59. *Id.*

60. MERRYMAN, *supra* note 44, at 36, 37.

61. *Id.* at 117-18.

seniority. Ordinary court judges . . . practice technical, rather than policy-oriented, statutory application."[62] Although it is hard for American common lawyers to picture Ben Cardozo acquiescing to such a self-concept at any point in his career, the prevailing ideology in civil-law countries traditionally has portrayed judges as unthinking "syllogism machine[s]."[63]

The "dogma [] of completeness"[64] is, of course, a fiction—but, for civil lawyers, it is a fiction "that has made all the difference."[65] As the American comparativist Merryman sees the common- and civil-law traditions, the crucial difference between the two lies not in "what courts in fact do, but in what the dominant folklore tells them they do"[66]—and the dominant folklore tells civil-law judges that they are little more than mouthpieces for the legislative will. Because this folklore has real consequences in the way judges see themselves, it accounts for several actual differences between the two traditions, more so "in the area of mental processes, in styles of argumentation, and in the organization and methodology of law than in positive legal norms."[67] Unlike American and English judges, who are used to their utterances commanding respect and deference,[68] even the more policy-oriented constitutional judges in a civil-law country such as the Russian Federation rarely include free-form philosophical disquisitions on the law in their published opinions. Instead, civil-law judges typically craft published opinions in which the court's decisions give the appearance of following

---

62. Sheive, *supra* note 42, at 1205 (footnote omitted).

63. Lasser, *supra* note 5, at 1343 (quoting 1 JEAN CARBONNIER, DROIT CIVIL 18 (1967)). *But see* text accompanying and sources cited *infra* notes 117 and 121. Especially since World War II, with the advent of constitutional courts in many civil-law countries, all levels of the judiciary generally are more respected today because the prominence of constitutional judges' roles has increased awareness of the complexities inherent in even the simplest judicial decisions.

64. Sereni, *supra* note 51, at 63.

65. ROBERT FROST, *The Road Not Taken*, l. 20, *in* THE POETRY OF ROBERT FROST 105 (Edward Connery Lathem ed., 1969).

66. MERRYMAN, *supra* note 44, at 49.

67. GLENDON ET AL., *supra* note 31, at 61. *But see* F.H. LAWSON, A COMMON LAWYER LOOKS AT THE CIVIL LAW 209 (1953) ("the leading differences between [the civil-law world] and the Common Law [*sic*] world are not differences of method or in the ways of handling source materials, but in the [substantive] concepts themselves . . .") [hereinafter LAWSON, A COMMON LAWYER LOOKS].

68. For well-known representative examples of the confident, discursive common-law nature of American and English opinions, *see* Marbury v. Madison, 5 U.S. 137 (1803); and Rylands v. Fletcher, 1 All E.R. 1861-1873. For a well-known example of a subtler extension of judicial authority beyond mere discursiveness—to a degree that would exceed a civil lawyer's comprehension—*see* Brown v. Board of Educ., 347 U.S. 483 (1954) and 349 U.S. 294 (1955). *See also* GARY L. MCDOWELL, EQUITY AND THE CONSTITUTION: THE SUPREME COURT, EQUITABLE RELIEF, AND PUBLIC POLICY (1982) (arguing that in *Brown* the Warren Court abandoned not only established rhetorical standards of evidentiary support but also traditional procedural standards of equity jurisprudence to reach the morally right result).

inevitably from statutory premises;[69] in which dictum, if present at all, is both careful and negligible; and in which the very organization and contents of the published opinions are themselves expressly required by statute.[70] The published opinions of the Russian Constitutional Court exhibit all of these typically civilian traits.[71]

III. EXPRESSIONS OF THE CIVIL-LAW TRADITION IN RUSSIAN LAW

The civilian nature of the Russian Constitutional Court's methodology has historical roots in the French Revolution. Through the French Civil Code and the French jurists' expositions of the ideology that informed their codes, nineteenth-century French adaptations of the civil-law tradition were immensely influential across Europe.[72] That ideology directly influenced Russia when "Napoleon brought the French Revolution . . . right to the doors of the Russian people."[73] Although contact with the substance of French law could not alter Russian law enough to avoid the 1917 Russian

---

69. In civil-law jurisdictions, "[a]ll judicial decisions are presented as applications of statutory provisions." HENKET, *supra* note 40, at 6-7.

70. *See* Federal Constitutional Law No. 1-FKZ, On the Constitutional Court of the Russian Federation, art. 75, 21 July 1994; GAZETTE OF THE CONGRESS OF PEOPLE'S DEPUTIES OF THE RUSSIAN FEDERATION AND THE SUPREME SOVIET OF THE RUSSIAN FEDERATION, No. 13, Item 1447, *translated in* 31 STATUTES & DECISIONS 8-56, 41-42 (July-Aug. 1995) (express twelve-step guidelines to the Russian Constitutional Court on "setting forth an opinion"), *quoted infra* text accompanying note 113 [hereinafter *Law on the Court*].

On the unusual intermediary position in the Russian legal system of federal constitutional laws, whose undefined authority is less than the Constitution's but greater than that of ordinary federal laws, *see* KONST. RF art. 76, § 3 ("Federal laws may not contravene federal constitutional laws"); and Herbert Hausmaninger, *Towards a "New" Russian Constitutional Court*, 28 CORNELL INT'L L.J. 349, 386 n.122 (1995).

71. *See* Part IV, *infra*. Civil-law courts apparently expend no small effort to present the concise, certain image of the law that appears in their published opinions. For a fascinating behind-the-published-opinions glimpse of civil-law adjudication, see Lasser, *supra* note 5, at 1358-60 (text of *conclusions*, arguments urged by counsel to the justices of France's appellate *Cour de cassation*) and 1364-67 (text of a *rapport*, legal analysis presented by one justice of the *Cour de cassation* to his fellow justices). In both sets of arguments, "the method as well as the substance of the argument[s] empower case law over statutory authority." *Id.* at 1362. According to Lasser, "*Cour de cassation* decisions typically run a single typewritten page." *Id.* at 1369. The rare published *conclusions* and *rapports* "can be five times as long." *Id.* The unedited *conclusions* and *rapports*, however, "can routinely be fifty pages long." *Id.* at 1370. Lasser's study confirms the suspicion that law is a much messier and more human enterprise in civil-law countries than civil lawyers let on. *See also* GLENDON ET AL., *supra* note 31, at 208 (in civil-law countries, "the case law . . . plays an enormous role in the everyday operation of the legal system").

72. MERRYMAN ET AL., *supra* note 33, at 453-54.

73. BERMAN, *supra* note 34, at 209.

Revolution,[74] in style and underlying legal ideology, especially *vis-à-vis* the separation of power between the legislature and the judiciary, the French Civil Code was a seminal influence on the legal environment in which the members of the Russian Constitutional Court learned to think as (civil) lawyers:[75]

> The French Code (the Napoleonic Code of 1804) reflected the spirit of the French Revolution and the objective of the revolution was to get rid of lawyers by making the code complete, coherent, clear, and simple and in effect curtailing the power of the judges to make laws. . . . The underlying ideology of the Soviet codes was nearer that of the French in the sense that the drafters attempted to make the language of the code as simple, straightforward, and lucid as possible and its provisions as comprehensive as they could be.[76]

A thorough accounting of these civilian qualities in Russian law would far exceed the intended scope of the present inquiry. Here, to establish the civilian ideology's presence in the contemporary Russian legal system, three examples will suffice: the sources of law for Russian lawyers, that code-like Russian Constitution itself, and Articles 74 and 75 of the federal constitutional law "On the Constitutional Court of the Russian Federation."[77]

Russian law derives from a hierarchy of sources, with positive laws the publicly favored source. The sources of law in Russia thus accord with "the accepted theory of sources of law in the civil-law tradition[,] [which] recognizes only statutes, regulations, and custom as . . . law."[78] Whereas

---

74. *Id.* at 209-24.

75. GLENDON ET AL., *supra* note 31, at 949. Of course, members of the Russian Constitutional Court, whose average age is about 55, learned to think as lawyers during the Soviet adaptations of the civil-law tradition. Indeed, all but one of the original thirteen justices on the Court were members of the Communist Party of the Soviet Union. Hausmaninger, *supra* note 70, at 381. The independence the Court has shown in its decisions, however, suggests that legal traditions have influenced their thinking more deeply than have party affiliations. *Id.* at 355, 361 (in its first seventeen decisions, the Court struck down part or all of eleven legal enactments for failure to comply with constitutional standards).

76. GLENDON ET AL., *supra* note 31, at 949 (quoting C. Osakwe, *Soviet "Pactomania" and Critical Negativism in Contemporary International Law,* 19 L. E. EUR. 291, 314 (1975)). In the twentieth century, however, the Russian Civil Codes have more closely resembled Germanic than French models. *See* Bernard Rudden, *Civil Law, Civil Society, and the Russian Constitution,* 110 L.Q. REV. 56, 61 (1994) ("In structure, general principles, and in many detailed provisions[,] [Russian civil-law] has since 1922 been largely a simplified copy of that found in Western Europe, especially in the German-speaking countries").

77. *Law on the Court, supra* note 70, at 40-42.

78. MERRYMAN, *supra* note 44, at 25. *See also* GLENDON ET AL., *supra* note 31, at 193.

common lawyers take their law where they find it,[79] Russian lawyers preferably ground their reasoning in positive law—the Constitution, statutes, ordinances, decrees and edicts, sub-statutory normative acts, and normative decisions issued by competent state authorities.[80] Although international law was only an "extra-legal source of law"[81] in the Soviet Union, today both the Russian Constitution[82] and the Russian Civil Code[83] expressly incorporate international law into the Russian legal system. (Given the cultural isolation that has marked Russian history,[84] and given the Soviet Union's frigid relations with the world community, this contemporary use of international law for norms that have positive force throughout the Russian Federation is at least as much the product of good rhetoric as it is the product of good law.[85]) As in other civil-law countries, unwritten sources such as general

---

79. MERRYMAN, *supra* note 44, at 26.

80. Th. J. Vondracek, *The Relationship between Written and Unwritten Sources of Law in the Soviet Union, in* NETHERLANDS REPORTS TO THE VIIITH INTERNATIONAL CONGRESS OF COMPARATIVE LAW 23-32, 23-24 (1970). This discussion of the sources of Russian law follows MERRYMAN ET AL., *supra* note 33, at vii, and disregards the peculiarly Soviet aspects of Vondracek's study.

See also In the Case of the Verification of the Constitutionality of Part Two of Point 2 of the Decree of the Congress of People's Deputies of the Russian Federation of 29 March 1993 "On the All-Russian Referendum of 25 April 1993, the Procedure for the Tabulation of Its Results, and the Mechanism for the Realization of the Results of the Referendum," Decree of the Constitutional Court of the Russian Federation, 21 April 1993; GAZETTE OF THE CONGRESS OF PEOPLE'S DEPUTIES OF THE RUSSIAN FEDERATION AND THE SUPREME SOVIET OF THE RUSSIAN FEDERATION, 1993, No. 18, Item 653, *translated in* 30 STATUTES & DECISIONS 39-62 (Sept.-Oct. 1994) (establishing the superiority of statutes among other representative enactments in the Russian legal system); and *discussed in* Hausmaninger, *supra* note 70, at 358.

Contrast a civil-law jurisdiction's clear preference for positive law with the source of law that enjoys primacy in a common-law jurisdiction: "English courts have expressed the view that a statute, except for its clear wording to the contrary, must not be construed as altering the existing common law." SAUVEPLANNE, *supra* note 39, at 22. *See also, e.g.*, The Group, Inc. v. Spanier, 1997 WL 349883, at *3 (Colo. App. June 26, 1997) (acknowledging that "[s]tatutes in derogation of the common law must be construed strictly").

81. Vondracek, *supra* note 80, at 29.

82. "The commonly recognized principles and norms of the international law and the international treaties of the Russian Federation shall be a component part of its legal system." KONST. RF art. 15, § 4.

83. "The generally accepted principles and rules of international law and the international treaties of the RF shall be, in conformity with the RF Constitution, a component part of the RF legal system." GK RF art. 7, § 1.

84. "Russia did not experience with Europe several of the antecedent developments in Western intellectual history." SHARLET, *supra* note 13, at 7.

85. "[T]he 1993 Constitution contains an unprecedented number of references to international law. To a large extent, the constitutional provisions on international law reflect the desire of democratic Russia to become an open and law-abiding member of the international community." Gennady M. Danilenko, *The New Russian Constitution and International Law*, 88 AM. J. INT'L L. 451, 452 (1994).

principles (*e.g.*, honesty, legislative intent, substantive rather than merely formal satisfaction of rights,[86] and economy), customs, and internal instructions and unwritten laws are discernible but indefinite sources of law in Russia.[87] Notably, judicial precedent is not a publicly acknowledged source of law:[88] "the [Russian] courts are not supposed to have the power to establish norms which are generally binding. The doctrine of *stare decisis* is rejected."[89] Thus, in both its acknowledged and its unacknowledged sources of law, the Russian legal system reveals its typically civilian ideology.

Similarly, the specificity with which the framers of the Russian Constitution posited individual rights exhibits the civilian preference to leave the judiciary as little room as possible to interpret—that is, to leave the judiciary as little room as possible in which to *legislate*. The new Russian Constitution *is* a code-like constitution. For American common lawyers who are used to thinking of constitutional rights as both abstract and negative—as vague limitations on governmental power rather than as specific requirements for affirmative governmental action[90]—the first reading of the Russian Constitution can shock one's legal sensibilities. Through the Bill of Rights, the U.S. Constitution guarantees such abstract negative rights as freedoms of speech and religion[91] and freedom from cruel and unusual punishment.[92] In some provisions the Russian Constitution extends what seem to be even broader abstract negative rights than those found in their analogs in the U.S. Constitution as interpreted by the U.S. Supreme Court.[93] In other provi-

---

86. *Cf.* the traditional maxim that "equity looks to the substance rather than the form," *discussed in* 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 88 (14th ed. 1918) [hereinafter STORY ON EQUITY]. On substantive equity under Soviet socialist rule, see Kazimierz Grzybowski, *Soviet Socialism and the Function of Equity, in* EQUITY IN THE WORLD'S LEGAL SYSTEMS: A COMPARATIVE STUDY 485-94 (Ralph A. Newman ed., 1973); and John N. Hazard, *"Socialist Equity" as Defined by Soviet Law, in* EQUITY IN THE WORLD'S LEGAL SYSTEMS: A COMPARATIVE STUDY 495-518 (Ralph A. Newman ed., 1973).

87. Vondracek, *supra* 80, at 26-29.

88. *Id.* at 25-26.

89. *Id.* at 30-31 (footnote omitted).

90. *See* Sunstein, *Against Positive Rights, supra* note 3. On the common inclusion of positive, particularized rights in constitutions and international instruments since World War II, see Schwartz, *Aiming High, supra* note 16, at 25. *See also* Wiktor Osiatynski, *Rights in New Constitutions of East Central Europe*, 26 COLUM. HUM. RTS. L. REV. 111, 112 (1994) (arguing in part for "the need for the constitutionalization of human rights in East Central Europe"—*i.e.*, Poland, Hungary, the Czech Republic, and the Slovak Republic).

91. U.S. CONST. amend. I.

92. U.S. CONST. amend. VIII.

93. *See, e.g.*, KONST. RF art. 22, § 2, guaranteeing that "[a]rrest, detention and keeping in custody shall be allowed only by an order of a court of law. No person may be detained for more than 48 hours without an order of a court of law." Under the U.S. Supreme Court's interpretations of the broad search and seizure provision of the U.S. Constitution's Fourth Amendment, warrantless felony arrests are constitutional even absent exigent circumstances.

sions, however, the Russian Constitution guarantees particularized rights "to privacy of correspondence, telephone communications, mail, [and] cables,"[94] "to use [a] native language,"[95] "to leave the boundaries of the Russian Federation,"[96] "to have land in [one's] private ownership,"[97] "to remuneration for work . . . not below the statutory minimum wage, and . . . to security against unemployment,"[98] "to a home,"[99] and "to receive, free of charge and on a competitive basis, higher education in a state or municipal educational institution or enterprise."[100] These rights are not on the order of the right of a "[p]articipant in a business partnership . . . to take part in the operation of the partnership or company,"[101] of the right of "[t]he party adhering to [an] agreement [of adhesion] . . . to demand cancellation or alteration of the agreement,"[102] or of the right of a person who maintains stray animals to acquire ownership of the animals "[w]here . . . their owner is not discovered or himself fails to declare his right to these."[103] Instead, they are rights that "the multinational people of the Russian Federation"[104] consider "so fundamental and irreplaceable that [these rights] should [be made] very difficult to alter";[105] given the Russian people's history, these are rights that the Russian people felt compelled to *constitutionalize*. As such, they are rights that a civil-law country will not allow just any court of ordinary jurisdiction to adjudicate. Under the concentrated, carefully

---

See United States v. Watson, 423 U.S. 411 (1976). The Russian Constitution's subsequent explicit 48-hour provision also has a direct analog in American law. Under the U.S. Constitution, though, the same right required 200 years to become "constitutional law" through case law in the *Gerstein-McLaughlin* rule. *See* Gerstein v. Pugh, 420 U.S. 103 (1975) (requiring a prompt determination of probable cause after a warrantless arrest); and County of Riverside v. McLaughlin, 500 U.S. 44 (1991) (defining "promptness" as 48 hours). As Schwartz quite correctly observes, given the general crisis of cultural transformation in Eastern Europe, "The East Europeans don't have [the luxury of 200 years]" in which to refine a broad seizure provision down to a relatively precise temporal definition. Schwartz, *Aiming High, supra* note 16, at 26. If the framers of the Russian Constitution wanted to ensure such a definition of promptness, they were wise to constitutionalize it so that disputes over the right will now *begin* at such a relatively advanced stage of constitutional maturity.

94. KONST. RF art. 23, § 2.

95. KONST. RF art. 26, § 2.

96. KONST. RF art. 27, § 2.

97. KONST. RF art. 36, § 1.

98. KONST. RF art. 37, § 3. *See also* the roster of specific affirmative duties imposed upon the Russian government by KONST. RF art. 7, § 2, which requires, *inter alia,* that "[t]he Russian Federation shall . . . establish a guaranteed minimum wage."

99. KONST. RF art. 40, § 1.

100. KONST. RF art. 43, § 3.

101. GK RF art. 67, § 1.

102. GK RF art. 428, § 2.

103. GK RF art. 231, § 1.

104. KONST. RF preamble.

105. Schwartz, *Aiming High, supra* note 16, at 26.

restricted constitutional review preferred by civil-law countries,[106] these rights "[are] subject to the jurisdiction of only the Constitutional Court of the Russian Federation."[107] The code-like precision alone of such provisions, however, brings the Russian Constitution squarely within the civil-law tradition: the framers of the Russian Constitution assumed that they could not entirely entrust the definition of rights they considered fundamental to the judiciary. Whereas the U.S. Constitution contains a bill of individual rights to protect such rights from tyranny of the majority,[108] the Russian Constitution contains such rights because the majority sought to protect them from the vicissitudes of the judge.

The civilian distrust of the judiciary even underlay the Russian State Duma's code-like delineation of not only the Russian Constitutional Court's jurisdiction but also, as much as possible, the very manner in which the Court thinks its way to answers for, and writes its published opinions on, the constitutional questions it hears. Civil-law ideology compels legislatures to offer step-by-step directions for a mere judge's thinking process because, "[i]n the uncommon case in which some more sophisticated intellectual work is demanded of the judge, he is expected to follow carefully drawn directions about the limits of interpretation."[109] That is why even a mixed common-law/civil-law jurisdiction such as Louisiana enacts a counterintuitive "equity statute";[110] civilian distrust of the judiciary requires at least a nominal effort to legislate and restrict judicial discretion. It is also why the State Duma adopted a discretion statute for Russia's ordinary judiciary, Article 6 of the RF Civil Code:

> *Article 6. Application of Civil Legislation by Analogy*
>
> 1. Where the relations specified in . . . Article 2 of the present Code are not directly regulated by legislation or contract between the parties, and in the absence of any usage or custom of

106. *See* Sheive, *supra* note 42, at 1205-06; Schwartz, *New Courts, supra* note 42, at 743-47.

107. In the Case Concerning Verification of the Constitutionality of Articles 220(1) and 220(2) of the Criminal Procedure Code of the RSFSR [Russian Soviet Federative Socialist Republic] in Connection with the Appeal of Citizen V.A. Avetian, Decree No. 4-P of the Constitutional Court of the Russian Federation, 3 May 1995, *published in* Ross. Gazeta, 12 May, 1995, p. 4, *translated in* 31 Statutes & Decisions 85-91, 87-88 (July-Aug. 1995).

108. *See* THE FEDERALIST No. 84 (Alexander Hamilton) (arguing against demands to include a bill of rights in the U.S. Constitution as protection against potential usurpations of individual rights by the representative federal government). The phrase "tyranny of the majority" is from ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 250 (George Lawrence trans. and J.P. Mayer ed., 1969).

109. MERRYMAN, *supra* note 44, at 38.

110. LA. CIV. CODE ANN. art. 4 (West 1988), *quoted supra* note 41.

> business commerce applicable thereto, application to such relations shall be made of civil legislation regulating similar relations . . . unless this is contrary to the substance of these relations.
>
> 2. Where it is impossible to use analogy of [legislation regulating similar relations], the rights and obligations of the parties shall be determined proceeding from the general principles and meaning of civil legislation . . . and the requirements of good faith, common sense and fairness.[111]

The implicit message of Article 6 is clear: only when all else fails is a judge to rely to any substantial extent upon his or her own judgment. Otherwise, the judge shall omit his or her personal impression of analogous statutes or of equity from the court's decision.

A similar message informs Articles 74 and 75 of the Law on the Constitutional Court:

> *Article 74. Requirements made of decisions*
>
> The Constitutional Court of the Russian Federation shall adopt a decision in a case by evaluating both the literal meaning of the act under consideration and the meaning given to it by official and other interpretation or the developed practice of application of the law, as well as proceeding from its place in the system of legal acts.[112]
>
> The Constitutional Court of the Russian Federation shall adopt decrees and give conclusions only on the subject indicated in the submission and only in relation to that part of an act or compe-

---

111. GK RF, art. 6.

112. For an alternative rendering of the difficult syntax in this important second clause of Art. 74, see the Law on the Court as translated in FOREIGN BROADCAST INFORMATION SERVICE (FBIS)-SOV-94-145-S (28 July 1994), at 14 [hereinafter FBIS-SOV-94-145-S (28 July 1994)]:

> The Russian Federation Constitutional Court adopts a ruling on a case by assessing both the literal meaning of the act under consideration and the meaning conferred on it by official and other interpretation or by prevailing legal-administrative practice, and also on the basis of its place within the system of legal acts.

Two native speakers of Russian who attend the Indiana University School of Law—Indianapolis (one of whom practiced law in Russia) have separately observed that the original Russian for this clause resists translation, not because it contains a Russian idiom, but because it is the product of vague drafting.

tence of a body the constitutionality of which was subjected to doubt in the submission. In adopting a decision, the Constitutional Court of the Russian Federation shall not be bound by the justifications and arguments set forth in the submission.

Article 75. Setting forth of a decision

A decision of the Constitutional Court of the Russian Federation, set forth in the form of a separate document, shall contain the following information, depending upon the character of the question under consideration:

1. the name of the decision, and the date and place of its adoption;

2. the personal composition of the Constitutional Court of the Russian Federation that adopted the decision;

3. necessary data on the parties;

4. formulation of the question under consideration, and the justification and grounds for its consideration;

5. the norms of the Constitution of the Russian Federation and the present Federal Constitutional Law according to which the Constitutional Court of the Russian Federation has the right to consider the given question;

6. the demands contained in the submission;

7. the factual and other circumstances established by the Constitutional Court of the Russian Federation;

8. the norms of the Constitution of the Russian Federation and the present Federal Constitutional Law by which the Constitutional Court of the Russian Federation was guided in the adoption of the decision;

9. the arguments in favor of the decision adopted by the Constitutional Court of the Russian Federation, and, if necessary, the arguments refuting the assertions of the parties as well;

10. the formulation of the decision;

> 11. an indication of the finality and binding nature of the decision;
>
> 12. the procedure for the entry of the decision into force, as well as the procedure, periods, and particularities of its execution and publication.
>
> A final decision of the Constitutional Court of the Russian Federation shall be signed by all of the judges who participated in the vote.[113]

In these two articles, the Russian federal legislature has done everything in its power to regulate the interpretative and writing processes of the Russian Constitutional Court: these articles exist solely because their creators assumed that the Court *needs* the precise limitations that these articles provide. Article 74 explicitly governs the Court's interpretative process; of the two articles, it is the more analogous to the typical civil-law discretion statute, particularly in Article 74's second clause (the first clause of Article 74 reproduced here). That clause requires the Court to temper the discretion in its interpretations by considering the challenged act from at least three of five specific perspectives: literal meaning, official meaning, meaning according to "other interpretation" besides official meaning, settled meaning according to "developed practice of application," and contextual meaning with reference to other legal acts.[114] Unless the Court evaluates these bases of decision in a given case, "it will be impossible to understand the real meaning, effect, and consequences of the . . . [challenged acts] under consideration."[115] A court in a common-law jurisdiction most likely would consider such perspectives when evaluating constitutional challenges

---

113. *Law on the Court* arts. 74 and 75, *supra* note 70, at 40-42.

114. *Law on the Court* art. 74, *supra* note 70, at 40-41. Note that the requirement to consider settled meaning does not refer to *stare decisis*. Even where the "practice of application of the law" refers to application performed by courts (rather than to application in "administrative practice," FBIS-SOV-94-145-S (28 July 1994), *supra* note 112, at 14), in a civil-law jurisdiction the practice of application would officially be only persuasive, not binding.

The unofficial reality, however, is that "a settled line of cases . . . has great authority everywhere." GLENDON ET AL., *supra* note 31, at 208. The reality is that

> [a]s a practical matter it is generally recognized in civil law [*sic*] systems that judges do and should take heed of prior decisions, especially when the settled case law shows that a line of cases has developed. . . . Court decisions . . . are de facto legal rules whose authority varies according to the number of decisions, the importance of the court issuing them, and the way the opinion writer expresses himself or herself.

Id. at 209.

115. *Chechen Crisis Case* (Zorkin, J., separate opinion), *supra* note 29, at 76.

to legislative and executive acts—but it's that "most likely" the civilian preference for certainty cannot tolerate. In a civil-law jurisdiction, the legislature positively enacts these perspectives to narrow the gap between likelihood and certainty that the discretion inherent in all interpretation will follow accepted standards. Similarly, Article 75 meticulously disciplines the structure and contents of the Court's published decisions. Together, true to the civil-law premises that support the Russian legal system, Articles 74 and 75 are ways for Russian federal legislators to assure themselves that they have minimized the scope of judicial discretion at the Russian Constitutional Court.

IV. THE CIVILIAN METHODOLOGY OF THE RUSSIAN CONSTITUTIONAL COURT

> *Compliance with the rules is not a formality but a mandatory requirement. If we do not have order, then what right will we have to demand it from everybody else?*[116]

The very nature of judicial review implies an extraordinary degree of judicial discretion. Unlike even those private disputes for which no positive law governs, constitutional conflicts inevitably touch upon "considerations of policy that operate independently of the legal nature of the system."[117] Additionally, constitutional questions touch upon concerns that run much deeper than easily identified issues of "policy." They are questions of cultural psychology that touch upon only the articulable periphery of a culture's identity, the mere edge of that inarticulable core of "[a] legal system [that] is built up slowly over the centuries."[118] That is at least partly why the civil-law tradition, with its predominant anti-judicial bias, has until recently resisted judicial review; the U.S. has accepted judicial review since John Marshall's fiat in *Marbury v. Madison,*[119] but the civil-law countries of Western Europe generally began to incorporate constitutional review only after World War II.[120] No matter how code-like a constitution may be, it exists only in an eminently interpretable medium—language—and, much more than do other legal instruments, it implicates the most sensitive levels

116. *Tumanov Interview, supra* note 30, at 78.

117. SAUVEPLANNE, *supra* note 39, at 4.

118. BERMAN, *supra* note 34, at 5.

119. 5 U.S. 137 (1803). Originally a verb in the subjunctive mood used jussively, "fiat" aptly describes a declaration that emanates from a law-giver who comfortably claimed all the authority that the common-law tradition afforded him.

120. Schwartz, *New Courts, supra* note 42, at 741.

of a country's legal system.[121] Thus, on one level judicial review is distasteful in civil-law countries for the same reason that it meets objections in the U.S.—"when the Court invalidates the action of a . . . legislature, it is acting against the majority will."[122] Quite apart from the antimajoritarian objection, though, judicial review particularly offends civilian sensibilities because the intrinsic discretion in constitutional adjudication is so broad and because it touches the legal system so deeply.[123]

Although some established European constitutional courts have begun to claim a broad discretionary jurisdiction, "neither hesitat[ing] nor apologiz[ing] when issuing wide-ranging decisions . . . often drawing on unwritten or historical principles and values,"[124] the Russian Constitutional Court has used a conservative, text-based methodology. At this point in Russia's experiment with democracy, a conservative approach is probably the wiser course:

> Although there certainly exist settled rules that are used by courts in the interpretation and application of the laws, these existing rules provide limited guidance in the interpretation of the meaning behind the broad statements of rights and responsibilities contained in a document acknowledged to be the highest source of law. The first Constitutional Court[125] was almost

---

121. For that matter, "[h]owever complete a code might seem, there will always be gaps and interstices which require the judge's exercise of discretion." Roberto G. MacLean, *Judicial Discretion in the Civil Law,* 43 LA. L. REV. 45, 51 (1982).

122. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 33 (2d ed. 1986).

123. It is thus no wonder that civil-law countries, perhaps out of psychological self-defense, hesitate "to call constitutional courts 'courts' and the judges on such courts 'judges.'" MERRYMAN, *supra* note 44, at 39. "The constitutional court . . . stands apart from the rest of the governmental apparatus, including the judiciary, and is responsible only to the nation's constitution and the values it incorporates." Schwartz, *New Courts, supra* note 42, at 745. If constitutional courts are perceived as openly fulfilling a quasi-legislative function, then they do not exceed the normal judiciary's traditionally restricted authority, and the fiction of a strict separation of legislative and judicial powers survives. Thus, because from a civil-law perspective the Russian Constitutional Court is a quasi-legislative body, its decisions can be (and are) binding on all governmental bodies throughout the Russian Federation. *See Law on the Court* art. 6, *supra* note 70, at 10.

Theoretically, the Court answers to no one but the Russian Constitution. The Court discharges its functions to "protect[] . . . the foundations of the constitutional order and the fundamental rights and freedoms of the person and the citizen and [for purposes] of provision for the supremacy and direct effect of the Constitution of the Russian Federation on the entire territory of the Russian Federation." *Law on the Court* art. 3, *supra* note 70, at 8.

124. Schwartz, *New Courts, supra* note 42, at 745.

125. The "first" Russian Constitutional Court was created by act of the RSFSR Congress of People's Deputies on 12 July 1991, further proof of the extent to which *perestroika* transformed the idea of constitutional structure in the Soviet Union: the power of constitutional

> completely free to develop its own patterns, practices, and principles for giving concrete meaning to constitutional provisions—its own "art of constitutional interpretation."[126]
>
> [T]he [second] Constitutional Court in effect [has] state[d] that it will interpret vague or nonbinding issuance strictly in accordance with its content and legal force, effectively assuming that the error or improper intent is on the side of the implementors in all such situations. This approach is in one sense quite appropriate in the Russian environment, in which a strict formal legality in interpretation may encourage a serious attention to the form and content of legal acts that has been absent in the past and is very much needed.[127]

In a word, the Russian Constitutional Court has publicly adopted a deferential *civilian* method. According to positive law, the Court has never been "almost completely free to develop its own patterns, practices, and principles for giving concrete meaning to constitutional provisions."[128] The second clause of Article 74 of the 1994 Law on the Court was a clear attempt by the Federal Assembly to prevent such freedom in the Court's interpretations, as was that clause's predecessor in the 1991 Law on the Court.[129] Within the

---

review was vested in a Russian judicial body *before* the attempted coup in August 1991. *See generally* RSFSR Constitutional Court Act, 12 July 1991, *available in* 1991 WL 496580 [hereinafter RSFSR Law on the Court]. During the crisis of September and October 1993, in which security forces killed between 60 and 130 deputies of the Supreme Soviet (Parliament), President Yeltsin suspended the first Constitutional Court after it found that the President's dissolution of the Supreme Soviet was unconstitutional. *See Yeltsin Dissolves Parliament, Calls Elections*, 45 CURRENT DIGEST OF THE POST-SOVIET PRESS 1 (no. 38, 1993); *Yeltsin Decree Spells End of Constitutional Court*, 45 CURRENT DIGEST OF THE POST-SOVIET PRESS 13 (no. 41, 1993); Hausmaninger, *supra* note 70, at 350 (stating that security forces killed 62 deputies); and Dwight Semler, *The End of the First Russian Republic*, 3 E. EUR. CONST. REV. 107, 107 (1993) (stating that security forces killed 127 deputies).

The "second" Russian Constitutional Court was created, under the authority of the 1993 Constitution, on 21 July 1994. *See* KONST. RF art. 125 (vesting broad powers in the Court); KONST. RF art. 128, § 3 ("The powers, and procedure of the formation and activities of the Constitutional Court of the Russian Federation . . . shall be established by federal constitutional law"); and *Law on the Court, supra* note 70. The second Constitutional Court heard its first case in early 1995.

126. Sarah J. Reynolds, *Editor's Introduction*, 30 STATUTES & DECISIONS 5, 6 (May-June 1994).

127. Sarah J. Reynolds, *Editor's Introduction*, 31 STATUTES & DECISIONS 4, 11 (Sept.-Oct. 1995). *See also* Lessig, *supra* note 5, at 104 ("respect for textual limits is an important lesson [for drafters in the former Soviet republics] to relearn").

128. Reynolds, *supra* note 126, at 6.

129. "The RSFSR Constitutional Court, when trying the constitutionality of [a] normative act, shall have in view both its literal meaning and the construction put on it by official and

strictures imposed by Article 74, however, the Court *is* almost completely free to adjudicate the Russian Constitution as it sees fit; the Russian Constitutional Court occupies the same position in Russian constitutional law that the Jay and Marshall Courts occupy in American constitutional law. That the Russian Court's chosen methods illustrate the civil-law tradition so well says much about the strength of the Court's legal heritage.

The two most visible aspects of the Court's civilian methodology are its reliance on positive sources of law and its use (and disuse) of statutorily defined discretion.

A. *Reliance on Positive Sources of Law*

The Court's reliance on positive sources of law—primarily, of course, the Constitution—is effectively total.[130] This reliance is both direct and indirect. Direct reliance on positive law occurs when an on-point provision of a positive statement of law provides the Court with the major premise under which it can resolve a given dispute. Indirect reliance occurs when no on-point provision exists, but the Court inductively analogizes from similar provisions, perhaps even from international instruments,[131] to derive a principle by which it can decide the case.[132] A striking example of direct reliance appears in the first case that the first Constitutional Court heard, in which the Court determined the constitutionality of the edict by which Yeltsin proposed to merge the ministries of security and internal affairs.[133]

---

other binding acts of interpretation, and also by the established practice of its application." RSFSR Law on the Court, art. 32 ("Limits of the RSFSR Constitutional Court's determination and rendering of finding"), § 5, *supra* note 125. *See also Tatarstan Referendum Case, supra* note 37, at 48 (Ametistov, J., separate opinion) (concurring in the result but reminding the majority that, pursuant to the RSFSR Law on the Court, art. 32, § 5, before reaching a decision the Court must consider the official interpretation of the Presidium of the Supreme Soviet of the Republic of Tatarstan of the referendum at issue).

130. Though rare, references to judicial precedent do occur. *See, e.g.*, the *Housing Code Case, supra* note 26, at 83 (pursuant to art. 74, part 2, of the Law on the Court, the majority cites an interpretation of the Plenum of the Supreme Court of the USSR, but only to establish "an official or other interpretation or a practice of the application of the law that has developed"; the Law on the Court does not bind the Court to follow the earlier court's interpretation, only to evaluate it); *Chechen Crisis Case, supra* note 29, at 61 (Kononov, J., separate opinion) (citing one of the Court's own interpretations); and *Tatarstan Referendum Case, supra* note 37, at 46 (Ametistov, J., separate opinion) (citing another of the Court's own interpretations).

131. Under the new Russian Constitution (and the RSFSR Constitution before it), international law is binding on all governmental bodies throughout the Russian Federation. *See* KONST. RF art. 15, § 4, *quoted supra* note 82.

132. *Cf.* GK RF art. 6, § 2, *quoted supra* note 41.

133. *See Internal Security Case, supra* note 36. *See also Yeltsin Loses Case in Constitutional Court: Russian Constitutional Court Voids Yeltsin Decree Merging Security, Interior Agencies as Violating Separation of Powers*, 44 CURRENT DIGEST OF THE POST-

An example of indirect reliance appears in the third issue of the third case that the first Court heard, the Tatarstan Referendum Case.[134]

In the Internal Security Case, the Court relied on more than two dozen positive statements of law in declaring Yeltsin's edict unconstitutional for violating the constitutional principle of the separation of powers. Two decrees of the Congress of People's Deputies granting emergency powers to Yeltsin[135] required him to submit to "preliminary supervision on the part of the Supreme Soviet . . . over the correspondence of draft edicts of the President . . . with the Constitution and laws of the RSFSR."[136] Yeltsin ignored the requirement and unilaterally issued the edict that would have merged the two ministries. The dispute arose when, a week after Yeltsin issued his edict, the Supreme Soviet issued a decree in which it "proposed to the President that he reverse [his] . . . Edict."[137] Deciding the case under the RSFSR Constitution, the Court found that Yeltsin's edict contradicted no fewer than sixteen constitutional provisions,[138] three statutes,[139] five decrees,[140] and one provision of an official state declaration.[141] The case

---

SOVIET PRESS 13 (no. 3, 1992).

134. *See supra* note 37. *See also* In the Case of the Verification of the Constitutionality of the Practice of Application of the Law Concerning the Abrogation of a Labor Contract on the Grounds Envisioned by Point 1(1) of Article 33 of the Code of Laws on Labor of the RSFSR, Decree of the Constitutional Court of the RSFSR, 4 February 1992; GAZETTE OF THE CONGRESS OF PEOPLE'S DEPUTIES OF THE RSFSR AND THE SUPREME SOVIET OF THE RSFSR, 1992, No. 13, Item 669, *translated in* 30 STATUTES & DECISIONS 19-27, 21, 22-23 (May-June 1994) (extrapolating a major premise for one basis of the decision from three constitutional provisions and another for a second basis of decision from three international instruments).

135. The two decrees were the 1 November 1991 decrees "On the Organization of the Executive Power During the Period of Radical Economic Reform" and "On Legal Provision for the Economic Reform." *Internal Security Case, supra* note 36, at 11.

136. *Id.*

137. *Id.* at 12.

138. *See generally Internal Security Case, supra* note 36 (citing KONSTITUTSIIA (ROSSIISKAYA SOVYETSKAYA FEDERATIVNAYA SOZIALISTICHESKAYA RESPUBLICA) [CONSTITUTION OF THE RSFSR] (as amended through 10 December 1992) art. 52 (inviolability of the person); art. 53 (personal life); art. 54 (secrecy of correspondence, telephone conversations, and telegraphic messages); arts. 89 and 90 (Congress of People's Deputies' right to create executive bodies); art. 104, § 2 (Congress of People's Deputies' right to resolve questions within its jurisdiction); art. 109, §§ 7, 9, 16, and 26 (Supreme Soviet's jurisdiction over the creation of ministries); art. 130 (legislative bodies' right to determine structure and competence of the Council of Ministry); and art. 121, §§ 5(4), 5(5), 5(11), 5(16), and 8 (establishing the competence of the President), *translated in* COLLECTED LEGISLATION OF RUSSIA 1-64 (W.E. Butler trans., 1993) [hereinafter KONST. RSFSR]).

139. Law "On the Council of Ministers of the RSFSR," 3 August 1979; Law "On the Republican Ministries and State Committees of the RSFSR," 14 July 1990; and Law "On the State of Emergency," 17 May 1991. *Internal Security Case, supra* note 36, at 10, 14.

140. Decree "On the Establishment of the Committee for Security of the RSFSR," Congress of People's Deputies, 15 December 1990; Decree "On the Organization of the Executive Power During the Period of Radical Economic Reform," Congress of People's

turned on the constitutional limitation on the president's lawmaking powers, which provided that "edicts of the President of the RSFSR may not contradict the Constitution of the RSFSR and the laws of the RSFSR."[142] The Court held that "the President of the RSFSR . . . exceeded the powers provided him"[143] and voided the edict.[144]

From a common lawyer's perspective, what is so striking about the Internal Security Case is not the substantive result but the focused manner in which the Court reached the result. The opinion contains no dicta: all cited positive statements of law participate directly in the Court's *ratio decidendi*. In this way, regardless of the sources the Court consulted in chambers, the Court's public issuance projects the image of a disinterested but resolute arbiter whose resolve results naturally from reasoning directly from the legislative will. Such a court need not publicly invoke the vagaries of judicial discretion.

Unlike the Internal Security Case, in which positive law directly resolved the issue before the court, one issue in the Tatarstan Referendum Case required the Court to rely on positive enactments that did not directly dispose of the question before the Court. Various aspects of federalism were at issue in the case. The dispute arose when the RSFSR Supreme Soviet and Congress of People's Deputies challenged, among other things, the Republic of Tatarstan's Declaration of State Sovereignty, which "ma[de] no mention whatsoever of the fact that the Republic of Tatarstan is part of . . . the RSFSR."[145] The RSFSR legislative bodies also challenged the decree by which Tatarstan proposed to hold a referendum in the republic on its sovereign status. The proposed referendum asked citizens of Tatarstan whether they agreed that the republic "is a sovereign state, a subject of international law that constructs its relations with the Russian Federation and other republics and states on the basis of treaties between equal parties."[146] The decree that contained this question put three issues before the Court: (1) whether the Republic of Tatarstan had a right to self-determination; (2) if so, whether Tatarstan's right to self-determination implied a right for the

---

Deputies, 1 November 1991; Decree "On Legal Provision for Economic Reform," Congress of People's Deputies, 1 November 1991; Decree "On the Procedure for Bringing into Force the Law of the RSFSR 'On the Militia'," Supreme Soviet, 18 April 1991; and Decree "On the Security of the RSFSR," Supreme Soviet, 18 December 1991. *Internal Security Case, supra* note 36, at 10, 11, 13, 14.

141. Declaration of State Sovereignty of the Russian Soviet Federated Socialist Republic (12 June 1990) art. 13, *translated in* COLLECTED LEGISLATION OF RUSSIA, *supra* note 138, at 65-67.

142. KONST. RSFSR, art. 121, § 8, *supra* note 138.

143. *Internal Security Case, supra* note 36, at 14.

144. *Id.* at 12-13.

145. *Tatarstan Referendum Case, supra* note 37, at 35.

146. *Id.* at 39.

republic to question its status in the Federation; and (3) whether the referendum's goal was to violate the territorial integrity of the RSFSR and thereby "cause harm to the constitutional order of the RSFSR."[147] The Court eventually resolved the determinative third issue by directly relying on seven provisions in the RSFSR Constitution.[148] The first two issues, however, were more problematic.

On those first two issues, the Court relied on nine positive enactments as the bases for the premises under which it held that the Republic of Tatarstan did have a right to self-determination, but that the republic could not assert that right at the expense of the RSFSR's national unity.[149] Of the nine positive enactments, though, only one directly voiced a specifically Russian legislative will: a decree of the Congress of People's Deputies that broadly established "the right of peoples to self-determination" throughout the RSFSR.[150] Here, in the absence of precedent and further positive pronouncement, a common-law court likely would have resorted to abstract equitable principles in determining a people's right to assert the freedom of self-determination.[151] For example, a common-law court plausibly could

---

147. *Id.* at 41.

148. *Id.* (citing KONST. RSFSR, *supra* note 138, art. 4 (obligation of state and public organizations and officials in the constituent republics to observe the RSFSR Constitution); art. 70 (inclusive nature of the relationship between the territory of the RSFSR and that of the Republic of Tatarstan and the requirement that the RSFSR must consent to any change in that relationship); art. 71 (constituent nature of the Republic of Tatarstan's relationship with the RSFSR); art. 78 (requirement that the Republic of Tatarstan's Constitution correspond to the Constitution of the RSFSR); and arts. 72, § 1; 104, § 3; and 109, § 12 (requirement of constitutional amendments to change the RSFSR's national-state structure, and the exclusiveness of the RSFSR's jurisdiction over such amendments)).

After proceeding to this third issue, the Court held against the Republic of Tatarstan: "The Republic of Tatarstan, as a part of the RSFSR and having state-legal relations with it, does not have the right to decide unilaterally, in violation of the Constitution of the RSFSR, the question of its state-legal status." *Tatarstan Referendum Case, supra* note 37, at 41.

149. *Tatarstan Referendum Case, supra* note 37, at 41.

150. *Id.* at 39. The decree was "On the Fundamental Principles of the National-State Structure of the RSFSR (on the Federation Treaty)." *Id.* This decree, however, did not directly help to resolve the ultimate question of whether the Republic of Tatarstan could *assert* its right to self-determination.

151. Recent U.S. Supreme Court decisions, however, have adopted more-precise analytical standards. *Contrast, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (redefining traditionally ambiguous constitutional standing analysis according to more-precise standards of actual injury, nexus with defendant's conduct, and redressability of injury) *with* Lister v. Lucey, 575 F.2d 1325, 1334-36 (7th Cir. 1978) (discursively applying ambiguous, generally articulated adversity-of-interests Article III jurisdictional analysis). *See also* Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992).

It is interesting to give historical and global context to common-law jurisdictions' clear trend toward codification, as well as to their (potential) trend toward sharper analytical standards. The civil-law tradition is roughly three times as developed as the common-law

have reasoned that even if the Republic of Tatarstan had a right to self-determination, principles such as those embodied in the clean hands doctrine barred the republic from prevailing in this specific dispute.[152] The RSFSR Constitution clearly conferred upon the RSFSR several sovereign rights in dispute.[153] Under traditional equitable principles, the Republic of Tatarstan therefore could assert its right to self-determination only if such an assertion accommodated all of the RSFSR's own legitimate demands.[154] Therefore, a common-law court might reason, the Republic of Tatarstan's claim against the RSFSR must fail for violating the RSFSR's just demand that Tatarstan uphold its own constitutional obligations. The Russian Constitutional Court, however, proceeding under the RSFSR Constitution's express incorporation of international law into the RSFSR legal system,[155] at this point turned to eight international instruments to define the parameters of a people's right to assert its right to self-determination.[156] Under three of those documents, the Court found that "the right to self-determination is one of the basic principles of international law."[157] Under two other of those international documents, however, "'the development and protection of one category of rights can never serve as a pretext or excuse for the release of states from [obligations concerning] the development, and protection of other rights.'"[158] Reasoning

---

tradition. *See supra* text accompanying note 45. In that context, recent trends in the common-law tradition become meaningful under the theory that "[l]egal systems are more or less developed or mature, standing at different stages of evolution. When they converge, it is because the less developed system is catching up with the more developed one." John Henry Merryman, *On the Convergence (and Divergence) of the Civil Law and the Common Law*, 17 STAN. J. INT'L L. 357, 359-73, 387-88 (1981), *reprinted in* MERRYMAN ET AL., *supra* note 33, at 16-25, 17.

152. An equally applicable variant of the clean hands doctrine is the maxim that *he who seeks equity must do equity, discussed in* STORY ON EQUITY, *supra* note 86, at 76.

153. *See supra* note 148.

154. "[W]hatever be the nature of the controversy between two definite parties, and whatever be the nature of the remedy demanded, the court will not confer its equitable relief upon the party seeking [the court's] interposition and aid, unless he had acknowledged and conceded, or will admit and provide for, all the equitable rights, claims, and demands justly belonging to the adversary party . . . ." STORY ON EQUITY, *supra* note 86, at 79.

155. *See* the analogous provision in KONST. RF, *quoted supra* note 82.

156. International Covenant on Economic, Social, and Cultural Rights, 19 December 1966, art. 1; International Covenant on Civil and Political Rights, 19 December 1966, art. 1; Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the U.N., adopted by the U.N. General Assembly, 24 October 1970; Universal Declaration of Human Rights [date unknown], art. 29; Resolution 41/117, adopted by the U.N. General Assembly, 4 December 1986 [hereinafter *Resolution 41/117*]; Helsinki Final Act, Conference on Security and Cooperation in Europe, 1975; Final Document of the Vienna Meeting, Conference on Security and Cooperation in Europe, 1986; and Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 1990. *Tatarstan Referendum Case, supra* note 37, at 40-41.

157. *Tatarstan Referendum Case, supra* note 37, at 40.

158. *Id.* (quoting *Resolution 41/117, supra* note 156).

inductively from the instruments that established these principles, the Court then generalized that "[i]nternational documents emphasize the impermissibility of making reference to the principle of self-determination in order to jeopardize [another sovereign's right to] state and national unity."[159] In the context of three international statements on human rights, the Court finally concluded that "it is appropriate to proceed under the premise that international law restricts [the right of a people to self-determination] by the observance of the requirements of the principle of territorial integrity and the principle of the observance of human rights."[160] If applied deductively to the case at hand as the major premise that would resolve the dispute, the Court's inductive conclusion clearly required that the Republic of Tatarstan's claim against the RSFSR fail, and the Court so held.[161]

The hypothetical common-law court and the civilian Russian Constitutional Court reached the same result on the constitutionality of the Republic of Tatarstan's proposed referendum; the courts differed only in the precision of their analyses. To bridge the gap between the Congress of People's Deputies decree and the case at hand, the common-law court had no other basis besides fairness upon which to render its decision. To bridge the same gap, the Russian Constitutional Court analyzed specific positive statements of international law to temper the Court's discretion;[162] the Russian Court

---

159. *Id.*

160. *Id.* at 41.

161. *Id.* *See also supra* note 148 (quoting the holding). The Court almost certainly would have known that the RSFSR Constitution's international-law provision, similar to KONST. RF art. 15, § 4, *quoted supra* note 82, also provided access to the international equity jurisprudence that has dared to speak its name since Justice Manley O. Hudson's influential concurring opinion in *Diversion of Water from the Meuse (Neth. v. Belg.)*, 1937 P.C.I.J. (ser. A/B) No. 70, 4, 73-80 (June 28) (separate opinion of Justice Hudson). *See also generally* CHRISTOPHER ROSSI, EQUITY AND INTERNATIONAL LAW (1993). Justice Hudson advocated explicit application of equity principles in international law because "[w]hat are widely known as principles of equity have long been considered to constitute a part of international law . . . . A sharp division between law and equity . . . should find no place in international jurisprudence . . . ." 1937 P.C.I.J. at 76. Implied authority for deciding cases at the International Court of Justice on the basis of equity, according to Justice Hudson, exists in the instrument that obligates the International Court to apply "the general principles of law recognized by civilized nations." *Id.* (citing STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38, § 1, para. a., *quoted in* Joseph Hendel, *Equity in the American Courts and in the World Court: Does the End Justify the Means?*, 6 IND. INT'L & COMP. L. REV. 637, 645 n.85 (1996)).

For the Russian Constitutional Court, however, the international equity jurisprudence would have had two dispositive strikes against it as a public basis for decision. First, it is judge-made law. Second, given the availability of positive, enacted norms, equity would have been available as a basis for the Court's discretion only as a last resort. *See, e.g.*, GK RF art. 6, § 2, *supra* text accompanying notes 41 and 111; and LA. CIV. CODE ANN. art. 4 (West 1988), *quoted supra* note 41. The existence of the instruments that the Court did rely on would have precluded reliance on equity to resolve the right-to-assert-self-determination issue.

162. In fairness to our hypothetical common-law court, it bears noting that the positive

clearly exercised discretion in its inductive leap from positive instruments to applicable principles of law,[163] but such discretion is also grounded in relatively precise points of reference that elevate the decision beyond mere subjectivity.[164] Whereas the common-law court's conclusion was compelled only by the court's own inherent, unaided discretion, the Russian Constitutional Court's result was compelled by the more certain, persuasive force of inductively supported logic. Such a difference is one of the defining distinctions between the common- and civil-law traditions.[165]

B. *The Use (and Disuse) of Statutorily Defined Discretion*

In addition to its almost exclusive, seemingly discretionless reliance on positive law, the Court also exhibits its civil-law foundations through its use of the statutory provision that tries to define the Court's interpretive discretion—part 2 of Article 74 of the Law on the Court.[166] As expected, the Court has expressly applied part 2 of Article 74 to guide its interpretation of challenged acts (*e.g.*, statutes, edicts, and orders).[167] A far more interesting dynamic emerges, however, when a majority of the Court proves the value of civil-law theory in the breach by ignoring part 2 of Article 74 and analyzing an act with only minimal reference to the legislatively imposed criteria;[168] the proof illustrates both the power and the danger of unregulated judicial discretion. When such proof occurs, judicial discretion itself becomes the key element in an analysis of the *Court's* analysis. In theory, the demonstrably civilian Russian Constitutional Court should follow as closely as possible the black letter of the only two instruments that govern it, the Constitution and the Federal Constitutional Law on the Court.[169] For the

---

statements in the international instruments reviewed by the Russian Court were themselves based on notions of fairness. *See, e.g., supra* text accompanying note 158.

163. *See supra* quotation in the text accompanying note 160.

164. *Cf.* the analytic standards articulated in *Law on the Court* art. 74, part 2, *quoted supra* in text accompanying note 113.

165. "The civilian likes to be able to see clearly the shape and limits of the abstract concepts and doctrines with which he has to work before he starts to work with them. . . . [T]he concepts must move according to clear and definite rules . . . . The common lawyer is much more inclined to use a concept of half-known outline as soon as he knows it is capable of performing the actual limited task he wants it to perform, leaving for further consideration what its other possibilities may be. Common law [*sic*] concepts are much more like human beings whose personalities become known only by experience and may easily change in course of time." LAWSON, A COMMON LAWYER LOOKS, *supra* note 67, at 66.

166. *See supra* quotation accompanying note 112.

167. *See, e.g.*, the *Housing Code Case*, *supra* note 26, at 83 (quoting and applying art. 74, part 2, in interpreting, and invalidating, a provision of the RSFSR Housing Code).

168. *See supra* quotation of the criteria in the text accompanying note 112.

169. "The authority and procedure for the formation and activity of the Constitutional Court of the Russian Federation shall be determined by the Constitution of the Russian

most part, with its ingrained civilian aversion to discretion, it does. But, as its dissenters have pointed out,[170] the Court also occasionally fails to follow part 2 of Article 74, as it did with dramatic constitutional implications in the Chechen Crisis Case.[171]

The Chechen Crisis Case arose when the Federal Assembly petitioned the Court to verify the constitutionality of three edicts issued by Yeltsin[172] and of one decree issued by the Government of the Russian Federation.[173] Underlying the court action was the executive branch's response to conflict between the Federation and one of its constituent subjects, the Chechen Republic. Between 1991 and 1994, Chechnya had taken numerous official steps to reject the Federation's authority. Eventually the Chechens responded to the Federation's assertions of authority with sophisticated military equipment—"tanks, rocket launchers, artillery systems, and battle aircraft."[174] In response to the escalating unrest in Chechnya, on 2 November 1993 Yeltsin issued Edict No. 1833, in which he endorsed the

---

Federation and the present Federal Constitutional Law." *Law on the Court* art. 2, *supra* note 70, at 8.

170. Although dissenting opinions weaken the image of certainty in the law and are not permitted in any other court in Russia, "[a] judge of the Constitutional Court of the Russian Federation not in agreement with a decision of the Constitutional Court of the Russian Federation shall have the right to set forth his separate opinion in writing." *Law on the Court* art. 76, part 1, *supra* note 70, at 42. *See also* Rudden, *Courts and Codes, supra* note 53, at 1016 (observing Russia's traditional opposition to dissenting opinions).

171. *See supra* note 29. *See also Tatarstan Referendum Case, supra* note 37, at 48 (Ametistov, J., separate opinion) (noting the Court's failure to apply Article 74, part 2's predecessor provision in the original 1991 Law on the Court).

172. Presidential Edict No. 1833 "On the Fundamental Provisions of the Military Doctrine of the Russian Federation," 2 November 1993 [hereinafter Edict No. 1833]; No. 2137 "On Measures for the Restoration of Constitutional Legality and Law and Order on the Territory of the Chechen Republic," 30 November 1994 [hereinafter Edict No. 2137]; and No. 2166 "On Measures for the Cessation of the Activity of Illegal Armed Formations on the Territory of the Chechen Republic and in the Zone of the Ossetian-Ingush Conflict," 9 December 1994 [hereinafter Edict No. 2166]. *Chechen Crisis Case, supra* note 29, at 49.

173. Governmental Decree No. 1360 "On Provision for the State Security and Territorial Integrity of the Russian Federation, Legality, the Rights and Freedoms of Citizens, and the Disarmament of Illegal Armed Formations on the Territory of the Chechen Republic and the Regions of the North Caucasus Contiguous to It," 9 December 1994 [hereinafter Decree No. 1360]. *Chechen Crisis Case, supra* note 29, at 49.

The Russian Constitution provides for four entities of federal power across the three branches of government: "State power in the Russian Federation shall be exercised by the President of the Russian Federation, the Federal Assembly (Council of the Federation and State Duma), the government of the Russian Federation and courts of the Russian Federation." KONST. RF art. 11, § 1. The Government of the Russian Federation is an administrative body, as it "exercises" the executive power. KONST. RF art. 110, § 1. Further proof of the Government's position in the executive branch is that the Government's chairman "shall be appointed by the President of the Russian Federation with consent of the State Duma." KONST. RF art. 111, § 1.

174. *Chechen Crisis Case, supra* note 29, at 56.

Fundamental Provisions of the Military Doctrine of the Russian Federation.[175] One of the Doctrine's provisions "concern[ed] the possibility of the use of the Armed Forces of the Russian Federation in the resolution of internal conflicts."[176] Because on its face Edict No. 1833 merely endorsed military force without prescribing norms with which Russian citizens had to comply, the Court found that "[n]ormative content . . . [was] absent"[177] from that edict. On 30 November 1994, Yeltsin issued Edict No. 2137, which called for "the introduction of a state-of-emergency regime on the territory of the republic" of Chechnya.[178] Under legislative definitions of a state of emergency, however, a state of emergency could not be imposed.[179] On 9 December 1994, Yeltsin issued Edict No. 2166, which charged the Government of the Russian Federation "to use all means available to the state for provision for state security, legality, the rights and freedoms of citizens, the protection of public order, the struggle against crime, and the disarmament of illegal armed formations"[180] in Chechnya. To execute the goals of Edict No. 2166, also on 9 December 1994 the Government of the Russian Federation issued its Decree No. 1360, which prescribed "[measures] [*sic*] associated with the restriction of constitutional rights and freedoms."[181] The Federation Council responded to these acts by challenging the constitutionality of Edict No. 2137, Edict No. 2166, and Decree No. 1360, alleging that the three acts "constituted a single system of normative legal acts and led to the unlawful application of the Armed Forces of the Russian Federation."[182] The Council alleged further that implementation of these acts "resulted in illegal restrictions of and mass violations of the constitutional rights and freedoms of citizens of Russia."[183] In its petition, the State Duma challenged the constitutionality of Edict No. 1833 and of Decree No. 1360 on grounds that the acts violated the Federation's constitutionally imposed internal obligations.[184]

---

175. *Id.* at 56-57.

176. *Id.* at 50.

177. *Id.* at 57.

178. *Id.* at 52. This decree was not Yeltsin's first attempt to impose a state of emergency in Chechnya. *See Yeltsin's Chechen Emergency Decree Nixed,* 43 CURRENT DIGEST OF THE POST-SOVIET PRESS 14 (no. 45, 1991).

179. *Chechen Crisis Case, supra* note 29, at 53 ("the named Law is not designed for extraordinary situations such as the one that had developed in the Chechen Republic, where the federal authorities were being opposed by forces relying on illegally created regular armed formations equipped with the latest military equipment").

180. *Id.*

181. *Id.* at 57.

182. *Id.* at 50.

183. *Id.*

184. *Id.*

The Russian Constitutional Court held that it lacked subject-matter jurisdiction over Edict No. 1833;[185] that Edict No. 2137 had in effect been repealed by, and was therefore mooted by, Edict No. 2166;[186] that Edict No. 2166, charging the Government to "use all means available to the state" to silence the conflict in Chechnya, was constitutional;[187] and that the provisions in Decree No. 1360 ordering expulsion of citizens beyond the Chechen borders and depriving journalists in Chechnya of accreditation were unconstitutional.[188] Thus, according to a majority of the Court, Yeltsin's use of military force in the Republic of Chechnya complied with the Russian Constitution.

The constitutional and human consequences of that substantive backdrop acutely emphasize the need for formal, procedural limitations in the judicial process. In the Chechen Crisis Case, the Court could affirm Yeltsin's use of military force only through a demonstrably unlawful abuse of discretion—its failure to comply with the interpretive limitations legislatively imposed by part 2 of Article 74 of the Law on the Court. That clause provides that:

> The Constitutional Court of the Russian Federation shall adopt a decision in a case by evaluating *both* the literal meaning of the act under consideration *and* the meaning given to it by official and other interpretation or the developed practice of application of the law, *as well as* proceeding from its place in the system of legal acts.[189]

---

185. *Id.* at 59. One of the jurisdictional provisions of the Law on the Court, art. 3, § 1(a), requires that challenged laws and acts be normative. *Law on the Court, supra* note 70, at 9. Because the Court found that Edict No. 1833 contained no normative content, *supra* text accompanying note 177, the Court therefore concluded that it had no subject-matter jurisdiction over that act. When the Court heard the Chechen Crisis Case, the Federal Assembly had provided no standards for determining normativity. *See High Court Won't Consider a "Nonnormative" Decree: Constitutional Court Puts Off Decision on Whether Yeltsin's Decree on Aiding Atomic Industry Conversion in Zheleznogorsk is a Normative Act (If Not, It Is Outside Court's Purview); Fate of Decree on Chechnya Is Involved,* 47 CURRENT DIGEST OF THE POST-SOVIET PRESS 8 (no. 23, 1995) (explaining the Court's jurisdictional requirement of normativity and predicting jurisdictional issues in the Chechen Crisis Case).

186. *Chechen Crisis Case, supra* note 29, at 58-59. The majority conceded that "the measures envisioned in [Edict No. 2137] . . . could have touched upon the constitutional rights and freedoms of citizens." *Id.* at 53. Because those measures were never implemented, however, "the effect of this Edict did not lead to [those rights'] restriction or violation." *Id.*

187. *Id.* The Court found constitutional grounds for this edict under provisions such as KONST. RF art. 80, § 2, which establishes that "[t]he President . . . shall take measures to protect the sovereignty of the Russian Federation, its independence and state integrity."

188. *Chechen Crisis Case, supra* note 29, at 59.

189. *Law on the Court* art. 74, § 2 (emphasis added), *supra* note 70, at 40-41.

The grammar of this clause dictates its statement of the law. The copulative use of the first conjunction (*both . . . and*)[190] *requires* the Court to consider at least three criteria every time it interprets a challenged act: *both* (1) the act's literal meaning *and* (2) either its official and other interpretation or the developed practice of its application, *as well as* (3) the act's contextual meaning in the overall system of legal acts. In the Chechen Crisis Case, however, the majority not only failed to explicitly invoke Article 74 as a limitation on its interpretations but also failed to implicitly consider Article 74's statutorily imposed criteria. Instead, as four of the six dissenters vigorously reminded the majority,[191] the Court reached its holdings by applying only one of the interpretive standards articulated by part 2 of Article 74. That lone standard was each act's literal meaning.[192] Under part 2 of Article 74, though, the Court's obligation to consider more than the literal meaning of each separate act was not a matter of choice.[193] In the Chechen Crisis Case, the Court thus unlawfully abused its discretion twice—once by failing to acknowledge a governing law whose existence and terms the Court undoubtedly knew,[194] and once by failing to discharge the obligations that that law imposed.

These abstract methodological considerations directly affected the result in the case; indeed, they largely (if not entirely) determined the result. By failing to consider the challenged acts in context with each other as members of "[a] system of legal acts"—as part 2 of Article 74 of the Law on the Court expressly requires—the majority could justify a piecemeal analysis through which the Court could decline to review two of Yeltsin's edicts on jurisdictional grounds, No. 1833 for lack of subject-matter jurisdiction (for its facial lack of normative content)[195] and No. 2137 for mootness. If, however, the Court had followed part 2 of Article 74 and considered all four acts as participants in one normative scheme, the Court would have had subject-matter jurisdiction over Edict No. 1833.[196] Moreover, the deprivations of constitutional rights in Edict No. 2137, which the majority

190. *See* ALLEN AND GREENOUGH'S NEW LATIN GRAMMAR 198-200 (reprint 1992) (Greenough et al. eds., 1931).

191. *See Chechen Crisis Case, supra* note 29, at 60-66 (Kononov, J., separate opinion); at 66-74 (Luchin, J., separate opinion); at 74-79 (Zorkin, J., separate opinion); and at 81-85 (Gadzhiev, J., separate opinion).

192. *See supra* text accompanying notes 185-88 (literal contents of each act separately supporting the Court's holdings).

193. *Law on the Court* art. 2, *quoted supra* note 169.

194. The Court decided the Housing Code Case, *see supra* note 26, at 83, in which the Court explicitly invoked Article 74, part 2, on 25 April 1995, only three-and-one-half months before the Chechen Crisis Case. Of course, the majority also most likely heard repeated arguments on Article 74 from the dissenters while the Chechen Crisis Case was under advisement.

195. *Law on the Court* art. 3, § 1(a), *supra* note 70, at 9.

196. *Id.*

conceded,[197] would have been viable for decision because Edict No. 2166 could not have repealed part of a coherent whole. Viewed as part of a whole, Edict No. 2137 fulfills "the role of a starter [that] . . . released the military machine."[198] In dissent, Judge A.L. Kononov read the challenged acts from more than their literal perspective:

> Taken as a whole, the Edicts of the President . . . and the Decree of the Government . . . in their meaning, content, subject of regulation, goals, and even their naming, represent a single aggregate of consistent and mutually elaborating resolutions of one and the same question—the restoration of the influence of federal power in the Chechen Republic by means of armed force.[199]

That simple shift in perspective—to the analytic standards required by positive law—most likely would have reversed the result on all three of Yeltsin's edicts; No. 2166, which the Court upheld, would have become unconstitutional by participating in an unconstitutional normative scheme. The majority wrote as if bad legislation predetermined the result.[200] Legislative defects did affect the case,[201] but not as much as did the majority's choice to ignore the law.

---

197. *See supra* note 186.

198. *Chechen Crisis Case, supra* note 29, at 68 (Luchin, J., separate opinion).

199. *Id.* at 60.

200. "[I]t is likewise confirmed that 'the legal basis for the use of the Armed Forces of the Russian Federation and other troops during provision for guarantees of the constitutional order is imperfect.' This ought to have been corrected legislatively, which was not done in a timely manner" (quoting the State Duma's decree "On the Strengthening of Russian Statehood and on Measures for Exit from the Crisis That Has Arisen in Connection with the Situation in the Chechen Republic," 13 January 1995). *Id.* at 56. *See also* point 6 of the Court's decree (ordering the Federal Assembly "to put in order the legislation on the use of the Armed Forces"). *Id.* at 59-60.

At least one member of the Russian press agreed:

> The massive violation of civil rights that are recognized by the world community, the brutality and stupid unprofessionalism of the military command, the shortsightedness and irresponsibility of the federal authorities—in short, those aspects of the Chechen war that, under all humane laws, make us treat that conflict as a criminal war—are in fact in complete conformity with the letter of Russian Federation legislation as it stands today.

Sergei Parkhomenko, *Constitutional Court Rules for Yeltsin: Public Upset by Court's Finding for Yeltsin, but Judges Have to Rule on Basis of a Few Legal Documents; Rights Violations, Troops' Ineptitude, Moscow's Irresponsibility All Excused by Current Laws*, 47 CURRENT DIGEST OF THE POST-SOVIET PRESS 5 (no. 31, 1995).

201. *See supra* note 179 (quoting the Court on the current laws governing states of emergency).

The Chechen Crisis Case illustrates both the Russian Constitutional Court's civilian methodology, in the dissenters' deferential use of statutorily defined discretion, and the need for that methodology, in the majority's unacknowledged decision to modify positive law. As the dissenters well knew, Article 74 not only controls judicial discretion; ideally, by providing several specific analytic standards, it enables that discretion to reach the soundest decision in each case. Especially in a country whose history does not predispose it to respect the rule of law,[202] the formalist tendencies of the civil-law tradition, if followed, would help prevent the Court's decisions from being perceived as exercises in merely political discretion whose only purpose is self-preservation.[203]

V. CONCLUSION

Far from perfect, and decidedly un-American, the Russian Constitution nonetheless conforms with the broad strokes of the civil-law tradition in which the Russian legal system has evolved. The Russian Federation has constitutionalized many particularized rights, as the civil-law tradition's demand for certainty in the law requires. Under that Constitution, the Federation has vested the power of judicial review in one court, a concentration of the broad review power that the civil-law tradition also favors. Because of that tradition, disciplined restraint, not discretion, is the better part of even the Russian Constitutional Court's relatively abstract constitutional adjudication. Understanding that difference in perspective enables us to engage in more productive constitutional debate, both at home and abroad.

Jeffrey Waggoner[*]

202. *See* SHARLET, *supra* note 13.

203. "More than a week has gone by since the verdict in the Chechen case was handed down, but the public continues to be distressed over how Russia's Constitutional Court 'really chickened out.' Why, people are asking, did it 'do so much kowtowing to the President'? [*sic*] Is it really true that every decision it makes can still be explained primarily by the '1993 syndrome,' by a fear of dissolution, repression or, at least, a loss of privileges?" Parkhomenko, *supra* note 200. *See also supra* note 125 (on Yeltsin's unilateral dissolution of the first Constitutional Court in October 1993).

* J.D. Candidate 1998, Indiana University School of Law—Indianapolis; B.S. 1983, M.A. 1986, Southern Illinois University at Carbondale. The author thanks the following people for their generous assistance: Ylena Fertman and Marina Portnova, students at the Indiana University School of Law—Indianapolis, for their impromptu alternative Russian-to-English translations of Art. 74, part 2, of the 1994 Law on the Constitutional Court of the Russian Federation; Ms. Fertman also for her ready English-to-Russian translations of the names of the various Russian Constitutions cited in this note; Ania Budziak of the EAST EUROPEAN CONSTITUTIONAL REVIEW at the University of Chicago Law School, for locating a Cyrillic original and yet another alternative translation of Art. 74, part 2, of the 1994 Law on the Constitutional Court; the library staffs of both the Bloomington and Indianapolis campuses of the Indiana University School of Law; Michael Heise, professor of constitutional law, Indiana University School of Law—Indianapolis, for identifying the phrase "tyranny of the majority" as (probably) originally Tocqueville's; Sarah J. Reynolds of the Harvard University Law School, editor, STATUTES & DECISIONS, and Robert Sharlet, professor of political science, Union College (Schenectady, N.Y.), for their early correspondence on this project; and Bernard Rudden, professor of comparative law, University of Oxford, and fellow of Brasenose College, Oxford, for his comments on the first draft of this note.